

# *Federalism and the Paramountcy Doctrine*

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## I. Introduction

Federal systems require individuals to comply with laws enacted by more than one order of government. At times, the laws enacted by each order may overlap, and different approaches have been adopted to deal with this situation. In Canada, this is done through the paramountcy doctrine, which permits a court to render a law inoperative when faced with two valid but conflicting laws adopted by different orders of government.

However, despite being a staple of constitutional law for over a century, the paramountcy doctrine has been the subject of important doctrinal fluctuations over the years. For the time being, the doctrine includes a narrow branch known as the operational conflict branch and a broader — and sometimes controversial — branch known as the federal purpose branch. In its 2015 trilogy on the subject, the Supreme Court of Canada clarified the precise parameters of the doctrine while also noting in *obiter* that further doctrinal change may be on the horizon.

The purpose of this article is to review the place of the paramountcy doctrine in Canada's constitutional scheme and provide avenues for further doctrinal refinement. I suggest that an analysis of the text and structure of the Constitution can assist in brushing away some of the

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fog present in this area of law and providing a solid foundation for the way forward. In doing so, I note that a distinction must be made between what I call the “orientation” of the doctrine — that is, whether there should be federal or sub-national paramountcy — and its scope. The approaches adopted in some federal systems show that “federal” paramountcy cannot be assumed. This is also reflected in the Canadian constitutional experience.

More importantly, the broader branch — the purpose branch — continues to be deployed, albeit with some restraint. In what follows, I argue that, at a minimum, the operational conflict branch can be implied in a federal system to further the constitutional principle of the rule of law. However, this does not necessarily entail that a broader branch is justified or should be deployed with enthusiasm when the orders of government are coordinate. Ultimately, I use the case of *Murray-Hall v Quebec (Attorney General)* to highlight these issues and argue that the purpose branch of the paramountcy doctrine should effectively be abandoned in relation to the criminal law power.<sup>1</sup>

I will begin by highlighting the doctrine’s past and current manifestation in the jurisprudence of the Supreme Court (II). Then, I engage with the cases that have held provincial laws to be inoperative pursuant to the purpose branch of the paramountcy doctrine to show that this shift has important implications (III), before considering recent developments and the openings they provide (IV). This leads me to offer avenues for doctrinal refinement by suggesting that the framework currently adopted by the Supreme Court would benefit from a principled approach (V). This can be done by reading the constitutional text in its proper context and developing the law in a way that is sensitive to Canada’s federal structure (VI). I then provide an alternative account with a view to explaining that, even when its use may be legitimate, a restrained approach to the purpose branch is warranted (VII). I conclude by offering comments on the paramountcy issues raised in the context of Quebec’s *Cannabis Regulation Act* (VIII).

## II. The Paramountcy Doctrine: Past and Present

The paramountcy doctrine has been through a series of twists and turns throughout Canada’s history.<sup>2</sup> The need for the doctrine arose because, unlike in traditional unitary states, the laws of different orders of government may overlap in federal systems. Therefore, a mechanism was needed to address this situation without undermining the division of powers.

The effect of the doctrine is to relieve individuals of their obligation or ability to comply with valid laws enacted by one order of government in some cases. This is different from cases in which legislation is declared constitutionally invalid or inapplicable, which entails determining that the laws of one order of government are entirely or partially beyond its legislative jurisdiction or limited in their reach as a matter of constitutional law.<sup>3</sup> Paramountcy only comes into play when the laws of different orders of government overlap, are both independently constitutionally valid, and there is no question as to their constitutional reach.

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1 See *Procureur général du Québec v Murray-Hall*, 2021 QCCA 1325 [*Murray-Hall QCCA*].

2 Luanne A Walton, “Paramountcy: A Distinctly Canadian Solution” (2004) 15:3 NJCL 335.

3 See Guy Régimbald & Dwight Newman, *The Law of the Canadian Constitution*, 2nd ed (Toronto: LexisNexis, 2017) at 222-23.

As a technical matter, the doctrine is applied by courts when they are seized of a dispute. However, the state of the law and the situation on the ground may sometimes lead political actors to change their laws or refuse to regulate an issue in the face of overlap without court intervention. Scholars usually describe this doctrine as dealing “with situations of *conflict* between otherwise valid, but overlapping” laws adopted by two orders of government, and note that the conflicting legislation at issue is only rendered inoperative “to the extent of the inconsistency.”<sup>4</sup> On this understanding, “conflict” encompasses not only operational conflict, but also conflict of purposes.<sup>5</sup> While this is the proper object of the inquiry, Canadian history shows that “conflict” has not always been the explicit marker for the doctrine’s application.

In the early years of Canada’s existence, courts articulated two visions of the doctrine: express contradiction and occupied field. The first approach held that provincial laws were only inoperative when it was impossible to comply with both federal and provincial laws. This was a narrow vision of paramountcy that favoured the continued operation of provincial laws. Its modern equivalent can be found in the first branch of the paramountcy doctrine, discussed below.

By contrast, the occupied field approach encapsulated the idea that provincial laws were inoperative when a federal law had entered the domain in issue, irrespective of actual conflict with provincial norms. In other words, according to these cases, the mere presence of federal law in the area was sufficient to justify the application of the doctrine.<sup>6</sup> This vision of paramountcy was notably present in the jurisprudence on section 95 of the *Constitution Act 1867*, which created explicit concurrency and paramountcy.<sup>7</sup> This was an exceedingly broad conception of paramountcy deployed by courts.

In the years following the abolition of appeals to the Judicial Committee of the Privy Council in 1949, the Supreme Court began to ignore the occupied field approach. It is generally accepted that “[e]xpress contradiction dominated the majority judgments”<sup>8</sup> during this period. The problem, though, as Luanne Walton explains, is that parties continued to rely on the occupied field approach in oral argument, and some judges continued to evoke it in dissenting opinions, all of which served to keep it “alive.”<sup>9</sup> The debate was finally put to rest in 1982 in *Multiple Access Ltd v McCutcheon* when Dickson J expressly rejected the occupied field approach,<sup>10</sup> writing that “there would seem to be no good reasons to speak of paramountcy and preclusion except where there is actual conflict in operation.”<sup>11</sup>

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4 See Wade K Wright, “Facilitating Intergovernmental Dialogue: Judicial Review of the Division of Powers in the Supreme Court of Canada” (2010) 51 SCLR (2d) 625 at 641 [emphasis added] [Wright, “Facilitating Intergovernmental Dialogue”].

5 *Ibid* at 649-650 and 675.

6 Eugénie Brouillet, “Le fédéralisme et la Cour suprême du Canada : quelques réflexions sur le principe d’exclusivité des pouvoirs” (2010) 3 RQDC 1 at 17 [Brouillet, “Le fédéralisme et la Cour suprême du Canada”]; Eugénie Brouillet, *La négation de la nation : L’identité culturelle québécoise et le fédéralisme canadien* (Sillery: Septentrion, 2005) at 271 [Brouillet, *L’identité culturelle québécoise et le fédéralisme canadien*].

7 Jesse Hartery, “La compétence concurrente en matière d’immigration : rendre aux provinces canadiennes ce qu’elles ont perdu” (2018) 63:3 McGill LJ 487 at 506-07.

8 Walton, *supra* note 2 at 348; Brouillet, “Le fédéralisme et la Cour suprême du Canada”, *supra* note 6 at 17. See e.g. *O’Grady v Sparling*, [1960] SCR 804, 25 DLR (2d) 145.

9 Walton, *supra* note 2 at 343.

10 *Multiple Access Ltd v McCutcheon*, [1982] 2 SCR 161 at 188, 138 DLR (3d) 1 [*Multiple Access*].

11 *Ibid* at 191.

Despite this clear victory for a narrow understanding of paramountcy, the Supreme Court's opinion in *Bank of Montreal v Hall* began to retreat from the approach adopted after 1949.<sup>12</sup> In *Multiple Access*, Dickson J had noted, in a paragraph on *duplicative* provisions, that there is no constitutional problem in such a case because "the legislative purpose of Parliament will be fulfilled regardless."<sup>13</sup> In *Hall*, a five-judge panel seized on this passage to expand the paramountcy doctrine and create what would later be described as the "federal purpose" branch.<sup>14</sup>

When the opinion in *Multiple Access* is read as a whole, it is clear that Dickson J was not endorsing such an expansion. His reasons adopted the "express contradiction" or "conflict in operation" approach.<sup>15</sup> In doing so, he cited some of the fiercest defenders of the principle of federalism with approval, notably Martland J in *Smith v The Queen* and Beetz J in *Construction Montcalm Inc v Min Wage Commission*.<sup>16</sup> His judgment was grounded in the understanding that a narrow approach to paramountcy would leave the provinces with "ample legislative room."<sup>17</sup> He emphasized that any untidiness created by this narrow approach "is the price we pay for a federal system in which economy 'often has to be subordinated to ... provincial autonomy.'"<sup>18</sup> Indeed, it is telling that later decisions, such as *Alberta (Attorney General) v Moloney*, confirm this understanding of *Multiple Access* and suggest that *Hall* effectively "formulated" the federal purpose branch.<sup>19</sup>

Nonetheless, as a result of this change, the paramountcy doctrine has distinct branches and will be applied in one of two situations: 1) when "there is an operational conflict because it is impossible to comply with both laws," and 2) when, "although it is possible to comply with both laws, the operation of the provincial law frustrates the purpose of the federal enactment."<sup>20</sup>

### III. The Purpose Branch and its Implications

Scholars have taken note of this shift in constitutional doctrine. Eugénie Brouillet and Bruce Ryder, for instance, have suggested that the new purpose branch has significant implications for the federal-provincial balance.<sup>21</sup> In addition, Robin Elliot has observed that this change

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12 *Bank of Montreal v Hall*, [1990] 1 SCR 121, 65 DLR (4th) 361 [*Hall* cited to SCR]. See also Bruce Ryder, "Equal Autonomy in Canadian Federalism: The Continuing Search for Balance in the Interpretation of the Division of Powers" (2011) 54 SCLR (2d) 565 at 578.

13 *Multiple Access*, *supra* note 10 at 190. See also *Bank of Montreal v Marcotte*, 2014 SCC 55 at paras 79-80 [*Marcotte*].

14 *Rothmans, Benson & Hedges Inc v Saskatchewan*, 2005 SCC 13 [*Rothmans*]. See e.g. Brouillet, "Le fédéralisme et la Cour suprême du Canada", *supra* note 6 at 18; Peter Hogg, "Paramountcy and Tobacco" (2006) 34 SCLR (2d) 335 at 339; Donald F Bur, *Law of the Constitution: The Distribution of Powers* (Toronto: LexisNexis, 2016) at para 2.1041.

15 *Multiple Access*, *supra* note 10 at 187, 191.

16 *Ibid* at 186-87.

17 *Ibid* at 186.

18 *Ibid* at 190.

19 *Alberta (Attorney General) v Moloney*, 2015 SCC 51 at paras 22, 25 [*Moloney*].

20 *Ibid* at para 18.

21 Eugénie Brouillet, "The Federal Principle and the 2005 Balance of Powers in Canada" (2005) 34 SCLR (2d) 307 at 325-332; Brouillet, *L'identité culturelle québécoise et le fédéralisme canadien*, *supra* note 6 at 275;

“represents a very real threat” to the value placed on the preservation of provincial autonomy.<sup>22</sup>

I agree that *Hall* has important implications for Canadian federalism. While each branch of the paramountcy doctrine gives effect to Parliament’s policy choice in some way, they are two different inquiries. The approach adopted in *Multiple Access* perceives the paramountcy doctrine as a “necessary evil, an omnipresent threat” to provincial autonomy “that the courts should only apply in circumstances in which they ha[ve] no choice but to do so.”<sup>23</sup> This approach can also be understood as a form of respect for *both* orders of government by recognizing that each can legitimately require individuals to comply with its laws. The shift operated in *Hall* was, on the contrary, “designed to ensure that provincial legislative activity does not impinge on the ability of the federal government to achieve the goals it has decided to pursue.”<sup>24</sup> Fundamentally, it is an approach that privileges *one* order of government at all costs.<sup>25</sup>

Three of the four cases in which the Supreme Court has applied the purpose branch to render provincial legislation inoperative show the dangers of applying it with enthusiasm, while its use was unnecessary in the fourth case, as discussed further below. In *Hall*, the Supreme Court held that a security interest created pursuant to the federal *Bank Act* could not be subjected to the enforcement procedures prescribed by provincial legislation. The process established pursuant to federal law was held to be “self-executing” and a “complete code” based on the court’s understanding of the scheme.<sup>26</sup> I leave for others any consideration of the proper scope of the banking power, particularly in light of Beetz J’s opinion in *Canadian Pioneer Management Ltd v Labour Relations Board of Saskatchewan*.<sup>27</sup> For present purposes, I assume that Parliament can adopt provisions like those at issue in *Hall*. In this case, the province sought to establish a procedure that had to be followed to take possession of a security. It required a bank to serve notice prior to seizure to ensure the debtor had sufficient warning. It did not seek to eviscerate the security interest itself. As the majority at the Court of Appeal put it, “[t]he *Limitation of Civil Rights Act* could not be said to operate so as to affect the amount of a debtor’s indebtedness or his liability for payment. It merely imposed an obligation on the bank to give notice prior to seizure.”<sup>28</sup> If the provisions at issue did have a constitutionally problematic purpose and effect, they would be invalid or inapplicable.<sup>29</sup> The application of the purpose branch in this case has the effect of negating a policy meant to account for the procedural interests of debtors.

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Ryder, *supra* note 12 at 578-579.

22 Robin Elliot, “Safeguarding Provincial Autonomy from the Supreme Court’s New Federal Paramountcy Doctrine: A Constructive Role for the Intention to Cover the Field Test?” (2007) 38 SCLR (2d) 629 at 630.

23 *Ibid* at 650.

24 *Ibid*.

25 Wright, “Facilitating Intergovernmental Dialogue”, *supra* note 4 at 690.

26 *Moloney*, *supra* note 19 at para 48.

27 *Canadian Pioneer Management Ltd v Labour Relations Board of Saskatchewan* (1979), [1980] 1 SCR 433 at 468, 107 DLR (3d) 1. For further discussion, see Régimbald & Newman, *supra* note 3 at 391-92; *Canadian Western Bank v Alberta*, 2007 SCC 22 at para 65.

28 *Hall*, *supra* note 12 at 129. See also *Marcotte*, *supra* note 13 at paras 70-84.

29 See e.g. *Reference re Environmental Management Act (British Columbia)*, 2019 BCCA 181 at paras 97, 101-05, *aff’d* 2020 SCC 1.

*British Columbia (Attorney General) v Lafarge Canada Inc* is a further demonstration of the problem created by the purpose branch. The case concerned the requirements for the construction of a cement plant on port lands owned by the federal government. The Supreme Court rightly held that building a cement plant does not fall within the vital functions of the port authority,<sup>30</sup> as it is not essential to marine transportation. Much like in *Hall*, the municipal provisions did not prevent the building of a cement plant or plants but imposed a 30-foot height restriction rather than a 100-foot height limit.<sup>31</sup> It is difficult to see how this limit — regulation meant to protect the interests of the local community without affecting the ability of the port authority to pursue its core mandate — could be perceived as constitutionally problematic rather than an adaptation to local circumstances. *Lafarge* denies provinces and municipalities the opportunity to be responsive to legitimate concerns, including limiting nuisance, protecting the environment, and zoning to ensure the aesthetic quality of the neighborhood. In a federal system like Canada, elected officials should be capable of responding to competing concerns in a manner that gives effect to all the interests at stake. However, as *Lafarge* shows, the purpose branch can put an end to such democratic conversations instead of facilitating them.

The federal provisions at issue in *Law Society of British Columbia v Mangat* authorized non-lawyers to appear and represent clients before the Immigration and Refugee Board, which the provincial regulatory scheme did not allow. These provisions were held to fall within Parliament's jurisdiction under section 91(25).<sup>32</sup> As I have explained elsewhere, the Supreme Court has yet to be presented with a case that directly addresses the scope of section 95.<sup>33</sup> Moving beyond that, it is not clear how regulating a profession — or indirectly creating a new one by permitting non-lawyers to appear as advocates — falls within the federal Parliament's jurisdiction over naturalization and aliens. The federal provisions at issue go beyond providing a forum and a process to apply federal laws. They go deep into matters that have always been held to fall exclusively within section 92.<sup>34</sup> In such a case, the paramountcy issue should arguably never have arisen because the Court should have held the federal provisions to be constitutionally invalid. In any event, the provisions themselves did not make appearances by non-lawyers mandatory. In addition, the use of the purpose branch entails giving short shrift to the local interest in ensuring proper standards of conduct and skill in an effort to protect the public interest.

As I explain below, this branch continues to have real implications for legitimate provincial interests. Indeed, the application of the purpose branch is a focus in the *Murray-Hall* case, which is currently before the Supreme Court of Canada. It puts squarely into the spotlight the ability of the provinces to address health policy issues and regulate local trade in goods through a government monopoly.

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30 *British Columbia (Attorney General) v Lafarge Canada Inc*, 2007 SCC 23 at paras 72-73.

31 See also Wright, "Facilitating Intergovernmental Dialogue", *supra* note 4 at 680.

32 *Law Society of British Columbia v Mangat*, 2001 SCC 67 at para 37. See also Hartery, *supra* note 7 at 510.

33 Hartery, *supra* note 7 at 536.

34 See Peter Hogg & Wade Wright, *Constitutional Law of Canada*, 5th ed (Toronto: Thomson Reuters, 2021) §21:9 [Hogg & Wright].



## IV. The Shifting Doctrine and the Uncertain Future of the Purpose Branch

While the Supreme Court has not directly acknowledged the implications of its change of course, it is alive to the concerns it raises because it has cabined *Hall* and its progeny by warning in a 2015 trilogy and subsequent cases that both branches of the paramountcy doctrine must be applied with restraint. Each of these branches was the subject of doctrinal refinement in that same trilogy, which also brought divisions to the fore, with McLachlin CJ and Côté J disagreeing with the majority on its understanding and application of each branch.

The first branch, known as the “operational conflict” branch, reflects the approach adopted in *Multiple Access*.<sup>35</sup> In *Moloney*, Gascon J, writing for the majority, noted that the operational conflict analysis is properly focused on establishing whether it is possible to comply with both a valid provincial and federal law. He reviewed the two classic situations that will not lead to an operational conflict: 1) where the federal and provincial laws are “duplicative,” and 2) “where a provincial law is more restrictive than a federal law.”<sup>36</sup> However, he emphasized that provincial laws cannot permit conduct that is prohibited by federal law, as was the case in *Moloney*.<sup>37</sup> In that case, the federal provision provided that, upon discharge under the *Bankruptcy and Insolvency Act*, a debtor would be released from all debts that are claims provable in bankruptcy, and all creditors would be prohibited from enforcing them. The provincial law disregarded this prohibition and permitted the use of debt enforcement mechanisms on such claims. This is a true operational conflict.

The second branch, known as the “purpose” branch, was also the subject of doctrinal clarification in the trilogy. In *Moloney*, Gascon J noted that this branch will usually find application when a more restrictive provincial law is at issue. If the federal law provides for a “positive entitlement,” this branch could be engaged.<sup>38</sup> In *Saskatchewan (Attorney General) v Lemare Lake Logging Ltd*, Abella and Gascon JJ, writing for the majority, explained that courts must be careful not to undermine Canada’s federal structure when applying this branch of the analysis. As a result, “absent *clear* evidence that Parliament intended a broader statutory purpose, courts should avoid an expansive interpretation of the purpose of federal legislation which will bring it into conflict with provincial legislation.”<sup>39</sup>

In that case, the federal provision at issue authorized a court, upon application from a secured creditor, to appoint a national receiver within ten days where such an appointment is “just or convenient.” The provincial scheme at issue, Part II of *The Saskatchewan Farm Security Act*, aimed at providing additional protection to farmers against losses of their farmland and provided a compulsory 150-day waiting period for a creditor wishing to enforce its security interest. While there was no operational conflict, the Supreme Court also held that it did

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35 *Moloney*, *supra* note 19 at para 19.

36 *Ibid* at para 26.

37 *Ibid* at para 63; *407 ETR Concession Co v Canada (Superintendent of Bankruptcy)*, 2015 SCC 52 at para 24. See also *M & D Farm Ltd v Manitoba Agricultural Credit Corp*, [1999] 2 SCR 961, 176 DLR (4th) 585; *Saskatchewan (Attorney General) v Lemare Lake Logging Ltd*, 2015 SCC 53 at para 18 [*Lemare Lake Logging*]; *Orphan Well Association v Grant Thornton Ltd*, 2019 SCC 5 at paras 106-07 [*Orphan Well*].

38 *Moloney*, *supra* note 19 at para 26.

39 *Lemare Lake Logging*, *supra* note 37 at para 23 [emphasis added].

not frustrate the federal purpose because the provision at issue merely permitted the establishment of a regime allowing for the appointment of a national receiver. Since there was no evidence to suggest that the legislation was mandatory or intended to operate as a complete code “exclusive of provincial law,” the provincial legislation was held to be operative.<sup>40</sup> This approach to the purpose branch was reaffirmed in *Orphan Well Association v Grant Thornton Ltd.*<sup>41</sup>

The result of these recent cases is that the paramountcy doctrine remains broader than the post-1949 approach that prevailed until *Hall*. Accordingly, scholars have observed that the purpose branch continues to be a “serious threat to provincial autonomy.”<sup>42</sup> However, the 2015 trilogy has adopted a narrower approach to the purpose branch — one that requires Parliament to be clear about its intention to oust provincial legislation. In *Desgagnés Transport Inc v Wärtsilä Canada Inc*, the Supreme Court emphasized this shift by holding that non-statutory federal law “created by courts” can *never* render provincial law inoperative because only “very clear *statutory* language” can do so.<sup>43</sup> It added that holding otherwise would have implications for the separation of powers. In *Lemare Lake Logging*, Abella and Gascon JJ went so far as to question whether there is a role for this branch of the doctrine going forward, noting that “[a]t some point in the future, it may be argued that the two branches of the paramountcy test are no longer analytically necessary or useful, but that is a question for another day.”<sup>44</sup>

## V. A Principled Approach to Paramountcy

The preceding section demonstrates that the precise contours of the paramountcy doctrine, while more clearly defined since 2015, are still in flux, given Abella and Gascon JJ’s *obiter* comments. In this section, I suggest that new doctrinal developments — to the extent that they are likely — should pay close attention to the principle of federalism.<sup>45</sup>

I begin by unsettling some assumptions that have trickled into the scholarship and which impede a proper understanding of the constitutional issues. For instance, in a seminal article on the topic, then Professor Bora Laskin began by referring to Privy Council case law articulating “federal” paramountcy and the occupied field approach. He then rather quickly concluded that “the issues raised by this pronouncement are concomitants of federalism, familiar in the United States and Australia, and immanent in the constitutions of the new federal

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40 *Ibid* at paras 47-49, 73. While the validity of the federal provision was not raised in that case, doubts arise regarding this issue, which increases the need to avoid an overenthusiastic use of the purpose branch. See Virginia Torrie, “Should Paramountcy Protect Secured Creditor Rights? *Saskatchewan v Lemare Lake Logging* in Historical Context” (2017) 22:3 *Rev Const Stud* 405.

41 *Orphan Well*, *supra* note 37.

42 See Eugénie Brouillet & Bruce Ryder, “Key Doctrines in Canadian Legal Federalism” in Peter Oliver, Patrick Macklem & Nathalie Des Rosiers, eds, *The Oxford Handbook of the Canadian Constitution* (Oxford: Oxford University Press, 2017) at 430.

43 *Desgagnés Transport Inc v Wärtsilä Canada Inc*, 2019 SCC 58 at para 103.

44 *Lemare Lake Logging*, *supra* note 37 at para 23. See also Hartery, *supra* note 7 at 545.

45 See e.g. *Reference re Securities Act*, 2011 SCC 66 at paras 7, 61-62, 71-74, 130-133 [*2011 Securities Reference*]; *R v Sullivan*, 2022 SCC 19 at paras 61-62; *Toronto (City) v Ontario (Attorney General)*, 2021 SCC 34 at paras 50, 52, 79 and 172 [*Toronto (City)*].



states that have come to being since the end of World War Two.”<sup>46</sup> The assumptions, therefore, are that “federal” paramountcy is a necessary corollary of federalism, and that the scope and application of the doctrine should be broad to allow the central Parliament to achieve its goals at all costs.<sup>47</sup>

However, neither of these assumptions is correct as a matter of comparative law, nor do they necessarily follow from the structure of a federal constitution. In addition, while some federal systems apply a broad approach to their equivalent of the paramountcy doctrine, this is not universal, nor should it necessarily be preferred if one is serious about the constitutional significance of local autonomy.

All federal systems seek to strike a balance between unity and diversity — this is the very essence of federalism as a constitutional principle. In this regard, federal systems reflect two desires: to allow the states, provinces, etc. to govern themselves without interference, and to simultaneously reap the benefits of central governance over certain issues.<sup>48</sup> The constitutional significance of the first desire — for local autonomy — is particularly compelling in multinational federal systems such as Canada. In the *Secession Reference*, the Supreme Court noted that federalism can “facilitat[e] the pursuit of collective goals by cultural and linguistic minorities,” and explained that a failure to permit a federated entity like Quebec, for example, to freely pursue internal self-determination, which includes “economic, social and cultural development,” may ground a right of secession at international law.<sup>49</sup>

Accordingly, as Stephen Tierney has observed, beyond its differing manifestations, “[f]ederalism at point of origin is ... a foundational recognition not only of territorial difference within the polity, but of its deep and ongoing significance, a significance that results in foundational constitutional respect and protection.”<sup>50</sup> This constitutional significance is often explained by noting that federal systems create orders of government that are “sovereign” within their respective spheres, and “not subordinate one to the other.”<sup>51</sup> Therefore, courts have a duty to account for the federal structure of the constitution and the constitutional significance of local autonomy in adjudicating legal disputes,<sup>52</sup> including when articulating and deploying conflict rules.

When a paramountcy doctrine is not explicitly articulated in a constitutional text, its existence can nonetheless be implied for one primary reason: the rule of law requires a conflict rule to ensure that individuals dealing with laws enacted by two orders of govern-

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46 Bora Laskin, “Paramountcy in Penal Legislation” (1963) 41 Can Bar Rev 234 at 234.

47 *Ibid* at 259-263.

48 See e.g. Stephen Tierney, “Federalism and Constitutional Theory” in Gary Jacobsohn & Miguel Schor, eds, *Comparative Constitutional Theory* (Cheltenham: Edward Elgar Publishing, 2019).

49 *Reference re Secession of Quebec*, [1998] 2 SCR 217 at paras 58-59, 136, 161 DLR (4th) 385 [*Secession Reference*].

50 Stephen Tierney, “Misconceiving Federalism: Canada and the Federal Idea” in Richard Albert & David R. Cameron, eds, *Canada in the World: Comparative Perspectives on the Canadian Constitution* (Cambridge: Cambridge University Press, 2018) at 42.

51 *Secession Reference*, *supra* note 49 at para 56; *2011 Securities Reference*, *supra* note 45 at para 71.

52 Jesse Hartery, “Protecting Parliamentary Sovereignty and Accountability in a Dualist Federation” (2020) 58 *Alta L Rev* 187.

ment can order their affairs with a degree of clarity. However, the need for the doctrine does not necessarily assist in determining its orientation or its scope and application in federal systems.

The experience of some federal systems indeed shows that diversity can also be given expression in articulating conflict rules, notably by having sub-national laws prevail over federal legislation.<sup>53</sup> Other federal constitutions, like those of the United States and Australia, for example, expressly articulate a federal paramountcy rule.<sup>54</sup> The purpose of the rule, in these latter circumstances, goes beyond maintaining the rule of law, and extends to ensuring that the central order of government's laws can achieve the goals of unity underpinning federalism. However, the crucial point is that, while the scope of the doctrine may be wider in these systems, this does not mean that the federal structure of the constitution and the importance of local autonomy do not and should not play a role in the analysis. For instance, in keeping with the principle of federalism, the Supreme Court of the United States has shown increasing restraint in its application of the preemption doctrine.<sup>55</sup> In other words, it is incorrect to assume, without further inquiry, that the paramountcy doctrine must favour the central order of government and be broad in scope and application.

## VI. Towards Doctrinal Refinement: Abandoning the Purpose Branch

This brings me to consider the Canadian context. The precise balance between unity and diversity in the Canadian federal system confirms that federal paramountcy cannot be assumed. It is well established that the paramountcy doctrine is not expressly outlined in the text of the Constitution, except in specific contexts (under sections 92A, 94A and 95).<sup>56</sup> In select cases, the Privy Council and the Supreme Court appeared to take the view that the textual anchor for the doctrine could be found in the opening or concluding paragraphs of section 91,<sup>57</sup> but these paragraphs merely affirm the exclusivity principle, which speaks to the validity and applicability of legislation. Indeed, while Parliament undoubtedly has exclusive authority to legislate on matters within the classes of subjects assigned to it by the Constitution, provincial legislatures also possess exclusive authority to legislate on matters within the classes of subjects to which they have been assigned.<sup>58</sup> As a result, the Supreme Court confirmed in the *Reference re Remuneration of Provincial Judges* that the paramountcy doctrine is in fact “nowhere to be found in the *Constitution Act, 1867*.”<sup>59</sup>

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53 Anna Dziejczak & Cheryl Saunders, “The Meanings of Concurrency” in Nico Steytler, ed, *Concurrent Powers in Federal Systems* (Leiden/Boston: Martinus Nijhoff Publishers, 2015) at 23-24.

54 US Const art VI, §2; *Commonwealth of Australia Constitution Act* (UK), 63 & 64 Vict, c 12, s 109.

55 See e.g. *Virginia Uranium, Inc v Warren*, 587 US \_\_\_ (2019), Gorsuch J; *Oklahoma v Castro-Huerta*, 597 US \_\_\_ (2022) at 7-18. See also Stephen A Gardbaum, “Nature of Preemption” (1994) 79:4 Cornell L Rev 767.

56 See Brouillet & Ryder, *supra* note 42 at 429; Bur, *supra* note 14 at para 2.864.

57 *Tennant v Union Bank* (1893), [1894] AC 31 at 45, [1893] UKPC 53; *Re Bozanich*, [1942] SCR 130 at 136, [1942] 2 DLR 145.

58 See also Ryder, *supra* note 12 at 577; Dwight Newman, “Canada’s Re-Emerging Division of Powers and the Unrealized Force of Reciprocal Interjurisdictional Immunity” (2011) 20:1 Const Forum Const 1 at 5; Hartery, *supra* note 7 at 497.

59 *Reference re Remuneration of Judges of the Provincial Court of PEI*, [1997] 3 SCR 3 at para 98, 150 DLR (4th) 577 [*Reference re Remuneration of Provincial Judges*].

This is consistent with the historical context, which shows that the framers had initially agreed to include a federal paramountcy clause identical to the one found in section 95 in the rough draft of the *British North America Act, 1867*.<sup>60</sup> This formulation disappeared in the first draft<sup>61</sup> before making a return in the third<sup>62</sup> and fourth<sup>63</sup> drafts. Ultimately, the paramountcy provision was removed entirely.<sup>64</sup> It is therefore incorrect to suggest, as Peter Hogg once did, that “the need for such a rule escaped the framers.”<sup>65</sup> The framers knew how to formulate a federal paramountcy provision, as they did with section 95, and considered including one with respect to sections 91 and 92. In the end, they decided against it.

This silence has led some scholars to suggest that no order of government has “the legitimate authority to ... make the legislation of the other inoperative.”<sup>66</sup> I disagree, at least in part. As explained previously, the more restrictive understanding of paramountcy — that is, the first branch discussed above — is needed at a minimum because without such a rule, individuals might be subject to contradictory laws from two orders of government, which is detrimental to the rule of law. This is the rationale for the existence of the doctrine that has been adopted by the Supreme Court.<sup>67</sup> Any questions regarding legitimacy are accordingly relevant in determining the orientation and scope of the doctrine, but not its existence.

In some cases, federal paramountcy is mandated, namely with respect to sections 92A and 95 of the *Constitution Act, 1867*. While I have argued elsewhere that the concurrent powers outlined in section 95 are conditional rather than pure, the federal orientation of the doctrine is not in question because it is expressly stipulated.<sup>68</sup> In that previous article, I noted that the power over immigration and agriculture is an example of conditional concurrency in federal systems, given that the purpose of the words “from Time to Time,” when understood in their linguistic, philosophic, and historical context, is to restrict the scope of federal jurisdiction. Accordingly, I argued that federal intervention is only justified in relation to matters that are qualitatively different from issues of provincial concern, consistent with the approach adopted with respect to the trade and commerce power and in the national concern jurisprudence. That being said, when the central Parliament has validly exercised its authority, federal law will be paramount. In other cases, provincial paramountcy is explicitly entrenched, namely with respect to old age pensions and supplementary benefits, which fall

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60 “Rough Draft of the London Conference for a British North America Bill” (no date), s 36(37), in Joseph Pope, ed, *Confederation: Being a Series of Hitherto Unpublished Documents Bearing on the British North America Act* (Toronto: Carswell, 1895) 123 at 132.

61 “First Draft of a Bill for The Union of the British North American Colonies and for Government of the United Colony” (January 23, 1867), s 38(27), in Pope, *supra* note 60, 141 at 154.

62 “Third Draft of a Bill for The Union of the British North American Colonies and for Government of the United Colony” (February 2, 1867), s 52, in Pope, *supra* note 60, 158 at 167-169.

63 “Fourth Draft of a Bill for The Union of the British North American Colonies and for Government of the United Colony” (updated), s 48, in Pope, *supra* note 60, 177 at 190-192.

64 “Final Draft of a Bill for The Union of the British North American Colonies and for Government of the United Colony” (February 9, 1867), s 99, in Pope, *supra* note 60, 212 at 233-234. See also *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, ss 91-92, reprinted in RSC 1985, Appendix II, No 5.

65 Hogg, *supra* note 14 at 335. See also Bur, *supra* note 14 at para 2.864.

66 Bur, *supra* note 14 at paras 2.856, 2.1022.

67 *Reference re Remuneration of Provincial Judges*, *supra* note 59 at para 98. See also Bur, *supra* note 14 at para 2.864; Brouillet & Ryder, *supra* note 42 at 429.

68 Hartery, *supra* note 7.

under section 94A.<sup>69</sup> Some treaties with Indigenous peoples also include sub-national paramountcy clauses.<sup>70</sup>

Yet, with respect to sections 91 and 92, Canadian courts have adopted a federal orientation for the paramountcy doctrine without explaining why.<sup>71</sup> On the one hand, this assumption could be challenged on the grounds that an argument could equally be made for provincial paramountcy, since the *Constitution Act, 1867* is the result of an agreement between pre-existing entities, which decided to come together and grant certain powers to a new central Parliament while retaining significant local autonomy.<sup>72</sup> It is also important to emphasize that, for Quebec, the federal system was devised to obtain *greater* autonomy following its experience with the *Union Act, 1840*.<sup>73</sup> All of this arguably suggests that provincial paramountcy might be warranted as the default option. In this respect, Dwight Newman has argued compellingly that, in some circumstances, “[t]o affirm provincial paramountcy is to act in accordance with both general federalism principles and the corollary of the subsidiarity principle.”<sup>74</sup>

On the other hand, the federal orientation of the doctrine could be explained by the impetus that led to union or maintaining the territorial integrity of the country: a desire for unity over the classes of subjects assigned to the central Parliament.<sup>75</sup> On this view, the presumption of the local, while cogent in a system dedicated to respect for local autonomy, can be rebutted in some cases. Although the central order of government need not act, a sub-national law should be rendered inoperative to the extent of any inconsistency with federal law when it has validly chosen to act for the entire country unless the framers have indicated otherwise. While this account is indeed compelling, it does not necessarily entail that the doctrine should be given a broad scope and application.

Ryder has reluctantly adopted a similar view, noting that, if forced to choose an orientation for the doctrine, “the interest of the whole will generally be greater than the interests of the part.”<sup>76</sup> He adds that, if federal paramountcy is adopted, this should lead to formulating a narrower scope for the doctrine. I share this position and believe this approach can achieve, in substance, what Newman describes as provincial paramountcy in some circumstances. While the paramountcy provision in section 95, which alludes to similar wording in the *Colonial*

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69 Brouillet & Ryder, *supra* note 42 at 428-29. See also *Quebec (Attorney General) v Lacombe*, 2010 SCC 38 at para 95, Deschamps J.

70 See e.g. *Nisgaà Final Agreement*, 27 April 1999, s 36, online: *Nisgaà Nation* <[www.nisgaanation.ca/treaty-documents](http://www.nisgaanation.ca/treaty-documents)> [perma.cc/9JME-FV35].

71 Walton, *supra* note 2 at 339.

72 *Secession Reference*, *supra* note 49 at paras 35-43, 58-60, 81; *Reference re Authority of Parliament in relation to the Upper House*, [1980] 1 SCR 54 at 71, 102 DLR (3d) 1.

73 *Secession Reference*, *supra* note 49 at para 59. See also Hoi Kong, “Subsidiarity, Republicanism and the Division of Powers” (2015) 45:1/2 RDUS 13 at 24-27; Brouillet, *L’identité culturelle québécoise et le fédéralisme canadien*, *supra* note 6 at 140-45.

74 Newman, *supra* note 58 at 5. See also Dwight Newman, “Changing Division of Powers Doctrine and the Emergent Principle of Subsidiarity” (2011) 74:1 Sask L Rev 21 at 29-30.

75 On the distinction between coming-together and holding-together systems, see e.g. Michael Breen, “The Origins of Holding-Together Federalism: Nepal, Myanmar, and Sri Lanka” (2017) 48 *Publius* 26. Canada is a mix of both these models given that the creation of the federal union in 1867 entailed bringing together pre-existing entities and holding the country together by clearly dividing the Province of Canada into Ontario and Quebec, not to mention the subsequent creation of provinces.

76 Ryder, *supra* note 12 at 578.

*Laws Validity Act*,<sup>77</sup> suggests that the purpose branch can have some role to play with respect to Canada's concurrent powers,<sup>78</sup> the lack of a paramountcy provision in sections 91 and 92 suggests that this branch should be abandoned. I would add that there is an argument to be made that the scope of the "conflict" clause in section 92A does not break with this understanding of the paramountcy doctrine, especially when one considers the prevailing view of its scope in 1982. This view preserves the rule of law and the goals of unity underpinning federalism while respecting the choice made by the framers to remove the paramountcy provision in relation to sections 91 and 92, a choice that implies the pursuit of local autonomy.

In other words, it is one thing to adopt a federal orientation of the doctrine, but it is quite another to adopt an expansive approach to that same doctrine. While there are debates surrounding the principle of subsidiarity in federal systems, I note that this principle also supports the preservation of norms responsive to local circumstances.<sup>79</sup> Simply put, the doctrine should be taken only as far as needed to ensure Canada's federal system can operate in an orderly fashion.

This approach has the benefit of encouraging the orders of government to cooperate if their broader legislative goals are in tension. Of course, historically, the federal order of government could deploy the disallowance power in cases of conflict within a year of a provincial law's adoption, although this would raise its own constitutional problems today. Indeed, the Supreme Court has recognized that disallowance stands in tension with constitutional principle and has given credence to the scholarly view that the power has become void through implied amendment.<sup>80</sup>

This brings me to make a few points in relation to the cases in which the Supreme Court has previously rendered provincial legislation inoperative pursuant to the federal purpose branch. As mentioned previously, the law in this area remains unsettled given that the Supreme Court questioned the place of the purpose branch in the paramountcy analysis in its 2015 trilogy. The Court may choose to directly refine its approach on that basis, but if it is inclined to act incrementally, it should be mindful of the fact that these cases only engage certain heads of power. It would accordingly be open to the Supreme Court to distinguish these cases, which Newman suggests has already been done implicitly in some contexts.<sup>81</sup>

Finally, while I have already explained above that *Hall*, *Mangat*, and *Lafarge* are doctrinally problematic, I add here that the fourth case in which the federal purpose branch has been used by the Supreme Court to render provincial laws inoperative is also suspect.<sup>82</sup> Indeed, the scenario identified by the Court of Appeal in *Hall* was essentially faced by the Supreme Court in *Quebec (Attorney General) v Canada (Human Resources and Social Development)*.<sup>83</sup> The prov-

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77 *Colonial Laws Validity Act*, 1865 (UK), 28 & 29 Vict, c 63, s 2. See also Bur, *supra* note 14 at para 2.1023.

78 Hartery, *supra* note 7 at 506, 545.

79 *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40 at para 3.

80 *Secession Reference*, *supra* note 49 at para. 55. See also Richard Albert, "Constitutional Amendment by Constitutional Desuetude" (2014) 62 Am J Comp L 641 at 651-668. See, however, *Toronto (City)*, *supra* note 45, which may have affected this analysis.

81 Newman, *supra* note 58 at 4, citing *Mazzei v British Columbia (Director of Adult Forensic Psychiatric Services)*, 2006 SCC 7.

82 Bur, *supra* note 14 at paras 2.1041-2.1042.

83 *Quebec (Attorney General) v Canada (Human Resources and Social Development)*, 2011 SCC 60 at para 30.



incial provision at issue deprived the federal government of its ability to recover an amount given and owed under the *Employment Insurance Act*.<sup>84</sup> While the federal provision allowed the federal government to seek the funds from a third party — here, a provincial government agency — rather than limit itself to obtaining them from the debtor directly, the funds at issue were nonetheless the debtor’s property. The point is that a provincial provision completely preventing the federal government from recovering its funds from the debtor could be understood to strike at the heart of the employment insurance program. It could accordingly be read down as inapplicable pursuant to interjurisdictional immunity.

In my view, these cases show that the intention to grant a positive entitlement should not be sufficient to render provincial laws inoperative. Instead, it is the nature of the entitlement and its relationship with federal or provincial powers that should be determinative in the division of powers analysis. This position is broadly consistent with the views advanced by Ryder and Newman, pursuant to which “the equal autonomy principle might give primacy to federal jurisdiction in some contexts and to provincial jurisdiction in others.”<sup>85</sup>

## VII. Towards Doctrinal Refinement: Tightening the Purpose Branch

In the alternative, greater caution should be exercised if the purpose branch is maintained with respect to sections 91 and 92. As I have argued elsewhere, this refined account should also be preferred in cases in which the legitimacy of the purpose branch of the paramountcy doctrine may not be in issue, including in cases of sub-national paramountcy. Indeed, the practice of intergovernmental relations with respect to immigration provides an illustration of the value of a restrained approach generally.<sup>86</sup>

The Supreme Court has, of course, already emphasized that, absent very clear statutory language, courts should not render provincial laws inoperative pursuant to the federal purpose branch. While it has mentioned the reasons or its adoption of this position, citing federalism and separation of powers concerns, it has not provided a complete account of its importance in a federal system.<sup>87</sup> It should do so.

On this account, given that the orders of government are coordinate, courts should not stand in the way of legitimate democratic decisions, unless doing so is necessary and the other legislature at issue has clearly stated a contrary intention. Even where Parliament can adopt certain norms, it should not be assumed that it intended to have these norms apply to the *exclusion* of provincial norms. It is equally possible that Parliament intended to have federal norms added onto provincial norms or to act as a floor in parts of the country in which the provinces are less involved. Parliament may also have failed to consider or not foreseen the purported conflict and its implications. Therefore, a restrained approach has the merit of putting the onus on Parliament to clearly state the purpose of a federal enactment and requires

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84 *Ibid* at paras 33-34. See also *Canada (Ministère des Ressources humaines et Développement social) c Bruyère*, 2009 QCCA 2246 at para 3.

85 Ryder, *supra* note 12 at 577. See also Newman, *supra* note 58 at 4-5.

86 See Hartery, *supra* note 7 at 518-524; Mireille Paquet, *Province Building and the Federalization of Immigration in Canada* (Toronto: University of Toronto Press, 2017).

87 *Lemare Lake Logging*, *supra* note 37 at paras 48, 73; *Desgagnés Transport*, *supra* note 43 at para 103.

it to assume the consequences of its policy decision,<sup>88</sup> as the government was required to do with disallowance.

In addition, this restrained approach would have the benefit of highlighting the potential conflict and permitting provincial officials to advocate for their unique interests. Canadian history shows that, when it came to disallowance, the provinces were capable of rendering this power a dead letter over time.<sup>89</sup> In some circumstances, this may indeed lay the groundwork for a more nuanced approach to regulating the field in question through engagement with provincial counterparts. If Parliament does choose to express its intention clearly, the dialogue between the orders of government can continue because the provinces could in theory still decide to adopt norms that do not frustrate the purpose as enacted.<sup>90</sup>

While the purpose branch would leave the central order of government with a certain trump card in some cases, this approach would protect both democratic accountability and provincial autonomy to the extent possible. Accordingly, whatever form the analysis takes, it should not be divorced from the federal structure of the Constitution and the constitutional significance of local autonomy.

## VIII. Paramountcy and Quebec's *Cannabis Regulation Act*

The *Murray-Hall* case brings these paramountcy issues to the fore. It raises the validity and operability of sections 5 and 10 of Quebec's *Cannabis Regulation Act*,<sup>91</sup> which prohibits the cultivation of cannabis for personal purposes in pursuit of a government monopoly and as a public health measure.<sup>92</sup> Meanwhile, sections 8 and 12 of the federal *Cannabis Act*<sup>93</sup> prohibit the possession of more than four cannabis plants for personal use.

The Court of Appeal concluded that the provincial provisions were a valid exercise of provincial jurisdiction over property and civil rights and matters of a local or private nature under sections 92(13) and (16) of the *Constitution Act, 1867*. The Court then turned to the paramountcy doctrine, concluding that the provincial provisions do not create an operational conflict or frustrate the federal purpose.<sup>94</sup> A similar case is making its way through the courts in Manitoba.

I assume that the provincial provisions are valid. Indeed, this case is much like the cases involving tobacco, in which it was held that the provincial legislatures and Parliament both have jurisdiction to adopt laws in the area.<sup>95</sup> The federal provisions have not been challenged, and their constitutional validity under section 91(27) is therefore also assumed, although I

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88 See also Wade K Wright, "Of Banks, Federalism and Clear Statements: Comment on Bank of Montreal v Marcotte" (2015) 71 SCLR (2d) 191 at 228-230; Wright, "Facilitating Intergovernmental Dialogue", *supra* note 4 at 691.

89 See Hogg & Wright, *supra* note 34, §5:13.

90 See *Orphan Well*, *supra* note 37 at para 65.

91 CQLR c C-5.3.

92 *Murray-Hall QCCA*, *supra* note 1 at paras 51, 67, 72-77.

93 SC 2018, c 16.

94 *Murray-Hall QCCA*, *supra* note 1.

95 *Rothmans*, *supra* note 14 at para 19. See also *Nova Scotia Board of Censors v McNeil*, [1978] 2 SCR 662 at 688-92, 84 DLR (3d) 1; *Siemens v Manitoba (Attorney General)*, 2003 SCC 3 at para 25; *Reference re Assisted Human Reproduction Act*, 2010 SCC 61 at paras 241, 264, LeBel & Deschamps JJ, and para 287, Cromwell J.

have expressed some doubts elsewhere regarding the extent of Parliament's ability to enter the field following decriminalization.<sup>96</sup>

If anything, cases like this demonstrate why, in my view, the dissent's articulation of the scope of the criminal law power in the *Genetic Non-Discrimination Reference* should prevail when this issue is ultimately settled.<sup>97</sup> To its credit, the approach taken there is infused with the principle of subsidiarity, and it both recognizes the existence of provincial jurisdiction and requires a solid basis for the assertion of federal jurisdiction. While it does not deny the possibility of *legitimate* and *limited* overlap, it requires Parliament to demonstrate that it has a constitutionally cognizable interest in the area, consistent with the principle of federalism.<sup>98</sup> This is an approach that is less likely to lead to the invalidation or setting aside of provincial norms. As a result, it is also aligned with the growing recognition of the importance of local autonomy in Canada and around the world, particularly as a tool for promoting peace in pluralistic and post-conflict societies, including with respect to Indigenous peoples.<sup>99</sup>

On the facts in *Murray-Hall*, there is no operational conflict because the provincial law is more restrictive than the federal law. An individual can therefore respect both laws by following the more restrictive provincial legislation. However, the case directly engages the purpose branch and provides an opportunity to officially abandon it with respect to the criminal law power. Indeed, a unanimous Supreme Court has already held that this power does not allow Parliament to create positive entitlements.<sup>100</sup> Rather, it is properly limited to the suppression of an "evil or injurious or undesirable effect upon the public,"<sup>101</sup> and is not a license to regulate intra-provincial trade and health.<sup>102</sup>

In this regard, the Court of Appeal's analysis of the federal purpose branch in *Murray-Hall* appears compelling. Indeed, this is supported by the Attorney General of Canada's absence from the legal challenge. First, the Court of Appeal concluded that the minor fines provided under provincial law do not contradict the purpose of reducing the burden on the criminal

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96 Xavier F Ménard & Jesse Hartery, "Election Promises and Marijuana Policy: What Federalism Has to Offer" (26 July 2016), online: *Advocates for the Rule of Law* <[www.ruleoflaw.ca/election-promises-and-marijuana-policy-what-federalism-has-to-offer/](http://www.ruleoflaw.ca/election-promises-and-marijuana-policy-what-federalism-has-to-offer/)> [perma.cc/26PK-NF46].

97 The scope of the power remains uncertain given Moldaver J's refusal to decide the point: *Reference re Genetic Non-Discrimination Act*, 2020 SCC 17 at para 138 [*Genetic Non-Discrimination Reference*]. Karakatsanis J's reasoning has been criticized elsewhere: Yann Joly et al, "Erring in Law and in Fact: The Supreme Court of Canada's *Reference re Genetic Non-Discrimination Act*" (2021) 99:1 Can Bar Rev 173; Shannon Hale & Dwight Newman, "Constitutionalism and the *Genetic Non-Discrimination Act Reference*" (2020) 29:3 Const Forum Const 31.

98 *Genetic Non-Discrimination Reference*, *supra* note 97 at paras 159-60, 231-34.

99 See, Samuel LaSelva, *The Moral Foundations of Canadian Federalism* (Kingston/Montreal: McGill-Queen's University Press, 1996); Alain-G Gagnon, *The Case for Multinational Federalism: Beyond the All-Encompassing Nation* (New York: Routledge, 2013); Liam Anderson, "Ethnofederalism and the Management of Ethnic Conflict: Assessing the Alternatives" (2016) 46:1 Publius 1.

100 *Rothmans*, *supra* note 14 at paras 18-19.

101 *Reference re Validity of Section 5(a) of the Dairy Industry Act*, [1949] SCR 1 at 49, [1949] 1 DLR 433.

102 *Reference re Assisted Human Reproduction Act*, *supra* note 95 at paras 241, 260, 262-67, LeBel & Deschamps JJ, and paras 286-87, Cromwell J. See also Emmanuelle Léonard-Dufour, "Jardinage cannabique et fédéralisme : la question du partage des compétences appliquée à l'autorisation de cultiver du cannabis à domicile" (2018) 48:1/2 RDUS 173 at 193.

justice system, in part because such prohibitions are contemplated by federal law.<sup>103</sup> Second, the Court of Appeal noted that some of the purposes identified by Mr Murray-Hall appear to conflict with those outlined in the legislation itself and that both orders of government were *ad idem* in relation to some of these purposes.

The main objection raised by those who seek to have the provincial provisions declared inoperative is that an important purpose of the federal provisions is allegedly to prevent the illicit production of cannabis by *allowing* personal production. In his testimony before the Standing Senate Committee, Mark Walters acknowledged that this was the main challenge faced by those who seek to maintain the operation of the provincial provisions. He took the view that the question was open to debate,<sup>104</sup> and the Court of Appeal noted that the argument was not “frivolous.”<sup>105</sup>

That being said, the Court of Appeal concluded that there is no tension between the broader purposes of the provincial and federal governments, as there is no federal provision providing a positive right to possess or cultivate cannabis plants for personal use.<sup>106</sup> In this regard, there is indeed a difference between decriminalization and legalization. Assuming that this is sufficient following *Lemare Lake Logging* and subsequent cases, it also observed that it is unclear from the legislative debates whether Parliament intended to provide a positive entitlement to grow and possess up to four plants.<sup>107</sup> Finally, it reasoned that this purpose — a positive entitlement to personal production — would arguably undermine other purposes identified in the federal legislation, namely, to “protect the health of young persons by restricting their access to cannabis” and to provide “access to a quality-controlled supply of cannabis.”<sup>108</sup>

Nonetheless, irrespective of the purposes advanced by Parliament, Canada’s federal structure and the scope of this power only allow it to achieve its objectives in certain ways, as mentioned above, and as the Court of Appeal implied in its conclusion. Indeed, courts should be careful to ensure the purpose branch does not become a means through which Parliament can extend its jurisdiction beyond constitutional boundaries and erode the federal-provincial balance.

Relatedly, abandoning the purpose branch in these situations does not entail taking a position on the merits of any given policy choice. Rather, it recognizes that the provincial scheme represents a democratic response to local circumstances, whether one agrees with it or not. This is not a weakness of the Canadian system, but is in fact the greatest strength of any federal system. If tensions exist with Parliament’s broader purposes, genuine cooperation between the orders of government is in order.

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103 *Murray-Hall QCCA*, *supra* note 1 at paras 118-22.

104 Senate of Canada, Standing Senate Committee on Legal and Constitutional Affairs, *Evidence*, 42-1, No 39 (29 March 2018), online: <[sencanada.ca/en/Content/Sen/Committee/421/LCJC/53932-e](http://sencanada.ca/en/Content/Sen/Committee/421/LCJC/53932-e)> [perma.cc/U8TW-Y7LG].

105 *Murray-Hall QCCA*, *supra* note 1 at para 115.

106 *Ibid* at paras 116-17.

107 *Ibid* at paras 130-32.

108 *Cannabis Act*, SC 2018, c 16, ss 7(a), 7(f). See also *ibid* at paras 127-28.

## IX. Conclusion

The preceding analysis shows that the Supreme Court has been right to adopt a restrained approach to the paramountcy doctrine in its 2015 trilogy and subsequent cases. While the existence of the doctrine is implied in a federal system, the Supreme Court has yet to provide a compelling explanation for its orientation. Although it may not overturn precedent on this latter issue, nor am I suggesting that it should, I do suggest that it may be time to abandon the purpose branch or, at a minimum, treat it with greater caution in relation to sections 91 and 92. The diversity in legal norms that this could create is not only legitimate in a federal system, but it is also necessary for the country's continued flourishing and survival. Indeed, as Pierre Trudeau once noted, if courts had historically failed to heed this concern for local autonomy, "Quebec separatism ... might be an accomplished fact."<sup>109</sup> Put simply, the significance of local autonomy is not limited to provinces like Quebec in a country like Canada, and the Supreme Court is at its best when it is responsive to this concern.

### *Postscript*

While this article was in the final stage of publication, the Supreme Court released its decision in *Murray-Hall*,<sup>110</sup> in which it unanimously upheld the validity and operability of Quebec's *Cannabis Regulation Act*. In its discussion of the paramountcy doctrine, the Court did not abandon the purpose branch in form but did so in substance in the context of the criminal law power. It called for caution in the analysis "to avoid eroding the importance attached to provincial autonomy."<sup>111</sup> It observed that the federal provisions at issue do not provide a positive entitlement and cannot be read in that way because "the creation of positive rights is not a valid exercise of the criminal law power."<sup>112</sup> Indeed, *after* emphasizing that providing any positive entitlements would be an improper purpose, it noted that, while not determinative, "the objectives pursued by Parliament and the provincial legislatures are consistent."<sup>113</sup> Ultimately, this case has bolstered the approach to paramountcy and the *obiter* comments advanced in 2015.

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109 Pierre E Trudeau, *Federalism and the French Canadians* (Toronto: MacMillan, 1968) at 198.

110 *Murray-Hall v Quebec (Attorney General)*, 2023 SCC 10.

111 *Ibid* at para 85.

112 *Ibid* at para 95.

113 *Ibid* at para 101.