Colourability

Colourability is a concept that goes against Canadian **federalism** because the Constitution has assigned certain powers to the federal jurisdiction under section 91 and to the provincial realms under section 92.[1] It occurs when either the federal government or any of the provincial or territorial governments, attempts to introduce legislation that may appear to address one issue within the scope of its power but in fact it is a disguised attempt to address something that is outside its jurisdiction. Or, in the words of constitutional scholar Peter Hogg, colourable legislation occurs when a jurisdiction attempts to pass a law indirectly that it cannot pass directly so that it "may accomplish its original goal."[2]

Colourability was an issue in the 1993 decision of *R v Morgentaler*.[3] Morgentaler planned to open an abortion clinic in Nova Scotia. The provincial government immediately passed legislation that would outlaw abortion clinics and limit the procedure to hospitals only. However, the regulations introduced were not limited to abortions. The province added procedures like liposuction and anything it claimed would jeopardize public health care in favour of a private system. Offenders would face criminal penalties. Morgentaler proceeded to open his clinic anyway and was charged. He then challenged the constitutionality of the provincial law that outlawed abortion clinics.[4] The Supreme Court agreed with the argument that specific abortion regulations, rather than being a valid provincial regulation of hospitals and medicine, instead constituted an invalid criminal law.[5] As a result, all regulations introduced in the legislation were struck down, including those not dealing with abortion.[6] Hogg argues that this was an example of colourability: Nova Scotia may have simply wished to limit abortions in the province, and so it introduced other legislation as a package that would accomplish more than one goal.[7]

Colourability is often thought of as a negative term that should be used both carefully and sparingly. According to Hogg, the adjective 'colourable' carries a strong connotation of disapproval or even suspicion of the means by which the legislative body sought to carry out the policy.[8] Therefore, when examining whether legislation is out of, or *ultra vires*, a particular jurisdiction one should not jump to the conclusion that the legislation is attempting to achieve some ulterior or subversive purpose.[9]

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[1]*The Constitution Act, 1867*, ss 38-49, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

[2]Peter W Hogg, *Constitutional Law of Canada*, vol 2, 5th ed (Scarborough: Thomson, 2007) at 15.2.

[3]*R v Morgentaler*, [1993] 3 SCR 463 (CanLII) .

<http://www.canlii.org/en/ca/scc/doc/1993/1993canlii158/1993canlii158.html>.

[4]*Ibid*.

[5]*Ibid*.

[6]*Ibid*.

[7]Hogg, *supra* note 1.

[8]*Ibid*.

[9]*Ibid*.