SCC File No: 39906

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF QUÉBEC)

BETWEEN:

JANICK MURRAY-HALL

APPELLANT
(Respondent)

- and -

ATTORNEY GENERAL OF QUEBEC

RESPONDENT
(Appellant)

- and -

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ATTORNEY GENERAL OF MANITOBA,
ATTORNEY GENERAL OF BRITISH COLUMBIA,
ATTORNEY GENERAL FOR SASKATCHEWAN,
ATTORNEY GENERAL OF ALBERTA
CANADIAN ASSOCIATION FOR PROGRESS IN JUSTICE,
CANADIAN CANCER SOCIETY, CANNABIS AMNESTY and
CANNABIS COUNCIL OF CANADA AND QUEBEC CANNABIS INDUSTRY ASSOCIATION

INTERVENERS

FACTUM OF THE INTERVENER, ATTORNEY GENERAL FOR SASKATCHEWAN

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. The Attorney General for Saskatchewan has intervened in this case to make submissions in support of the constitutionality of s. 5 and s. 10 of the *Cannabis Regulation Act* of Quebec.[1] Saskatchewan submits that the provisions (1) are *intra vires* provincial jurisdiction; (2) do not intrude on the federal criminal law power; and (3) do not frustrate the purpose of s. 8(1)(e) and s. 12(4)(b) of the federal *Cannabis Act*.[2]

B. Statement of Facts

2. Saskatchewan relies on the Statement of Facts set out in the Mémoire de l'Intimé, the Attorney General of Quebec.[3]

3. Saskatchewan has enacted *The Cannabis Control (Saskatchewan) Act*, which sets out a detailed regulatory framework for the "sale, possession, consumption, distribution and transportation of cannabis". Unlike the Quebec statute, the Saskatchewan statute does not prohibit the possession of cannabis plants generally. However, the Saskatchewan statute does prohibit individuals aged 18 and younger from possessing any cannabis,[4] as will be discussed in more detail below.

PART II – RESPONSE TO QUESTIONS IN ISSUE

4. Saskatchewan respectfully submits that the judges of the Court of Appeal of Quebec did not err in law in concluding that sections 5 and 10 of the *Cannabis Regulation Act* are constitutionally valid.

PART III – ARGUMENT

A. Outline of Argument

5. Cannabis is not a matter of exclusive federal jurisdiction. The fact that the federal government had until recently criminalised the possession and use of cannabis does not mean that it is a federal matter,

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[1] *Cannabis Regulation Act*, CQLR, c. C-5.3, ss. 5, 10 ("Quebec statute").

[2] *Cannabis Act*, SC 2018, c. 16, ss. 8(1)(e), 12(4)(b) ("federal statute").

[3] Mémoire de l'Intimé, paras. 1 to 16.

[4] *The Cannabis Control (Saskatchewan) Act*, SS 2018, c. C-2.111, s. 1-2 "minor"; s. 2(1)(b) ("Saskatchewan statute").

always immune from provincial regulation. By decriminalising cannabis, Parliament itself has recognised that there is now room for provincial regulation of the cultivation, sale, possession and use of cannabis, just like other commodities.[5]

6. The provinces have regulatory jurisdiction over health, derived from both s. 92(13) of the *Constitution Act, 1867* (property and civil rights) and s. 92(16) (matters of a purely local and private nature).[6] Cannabis is a substance which has mental effects on the user. It is not a purely innocuous substance, as this Court recognised almost twenty years ago in *R v Malmo-Levine*:

> [3] All sides agree that marihuana is a psychoactive drug which "causes alteration of mental function". That, indeed, is the purpose for which the appellants use it. Certain groups in society share a particular vulnerability to its effects.[7]

7. The federal statute itself recognises that cannabis use raises health risks, particularly for young people:

> **7** The purpose of this Act is to protect public health and public safety and, in particular, to
>
> **(a)** protect the health of young persons by restricting their access to cannabis;
>
> **(b)** protect young persons and others from inducements to use cannabis;
> …
> **(g)** enhance public awareness of the health risks associated with cannabis use.[8]

8. In addition to the health jurisdiction, the provinces can also regulate commercial and non-commercial activities, including regulating public access to commodities in trade. That provincial regulation can include prohibitions relating to the possession of a particular substance. Provincial alcohol regulation is one of the best examples of this principle in action. In regulating a substance like alcohol, provinces can assign a monopoly over that commodity to a provincial agency, and can impose restrictions and prohibitions on obtaining that commodity except from the provincial agency.[9] In fact, all ten

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[5] *Cannabis Act*, *supra* note 2, s. 2(1) "illicit cannabis"; s. 69 (provincially authorized selling); s. 72 (employees — provincial acts).

[6] *Schneider v. The Queen*, [1982] 2 SCR 112.

[7] *R v Malmo-Levine*, 2003 SCC 74, [2003] 3 SCR 571, para. 3.

[8] *Cannabis Act*, *supra* note 2, s. 7.

[9] *R. v. Comeau*, 2018 SCC 15, [2018] 1 SCR 342.

provinces have adopted that approach in relation to production, sale and possession of alcohol.[10] That same model is open to the provinces to use as a framework for regulating cannabis.

9. Saskatchewan submits that within the context of Quebec's cannabis regulatory system, the prohibition on possession of any plants is a valid provincial law. Sections 5 and 10 of the Quebec statute are not prohibitions for a criminal purpose, but part of a detailed regulatory scheme which is designed to allow adults in Quebec to obtain cannabis, through the Société québécoise du cannabis. The prohibitions in s. 5 and s. 10 must be interpreted in that context, as the Court of Appeal concluded. In that context, the prohibitions are not criminal law, contrary to the ruling of the trial judge[11] and the pretentions of the Appellant,[12] and are valid exercises of provincial jurisdiction.

10. In addition to being *intra vires*, s. 5 and s. 10 of the Quebec statute do not frustrate the purpose of s. 8(1)(e) and s. 12(4)(b) of the federal statute. The criminal law power is not a general regulatory power. It is a power to prohibit. If Parliament chooses not to prohibit something, that does not amount to an authorization to do that thing. In this case, the provisions of the federal statute do not grant a legal right to possess or cultivate cannabis plants. Nor can the federal criminal law be used to grant such a legal right of possession. Activities and substances that are not criminalised can be regulated by the provinces, and that provincial regulation is not criminal law.

11. The unique prohibitory character of the federal criminal law power must also factor into the paramountcy analysis, whenever a party argues that a provincial law frustrates the purpose of a federal criminal law. Federal criminal laws can only be intended to prohibit activities, not grant a right. When

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[10] See: Alberta: *Gaming, Liquor and Cannabis Act*, RSA 2000, c. G-1, s. 50; British Columbia: *Liquor Control and Licensing Act*, SBC 2015, c. 19, s. 8(2)(e) and *Liquor Distribution Act*, RSBC 1996, c. 268, s. 4(1)(e); Manitoba: *The Liquor, Gaming and Cannabis Control Act*, CCSM, c. L153, s. 54, s. 56 and *The Manitoba Liquor and Lotteries Corporation Act,* CCSM, c. L155, s. 31, s. 37; New Brunswick: *Liquor Control Act,* RSNB 1973, c. L-10, s. 134(b); Newfoundland and Labrador: *Liquor Control Act*, RSNL 1990, c. L-18, s. 17(1)(a), s. 70, s. 73; Nova Scotia: *Liquor Control Act*, RSNS 1989, c. 260, ss. 12(a),(b) and s. 90; Ontario: *Liquor Licence and Control Act, 2019,* SO 2019, c. 15, Sched. 22, ss. 38, 39; Prince Edward Island: *Liquor Control Act*, RSPEI 1988, c. L-14, ss. 32, 33, 37, 48; Quebec: *Act respecting offences relating to alcoholic beverages*, CQLR, c I-8.1, s. 91; Saskatchewan: *The Alcohol and Gaming Regulation Act, 1997*, SS 1997, c. A-18.011, s. 133.1.

[11] Jugement de la Cour supérieur, 2019 QCCS 3664, paras. 61, 76 (Dossier de l'Appelant, vol. 1, pp. 1-22).

[12] Mémoire de l'Appelant, paras. 12, 14, 34.

a province enacts stricter provisions as part of a general regulatory scheme, the provincial law does not frustrate the purpose of a federal statute enacted under the criminal law power.

B. Sections 5 and 10 are within Provincial Jurisdiction

(1) Basis for Provincial Jurisdiction

12. Saskatchewan submits that s. 5 and s. 10 of the Quebec statute are valid provincial law. They are part of an overall regulatory scheme, concerning a substance which has significant health implications. The provinces have jurisdiction to regulate health matters, which can include laws aimed at the use of a particular substance, such as requiring mandatory treatment for heroin users.[13] The provinces also have a general power to regulate particular businesses and activities within the provinces, which can include prohibitions on certain types of possession, backed up by fines.[14] Quebec has exercised those powers in enacting the *Cannabis Regulation Act*.

13. Saskatchewan respectfully submits that the trial judge erred in focussing on the prohibitions set out in s. 5 and s. 10 of the Quebec statute, without properly considering those prohibitions in the overall context of the provincial regulatory system for the sale of cannabis which the Quebec statute establishes. Saskatchewan submits that the Quebec Court of Appeal took the correct approach and analysed s. 5 and s. 10 in that overall context. Seen within that context, the prohibitions are part of the general regulatory system, concerned with a particular commodity, which has health implications. Quebec, like all the other provinces, has responded to the federal decision to decriminalise cannabis by adopting a regulatory scheme for the sale, possession and use of cannabis.

(2) Protection of Health

14. This Court has held that the provinces have the power to regulate matters of health, based on s. 92(16) of the *Constitution Act, 1867*. In *Schneider*, the Court unanimously upheld the power of a province to require mandatory treatment for heroin addicts under that health jurisdiction:

> This view that the general jurisdiction over health matters is provincial (allowing for a limited federal jurisdiction either ancillary to the express heads of power in s. 91 or the

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[13] *Constitution Act, 1867*, s. 92(16); *Schneider v. The Queen*, *supra* note 6.

[14] *Constitution Act, 1867*, s. 92(13) and (16); s. 92(15).

> emergency power under peace, order and good government) has prevailed and is now not seriously questioned.[15]

15. As noted earlier, this Court in *Malmo-Levine* held that the use of cannabis can have health implications.[16] The federal statute also cites health risks.[17] The speeches in both the federal Parliament[18] and the Quebec National Assembly[19] also recognised that cannabis can pose health risks, particularly for young people.

16. Saskatchewan submits that the nature of cannabis is such that it is open to the provinces to provide a regulatory framework for cultivation, purchase and sale, possession, and use of cannabis, relying on their jurisdiction over health, particularly with respect to young people. So long as the regulatory scheme ensures that adults in Quebec are able to obtain cannabis, then restrictions and prohibitions which are integrated into the regime are *intra vires* the province. The provincial health jurisdiction is therefore one of the constitutional bases for the Quebec statute, and s. 5 and s. 10 must be considered in that overall context.

(3) Provincial Jurisdiction to Regulate Commodities

17. The provincial jurisdiction over property and civil rights extends to the regulation of the production and sale of commodities, and can include prohibitions as part of a regulatory scheme. This point was clearly established in the case of *Shannon v Lower Mainland Dairy Products Board*. In that case, the Judicial Committee of the Privy Council upheld a provincial marketing scheme for agricultural products, which was "within the **sovereign powers** granted to the Legislature by s. 92…"[20] Significantly, the provincial act in question included a power for the marketing boards to create prohibitions.[21] This

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[15] *Schneider v The Queen, supra* note 6, p. 137 (per Dickson J, as he then was, for the majority) [citations omitted]; p. 114 (per Laskin CJ, concurring); pp. 141-142 (per Estey J, concurring).

[16] *R v Malmo-Levine*, *supra* note 7, para. 3.

[17] *Cannabis Act*, *supra* note 2, s. 7(a), (b), (g).

[18] Cited in the Jugement de la Cour d'appel, 2021 QCCA 1325, para. 102 (Dossier de l'Appelant, vol. 1, pp. 23-66).

[19] Cited in the Jugement de la Cour supérieure, *supra* note , para. 39, note 35, and para. 40, note 36.11

[20] *Shannon v Lower Mainland Dairy Products Board*, [1938] UKPC 54, pp. 3-4, [1938] AC 708, pp. 718-720 [emphasis added].

[21] *Ibid.*, p. 2 (UKPC), p. 717 (AC), citing s. 4(1) of the British Columbia statute.

Court has also affirmed that provincial jurisdiction over intra-provincial trade can include restrictions on trade as an aspect of a marketing regime.[22]

18. Saskatchewan submits this general principle provides the constitutional authority for the province to regulate a commodity such as cannabis, now that Parliament decriminalised it and it is a commodity in trade. A provincial regulatory scheme can include a provincial monopoly, with related prohibitions.

(4) Regulation of Particular Substances: The Example of Provincial Alcohol Regulation

19. Saskatchewan also relies on provincial regulation of alcohol sales, as a specific example of the provincial power to regulate intra-provincial trade. There are parallels between the social and health concerns that led to alcohol regulation, and the similar concerns over cannabis markets, now that cannabis has been decriminalised. Canada has a long history of provincial regulation of alcohol, including prohibitions on the possession of alcohol in certain cases. The courts have consistently upheld the provincial power to regulate the specific substance of alcohol.[23] Saskatchewan submits that the cases on alcohol regulation and prohibition provide strong support for the *vires* of s. 5 and s. 10 of the Quebec statute, in the context of a detailed regulatory scheme.

20. The issue of provincial jurisdiction over alcohol arose in the *Local Prohibition Reference*. The Judicial Committee confirmed that the provinces could enact local alcohol prohibitions.[24] In subsequent cases, the Judicial Committee upheld other provincial statutes which prohibited the sale of alcohol, either completely, or as part of a system of alcohol control.[25]

21. This Court has also held that the provinces can impose restrictions on possession of alcohol by means of a provincial alcohol regulatory system, which can include related prohibitions. For example, in *Rio Hotel*, the Court upheld provincial restrictions on nude entertainment within bars in New

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[22] *Reference re Agricultural Products Marketing*, [1978] 2 SCR 1198, at pp. 1293, 1296-1297 (per Pigeon J. (majority)); pp. 1282-1283, 1286-1287 (per Laskin CJ, concurring).

[23] The Honourable Morris J. Fish, "The Effect of Alcohol on the Canadian Constitution … Seriously", (2011) 57:1 *McGill LJ* 189, at pp. 197-198, 203-205.

[24] *Attorney General for Ontario v Attorney General for Canada*, [1896] UKPC 20, pp. 12-14, [1896] AC 348 ("*Local Prohibition Reference)*, pp. 364-365.

[25] *Attorney General of Manitoba v Manitoba Licence Holders' Association*, [1901] UKPC 52, [1902] AC 73; *Canadian Pacific Wine Co. v. Tuley*, [1921] UKPC 89, [1921] 2 AC 417; *R v Nat Bell Liquors Ltd.*, [1922] UKPC 35, [1922] 2 AC 128.

Brunswick. Speaking for the majority, Dickson CJ stated: "It has long been settled that under s. 92(13) and (16) of the *Constitution Act, 1867*, the provinces are vested with legislative authority to regulate the conditions for the sale and consumption of alcohol within the province." He went on to conclude that the provincial prohibitions on nude entertainment, enacted as part of the alcohol regulatory scheme, were constitutionally valid and did not conflict with the *Criminal Code* provisions on nudity.[26]

22. More recently, this Court confirmed the constitutional validity of provincial regulation of alcohol, including prohibitions on possession, in its decision in *R v Comeau*:

> [124] The objective of the New Brunswick scheme is not to restrict trade across a provincial boundary, but to enable public supervision of the production, movement, sale, and use of alcohol within New Brunswick. **It is common ground that provinces are able to enact schemes to manage the supply of and demand for liquor within their borders**: *Air Canada v. Ontario (Liquor Control Board)*, [1997] 2 S.C.R. 581, at para. 55, citing *R. v. Gautreau* (1978), 21 N.B.R. (2d) 701 (S.C. (App. Div.)). Governments manage liquor prices, storage and distribution with a view to diverse internal policy objectives. Although the Crown conceded that New Brunswick generates revenue from its legislative scheme, this is not the primary purpose of the scheme, but an offshoot of it. Finally, s. 134(b) is not divorced from the objective of the larger scheme. It plainly serves New Brunswick's choice to control the supply and use of liquor within the province.
>
> [125] We conclude that the primary purpose of s. 134(b) is to prohibit holding excessive quantities of liquor from supplies not managed by the province. **New Brunswick's ability to exercise oversight over liquor supplies in the province would be undermined if non-Corporation liquor could flow freely across borders and out of the garages of bootleggers and home brewers**. The prohibition imposed in s. 134(b) addresses both. While one effect of s. 134(b) is to impede interprovincial trade, this effect is only incidental in light of the objective of the provincial scheme in general. Therefore, while s. 134(b) in essence impedes cross-border trade, this is not its primary purpose.[27]

23. Thus, in the context of a general regulatory scheme, provincial prohibitions on possession do not amount to a criminal offence, and do not intrude on federal jurisdiction. The alcohol cases establish that the constitutional source for regulatory systems, including prohibitions, is s. 92(13) of the *Constitution Act, 1867* (property and civil rights), and possibly s. 92(16) (matters of a merely local and private nature in the province). The power to enforce the prohibition by a fine is authorised by s. 92(15) of the *Constitution Act, 1867*, which gives the provinces the power to impose fines as part of the enforcement

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[26] *Rio Hotel Ltd. v. New Brunswick (Liquor Licensing Board)*, [1987] 2 SCR 59, para. 2 (per Dickson CJ); see also para. 14 (per Estey J, concurring).

[27] *R v Comeau*, *supra* note 9, paras. 124, 125 [emphasis added].

of a provincial law enacted under the heads of power in s. 92.[28] Those same regulatory powers can be used for provincial regulation of the cultivation, sale, possession and use of cannabis.

24. In 2018, in response to the decriminalisation of cannabis by the federal Parliament, the Saskatchewan Legislature enacted *The Cannabis Control (Saskatchewan) Act*. That Act followed the alcohol regulation model and treated cannabis regulation in the same way as alcohol regulation, including prohibitions. For example, the Act defines "minor" as someone under the age of 19, which is the age for acquiring alcohol in Saskatchewan.[29]

25. The Minister of Justice, Don Morgan QC, explained this point during the debates on the bill:

> Mr. Chair, as I've noted previously, a primary focus of our provincial legislation is to protect the health and safety of our citizens, particularly minors. The proposed legislation will achieve this through a number of measures. **Saskatchewan, as with a majority of other Canadian jurisdictions, will prohibit the consumption, possession, or distribution of cannabis by minors under the age of 19. This mirrors the province's legal age for the consumption of alcohol**.
>
> Although the federal *Cannabis Act* sets a minimum age of 18 for the consumption or possession of cannabis, **the federal government has been clear that provinces may adopt a higher minimum age, and we propose to do so**.[30]

26. The effect of that definition of "minor", coupled with the Saskatchewan statute's prohibition on minors possessing cannabis,[31] means that a person aged 18 cannot possess cannabis plants in Saskatchewan. Although this prohibition does not go so far as the Quebec prohibition in issue in this case, Saskatchewan submits that the Saskatchewan statute and the Quebec statute are examples of provinces deciding how best to use their legislative powers to regulate the possession of cannabis in their jurisdictions. The two statutes are examples of federalism at work. As this Court has recently stated, diversity is a key value of our federal system, to ensure that laws are tailored to local conditions and policy choices.[32]

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[28] *Constitution Act, 1867*, s. 92(13), (15), (16).

[29] *The Cannabis Control (Saskatchewan) Act*, *supra* note 4, s. 1-2 "minor".

[30] Saskatchewan Legislative Assembly, Standing Committee on Intergovernmental Affairs and Justice, Hansard Verbatim Report No. 29 – May 28, 2018, p. 459; see also pp. 460-461.

[31] *The Cannabis Control (Saskatchewan) Act*, *supra* note 4, s. 1-2 "minor"; s. 2(1)(b).

[32] *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11, paras. 48-50.

(5) Application to this Case

27. Applying these principles, Saskatchewan submits that the starting point is that the Quebec statute is, exactly as it states, an act to regulate the sale and possession of cannabis. It ensures that adult residents of Quebec will be able to buy, possess, and use cannabis. That legislative purpose is significant for the classification of s. 5 and s. 10 of the Quebec statute under the division of powers. The overall purpose of the Quebec statute is different from the purpose of the former federal statute, the *Controlled Drugs and Substances Act*, which was a general prohibition on the cultivation and possession of cannabis.[33] The Quebec statute, by contrast, **enables** the purchase, possession and use of cannabis by adults in Quebec. That difference in overall purpose must be taken into account. The prohibitions in s. 5 and s. 10 of the Quebec statute cannot be treated as exactly the same as the former criminal prohibitions, contrary to the conclusion of the trial judge that s. 5 and s. 10 intruded on the federal criminal law jurisdiction.[34]

28. Saskatchewan also submits that by decriminalising cannabis, the federal government made the policy choice that cannabis would now become a commodity in trade. Like other commodities, cannabis is now subject to provincial regulation. As outlined above, the provinces have broad powers to regulate commodities in trade, including creating prohibitions as part of an overall regulatory system.

29. Saskatchewan therefore responds to the Constitutional Question by submitting that the Quebec Court of Appeal correctly upheld s. 5 and s. 10 of the *Cannabis Regulation Act*. Unlike the trial judge, who analysed those sections primarily as stand-alone prohibitions, the Court of Appeal conducted a detailed review of s. 5 and s. 10 in the context of the regulatory scheme set out in the statute. The Court of Appeal began with s. 1:

> **1.** The purpose of this Act is to prevent and reduce cannabis harm in order to protect the health and security of the public and of young persons in particular. The Act also aims to ensure the preservation of the cannabis market's integrity.
>
> To those ends, it regulates such aspects as the possession, cultivation, use, sale and promotion of cannabis.[35]

30. The Court of Appeal correctly held that this general statement of purpose applies to the entire Quebec statute, including the prohibitions in s. 5 and s. 10. Those prohibitions cannot be viewed as

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[33] *Controlled Drugs and Substances Act*, SC 1996, c. 19, ss. 4(1), 7(1).

[34] Jugement de la Cour supérieur, *supra* note 11, paras. 61-70, 76.

[35] *Cannabis Regulation Act*, *supra* note 1, s. 1 (extract).

stand-alone provisions, but must be interpreted in the overall context of the Act's regulatory scheme.[36] The Court of Appeal went on to conduct a detailed review of the overall regulatory scheme. It concluded that the prohibitions on possession were an integral part of the overall scheme for allowing adult residents of Quebec to obtain access to cannabis from the government monopoly, the Société québécoise du cannabis.[37] That detailed review contributed to the Court of Appeal's conclusion that the two sections were valid provincial law.[38]

31. Saskatchewan submits that the analysis of the Quebec Court of Appeal is correct. The prohibitions on possession and cultivation in s. 5 and s. 10 are within provincial jurisdiction, and do not intrude on the federal criminal law jurisdiction. The province is exercising its jurisdiction to regulate a trade in a particular substance, one that has well-recognised health consequences.

C. Paramountcy: Sections 5 and 10 do not Frustrate the Federal Law

(1) Principles of Paramountcy

32. Turning to the issue of paramountcy, which has been raised by some of the interveners, Saskatchewan submits that the doctrine of paramountcy applies only in limited circumstances. Wherever possible, federal and provincial legislation should be interpreted as to find no inconsistency,[39] and conflicts must be defined narrowly.[40] As Wagner CJ stated for the majority in *Orphan Well Association*: "…courts should avoid an expansive interpretation of the purpose of federal legislation which will bring it into conflict with provincial legislation."[41]

33. The test for determining whether paramountcy applies was recently refined by this Court in three seminal cases: *Saskatchewan (Attorney General) v Lemare Lake Logging Ltd;*[42] *Alberta (Attorney*

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[36] Jugement de la Cour d'appel, *supra* note 18, paras. 38-39.

[37] Jugement de la Cour d'appel, *supra* note 18, paras. 45-52.

[38] Jugement de la Court d'appel, *supra* note 18, paras. 67-68.

[39] *Canadian Western Bank v Alberta*, 2007 SCC 22 at paras. 74-75, [2007] 2 SCR 3; *Saskatchewan (Attorney General) v Lemare Lake Logging Ltd*, 2015 SCC 53 at paras. 20, 71, [2015] 3 SCR 419 [*Lemare Lake*].

[40] *Lemare Lake, ibid.* at para. 27.

[41] *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5, at paras. 65-66, [2019] 1 SCR 150

[42] *Lemare Lake*, *supra* note 39.

General) v Moloney;[43] and *407 ETR Concession Co v Canada (Superintendent of Bankruptcy)*.[44] The Court held that there are two distinct paths to finding an inconsistency between provincial and federal legislation: operational conflict and purpose frustration. Under each path, the burden of proof always rests on the party alleging the conflict. As Gascon J stated for the majority in *Moloney*: "Discharging that burden is not an easy task, and the standard is always high."[45]

34. Here, no operational conflict arises because adult residents of Quebec can comply simultaneously with both s. 5 and s. 10 of the Quebec statute, and s. 8(1)(e) and s. 12(4)(b) of the federal statute. The paramountcy analysis therefore is limited to alleged frustration of the purpose of the federal provisions.

(2) Purpose Frustration

35. The frustration branch of the paramountcy test is only satisfied where "the effect of the provincial law may frustrate the purpose" of the federal law.[46] To prove that provincial legislation frustrates the purpose of a federal law, "the party relying on the doctrine must first establish the purpose of the relevant federal statute, and then prove that the provincial legislation is incompatible with this purpose."[47]

36. The argument that s. 5 and s. 10 of the Quebec statute frustrate the purpose of the federal statute relies on a particular characterization of the federal statute's purpose. It is based on the proposition of a federal intention to facilitate home cultivation of small quantities of cannabis. Sections 5 and 10 of the Quebec statute are said to frustrate this purpose.

37. Those who argue paramountcy is engaged suggest that Parliament – in prohibiting the possession of more than four cannabis plants – demonstrated an intention to grant certain Canadians a positive right to possess or cultivate four or fewer cannabis plants, or to do so without encountering a certain measure of state interference. This is said to be Parliament's *specific* purpose, to use the phrase from *Rothmans, Benson & Hedges Inc v Saskatchewan*.[48] And it is said to be pursued in aid of more *general* purposes,

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[43] *Alberta (Attorney General) v Moloney*, 2015 SCC 51, [2015] 3 SCR 327 [*Moloney*].

[44] *407 ETR Concession Co v Canada (Superintendent of Bankruptcy)*, 2015 SCC 52, [2015] 3 SCR 397.

[45] *Moloney, supra* note 43, at para. 27.

[46] *Ibid.,* at para. 25.

[47] *Lemare Lake, supra* note 39, at para. 26.

[48] *Rothmans, Benson & Hedges Inc v Saskatchewan*, 2015 SCC 13 at para. 25, [2005] 1 SCR 188 [*Rothmans*].

such as eliminating the black market for illicit cannabis and reducing the burden on the criminal justice system.

38. However, the purpose analysis must occur in the context of the specific head of federal power in issue. This Court has held that federal prohibitions of drugs are enacted under the criminal law power.[49] The prohibitions contained in the *Cannabis Act* are criminal laws, as were those of its predecessor, the *Controlled Drugs and Substances Act*. By the inherent nature of the criminal law, those laws cannot grant a positive right to do what is not prohibited.

39. Saskatchewan submits that s. 8(1)(e) and s. 12(4)(b) of the federal statute respect this limit on federal power, and do not attempt to create any legal right to possess four or fewer cannabis plants. These provisions are prohibitions. Unless authorised by the federal statute, s. 8(1)(e) prohibits an individual from possessing more than four cannabis plants that are not budding or flowering, while s. 12(4)(b) prohibits cultivation of more than four plants. As a matter of statutory interpretation, those prohibitions do not create any right to possess or cultivate four or fewer plants. That statutory interpretation is strengthened by the particular context of the criminal law, and the constitutional limits on the federal criminal law power.

40. In Saskatchewan's respectful submissions, the federal government could not have effected such a purpose – granting a positive right to cultivation or any other activity – through the enactment of a criminal law such as the federal statute, even if it intended to do so. The unique nature of the federal criminal law power must factor into the paramountcy analysis whenever one argues a provincial law frustrates the purpose of a federal criminal law power. If the alleged purpose frustration arises from a provincial law prohibiting an activity which is not prohibited under the federal criminal law, the challenge must be dismissed.

(3) The Criminal Law Power

41. The governing conception of the federal criminal law power originated in *Proprietary Articles Trade Association v Attorney General of Canada*. Lord Atkin there offered the following definition of criminal law which in turn defined the scope of the federal criminal law power:

> Criminal law connotes only the quality of such acts or omissions as are prohibited under appropriate penal provisions by authority of the state. The criminal quality of an act

[49] *Industrial Acceptance Corp. Ltd v The Queen*, [1953] 2 SCR 273; *R v Malmo-Levine*, supra note 7, para. 72.

> cannot be discerned by intuition; nor can it be discovered by reference to any standard but one: **Is the act prohibited with penal consequences?**[50]

42. The definition of criminal law has developed during the intervening century, particularly in the *Margarine Reference*. In that case, Rand J gave the seminal definition of the criminal law power: "A crime is an act which the law, with appropriate penal sanctions, forbids; but as prohibitions are not enacted in a vacuum, we can properly look for some evil or injurious or undesirable effect upon the public against which the law is directed."[51] The objective of the law and the means chosen to advance the objective are both relevant to assessing whether a law is supportable under the criminal law power.

43. In subsequent cases, this Court has established nuances to that general principle. For example, the Court has held that Parliament can tailor the scope of an offence by setting out conditions, which if followed, provide a complete defence to the charge. For example, in *Morgentaler v The Queen*, this Court held that complying with the therapeutic abortion committee process meant that it would not be an offence to obtain or perform an abortion.[52] This Court has held that the lottery provisions of the *Criminal Code* do not in themselves provide a right to run a lottery. Their effect is that if the provisions are followed, then running a lottery is not a criminal offence. Lotteries can be operated provide they comply with the regulations set out in provincial law.[53] Similarly, the *Firearms Act* is essentially criminal law, not a regulatory law. The licensing provisions of the Act provide a defence to a charge of unlawful possession of a firearm.[54]

44. Nor does a criminal offence have to address the main social harm in issue. In *RJR-MacDonald Inc v Canada (Attorney General)*, this Court confirmed that valid criminal legislation may pursue its goals indirectly, for example by prohibiting advertising of tobacco.[55] Parliament can use the criminal law to pass laws which prohibit tobacco advertising, with prescribed exceptions. If a tobacco vendor

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[50] *Proprietary Articles Trade Association v Attorney General of Canada,* [1931] UKPC 11, p. 7, [1931] AC 310, at p. 324 [emphasis added].

[51] *Reference re Validity of Section 5 (a) Dairy Industry Act*, [1949] SCR 1, at p. 49; affirmed, *sub nom. Canadian Federation of Agriculture v Attorney General of Quebec*, [1950] UKPC 31, [1951] AC 179.

[52] *Morgentaler v The Queen*, [1976] 1 SCR 616, at p. 672, 676 (per Dickson J, as then was); at p. 671 (Pigeon J concurring); at pp. 627, 631 (per Laskin CJ (dissenting, but not on this point).

[53] *R v Furtney*, [1991] 3 SCR 89, at p. 102; *The Alcohol and Gaming Regulation Act, 1997*, *supra* note 10.

[54] *Reference re Firearms Act (Canada),* 2000 SCC 31, [2000] 1 SCR 783, at paras. 19, 38, 39, 58.

[55] *RJR-MacDonald Inc v Canada (Attorney General),* [1995] 3 SCR 199, at paras. 50-57.

follows those exceptions, they are not in breach of the federal criminal law regulating tobacco advertising, but complying with the federal exceptions does not immunise vendors from a provincial law which also regulates tobacco advertising. The exceptions to the federal criminal offences cannot go further, and create a right to advertise tobacco, regardless of provincial laws.[56]

45. Overall, this Court has recognised considerable discretion for Parliament in framing its criminal laws, but one thing has remained constant since the *P.A.T.A.* case, ninety years ago: the criminal law power is, and has always been, prohibitory in character. It empowers Parliament to pursue a variety of diverse criminal public purposes. But it only gives Parliament a single tool with which to pursue these purposes: a prohibition, broadly defined, backed by a penalty. If the federal government chooses to pursue a criminal public purpose through means other than a prohibition backed by a penalty, it cannot rely on the criminal law power to do so. Authority must be found elsewhere.

46. In this way, the criminal law power is unique. Whereas the scope of most powers enumerated in s. 91 and s. 92 of the *Constitution Act, 1867* are defined exclusively by subject (e.g. s. 91(12) (fisheries)) or by subject and geography (e.g. 92(13)), the scope of criminal law power is defined by both subject and form. A prohibition and penalty are necessary components of valid criminal law, though they are not sufficient to establish that an enactment is valid criminal law.

47. Not only is this form-based limit on the federal criminal law power firmly entrenched in Canadian constitutional jurisprudence, but it is also critical for maintaining healthy federalism. In *Reference re Assisted Human Reproduction Act*, McLachlin CJ cautioned that "a limitless definition [of the federal criminal law power], combined with the doctrine of paramountcy, has the potential to upset the constitutional balance of federal-provincial powers."[57]

48. Although McLachlin CJ was speaking about the purpose-based limit on the criminal law power, her comments apply equally to the power's form-based limits. If criminal law is no longer confined to prohibitory acts and can rather be used to promote or require beneficial practices, any federal law that pursues a "criminal public purpose" could fall under the purview of s. 91(27). Such an arrangement would greatly extend federal power into areas predominantly in provincial jurisdiction, such as those protected under s. 92(13) and s. 92(16). And, when combined with the doctrine of paramountcy, such

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[56] *Rothmans*, *supra* note 39, at paras. 18, 19.

[57] *Reference re Assisted Human Reproduction Act*, 2010 SCC 61 at para. 43 (per McLachlin CJC); at para. 239 (per LeBel and Deschamps JJ concurring on this point).

an arrangement could be used to undermine a variety of provincial competences and thereby upset the balance of Confederation.

(4) Relationship Between the Criminal Law Power and Purpose Frustration

49. In assessing the purposes of a federal law, one must bear in mind the limits of a particular head of power. The purpose assigned to a federal statute when conducting a purpose frustration inquiry cannot exceed the boundaries of the supporting head of power.

50. Because the criminal law power only empowers Parliament to prohibit activity, no federal statute enacted pursuant to that power can validly pursue purposes related to the creation of a positive right to participate in that activity. The federal criminal law power is not a general regulatory power and criminal laws can only be intended to prohibit activities.

51. It is therefore impossible for a validly enacted provincial prohibition to frustrate the purpose of federal criminal law on grounds that the criminal law "authorizes" the subject of the provincial prohibition. Where, as here, an alleged purpose frustration arises from a provincial law prohibiting an activity not prohibited under the federal criminal law, the paramountcy challenge must be dismissed. It is unnecessary to inquire whether Parliament intended the statute to create a positive right to undertake a certain activity. Even if that was Parliament's intention, such an intention could not have been validly effected through an exercise of the federal criminal law power.

52. This position is consistent with this Court's jurisprudence. In *Rothmans*, the issue was the effect of a provincial statute which prohibited advertising for tobacco products on all premises in which persons under 18 years were permitted. The relevant federal criminal law effected a more narrow prohibition on advertising tobacco products. This Court unanimously held that the provincial statute did not frustrate the purpose of the federal statute. Speaking for a unanimous Court, Major J described the limits of the criminal law power and the effect such limits have on paramountcy inquiries:

> [18] … Parliament did not grant, **and could not have granted**, retailers a positive entitlement to display tobacco products. That is so for two reasons.
>
> [19] First, like the *Tobacco Products Control Act*, S.C. 1988, c. 20, before it, the *Tobacco Act* is directed at a public health evil and contains prohibitions accompanied by penal sanctions. Accordingly, and as the Saskatchewan courts correctly concluded in light of this Court's decision in *RJR-Macdonald Inc. c. Canada (Procureur général)*, [1995] 3 S.C.R. 199 (S.C.C.), it falls within the scope of Parliament's criminal law power contained in s. 91(27) of the *Constitution Act, 1867*… **As the criminal law power is essentially**

> **prohibitory in character, provisions enacted pursuant to it, such as s. 30 of the *Tobacco Act*, do not ordinarily create freestanding rights that limit the ability of the provinces to legislate in the area more strictly than Parliament.** This limited reach of s. 91(27) is well understood: see, for example, *O'Grady v. Sparling*, [1960] S.C.R. 804 (S.C.C.); *Ross v. Ontario (Registrar of Motor Vehicles)* (1973), [1975] 1 S.C.R. 5 (S.C.C.); and *Spray-Tech*.[58]

53. In *Reference re Assisted Human Reproduction Act*, McLachlin CJ, writing for four judges, cited *Rothmans* while explaining why maintaining the form-based limit on the federal criminal law power and understanding its implication for the paramountcy doctrine is critical for maintaining healthy federalism:

> [38] In my view, the requirement that a criminal law contain a prohibition prevents Parliament from undermining the provincial competence in health. **The federal criminal law power may only be used to prohibit conduct, and may not be employed to promote beneficial medical practices**. Federal laws (such as the one in this case) may involve large carve-outs for practices that Parliament does not wish to prohibit. However, **the use of a carve-out only means that a particular practice is *not* prohibited, not that the practice is positively *allowed* by the federal law. This has important implications for the doctrine of federal paramountcy. If a province enacted stricter regulations than the federal government, there would be no conflict in operation between the two sets of provisions since it would be possible to comply with both. Further, there would be no frustrations of the federal legislative purpose since federal criminal laws are only intended to prohibit practices. A stricter provincial scheme would complement the federal criminal law.** See *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, 2005 SCC 13, [2005] 1 S.C.R. 188 (S.C.C.), at para. 22; *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 S.C.R. 927 (S.C.C.), at pp. 964-65; and *Ross v. Ontario (Registrar of Motor Vehicles)* (1973), [1975] 1 S.C.R. 5 (S.C.C.). There may be a conflict between a criminal law and a *less* strict provincial scheme. However, in such a case, Parliament's stricter scheme would be acting as a prohibition. In this way, the prohibition requirement for criminal laws acts as a major limitation on the effect of s. 91(27).[59]

(5) Application to this Case

54. As McLachlin CJ stated: federal criminal laws are only intended to prohibit practices, so a province enacting stricter regulations than the federal government cannot frustrate the purpose of a statute enacted pursuant to the criminal law power. Saskatchewan respectfully submits that this Court must affirm this principle and dismiss the Appellant's paramountcy argument on this basis.

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[58] *Rothmans*, *supra* note 39, at para. 18-19 [emphasis added].

[59] *Reference re Assisted Human Reproduction Act, supra* note 57, at para. 38 [emphasis in bold added; italics in original]; no disagreement on this point from LeBel, Deschamps, or Cromwell JJ.

55. It is true, as the Quebec Court of Appeal held, that the intrinsic and extrinsic evidence does not support a finding that Parliament intended to grant Canadians a positive right to possess or cultivate four or fewer cannabis plants, so s. 5 and s. 10 cannot be rendered inoperative by an alleged conflict with this purpose. But this Court should not consider whether the intrinsic and extrinsic evidence demonstrates a Parliamentary intention to grant Canadians a positive right to possess or cultivate four or fewer cannabis plants, because such an intention could never be validly pursued through the criminal law power.

56. The power to pass a criminal prohibition cannot be turned into a general positive right to carry on an activity that is not covered by the prohibition. That would be a general regulatory power. Saskatchewan therefore respectfully disagrees with the position taken by the Appellant, who several times refers to the federal provisions as permissive, apparently in the sense of granting a right:

- «permet de manière positive la vente et la possession de cannabis à des fins récréatives au Canada, mais permet également aux Canadiennes et aux Canadiens de posséder et de cultiver à des fins récréatives personnelles, un maximum de 4 plantes de cannabis au sein de leur domicile. »;
- « la possibilité d'interdire ce que le législature federal permet »;
- « une restriction de ce qui est permis par la Loi fédérale »;
- « le parlement federal a permis la culture de 4 plantes ou moins à domicile à travers le pays »;
- « de légaliser certains actes dont, notamment, la possession de cannabis »;
- « une loi federal permissive »;
- « la permissivité de la Loi fédérale »;
- « ce qui est permis par la Loi fédérale »;
- « ce qui est permis par le Parlement fédérale ».[60]

57. Nor can the federal Parliament create an immunity from "state interference". Parliament cannot simultaneously vacate the field by decriminalising, and yet try to bar the provinces from legislating under their well-established jurisdictions over health and commodities in trade. The federal government has

[60] Mémoire de l'Appelant, paras. 2, 4, 10, 26, 31, 32, 35.

made a clear policy choice to decriminalise cannabis, thereby accepting that the provinces can exercise their jurisdiction over cannabis as a matter of health and commodity regulation.[61] Parliament cannot prevent the provinces from exercising their jurisdiction once cannabis has been decriminalised.

58. The purpose assigned to a federal statute when conducting a purpose frustration inquiry cannot exceed the boundaries of the supporting head of power. And the unique nature of the federal criminal law power – specifically that it only empowers Parliament to prohibit activity – means that it is impossible for a validly enacted provincial prohibition to frustrate the purpose of federal criminal law on grounds that the criminal law "authorizes" or "permits" the subject of the provincial prohibition. Wherever an alleged purpose frustration arises from a provincial law prohibiting an activity not prohibited under the federal criminal law, the paramountcy challenge must be dismissed.

D. The Attorney General of Canada Has Not Intervened

59. Saskatchewan submits that the fact that the Attorney General of Canada has not intervened in this appeal is a factor that this Court should take into account in assessing the *vires* of s. 5 and s. 10 of the Quebec statute, and also in the paramountcy analysis.

60. In *OPSEU*, a division of powers case, Dickson CJ (concurring in the result) commented that the federal Attorney General had intervened in support of the provincial statute in issue. After noting that agreement by the two governments was not determinative, he stated: "Nevertheless, in my opinion **the Court should be particularly cautious about invalidating a provincial law when the federal government does not contest its validity** or, as in this case, actually intervenes to support it and has enacted legislation based on the same constitutional approach adopted by Ontario."[62]

61. Saskatchewan respectfully submits that this caution applies here, where the *vires* of provincial provisions are in issue, relating specifically to a recently enacted federal statute, which fundamentally changed the law governing cannabis. This caution applies with even greater force when the issue before the Court is whether a provincial statute frustrates the purpose of that federal statute.

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[61] *Cannabis Act*, *supra* note 2, s. 2(1) "illicit cannabis"; s. 69 (provincially authorized selling); s. 72 (employees — provincial acts).

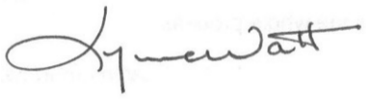
[62] *Ontario (Attorney General) v OPSEU*, [1987] 2 SCR 2, para. 29 [underlining in the original; bolding added]. See also *Schneider v The Queen*, *supra* note 6, p. 138 (per Dickson J, as he then was, speaking for the majority).

62. The silence of the Attorney General of Canada speaks volumes. The Attorney General of Canada is charged with the due enforcement of federal laws.[63] His absence in this case supports the conclusion that there is no frustration of the federal provisions. Sections 5 and 10 of the provincial statute are valid.

PART IV – COSTS

63. Saskatchewan does not seek costs and submits that the ordinary rule that costs are not awarded against an Intervener should apply.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 22nd day of August, 2022.



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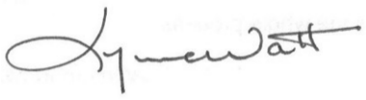
Thomson Irvine, QC



for:

Noah Wernikowski

Counsel for the Intervener,
Attorney General for Saskatchewan

[63] *Department of Justice Act*, RSC 1985, c. J-2, s. 4(a), (b), s. 5(d).

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