Cannabis Regulation Act: Summary of Murray-Hall v. Attorney General of Québec, 2023 SCC 10

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In an unprecedented visit by the Supreme Court to Québec City in September of 2022, the country's highest court heard the appeal of Mr. Janick Murray-Hall (the Appellant) in his challenge of the constitutional validity of two sections of the *Cannabis Regulation Act*.

The decision in *Murray-Hall v. Attorney General of Québec*, 2023 SCC 10 is an interesting example of the application of the double aspect doctrine, whereby the Supreme Court confirmed that provincial legislatures may enact legislation that has all the appearance of criminal law, where such legislation is enacted within the limits of the heads of jurisdiction granted to the provinces. Moreover, the decision of the highest court in the land also confirms the essentially prohibitive nature of criminal law rules and that, as a matter of principle, such rules do not grant positive rights to constituents.

Key takeaways

- According to the double aspect doctrine, Parliament and the provincial legislatures may make laws on matters that by their very nature have both a provincial and a federal aspect.
- Under the doctrine of federal paramountcy, there is an inconsistency that justifies giving a federal law priority over a valid provincial law where there is an operational conflict or when the purpose of the federal law is frustrated.
- The federal head of power on criminal law can only be exercised to prohibit acts, and thus cannot create positive rights for litigants.

Context

In 2018, the federal government passed the *Cannabis Act* (the Federal Act), decriminalizing the recreational use of cannabis. The Federal Act prohibits the possession or cultivation of more than four cannabis plants in a dwelling-house. At the same time, the provincial government passed the *Cannabis Regulation Act* (the Provincial Act) regulating the possession, cultivation, use, sale and promotion of

cannabis in Québec, and also creating the *Société québécoise du cannabis*, which has a monopoly on the sale of cannabis in the province. The Provincial Act prohibits the possession or cultivation of cannabis plants for personal use in a dwelling-house,[1] subject to fines.

Mr. Murray-Hall challenged the validity of sections 5 and 10 of the Provincial Act on his behalf and on behalf of all persons who are liable to be prosecuted for possession of a cannabis plant in their dwelling-house in Québec. The Appellant claimed, among other things, that these prohibitive sections of the Provincial Act infringed upon the federal criminal law power.[2]

While the Superior Court initially ruled in favour of the Appellant by declaring the two impugned provisions invalid, the Court of Appeal subsequently overturned the first instance judge's decision in a unanimous judgment.

On April 14, 2023, the Supreme Court of Canada, in a unanimous decision written by the Chief Justice, dismissed the Appellant's appeal and upheld the decision of the Québec Court of Appeal. In so doing, the highest court in the land upheld the constitutional validity and the operability of sections 5 and 10 of the Provincial Act, since these provisions constitute, in the Supreme Court's view, a valid exercise by the Québec legislature of the powers conferred on it by ss. 92(13) and (16) of the *Constitution Act, 1867*, and do not frustrate the purpose of the Federal Act. Thus, the Provincial Act continues to prohibit the possession or cultivation of a cannabis plant or plants in a dwelling-house in Québec.

Analysis

The highest Court in the land held that the provisions of the Provincial Act that prevent the possession or cultivation of cannabis plants in a particular context are related to the provincial head of power over property and civil rights[3] and from the residual jurisdiction of the provinces over matters of a merely local or private nature in the province.[4]

In this regard, the Court concluded that, although the impugned provisions of the Provincial Act taken individually have all the appearance of criminal law rules, it cannot automatically be inferred that they are within federal jurisdiction and that they go beyond the powers that have been conferred on the provinces. Indeed, where sections are part of a regulatory scheme, it is necessary to interpret them in their context, that is, to consider how they interact with the rest of the scheme. [5]

In characterizing the pith and substance of the impugned provisions, the Court noted that it is important not to confuse the actual purposes of the law (the "why") with the means chosen to achieve those purposes (the "how").[6] In the Court's view, it would be wrong to suggest that the provincial government was attempting to "recriminalize" what the federal government had intended to decriminalize;[7] this would be more a matter of the means chosen to achieve the real purpose of the provisions. According to the Court, it is clear that the pith and substance of the sections in question is "to ensure the effectiveness of the state monopoly on the sale of cannabis in order to protect the health and security of the public, and of young persons in particular, from the harm caused by this substance",[8] despite the fact that the Québec legislature opted for a complete ban on these plants. Thus, the purpose of the prohibitions provided for in the

two sections of the Provincial Act is to control and supervise access to cannabis, rather than to punish offenders.

Moreover, since health is a matter that was not specifically assigned in the *Constitution Act, 1867*, overlapping jurisdiction in this area is very common. The "double aspect" doctrine, which is used when the federal and provincial governments enact legislation on matters that "by their very nature" have both a federal and a provincial aspect,[9] was therefore of some importance in this case. The Court found that, in the context of cannabis legislation, the federal aspect was reflected in a desire to legislate in criminal matters to suppress an "evil" or harmful or undesirable effect on the public. The provincial aspect, on the other hand, was more concerned with health or commerce, and was reflected in a desire to regulate the conditions of production, distribution and sale of the substance. The Court concluded that the two sections of the Provincial Act were more in keeping with this second perspective and, therefore, did not fall within the federal criminal jurisdiction.

The Court also dismissed the Appellant's alternative contention that sections 5 and 10 of the Provincial Act were inoperative as inconsistent with the Federal Act, which by its silence would allegedly allow the possession or cultivation of four or less cannabis plants. Instead, the Court found that the sections of the Provincial Act in question did not frustrate the purpose of the Federal Act and noted that, on the contrary, the provincial prohibitions were consistent with several of the objectives set out in the Federal Act, including the protection of the health and safety of young persons[10] and the prevention of inducement to use cannabis.[11] The Court added that the essentially prohibitory nature of the criminal law power - the jurisdiction governing the Federal Act - cannot create positive rights. Thus, "[t]he federal criminal law power may only be used to prohibit conduct",[12] so the Federal Act cannot, by its silence, permit the possession or cultivation of cannabis.

Conclusion

This decision of the Supreme Court of Canada confirms the latitude that the provinces have to legislate, within their areas of jurisdiction, on matters which, by their very nature, have a double aspect. The outcome of this case also reiterates the limits of federal jurisdiction in criminal matters, which is prohibitive in nature and cannot be interpreted as creating positive rights.

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Footnotes

[1] Sections 5 and 10, Provincial Act.

[2] S. 91(27) of the *Constitutional Act, 1867* (UK), 30 & 31 Victoria, c. 3. [CA 1867]

[3] S. 92(13), CA 1867.

[4] S. 92(16), CA 1867.

[5] As reminded by Justice Dickson in *Attorney General of Canada v. Canadian National Transportation, Ltd.*, [1983] 2 S.C.R. 206.

[6] As reminded by Chief Justice McLachlin in *Ward v. Canada (Attorney General)*, 2002 SCC 17, [2002] 1 S.C.R. 569.

[7] As seen in *R. v. Morgentaler*, [1993] 3 S.C.R. 463.

[8] *Murray-Hall v. Attorney General of Québec*, 2023 SCC 10, at para. 28.

[9] As seen in *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3.

[10] Section 7a), Federal Act.

[11] Section 7b), Federal Act.

[12] As mentioned by Chief Justice McLachlin in *Reference re Assisted Human Reproduction Act*, 2010 SCC 61.

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