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Hash-ing It Out: SCC Will Hear Challenge to Constitutionality of Quebec Legislation Banning Personal Possession and Cultivation of Cannabis

The Supreme Court of Canada recently granted leave to appeal in the decision of *Murray-Hall c Procureure generale du Quebec ,* opening the door for the Court to consider the constitutionality of provincial legislation purportedly aimed at regulating cannabis production and possession in the province of Quebec. The case is significant because it focuses on the validity of provincial legislation which directly contradicts federal legislation on the same issue.

Background

On June 21, 2018, the Federal Government enacted Bill C-45 which, among other things, decriminalized possession of cannabis (the "*Federal Cannabis Act*"). Relevant for this case, the *Federal Cannabis Act* decriminalized: 1) the possession of up to 4 cannabis plants and 2) the production of up to 4 cannabis plants in a dwelling house.

In anticipation of the federal legislation, on June 12, 2018, the Quebec Government enacted Bill 157 which, among other things, created the Société Quebecoise du Cannabis ("SQDC"), a subsidiary of the SAQ, to manage the production, distribution, and sale of cannabis in the province. The legislation also prohibited the possession and cultivation of cannabis (the " *Quebec Cannabis Act*").

The issue in this case centres on the constitutionality of ss. 5 and 10 of the *Quebec Cannabis Act* which prohibited the possession and cultivation of cannabis. The Applicant, Mr. Murray-Hall, argued that the provisions were *ultra vires* because the pith and substance of the impugned provisions were criminal in nature.

The key analytical framework for determining constitutionality in this case is as follows:

- **Determine pith and substance**: identify the purpose of the provisions and then determine which heads of power it relates to.

- **Ancillary powers**: if the provisions are *ultra vires*, they can only be saved if it is sufficiently integrated within valid legislation. If there is a serious intrusion into federal powers, the necessity test applies. If there is a lesser intrusion, the rational functional test applies.

- **Federal paramountcy**: if the provisions are *intra vires*, if they conflict with federal legislation, the conflicting provisions are rendered inoperative.

Decision of the Quebec Superior Court

The Quebec Superior Court concluded that ss. 5 and 10 were *ultra vires*.

First, the Court concluded that the "pith and substance" of the *Quebec Cannabis Act* was to completely prohibit the personal cultivation of cannabis because it harms the health and security of the public. The Court found that this purpose was a criminal law purpose, and therefore within federal jurisdiction. In reaching this conclusion, the Court noted:

- **The purpose of the provisions** was to suppress the personal production of cannabis to limit access to it and tighten its control. The Court noted that goal was to prevent increased use, especially by young people.

- **The practical and legal effects of the provisions** were to prohibit possession and cultivation of cannabis, to force consumers to purchase from the SQDC, and to impose penal sanctions for any violation.

- **The provisions fell within the federal criminal law power** because their dominant purpose and effect was to totally prohibit a practice that undercuts moral values and produces public health and security evils. The province effectively sought to suppress a now lawful activity. The Court noted:

    - The provisions attempt to address an evil affecting the health and security of the public. They also contained the typical indicia of criminal law powers, being a criminal law purpose, backed by a prohibition with a penalty (in this case, a monetary penalty).

- The provisions amounted to a total prohibition of possession or cultivation, which was directly contrary to the federal legislation. While the Court accepted that the Province has jurisdiction over the production, distribution, and use of cannabis, it exceeded that jurisdiction by imposing an all out prohibition.

Second, the Court concluded that the provisions could not be saved by the ancillary powers doctrine. In this case, the validity of the *Quebec Cannabis Act* was not disputed by the parties and the Court agreed that legislation regulating the use, sale and promotion of cannabis fell within provincial powers. Therefore, the only issue was the extent to which the impugned provisions encroached on federal powers.

In that respect, the Court concluded that the provisions seriously intruded on the federal powers. In particular, the Court noted that where legislation appears to replace legislation enacted by the other level of government, this suggests a serious intrusion. In light of this, the provisions therefore had to have a "necessary connection" with the *Quebec Cannabis Act*.

The Court concluded that there was no necessary connection with the *Quebec Cannabis Act* primarily because of the all-out prohibition. The Court held that further restricting possession and cultivation would have served the purpose of protecting the health and safety and the public without unlawfully impinging on the federal power.

Decision of the Quebec Court of Appeal

The Quebec Court of Appeal overturned the decision of the lower court, concluding that ss. 5 and 10 were *intra vires.* The reasons of the Court of Appeal demonstrate that it was primarily concerned with the Judge's "narrow" interpretation of ss. 5 and 10.

The Court held that the Judge failed to consider ss. 5 and 10 in their broader context. Whereas the Judge concluded that the purpose of these provisions was criminal in nature because they prohibited possession and cultivation, the Court of Appeal preferred a different approach, finding that these provisions were merely a "means" to ensure that the SQDC was the only entity that could supervise the production and sale of cannabis. Essentially, to prevent and reduce the harmful effects of cannabis and to protect the health and safety of the population, especially young people, the Province created a monopoly and the prohibition on personal use was simply a means of ensuring nothing reduced the effectiveness of that monopoly.

The Court also concluded that the objective of the federal legislation was to better control the interference of criminal organizations in the production and distribution of cannabis and that this purpose was better served by decriminalizing possession (rather than outright prohibition). In that context, the Court concluded that the Province also sought to pursue a parallel goal by creating a monopoly, to control production and distribution, of which ss. 5 and 10 were merely measures to achieve that objective. The objects of each legislation were therefore not contradictory.

With respect to federal paramountcy, which was not considered by the lower Court, the Court of Appeal concluded that it was not violated. It primarily relied on the fact that the federal law power permits it to prohibit conduct, not authorize it. Therefore, the province did not infringe on the criminal law power by prohibiting cultivation because it wasn't affecting a right to cultivate.

What to Watch For

We're keeping our eye on this decision because of its important implications for the division of powers between levels of government.

It is clear that in the courts below, a key issue was whether ss. 5 and 10 were merely a "means" to achieve an otherwise proper provincial power (i.e., regulation of cannabis in the province) or whether they were truly aimed at a criminal power (prohibiting possession and cultivation, with an accompanying penalty).

For those in the cannabis space, the decision will be significant not only because of its conclusions on the narrow issue of whether individuals in Quebec can possess or cultivate cannabis plants, but also for the broader implications of provincial exercises of power in the cannabis space. If the Court of Appeal's decision is upheld, it will affirm the Province's broad powers to regulate the Cannabis industry, even in the face of federal legislation which provides the opposite.