

OVERLAP AND CONFLICT

A. OVERVIEW

Because of the pervasiveness of law in modern life, it is normal for a single event or set of facts to be governed by more than one legislative provision or by both legislation and the common law. For example, the use of rented premises for operating a daycare centre might simultaneously be subject to provisions in the *Landlord and Tenants Act*, the *Professional Child Care Act*, the *Employment Standards Act*, various municipal bylaws, as well as common law contract, tort, and restitutionary law, or the *Civil Code of Québec*. The rules governing overlap are derived partly from constitutional law principles such as the sovereignty of Parliament and partly from common law presumptions about drafting and legislative intent. The most important of these is the presumption of coherence, the presumption that the legislature knows its own statute book and intends all additions to that statute book to produce consistent rules and coherent schemes.

In *Thibodeau v Air Canada*,¹ the Supreme Court of Canada recently offered an overview of the methodology to be relied on in dealing with overlapping provisions. The issue in the case was the jurisdiction of the Federal Court to award damages for a breach of the appellants' language rights that occurred during international air travel. Subsection 77(4) of the *Official Languages Act* provided:

1 2014 SCC 67 at para 89 [*Thibodeau*]. See also *R v LTH*, 2008 SCC 49 at para 47.

Where . . . the Court concludes that a federal institution has failed to comply with this Act, the Court may grant such remedy as it considers appropriate and just in the circumstances.

Air Canada claimed that an award of damages was barred by the *Carriage by Air Act*, which incorporated the *Montreal Convention*² into Canadian law. As interpreted by the court, the Convention's limitation on claims for damages against international air carriers did not permit an award of damages for breach of language rights. Justice Cromwell wrote:

The appellants contend that there is a conflict between two acts of the same legislature . . . , that the exclusion of damages during international air travel conflicts with the power to award an "appropriate and just" remedy.

The legal framework that governs this question is not complicated. First, courts take a restrictive approach to what constitutes a conflict in this context. Second, courts find that there is a conflict only when the existence of the conflict, in the restrictive sense of the word, cannot be avoided by interpretation. Overlap, on its own, does not constitute conflict in this context, so that even where the ambit of two provisions overlaps, there is a presumption that they both are meant to apply, provided that they can do so without producing absurd results. This presumption may be rebutted if one of the provisions was intended to cover the subject matter exhaustively. Third, only where a conflict is unavoidable should the court resort to statutory provisions and principle.³

This legal framework is examined in more detail below.

B. OVERLAP WITH OTHER LEGISLATION

When two (or more) legislative provisions apply to the same facts, there are four possibilities:

- 1) The overlapping provisions do not conflict and, since both apply, the court gives effect to both.
- 2) The overlapping provisions do not conflict, but the court concludes that one of the provisions was meant to be exhaustive and therefore applies to the exclusion of the other.

2 *Convention for the Unification of Certain Rules for International Carriage by Air*, RSC 1985, c C-26.

3 *Thibodeau*, above note 1 at paras 91–92.

- 3) The overlapping provisions might conflict, but the conflict is avoided through interpretation.
- 4) The overlapping provisions conflict, and, in order to resolve the conflict, the court applies a paramountcy rule.

1) Overlap without Conflict

The courts have repeatedly held that provisions do not conflict simply because they deal differently with the same facts. A conflict arises only if it would be impossible or contradictory or would defeat the legislature's purpose if both provisions were applied. In the absence of conflict, it is presumed that overlap is intended.⁴

This presumption is illustrated in the judgment of the Federal Court of Appeal in *Canada (Attorney General) v Michael*.⁵ The court was asked to review a ruling by the Unemployment Insurance Commission concerning a claim for benefit under the *Unemployment Insurance Act*. The commission found that the claimant had frivolously rejected two job offers. This meant, under section 14 of the Act, that she lost her entitlement to benefits for the relevant period and, under section 27(1), that she was subject to a six-week disqualification for each refusal. The claimant argued that these provisions were mutually exclusive and that the commission erred in applying both. The court upheld the commission. It affirmed that when the facts of a case come within two or more provisions and when the provisions do not conflict, the presumption is that they all apply. There is nothing problematic, inappropriate, or even unusual in attaching more than one legal consequence to a fact or set of facts. While the presumption may be rebutted, usually by evidence that one of the overlapping provisions was meant to be exhaustive, there was nothing in the scheme or wording of the legislation or its underlying policies to rebut the presumption here.

The overlapping provisions in the *Michael* case were penalties.⁶ Legislatures may also confer overlapping powers on one or more subordinate authorities. In *Thamotharem v Canada (Minister of Citizenship and Immigration)*,⁷ for example, the Federal Court of Appeal considered the relation between two powers conferred on the Chairperson of the

⁴ *Reference re Broadcasting Regulatory Policy CRTC 2010167 and Broadcasting Order CRTC 2010168*, 2012 SCC 68 at para 41.

⁵ (1994), 175 NR 325 (CA) [*Michael*]. See also *Canada (Attorney General) v Mercier*, 2010 FCA 167, leave to appeal to SCC refused, 2011 CanLII 2100.

⁶ See also *R v Williams*, [1944] SCR 226 at 236; *R v Blackbird* (2005), 74 OR (3d) 241 at para 17 (CA).

⁷ 2007 FCA 198.

Immigration and Refugee Board, one to issue guidelines to assist members of the board in carrying out their duties and another to make rules respecting the practice and procedure of the board. The rules required the approval of the Governor in Council and had to be tabled in both houses of Parliament. The appellant argued that since the guideline in question was a rule of procedure directing board practice in applying an existing rule, it should have been made under subsection 161(1), approved by the Governor in Council, and laid before Parliament. A majority of the court rejected this argument. Evans JA wrote:

[T]he Chairperson's power to issue guidelines extends, on its face, to matters of procedure. Its exercise is not made expressly subject to paragraph 161(1)(a), although a guideline issued under paragraph 159(1)(h) which is inconsistent with a formal rule of procedure issued under paragraph 161(1)(a) will be invalid.

On the basis of the foregoing analysis, I conclude that, on procedural issues, the Chairperson's guidelineissuing and rulemaking powers overlap. That the subject of a guideline could have been enacted as a rule of procedure issued under paragraph 161(1)(a) will not normally invalidate it, provided that it does not unlawfully fetter members' exercise of their adjudicative discretion, which, for reasons already given, I have concluded that it does not.

In my opinion, the Chairperson may choose through which legislative instrument to introduce a change to the procedures of any of the three Divisions of the Board. Parliament should not be taken to have implicitly imposed a rigidity on the administrative scheme by preventing the Chairperson from issuing a guideline to introduce procedural change or clarification.⁸

In *Canada (Attorney General) v Mercier*,⁹ the Federal Court of Appeal considered provisions of the *Corrections and Conditional Release Act* which conferred regulation-making powers on the Governor in Council and directive-making powers on the Commissioner of Corrections, all of which had the force of law. In concluding that the powers conferred on the commissioner were not limited by the powers conferred on the Governor in Council, Nadon JA wrote:

Section 96 enumerates the matters in regard to which the Governor in Council may make Regulations, while the Commissioner's authority to issue Directives under sections 97 and 98 is very broad. Moreover, section 96 provides the Governor in Council with the authority to enact Regulations on numerous matters (subsections (a) to (z)). Thus,

⁸ *Ibid* at paras 105–7.

⁹ Above note 5.

obliging the Commissioner to determine whether a proposed Directive overlaps in some way with the Governor in Council's regulation-making power would make it very difficult for him to issue Directives. For example, given the obvious overlap between "safety" and "security" in a penitentiary, the reference to the safety of inmates in section 70 could potentially prevent the Commissioner from issuing Directives on certain matters central to the operation of correctional facilities.

Lastly, I believe that it is likely that Parliament intended significant overlap between the Commissioner's power to issue Directives and the Governor in Council's authority to enact regulations. The prevailing approach to resolving conflicts between legislation and subordinate legislation, which is somewhat analogous to the doctrine of federal paramountcy, in no way precludes overlap.¹⁰

When regulation-making powers are conferred on different entities, there is obviously a potential for conflict. In the *Corrections and Conditional Release Act*, Parliament expressly provided that the commissioner's directives were subject to the Governor in Council's regulations. In the absence of a clear indication of legislative intent, the court must fall back on common law presumptions, which are considered below.

2) One of the Provisions Is Meant to Be Exhaustive

The legislature sometimes enacts a provision, a series of provisions, or a statute that is meant to be an exhaustive regulation of a matter. Once it is established that given legislation is meant to be exhaustive, it is applied to the exclusion of any other provisions that would otherwise apply. The absence of conflict between the exhaustive provision and other provisions is irrelevant because what matters here is the intention of the legislature. Legislation that is meant to provide an exhaustive exposition of the law on a matter is often labelled a code.

In considering whether legislation is meant to be exhaustive, the courts may rely on the full range of interpretive rules and techniques. However, their analysis tends to focus on three things. The first is whether the legislation is sufficiently complete and comprehensive to stand alone. Legislation that establishes a complete scheme or expressly addresses all aspects of a matter is readily found to be exhaustive; legislation that is vague or has gaps in the regulatory scheme is not.¹¹

A second, related, consideration is whether the particular policy or goal that the legislation is meant to achieve might be undermined by

¹⁰ *Ibid* at paras 66–67.

¹¹ See, for example, *Koubi v Mazda Canada Inc*, 2012 BCCA 310 at para 63.

the application of other provisions. To avoid defeating the purpose, a court may conclude that the legislation was meant to be exhaustive. This was argued by the appellants in the *Thibodeau* case, emphasizing the quasi-constitutional status of language rights legislation, but it was rejected by the court. Justice Cromwell wrote:

It is unlikely that, by means of the broad and general wording of s. 77(4), Parliament intended this remedial power to be read as an exclusive and exhaustive statement in relation to the Federal Court's remedial authority under the OLA, overriding all other laws and legal principles. The appellants' position in effect is that Parliament, through s. 77(4), intended that courts should be able to grant damages even though doing so would be in violation of Canada's international undertakings as incorporated into federal statute law.¹²

A third consideration is whether the legislation would do any useful work if it were not treated as exhaustive. Suppose a provision in the *Fisheries Act* empowered the Minister of Fisheries to issue licences to fish on whatever terms she thinks fit and another provision empowered the minister to grant two-week licences to fish for cod. Most courts would conclude that the second provision was exhaustive of the minister's power to license cod fishing. This conclusion does not follow from the fact that the provision is more specific but rather from the fact that it would have no point if it were not considered exhaustive. Under the general licensing power conferred by the first provision, the minister may grant licences to fish for cod for two-week terms or for any other term that seems appropriate. The second provision thus adds nothing to the first and does no work at all, contrary to the presumption against tautology, unless it is interpreted to be exhaustive of the minister's powers to confer cod-fishing licences.¹³

The reasoning used to determine whether legislation is meant to be exhaustive is well illustrated by the British Columbia Court of Appeal in *British Columbia Teachers' Federation v British Columbia (Attorney-General)*.¹⁴ Under British Columbia's *Financial Administration Act*, the Treasury Board was empowered by section 4 to issue directives respecting government expenditures and by section 24 to set limits

12 Above note 1 at para 113.

13 See, for example, *The Queen v Savage*, [1983] 2 SCR 428 at 445–46.

14 (1985), 23 DLR (4th) 161 (BCCA). For other examples of legislation that was held to be exhaustive and therefore precluded the application of other provisions that might otherwise apply, see *Mills v The Queen*, [1986] 1 SCR 863 at paras 272–73; *G(C) v Catholic Children's Aid Society of Hamilton-Wentworth* (1998), 40 OR (3d) 334 (CA); *Carpenter v Vancouver (City) Police Board* (1985), 63 BCLR 310 (CA).

or fix conditions for any kind of government expenditure. Acting pursuant to these sections, the Treasury Board issued a directive that cut back government funding to any local school board that voted to lay some teachers off while increasing the salaries of those who remained. Despite the broad wording of sections 4 and 24, the court concluded that the directive was beyond the Treasury Board's powers. In its opinion, Part 7 of British Columbia's *School Act* set out an exhaustive code dealing with the hiring, firing, and remuneration of teachers. Since the provisions in the *School Act* were meant to be exhaustive, sections 4 and 24 of the *Financial Administration Act* had to be "read down" to exclude applications to the matters dealt with in Part 7.

In reaching this conclusion the court emphasized the elaborate and detailed regulatory scheme found in Part 7 of the *School Act*. This scheme covered every aspect of teacher employment, including hiring, firing, and suspensions. It provided a detailed process for negotiating salaries, which was meant to be comprehensive and self-contained. Furthermore, the purpose of the scheme was to ensure that the matters covered by Part 7 were dealt with not centrally but at the local level. This policy would be undermined if the Treasury Board could exercise its powers under the *Financial Administration Act* to influence layoffs and teachers' salaries. In the view of the court, the legislature would not have gone to the trouble of establishing a comprehensive regulatory scheme designed to implement a specific policy unless it intended its scheme to occupy the field and to displace other ways of dealing with the same matter.

The court also noted that certain sections of the *School Act* and other British Columbia enactments expressly conferred powers on the executive branch of government to encroach on the powers of local school boards and to influence or second-guess their decisions. Based on its examination of these provisions, the court concluded that when the British Columbia legislature wanted to create an exception to the policy of having teachers' employment issues dealt with locally under Part 7, it drafted a special provision setting out in explicit and precise language the conditions and scope of the exception. These provisions would serve no purpose unless Part 7 was meant to be exhaustive. The court therefore concluded that unless the Treasury Board directive came within one of these specific exceptions, it was beyond the power of the board.

3) Conflict Avoidance

To minimize the incidence of conflict among overlapping provisions, the courts have developed two strategies. The first is to work with a narrow definition of conflict: overlapping provisions do not conflict

unless they contradict each other, or both cannot be applied to the same set of facts, at least not without defeating the purpose of one of them. The second is a rule of interpretation. It is presumed that the legislature intends to produce coherent, internally consistent legislation; therefore, an interpretation that avoids conflict is preferred over one that does not. To achieve harmony, the scope of one or both overlapping provisions may be narrowed to make room for the other.

The first of these strategies was used by the Supreme Court of Canada in *Friends of the Oldman River Society v Canada (Minister of Transport)*.¹⁵ The issue in this case was whether the Minister of Transport was required by regulations made under the *Department of the Environment Act* to conduct an environmental assessment before approving plans to build a dam across the Oldman River. Section 5 of the *Navigable Waters Protection Act* provided that no dam could be built across a navigable river unless the plans were approved by the minister “on such terms and conditions as the Minister deems fit.” Section 3 of the *Environmental Assessment and Review Process Guidelines Order* provided that a minister must carry out an environmental assessment before granting any approval that might have an environmental impact on an area of federal responsibility. Counsel argued that because the *Guidelines Order* narrowed the scope of the discretion conferred on the minister by the *Navigable Waters Protection Act* and because it significantly altered the mix of considerations on which the minister might lawfully base his decision, the order was in conflict with the Act. This argument did not succeed. Justice La Forest first drew attention to the stringent test for conflict and the presumption of internal harmony:

[A]s a matter of construction a court will, where possible, prefer an interpretation that permits reconciliation of the two [overlapping provisions]. “Inconsistency” in this context refers to a situation where two legislative enactments cannot stand together.¹⁶

To avoid potential conflict, the court may adopt a strained or even an implausible interpretation. But no such strategy was necessary in this case. As La Forest J explained:

It is likely that the Minister of Transport in exercising his functions under s. 5 always did take into account the environmental impact of a work However that may be, the *Guidelines Order* now formally

¹⁵ [1992] 1 SCR 3 [*Friends of the Oldman River*].

¹⁶ *Ibid* at 38. For an excellent comprehensive account of the evolving concept of conflict in the context of federal paramountcy, see *Rothmans, Benson & Hedges Inc v Saskatchewan*, [2003] SJ No 606 at para 54ff (CA).

mandates him to do so, and I see nothing in this that is inconsistent with his duties under s. 5. As Stone J.A. put it in the Court of Appeal, it created a duty which is “superadded” to any other statutory power residing in him which can stand with that power. In my view the Minister’s duty under the *Guidelines Order* is indeed supplemental to his responsibility under the *Navigable Waters Protection Act*, and he cannot resort to an excessively narrow interpretation of his existing statutory powers to avoid compliance with the *Guidelines Order*.¹⁷

The court further supported this interpretation with purposive analysis. The legislature must have intended that the order would narrow and control the discretion conferred on decision makers under other legislation; otherwise, the protectionist goals of the *Department of the Environment Act* would be defeated. To avoid defeating the purpose, the broader interpretation, consistent with the ordinary meaning, was preferred.

The second strategy is well illustrated by the majority judgment of the Supreme Court of Canada in *Charlebois v Saint John (City)*.¹⁸ The issue in that case was whether the term “institution” in New Brunswick’s *Official Languages Act* applied to municipalities. “Institution” was defined in section 2, and on its face this definition was certainly broad enough to include municipalities. However, adopting that interpretation gave rise to certain anomalies. As Charron J pointed out, if the obligations imposed on institutions under various provisions of the Act (sections 27–30) extended to municipalities, then a number of the provisions set out under the heading “Municipalities” (sections 35–38) would make no sense. She wrote:

If all municipalities, as institutions, are obliged to print and publish their by-laws in both official languages under s. 29, why would it matter what percentage was represented by the official language minority population in any given municipality? Likewise, what would be the sense of prescribing by regulation those services and communications required to be offered in both official languages if all municipalities, as institutions, were required under ss. 27 to 30 to provide them all? What is left for a municipality to declare itself bound under s. 37 if it is already bound by the general obligations imposed on institutions? Those are the “incoherent and illogical consequences” that Daigle J.A. [in the court below] found determinative in the search for the Legislature’s intent. I agree, particularly because, if the opposite

17 *Friends of the Oldman River*, above note 15 at 39–40.

18 [2005] 3 SCR 563.

interpretation is adopted and “institution” is read as not including municipalities, the internal coherence is restored.¹⁹

Even though Official Languages Acts are quasi-constitutional legislation and therefore attract a broad, goal-promoting interpretation, the presumption of coherence in these circumstances justified the majority preference for the more restrictive interpretation.

4) Conflict Resolution

a) Legislative Rule

In the complete statute book of a jurisdiction, whether federal, provincial, or municipal, there is inevitably a significant potential for conflict between provisions. Part of the job of legislative drafters is to search out such conflicts and seek instruction on how to deal with them—by repeal perhaps, or by designating one of the provisions to be paramount. The latter is conventionally rendered by introducing the paramount provision with words like “notwithstanding (or despite) section xx” or introducing the subordinate provision with words like “subject to section yy.” Sometimes general notwithstanding clauses are included that make certain provisions or an entire Act paramount over anything else that might conflict with it.²⁰

When two provisions are in conflict, even if the legislature does not provide an express solution, it may be apparent from the scheme and purpose of the legislation that one provision was intended to have priority over the other. However, in the absence of an express or implicit legislative solution, the conflict must be dealt with under common law paramountcy rules. These are essentially ranking rules. They assign a relative status to the provisions in conflict, with the higher-ranked or paramount provision prevailing over the lower-ranked or subordinate one. The paramount provision is applied in accordance with its terms while the subordinate provision is rendered inoperative to the extent it is in conflict with the paramount law. When legislation is rendered inoperative, it remains a valid part of the law, but cannot be applied.²¹ It remains in this suspended state until the conflict disappears, usually through repeal or amendment of one or both of the conflicting laws. There are five paramountcy rules.

19 *Ibid* at para 19.

20 It may not be wise to rely on a general clause of this sort. Sometimes the provisions in conflict are *both* covered by a general notwithstanding clause, in which case the problem of paramountcy must be resolved through interpretation.

21 It has the same status as a provision that has been enacted but not yet come into force.

b) Federal Legislation

There is considerable overlap in the division of powers between Parliament and the provincial legislatures under sections 91 and 92 of the *Constitution Act, 1867*. As a result, some matters may validly be dealt with at both the federal and the provincial levels. This overlap creates the possibility of conflict and the need for a paramountcy rule. In the event of conflict, legislation enacted by Parliament or under the authority of Parliament is paramount over provincial law. The federal law is paramount even if the provincial law was enacted to protect human rights or was subsequently enacted or is more specific. In other words, the rule of federal paramountcy is applied first and outranks other paramountcy rules.

c) Human Rights Legislation

Federal and provincial human rights Acts do not form part of the entrenched constitution, but because they express fundamental political values, they are considered constitutional or “quasi-constitutional” law. As such, they warrant special treatment. Under the liberal construction doctrine, human rights legislation is interpreted broadly and purposefully.²² It also benefits from a flexible application of the original meaning rule.²³ And finally, in the event of a conflict between human rights legislation and other legislation, the human rights legislation is paramount. It prevails even if the other legislation was subsequently enacted or is more specific.²⁴

d) Implied Exception (*Specialia Generalibus Non Derogant*)

This paramountcy rule is generally stated in the form of the Latin maxim *specialia generalibus non derogant*—the general does not derogate from the specific. In the event of a conflict between a specific provision

²² This application of the liberal construction doctrine is discussed in Chapter 14.

²³ This exception to the original meaning rule is less well-established. However, given the general language in which such Acts are typically drafted, they are likely to attract a dynamic interpretation in any case. See Chapter 7, Section D(3).

²⁴ *Insurance Corp of British Columbia v Heerspink*, [1982] 2 SCR 145 at 154. See also *Quebec (Commission des droits de la personne et des droits de la jeunesse) v Bombardier Inc (Bombardier Aerospace Training Center)*, 2015 SCC 39; *Tranchemontagne v Ontario (Director, Disability Support Program)*, 2006 SCC 14 at para 33ff. It is arguable that the decision of the Supreme Court of Canada in *Thibodeau*, above note 1, undermines this paramountcy rule by allowing legislation that implemented an international treaty to prevail over human rights legislation. That was the effect of avoiding conflict by narrowing the scope of the *Official Languages Act* (rather than the *Carriage by Air Act*) and of emphasizing presumed compliance with international law over the liberal construction doctrine.

dealing with a particular matter and a more general provision dealing not only with that matter but with others as well, the specific provision prevails. It prevails even if the general legislation was subsequently enacted. The specific provision is treated as an exception to the rule embodied in the more general provision.²⁵

e) Implied Repeal

Since a legislature cannot bind its successors, in the event of a conflict between two provisions, the more recent expression of the legislature's will prevails over the earlier one. Implied repeal is sometimes considered a method of actual repeal rather than a rule of paramountcy. It is certainly possible to analyze it this way: by enacting a provision that is inconsistent with existing legislation, a legislature impliedly expresses an intention to repeal the existing law and replace it with something else.

Canadian jurisdictions have a well-established convention of explicit formal repeal. When new legislation is prepared, those involved in drafting it review the existing statute book and include an express repeal of any provision that is judged to be inconsistent with the new legislation. Given this practice, implied repeal operates most often as a rule of paramountcy rather than a method of repeal.²⁶ This means that subsequently enacted provisions render previously enacted provisions inoperative to the extent of any conflict. However, the inoperative provisions remain valid law and will become applicable again if for any reason the conflict disappears.

Despite the drafting practice described above, mistakes sometimes occur, and provisions that should have been repealed are left on the books. For example, when the *Criminal Code* was amended to give the Supreme Court of Canada jurisdiction to hear appeals concerning *habeas corpus*, it created a conflict with the previously enacted section 40 of the *Supreme Court Act*. It provided that no appeal lay to the court in proceedings for *habeas corpus* in the context of extradition. The conflict came before the Supreme Court of Canada in *R v Schmidt*,²⁷ in which the appellant sought a writ of *habeas corpus* to avoid extradition to the United States. The court might refuse jurisdiction by applying the implied exception rule to resolve the conflict. However, it concluded that when Parliament amended the *Criminal Code*, it intended to confer jurisdiction to hear appeals involving *habeas corpus* in all contexts, and

²⁵ *Lévis (City) v Fraternité des policiers de Lévis Inc*, 2007 SCC 14 at paras 58–60 [*Lévis*]; *Brenner v Brenner*, 2010 BCCA 553 at paras 37 and 46; *Diamond Estate v Robbins*, [2006] NJ No 3 at para 69ff (CA).

²⁶ That is how it operates in *Lévis*, above note 25 at paras 58–60.

²⁷ [1987] 1 SCR 500.

the court therefore held that section 40 was impliedly repealed. This did not just render the section inoperative but removed it from the corpus of federal law.

f) Delegated Legislation

Statutes are considered paramount over delegated legislation because legislatures are sovereign law makers whereas the persons or bodies that exercise delegated law-making authority are not. Their authority is derived from the legislature and can be modified or taken back at will. However, it is possible for a sovereign legislature to authorize the making of subordinate or delegated legislation that is intended to prevail over the enabling statute or over other designated statutes in the event of conflict. In *Friends of the Oldman River Society v Canada (Minister of Transport)*, La Forest J wrote:

Just as subordinate legislation cannot conflict with its parent legislation . . . so too it cannot conflict with other Acts of Parliament . . . *unless a statute so authorizes . . .* Ordinarily, then, an Act of Parliament must prevail over inconsistent or conflicting subordinate legislation.²⁸

As this passage indicates, the paramountcy of statutes over delegated legislation operates as a presumption. In the event of conflict, the statute is presumed to prevail, but this presumption is rebuttable by clear evidence of a contrary intent.

The relation between this rule and the other paramountcy rules is complex and depends on the circumstances. Although statutes generally are paramount over regulations, a federal regulation would prevail over a provincial Act, and a regulation made under a human rights code might prevail over an ordinary Act.

g) How the Rules Are Applied

The application of conflict resolution rules is illustrated in the following examples. In *Insurance Corp of British Columbia v Heerspink*,²⁹ the Supreme Court of Canada had to deal with overlapping provisions from British Columbia's *Insurance Act* and its *Human Rights Code*. The *Insurance Act* provided that insurers were entitled to terminate contracts of insurance upon fifteen days' notice. The *Human Rights Code* provided that a service customarily available to the public could not be withdrawn without reasonable cause. Under the *Insurance Act* an insurer was free to terminate a contract for any cause, so long as the requisite notice was

²⁸ Above note 15 at 38. [Emphasis added.]

²⁹ Above note 24.

given. Under the *Human Rights Code*, cancellation for discriminatory reasons was prohibited. To the extent these provisions were in conflict, the *Human Rights Code* prevailed.

Had the *Insurance Act* been federal legislation, it would have prevailed over the provincial *Human Rights Code* to the extent of any conflict. But since both enactments were enacted by British Columbia, the federal paramountcy rule did not apply.

Counsel for the insurers argued that a provision dealing specifically with the cancellation of insurance coverage should prevail over a provision dealing with the cancellation of services in general, even though the general provision was enacted after the more specific one. He invoked the implied exception rule: a law of general application does not derogate from a law that makes specific provision for a particular thing. This argument did not succeed. Justice Lamer wrote:

[S]hort of that legislature speaking to the contrary in express and unequivocal language . . . it is intended that the [Human Rights] Code supersede all other laws when conflict arises.

As a result, the legal proposition *generalia specialibus non derogant* cannot be applied to such a code. Indeed the *Human Rights Code*, when in conflict with “particular and specific legislation”, is not to be treated as another ordinary law of general application. It should be recognized for what it is, a fundamental law.³⁰

In *Dunn v Dunn Estate*,³¹ an Ontario court was faced with overlapping provisions from two provincial statutes. Section 196 of Ontario’s *Insurance Act* provided that where the beneficiary of an insurance policy has been designated by the purchaser of the policy, the proceeds do not form part of the purchaser’s estate. Section 72(1)(f) of the *Succession Law Reform Act* provided that proceeds payable under an insurance policy on the life of a deceased person are deemed to form part of the deceased’s estate for certain purposes.

In this case, both enactments were provincial, and neither could be classified as human rights legislation. The conflict was resolved by applying the implied exception rule: the specific provision was treated as an exception to the more general one. Justice Haley wrote:

The *Insurance Act* section is a general provision dealing with the effect of a designation of a beneficiary in all contracts The *Succession Law Reform Act* section is a provision affecting only proceeds of

³⁰ *Ibid* at 158.

³¹ (1992), 9 OR (3d) 95 (Gen Div), aff’d (1993), 12 OR (3d) 601 (Div Ct) [*Dunn*]. See also *Diamond Estate v Robbins*, [2006] NJ No 3 at para 69ff (CA).

an insurance policy owned by the deceased and effected on his life in circumstances where dependency considerations rise. In my opinion, the *Succession Law Reform Act* provision is a special provision which can be interpreted as creating an exception to the general provision of the *Insurance Act*.³²

Since the *Succession Law Reform Act* provision was enacted after the *Insurance Act* provision, the same result could have been reached by applying the implied repeal rule.

C. OVERLAP WITH COMMON LAW

In a parliamentary democracy, the legislature is the primary and paramount source of law, and judges—like everyone else—must take direction from the legislature. This basic principle has several implications. First, it means that judge-made law is subordinate to valid legislation, whether federal or provincial, Act or regulation. In the event of a conflict between legislation and the common law, the legislation always prevails. Second, by enacting an exhaustive set of rules dealing with a matter, the legislature may occupy the field and preclude further recourse to the common law. Third, the power of judges to create new common law is limited to incremental change; in most areas, significant policy initiatives must be left to the legislature.

Despite the constitutional primacy of the legislature, the common law is sometimes difficult to displace. Most rules of statutory interpretation are judicial inventions, and a number of them are designed to preserve the common law from legislative encroachment. For example, it is presumed that the legislature does not intend to change the common law, to introduce exceptions to general principles (which often originate in common law), to interfere with common law rights and freedoms, or to take away the jurisdiction of common law courts. Apart from these presumptions, the common law supplies the intellectual framework within which much legislation is read. Many of the legal concepts and categories referred to in legislation are derived from the common law. Finally, the common law is a major source of the assumptions, policies, and principles that make up our legal culture. Even in an area like criminal law, which has been codified for more than a century in Canada, common law conceptions of *mens rea* and the claims of natural justice continue to dominate our thinking.

32 Dunn, above note 31 at 103.

In cases of overlap between legislation and the common law, there are four possibilities:

- 1) The legislation incorporates or codifies the common law, giving statutory force to common law rules or understandings.
- 2) The legislation supplements the common law without creating conflict; in cases of overlap, both apply.
- 3) The legislation supplements the common law without creating conflict, but the legislation is meant to be exhaustive and therefore displaces the common law.
- 4) The legislation conflicts with the common law and displaces it to the extent of the conflict.

1) Legislation Incorporates or Codifies the Common Law

Legislatures in common law jurisdictions often incorporate common law concepts or terms into legislation, and they sometimes codify common law principles and rules. A provision that uses an expression or concept that has a fixed common law meaning may be said to “incorporate” the expression or concept. When a concept or expression is thus incorporated, the court is expected to go to common law sources for its meaning and legal significance.

A provision that reproduces a common law principle or rule without changing it in any way is said to “codify” the common law. In such a case, the statute and the common law are identical, so the problem of conflict does not arise. Insofar as the codified rule incorporates common law concepts, the court appropriately relies on the common law meaning. However, as a result of codification, the statute displaces the common law. This means that all subsequent applications of the rule must invoke the statute rather than the common law and also that subsequent evolution of the codified law must be based on the statute and managed through the techniques of interpretation rather than ordinary common law development. Although this does not mean that the law is now ossified, its future evolution is controlled by the statutory context and purpose, and by the primacy of the legislature in effecting legislative change.

A good example of incorporation is found in *Positive Action Against Pornography v Minister of National Revenue*,³³ a judgment of the Federal Court of Appeal. The court there had to determine whether the appellant was a “charitable organization” within the meaning of the *Income Tax Act*. Justice Stone wrote:

33 [1988] 2 FC 340 (CA) [*Positive Action*].

In order to properly assess the relative merits of . . . [the appellant's arguments], they must be viewed in the light of applicable common law principles, the definition of the word "charity" found in the Act furnishing little or no assistance . . . Paragraph 149.1(1)(d) merely defines that word as meaning "a charitable organization or charitable foundation", both of which terms are in turn defined in paragraphs [149.1(1)](a) and [149.1(1)](b) respectively of that same subsection but not in any helpful way. Instead, the Act appears clearly to envisage a resort to the common law for a definition of "charity" in its legal sense as well as for the principles that should guide us in applying that definition.³⁴

The court found the help it was looking for in the caselaw establishing the common law of charity, which it treated as an extensive gloss on the meaning of the statutory language. In effect, the entire law of charitable gifts was incorporated into the Act through the word "charitable."

In the *Positive Action* case, the court's suggestion that the legislature intended to incorporate the common law definition of charity into the *Income Tax Act* is highly plausible. The distinction between charitable and non-charitable was crucial to the operation of the statutory scheme, yet the Act gave no hint of how that distinction was to be drawn. Fortunately, there was a rich line of common law cases reaching back to the seventeenth century addressing the issue of what is charitable in the eyes of the law. In these circumstances, incorporation was an obvious solution. It would be very difficult to codify caselaw of such complexity, and it would be undesirable to detach the concept of charity under the *Income Tax Act* from its understanding in other legal contexts. By relying on incorporation rather than codification, the legislature achieved a better solution.

An interesting example of codification is found in *R v Di Pietro*.³⁵ In that case the Supreme Court of Canada had to determine whether operating premises in which customers paid by the hour to play billiards constituted keeping a common gaming house within the meaning of section 179(1) of the *Criminal Code*. In creating this offence, the *Code* offered elaborate and apparently comprehensive definitions of "gaming" and "common gaming house." Justice Lamer wrote:

According to the definition of a common gaming house found in s. 179(1), the constituent elements of the offence, are:

1. keeping a place;
2. for gain;

³⁴ *Ibid* at para 8.

³⁵ [1986] 1 SCR 250.

3. resorted to by persons for the purpose of playing games;
 4. which games are games of chance or mixed chance and skill.
- ...

Although the *Criminal Code* is silent as to the necessity of wagering on the outcome of the game by the players thereof in order to establish that gaming did take place, it has long been recognized by the common law that this is an essential element of gaming . . . [T]he courts defined “gaming” as “playing a game for stakes hazarded by the players”.³⁶

In effect, the court concluded that section 179(1) of the *Code* was meant to be a codification of the common law offence. And since wagering was the essence of the offence at common law, it must be part of the statutory offence as well.

By adding the element of wagering to the *Code*’s definition of “gaming,” the court significantly narrows the scope of the offence. Its reason for doing this is evident: otherwise any number of perfectly “innocent” operations, like chess clubs or bridge clubs, would be criminalized. This cannot have been Parliament’s intention. By concluding that section 179 codified the common law offence and therefore included the element of wagering (despite the absence of any reference to this element in the definition of “gaming house”), absurdity was avoided.

2) Legislation Supplements the Common Law

In keeping with the presumptions aimed at preserving the common law, the courts presume that legislation is meant to supplement rather than displace common law rules or remedies. So long as the legislation does not entirely duplicate or subsume the common law, so long as the common law rules or remedies have some distinct purpose of their own, the courts are loath to get rid of them. On the whole, it is better for subjects to have a greater rather than a lesser choice of rules, remedies, and fora. Also, where courts believe that a legislative scheme is flawed, that the remedy offered by the legislature is inadequate, or that the common law offers some benefit or advantage not available under the legislation, they are likely to conclude that the legislature intended to supplement rather than displace the common law.

In *Rawluk v Rawluk*,³⁷ for example, the issue was whether Ontario’s *Family Law Act* precluded recourse to the common law remedy of constructive trust. Even though the Act provided a detailed and comprehensive scheme for the equalization of property upon marriage breakdown,

36 *Ibid* at 258–59.

37 [1990] 1 SCR 70 [*Rawluk*].

including a range of remedies, a majority of the Supreme Court of Canada held that it did not displace the common law approach. Justice Cory wrote: “The constructive trust is used in the matrimonial property context to allocate proprietary interests, a function that is totally distinct from the . . . equalization process.”³⁸ Also, as Cory J noted, the constructive trust gives a successful claimant a share in the ownership of property and not just a personal entitlement as offered under the Act. The courts are reluctant to see the elimination of what they take to be a common law advantage. In the circumstances, a majority of the court concluded that the legislation was meant to supplement rather than displace the common law constructive trust.

The *Rawluk* case can be used to illustrate one of the problems with the court’s tendency to preserve perceived common law advantages. Where the law is used to resolve disputes between parties, generally speaking the advantages conferred on one party are had at the expense of the other. To the extent the constructive trust is a better remedy for the plaintiff, it represents a loss to the defendant. In failing to incorporate the constructive trust mechanism into its Act, the Ontario legislature may have deliberately chosen to favour defendants over plaintiffs in matrimonial property disputes. If so, this choice was undermined by the majority decision to treat the Act as supplementing rather than displacing the common law.

3) Legislation Is Meant to Be Exhaustive

When it appears that legislation is meant to provide an exhaustive regulation of a matter, the legislation prevails over and displaces the common law. In considering whether legislation is meant to be exhaustive, the courts rely on the considerations discussed above in connection with overlapping legislation.³⁹ They focus on whether the legislation is complete and comprehensive, whether it provides adequate remedies, whether it implements a policy or scheme that might be undermined by resort to the common law, and whether it would be superfluous if it were not meant to be exhaustive.

In *Gendron v PSAC, Supply & Services Union, Local 50057*,⁴⁰ for example, an employee whose relations with his union and employer were governed by the *Canada Labour Code* sought to bring an action against his union on the basis of the common law duty of fair representation. The Supreme Court of Canada ruled that the matter of fair representa-

³⁸ *Ibid* at 93.

³⁹ Section B(2), above in this chapter.

⁴⁰ [1990] 1 SCR 1298.

tion was adequately dealt with in the *Code* and that resort to the common law was therefore precluded. Justice L'Heureux-Dubé wrote:

In reviewing the legislation it becomes clear that, at least as regards the duty of fair representation, Parliament has enacted a comprehensive, exclusive code. An overview of the *Code* puts the statutory duty of fair representation in its proper context, that of a complete and comprehensive scheme that both supplies the duty and provides the necessary adjudicative machinery such that resort to the common law is duplicative in any situation where the statute applies.⁴¹

Since resort to the common law would add nothing to the statute, the employee was limited to his statutory remedy.

A statute that is complete and comprehensive, provides adequate remedies, and would be undermined by resort to the common law is likely to be labelled a code, and codes displace the common law. However, the tests for exhaustiveness outlined above need not be applied to entire statutes. Often the focus is on one or more provisions at issue in the case. Even though a statute may not be a complete code, one or more of its provisions may deal exhaustively with a particular matter so as to displace the common law. In *Buschau v Rogers Communications Inc*,⁴² for example, the issue was whether the employees for whom a pension trust was established by an employer could collapse the trust under the rule in *Saunders v Vautier*.⁴³ Writing for the majority, Deschamps J concluded that the rule in *Saunders v Vautier* had been displaced by the *Pension Benefits Standards Act, 1985*. She wrote:

First, pension plans are heavily regulated. The PBSA regulates the termination of a plan and the distribution of the fund and the trust assets . . . The PBSA deals extensively with the termination of plans and the distribution of assets. It is clear from this explicit legislation that Parliament intended its provisions to displace the common law rule.^[44] To the extent that it provides a means to reach the distribution stage, the PBSA prevails over the traditional rule in *Saunders v. Vautier*.⁴⁵

...

⁴¹ *Ibid* at 1317.

⁴² [2006] 1 SCR 973.

⁴³ This equitable rule permits the beneficiaries of a trust to join together to bring a trust to an end in advance of the time stipulated by the settlor.

⁴⁴ Although in some contexts common law (that is, law made by judges of the common law courts) contrasts with equity (law made by the King's Chancellor), in other contexts common law includes equity because both are made by judges rather than legislators.

⁴⁵ Above note 42 at para 28.

The PBSA is not a complete code. However, when recourse is available to plan members, they should use it. Termination is dealt with explicitly in the PBSA.⁴⁶

Because the statute provided an adequate remedy, one that took into account the complex mix of policies involved in the regulation of pension plans, there was no room left for the operation of the common law rule.

4) Legislation Conflicts with Common Law

If there is an outright conflict between legislation and the common law, the matter is easily resolved: the legislation prevails. The application of this rule is illustrated in the judgment of the Supreme Court of Canada in *Québec (Attorney General) v Carrières Ste-Thérèse Ltée*.⁴⁷ The issue in the case was whether a power conferred on the Minister of Social Affairs by section 55 of Quebec's *Public Health Act* could be delegated to a deputy minister. Under the common law, ministers can delegate their powers to deputy ministers. However, section 55 of the *Public Health Act* provided that the Minister of Social Affairs "may himself exercise directly" certain powers set out in the Act. In the view of the court, this provision meant that the minister had to exercise the powers himself and could not delegate to the deputy. Since the statutory provision was in direct contradiction of the common law rule, both could not apply and the statutory rule prevailed. Although the common law would continue to apply to other ministers and to the Minister of Social Affairs with respect to other powers, this particular power could not be legally delegated.⁴⁸

Similarly, in *Prebuszewski v Dodge City Auto (1984) Ltd*,⁴⁹ the Supreme Court of Canada ruled that section 65 of Saskatchewan's *Consumer Protection Act* did not codify the common law rules respecting exemplary damages but rather changed them and therefore displaced them. Section 65 provided that "a consumer . . . may recover exemplary damages from any manufacturer . . . who has committed a wilful violation of this Part." Speaking for the court, Abella J explained:

At common law, exemplary or punitive damages are awarded only in exceptional cases to meet the goals of retribution, deterrence and denunciation in cases of "malicious, oppressive and high-handed" conduct that "offends the court's sense of decency".

...

46 *Ibid* at para 35.

47 [1985] 1 SCR 831.

48 *Ibid* at 838–39.

49 [2005] 1 SCR 649.

The language of s. 65(l) is clear and unambiguous: once a wilful—or deliberate—violation has been found, the trial judge has a discretion to award exemplary damages. Had the legislature intended that the common law—and more exacting—test apply, it could easily have used words affiliated with the traditional approach to exemplary damages, such as “malicious” or “oppressive”. By designating instead that “wilful” violations of the Act are sufficient to trigger a judge’s discretion, the legislature has signalled an intention to lower the threshold and grant easier access to the remedy of exemplary damages.⁵⁰

Justice Abella supported this conclusion with reference to a number of other interpretive techniques, including textual analysis, scheme analysis, and legislative history and evolution.⁵¹

50 *Ibid* at paras 23–24.

51 *Ibid* at para 26ff.