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 QUÉBEC

RESPONDENT
(Appellant)

-and-

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ATTORNEY GENERAL OF BRITISH COLUMBIA,
ATTORNEY GENERAL OF 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 OF MANITOBA

(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. In enacting the *Cannabis Act*,[1] Parliament removed the longstanding blanket criminal prohibition on the possession and sale of cannabis for non-medical purposes and introduced a new criminal regime to "restrict and strictly regulate access to cannabis".[2] Under this framework, the federal government and the provinces share responsibility in regulating non-medical cannabis in Canada. The provinces are responsible for regulating the distribution and sale of cannabis and are able to enact further restrictions tailored to local circumstances and conditions. The *Cannabis Act* represents cooperative federalism in action.

2. In response to the federal government's proposed new criminal regime for cannabis, provinces introduced legislation to regulate the distribution, sale and consumption of non-medical cannabis. In Manitoba, like Quebec, consumers can legally obtain non-medical cannabis only from regulated stores.[3] Like Quebec, Manitoba chose to prohibit the residential cultivation of cannabis with the aim of removing access to an unregulated source of cannabis and directing consumers to regulated retail environments.[4]

3. The Attorney General of Manitoba ("Manitoba") submits that the Quebec Court of Appeal correctly decided that the provincial ban on home cultivation is *intra vires* and is not rendered inoperative pursuant to the doctrine of federal paramountcy.

4. In pith and substance, the ban falls squarely within provincial jurisdiction. The prohibition on home cultivation is intended to preserve the integrity of the provincial regulatory regime under which consumers can obtain cannabis only from regulated stores.

5. The prohibition on home cultivation is also not incompatible with a federal purpose. Before the Court of Appeal, the Appellant asserted in the alternative that the provincial legislation frustrates

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[1] S.C. 2018, c. 16.
[2] Exhibit PGQ-4, House of Commons Debates, May 30, 2017, p. 11646, Appellant Record, vol. 14, p. 106 (English version: House of Commons Debates, 42-1, No. 183 (30 May 2017), p. 11638).
[3] *The Liquor, Gaming and Cannabis Control Act*, C.C.S.M. c. L153 ["*LGCCA*"], ss. 101.4(2), 101.13(1). Quebec and Manitoba also permit sales through regulated online stores.
[4] *LGCCA*, s. 101.15.

a federal purpose by prohibiting what the *Cannabis Act* allows: the home cultivation of four or less cannabis plants.

6. The standard for invalidating provincial legislation on the basis of federal purpose is high. Where federal legislation merely permits an activity or course of conduct and provincial legislation imposes a stricter standard, the provincial law does not frustrate the federal purpose. Under the *Cannabis Act*, the residential cultivation of four or less cannabis plants is not prohibited, but that does not mean that it is positively allowed. The Appellant places undue weight on ambiguous remarks made during parliamentary debates on the bill. There is nothing in the text of the *Cannabis Act* that evinces an intention to grant a positive entitlement to home cultivation. The provincial ban on home cultivation is in fact complementary with the purposes of the *Cannabis Act*.

B. Statement of Facts

7. Manitoba intervenes in this appeal pursuant to a Notice of Intervention filed May 13, 2022.

8. Manitoba accepts the facts as set out in the factum of the Respondent.

9. Manitoba has a direct interest in this appeal because the province is currently defending very similar litigation in *Lavoie v. The Government of Manitoba*, (Q.B. File No. CI20-01-28204). The applicant in that case challenged the constitutional validity of Manitoba's legislation prohibiting the residential cultivation of cannabis plants. The applicant asserted that the prohibition on home cultivation was *ultra vires* because it fell within the federal criminal law jurisdiction, or in the alternative, that the provision was inoperative pursuant to the doctrine of federal paramountcy because it conflicted with the *Cannabis Act*. The decision by the Manitoba Court of Queen's Bench is currently on reserve.

PART II – RESPONSE TO QUESTION IN ISSUE

10. The issue on appeal is stated in the constitutional question:

> Les juges de la Cour d'appel du Québec ont-ils erré en droit en concluant que les articles 5 et 10 de la *Loi encadrant le cannabis*, RLRQ c C-5.3, sont constitutionnellement valides?

> Did the judges of the Quebec Court of Appeal err in law by concluding that sections 5 and 10 of the *Cannabis Regulation Act*, CQLR c C-5.3, are constitutionally valid?

11. Manitoba submits that this question should be answered in the negative.

PART III – ARGUMENT

A. Pith and substance

12. The classic two-step process in a division of powers analysis involves first identifying the dominant characteristic or pith and substance of the challenged law and then assigning that matter to one of the classes of subjects or heads of legislative power in sections 91 and 92 of the *Constitution Act, 1867*.[5] A pith and substance analysis examines both the purpose and effect of the legislation.[6]

13. The Quebec Court of Appeal correctly decided that the pith and substance of the prohibition on the possession and cultivation of cannabis plants for personal use is to preserve the effectiveness of the Quebec government's monopoly over the sale and distribution of cannabis, which falls squarely within provincial jurisdiction over property and civil rights (s. 92(13)) and matters of a local or private nature (s. 92(16)). The exclusive sale of cannabis through stores operated by the Société québécoise du cannabis ("SQDC") is intended to protect public health and safety by controlling access to cannabis, ensuring quality control, and promoting responsible consumption.

14. Like Quebec, Manitoba enacted legislation that requires cannabis to be obtained exclusively through regulated retail stores to advance similar public health and safety objectives.[7] Non-medical cannabis can only be sold in Manitoba by retail stores that are licensed by the Liquor, Gaming and Cannabis Authority of Manitoba ("LGCA").[8] All cannabis sold at a retail store must be obtained from the Manitoba Liquor and Lottery Corporation ("MLLC") and grown by federally licensed producers,[9] and must be packaged and labelled in accordance with the

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[5] *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism & Culture)*, 2002 SCC 31 [*Kitkatla Band*], para. 52.
[6] *Kitkatla Band*, para. 53.
[7] *LGCCA*, ss. 101.4(2) and 101.13(1).
[8] *LGCCA*, ss. 101.4(1), 101.4(2) and 101.13(1).
[9] *LGCCA*, s. 101.6.

Cannabis Act,[10] which requires cannabis products to display a health warning and specific information about THC and CBD content and intended use.[11] A retail cannabis store must ensure that cannabis products, packaging and labelling are not visible to young persons,[12] and an age-restricted cannabis store cannot allow young persons to enter.[13]

15. In addition, retail cannabis stores in Manitoba must post notices regarding responsible cannabis consumption and the dangers of driving after consuming cannabis and provide purchasers with written information relating to cannabis.[14] Any retail staff involved in the sale of cannabis must also complete training specified by the LGCA.[15] This point-of-sale information is an important and convenient means to educate consumers about the laws and health risks associated with cannabis and to promote responsible consumption.

16. Manitoba's regime regulating the sale and distribution of cannabis was established to keep cannabis out of the hands of young persons and to control access to and the quality of cannabis products.[16] Further, the sale of cannabis in retail stores across Manitoba was intended to displace the illicit cannabis market.[17] The overriding objective of the regime was to protect the health and safety of Manitobans.

17. As under the Quebec legislation, Manitoba's legislation prohibits the residential cultivation of cannabis to preserve the effectiveness of this regulatory regime. The ban on home cultivation acts to remove access to an unregulated source of cannabis and to direct consumers to regulated retail environments, where the cannabis sold is required to meet Health Canada requirements and where point-of-sale information is available. Manitoba agrees with the Attorney General of Quebec that

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[10] *LGCCA*, s. 101.6(3).
[11] *Cannabis Regulation*, SOR/2018-144, ss. 123(1)(e), 124(1), 124.1, 132.1, 132.11, 132.12 and 132.18.
[12] *LGCCA*, s. 101.7.
[13] *LGCCA*, s. 101.8(2).
[14] *LGCCA*, ss. 101.20(1) and (2); Manitoba *Cannabis Regulation,* M.R. 120/2018, s. 30.
[15] *LGCCA*, s. 101.21.
[16] Legislative Assembly of Manitoba, Debates and Proceedings (Hansard), Vol. LXXI, No. 12B, December 7, 2017, pp. 443-445, Book of Authorities of the Attorney General of Manitoba [AGMB BOA] Tab 1.
[17] Legislative Assembly of Manitoba, Debates and Proceedings (Hansard), Vol. LXXI, No. 12B, December 7, 2017, pp. 443-445, Book of Authorities of the Attorney General of Manitoba [AGMB BOA] Tab 1.

the purpose of the prohibition on home cultivation is clearly not to punish personal cannabis possession or consumption as immoral or harmful. If Manitoba and Quebec sought to target cannabis possession or consumption through the criminal law, they would not enact a regime that makes it accessible through stores to consumers.

18. The Appellant's argument that the Quebec legislature could have fulfilled its objectives of health and safety by regulating home cultivation instead of prohibiting it completely is irrelevant to the division of powers analysis. It should be recalled that this Court has repeatedly cautioned that the wisdom or efficacy of a law is not relevant to the question of *vires*.[18] The legislature "is the judge of whether a measure is likely to achieve its intended purposes; efficaciousness is not relevant to the court's division of powers analysis".[19] The classification must be based on the law's purpose and effects as understood by the legislators.[20]

B. Federal paramountcy

19. Under the doctrine of federal paramountcy, where there is an inconsistency between validly enacted but overlapping provincial and federal legislation, the provincial law is inoperative to the extent of the inconsistency.[21] The doctrine applies to two kinds of conflicts: (1) an operational conflict, where compliance with both the federal and provincial law is impossible and (2) frustration of purpose, where the provincial law is incompatible with the purpose of the federal law.[22]

20. Courts have taken a restrained approach to the doctrine of federal paramountcy and where possible, favour giving effect to laws adopted by both levels of government consistent with the principle of cooperative federalism.[23] In keeping with the restrained approach to paramountcy,

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[18] *Reference re Firearms Act (Canada)*, 2000 SCC 31 [*Reference re Firearms Act*], para. 18; *Reference re Securities Act*, 2011 SCC 66 [*Reference re Securities Act*], para. 90; *Ward v. Canada (Attorney General)*, 2002 SCC 17, paras. 18 and 22; *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11, para. 332 (dissenting but not on this point).

[19] *Reference re Firearms Act*, para. 18.

[20] Peter Hogg, *Constitutional Law of Canada*, 5th ed., Toronto, Thomson Reuters, 2021, §15:10, Book of Authorities of the Attorney General of Manitoba [AGMB BOA] Tab 2.

[21] *Saskatchewan (A.G.) v. Lemare Lake Logging Ltd.*, 2015 SCC 53 [*Lemare Lake Logging*], para. 15; *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, 2005 SCC 13 [*Rothmans*] at para. 11.

[22] *Lemare Lake Logging,* para. 17.

[23] *Lemare Lake Logging*, paras. 20-23.

courts are particularly cautious about giving too broad a scope to paramountcy on the basis of frustration of federal purpose.[24]

21. It appears to be undisputed that there is no operational conflict in the present case. A person can comply with both the provincial law and the *Cannabis Act* by observing the more stringent provincial standard of not cultivating cannabis plants in one's home.[25]

22. With respect to frustration of purpose, the standard for invalidating provincial legislation on this basis is high.[26] The party relying on the doctrine must prove that the provincial legislation is incompatible with the purpose of the federal legislation.[27] Where federal legislation merely permits an activity or course of conduct and provincial legislation restricts the scope of that permission, this Court has held that the provincial law will not frustrate the federal purpose.[28] For example, in *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, federal legislation regulated which pesticides could be registered for manufacture and use in Canada. A municipal by-law prohibiting the aesthetic use of federally approved pesticides did not frustrate the purpose of the federal law, as the federal law was merely permissive.[29]

23. Where, however, the federal law is not merely permissive but rather confers a positive right or provides for a positive entitlement, the purpose of the federal law may be frustrated by more restrictive provincial legislation.[30]

24. As this Court explained in *Rothmans*, the federal criminal law power is essentially prohibitory in character. As such, it does not ordinarily create freestanding rights that limit the ability of provinces to legislate in the area more strictly than Parliament.[31] A criminal prohibition sets out

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[24] *Alberta (Attorney General) v. Moloney*, 2015 SCC 51 [*Moloney*], para. 86; *Lemare Lake Logging,* para. 23.
[25] *Lemare Lake Logging,* para. 25; see also *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39 [*COPA*], para. 65.
[26] *COPA,* para. 66.
[27] *COPA*, para. 66; *Lemare Lake Logging* at para. 26.
[28] *COPA*, para. 66; *Lemare Lake Logging,* para. 48; *Moloney,* para. 26.
[29] *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40 [*Spraytech*] at para. 35.
[30] *Moloney,* para. 26; *Bruyère c. Québec (Commission de la santé & de la sécurité du travail)*, 2011 SCC 60, [2011] 3 S.C.R. 635, paras. 32-33 and 36; *British Columbia (Attorney General) v. Lafarge Canada Inc.*, 2007 SCC 23, paras. 84-85; *Law Society (British Columbia) v. Mangat*, 2001 SCC 67, at para. 72.
[31] *Rothmans,* para. 19.

conduct that meets the criminal standard; it does not positively allow conduct that falls below the criminal standard.[32]

25. That said, the criminal law is not limited to blanket prohibitions and may also define the scope of the criminal standard through exemptions.[33] For example, legislation may prohibit certain activities unless conducted in accordance with federal regulations.[34] These carve-outs from the criminal law, however, do not confer a positive right to engage in certain conduct.[35] Rather, they clarify the scope of the criminal offence.[36] As noted in *Assisted Reproduction*, "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".[37]

26. The *Cannabis Act* sets out a series of prohibitions regarding cannabis possession, distribution, sale, cultivation, importation and exportation.[38] It also sets out circumstances or conditions under which the criminal law does not apply. For example, where a person has obtained a license that authorizes them to sell cannabis or is authorized to sell cannabis under a provincial Act, that person is exempted from the criminal prohibition on the unauthorized sale of cannabis.[39] These prohibitions and exemptions define the scope of the criminal standard pertaining to cannabis. They define the scope of what is prohibited, not what is positively allowed under federal law.

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[32] *Rothmans*, para. 19, citing *Ross v. Ontario (Registrar of Motor Vehicles)*, [1975] 1 S.C.R. 5 and *O'Grady v. Sparling,* [1960] S.C.R. 804 (S.C.C.). In *O'Grady*, this Court held that a provincial law prohibiting careless driving did not frustrate the purpose of a federal law that made it an offence to drive recklessly because Parliament did not intend to implicitly permit conduct that fell outside the scope of the criminal offence (in this case, careless driving) (see *Ross* at para. 14).

[33] *R v. Furtney*, [1991] 3 S.C.R. 89 [*Furtney*], paras. 43-44; *Canada (Procureure générale) c. Hydro-Québec)*, [1997] S.C.J. No. 76, para. 47 (dissenting but not on this point) and para. 151; *RJR-MacDonald Inc. v. Canada*, [1995] 3 S.C.R. 199, paras. 53 and 56 (dissenting but not on this point); *Reference re Firearms Act*, para. 39.

[34] *Reference re Assisted Human Reproduction Act*, 2010 SCC 61 [*Assisted Reproduction*], paras. 37-38; 290-291.

[35] *Assisted Reproduction*, para. 38; *Rothmans*, paras. 18-19.

[36] *Furtney*, para. 43.

[37] *Assisted Reproduction*, para. 38.

[38] *Cannabis Act*, S.C. 2018, c. 16 [*Cannabis Act*], ss. 8, 9, 10, 11 and 12.

[39] *Cannabis Regulations*, SOR/2018-144, s. 11(1); *Cannabis Act*, ss. 10(1) and 69(1).

27. The prohibition on residential cultivation of five or more cannabis plants under ss. 8 and 12 of the *Cannabis Act* sets out a criminal standard for home cultivation.[40] It does not create a positive entitlement to cultivate four or less cannabis plants. Pursuant to these provisions in the federal Act, the residential cultivation of four cannabis plants or less does not attract the heavy consequences and sanctions of the criminal law. This does not mean that the *Cannabis Act* grants a positive right to grow four or less plants at home.

28. The essentially prohibitory nature of the criminal law power has important implications for the doctrine of paramountcy. Since the criminal law defines the scope of conduct that is subject to criminal sanction and does not confer positive entitlements to conduct falling below that standard, a province can enact stricter standards without frustrating the purpose of the federal law.[41] The stricter provincial scheme in fact complements the federal criminal law.[42]

29. In regulating cannabis, Manitoba and other provinces have imposed stricter restrictions than certain criminal standards set out in the *Cannabis Act*. For example, the *Cannabis Act* prohibits a young person from possessing more than 5 grams of dried cannabis.[43] Manitoba and other provinces have enacted legislation that prohibits young persons from possessing any cannabis.[44] It is also prohibited under the *Cannabis Act* for a person 18 years old or older to possess more than 30 grams of dried cannabis in a public place.[45] But under Manitoba's legislation, persons under 19 years of age are prohibited from possessing or consuming any quantity of cannabis.[46]

30. The legislative history of the federal *Cannabis Act* confirms that it was specifically contemplated that provinces and territories would impose stricter restrictions in this manner. During the second reading of Bill C-45, the Honourable Jody Wilson-Raybould, then Minister of Justice, stated the following:

> Provinces and territories would generally be responsible for the distribution and sale components of the framework. They would also be able to create further restrictions as they saw fit, including increasing the minimum age in their jurisdictions to, for example, align with the

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[40] *Cannabis Act*, ss. 8 and 12.
[41] *Assisted Reproduction*, para. 38.
[42] *Assisted Reproduction*, para. 38.
[43] *Cannabis Act*, s. 8(1)(c).
[44] *LGCCA*, s. 101.18.
[45] *Cannabis Act*, s. 8(1)(a).
[46] *LGCCA*, s. 1(1) and 101.18.

> drinking age, and lowering possession limits for cannabis, which could be pursued to further protect youth. Further, the provinces and territories, along with the municipalities, could create additional rules for growing cannabis at home, including the possibility of lowering the number of plants allowed for residents and restricting the places in which cannabis could be consumed.[47] [Emphasis added]

31. Further, it was acknowledged during parliamentary debates on the bill that the use of the federal criminal law power would permit the provinces to impose stricter regulation, particularly in respect to residential cultivation of cannabis. Mr. David Lametti (at the time, Parliamentary Secretary to the Minister of Innovation, Science and Economic Development) noted the "flexibility" permitted by the criminal prohibitions in the federal Act, which allow the provinces to impose a more restrictive standard regarding home cultivation:

> …the criminal law standard, which is within federal jurisdiction, is a heavy apparatus and through our consultations we set the criminal law standard at four plants to allow a certain flexibility to the provinces. The provinces are, within their jurisdiction, able to further regulate on that point. That a number of provinces have chosen to do so or are planning to do so is indicative of a healthy federal system in which both the federal government and the provinces are attuned to the needs of their people and the health of their populations. There is nothing wrong with some variance across the country as provincial governments determine what to do with that standard.[48] [Emphasis added]

32. Other members of Parliament also confirmed that the federal Act was drafted in a manner that would allow provinces to impose stricter standards to address local circumstances and conditions:

> …Bill C-45 recognizes that provinces and territories and municipalities have a key role to play in the new system.

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[47] Exhibit PGQ-4, House of Commons Debates, May 30, 2017, p. 11648, Appellant Record, vol. 14, p. 108 (English version: House of Commons Debates, 42-1, No. 183 (30 May 2017), p. 11640). See also: Exhibit PGQ-4, House of Commons Debates, November 21, 2017, p. 15381, Appellant Record, vol. 15, p. 100 (English version: House of Commons Debates, 42-1, No. 235 (21 November 2017), p. 15359); Exhibit PGQ-4, House of Commons Debates, May 30, 2017, p. 11650, Appellant Record, vol. 14, p. 110 (English version: House of Commons Debates, 42-1, No. 183 (30 May 2017), p. 11642); and Exhibit P-4.4, House of Commons Debates, June 6, 2017, p. 12180, Appellant Record, vol. 3, p. 116 (English version: House of Commons Debates, 42-1, No. 188 (6 June 2017), p. 12168).

[48] Exhibit PGQ-4, House of Commons Debates, November 21, 2017, p. 15,382, Appellant Record, vol. 15, p. 101 (English version: House of Commons Debates, 42-1, No. 235 (21 November 2017), p. 15360).

> …
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> Provinces and territories could also set additional requirements to address issues of local concern. For example, provincial and territorial legislatures would have the authority to set a higher minimum age for cannabis possession. Provinces and territories could also set more restrictive limits on possession or personal cultivation, including lowering the number of plants or restricting where they may be cultivated.
>
> Thus, Bill C-45 is drafted in such a way as to provide the provinces and territories with the ability to establish stricter rules under their own authorities.[49] [Emphasis added]

33. The legislative history reveals that the *Cannabis Act* was intended as an instance of cooperative federalism, whereby the federal and provincial governments would share responsibility for regulating cannabis in Canada. The criminal standards set out in the *Cannabis Act* permit the provinces to have flexibility to impose more restrictive standards tailored to local conditions.

34. The further restrictions imposed by provincial legislation complement the purposes of the federal *Cannabis Act*. The federal Act creates a framework to "restrict and strictly regulate access to cannabis" in order to advance the stated objectives of the Act, which include protecting the health of young persons by restricting their access to cannabis; providing for the licit production of cannabis to reduce illicit activities related to cannabis; deterring illicit cannabis activities through sanctions; providing access to a quality-controlled supply of cannabis; and increasing public awareness of the health risks associated with cannabis use.[50] As discussed above, Quebec and Manitoba decided to ban home cultivation of cannabis and direct consumers to a regulated retail environment to further similar purposes. Far from frustrating these federal purposes, the prohibition on home cultivation advances complementary objectives.

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[49] Exhibit PGQ-4, House of Commons Debates, November 9, 2017, p. 15213, Appellant Record, vol. 15, p. 26 (English version: House of Commons Debates, 42-1, No. 233 (9 November 2017), p. 15191). See also Exhibit PGQ-4, House of Commons Debates, November 21, 2017, p. 15381, Appellant Record, vol. 15, p. 100 (English version: House of Commons Debates, 42-1, No. 235 (21 November 2017), p. 15359).

[50] Exhibit PGQ-4, House of Commons Debates, May 30, 2017, p. 11,646, Appellant Record, vol. 14, p. 106 (English version: House of Commons Debates, 42-1, No. 183 (30 May 2017), p. 11638); s. 7 of the *Cannabis Act*.

C. The Appellant's reliance on Hansard evidence

35. The Appellant relies on remarks made by Minister Petitpas-Taylor during parliamentary debates on Bill C-45 in support of his assertion that the federal *Cannabis Act* positively allows the residential cultivation of cannabis plants. Minister Petitpas-Taylor stated the government disagreed with a proposed amendment to the bill that would expressly state that provinces could prohibit home cultivation, because limited home cultivation would help displace the illicit cannabis market.[51] However, she also acknowledged that the provinces have the flexibility under the *Cannabis Act* to impose additional restrictions on personal cultivation and in fact noted that home cultivation could be restricted to one plant per residence.[52]

36. While Hansard is relevant to the background and purpose of legislation, courts must be mindful of its limited reliability and weight.[53] The Appellant places undue weight on statements that are ambiguous. The minister does not state unequivocally that the intention of the federal Act is to positively allow home cultivation and in fact notes that the provinces can impose additional restrictions.

37. There is nothing in the text of the federal *Cannabis Act* that evinces an intention to positively allow home cultivation of cannabis plants. As discussed, the Act sets out prohibitions as well as conditions under which the criminal law does not apply. It defines the scope of the criminal prohibition on cannabis; it does not positively allow conduct that falls below the criminal standard.

38. Further, if the prohibition on home cultivation of five or more plants does confer a positive entitlement to activity that falls below the criminal standard, as the Appellant asserts, then it must grant a right to the cultivation of four cannabis plants. However, the Appellant apparently concedes that although the provinces cannot prohibit home cultivation completely, they can restrict it. The implication is that the provinces can limit home cultivation to a single plant, but

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[51] Exhibit P-3, House of Commons Debates, June 13, 2018, pp. 20871-20873, Appellant Record, vol. 2, pp. 164-166.

[52] Exhibit P-3, House of Commons Debates, June 13, 2018, p. 20874, Appellant Record, vol. 2, p. 167.

[53] *Canadian National Railway Co. v. Canada (A.G.)*, 2014 SCC 40 [*Canadian National Railway*], para. 47; *Reference re Firearms Act*, para. 17; *R. v. Morgentaler*, [1993] 3 S.C.R. 463, pp. 484-485; *Reference re Genetic Non-Discrimination Act*, 2020 SCC 17 [*Reference re Genetic Non-Discrimination Act*], paras. 40-41.

cannot ban it completely. However, this interpretation is not grounded in the text of the *Cannabis Act*. If the *Cannabis Act* confers a positive right to engage in cultivation that falls below the criminal standard, then it must grant a positive entitlement to the cultivation of four plants.

39. Ultimately, the Appellant's argument that the federal Act permits *some* home cultivation is not found anywhere in the wording of the Act and results in significant uncertainty regarding the restrictions that a province can impose. How far can a province restrict home cultivation before it frustrates the federal purpose? For instance, can it limit home cultivation to a single crop a year from a single plant? Or does it have to permit multiple crops a year from four plants?

40. A further example of the interpretative issues that the Appellant's argument raises is with respect to the *Cannabis Act*'s prohibition on young persons possessing more than five grams of cannabis.[54] This prohibition is worded nearly identically to the prohibition on the possession of five or more cannabis plants in that it sets out a standard below which certain conduct is not prohibited (that is, possession of less than five grams). It appears to be undisputed that the prohibition does not confer a positive right on young persons to possess less than 5 grams of cannabis, and that the provinces can impose a complete prohibition on possession and consumption of cannabis by youth. However, it would be completely incongruous to conclude that although the provisions are phrased nearly identically, the *Cannabis Act* does not positively allow young persons to possess and consume cannabis, but does positively allow home cultivation, simply because of equivocal statements made during debates on Bill C-45.

41. As indicated above, for provincial legislation to be rendered inoperative due to frustration of purpose, it must be shown to be incompatible with a federal purpose.[55] Clear proof of purpose is required.[56] This is a high threshold to meet.[57] Manitoba submits that ambiguous remarks made during parliamentary debates are not sufficient to establish a federal purpose when there is nothing in the wording of the *Cannabis Act* itself indicating an intention to grant a positive right to home cultivation. The Appellant's argument that the *Cannabis Act* positively allows residential cultivation of cannabis is completely unmoored from the text of the *Cannabis Act*. While a useful extrinsic aid, statements made during debates cannot override specific text or the plain meaning

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[54] *Cannabis Act*, s. 8(1)(c).
[55] *COPA*, para. 66.
[56] *Lemare Lake Logging*, para. 26; *COPA*, para. 68; *Moloney*, para. 125.
[57] *COPA*, para. 66; *Lemare Lake Logging*, para. 26.

of an enactment.[58] Further, certain statements made by members of Parliament should not be privileged over those of other parliamentarians.[59]

42. In *Rothmans*, this Court rejected the argument that federal tobacco legislation enacted pursuant to the criminal law power granted a positive right to display tobacco products. In demarcating the scope of the criminal prohibition on tobacco advertising through an exemption that permitted the display of tobacco products in retail stores, Parliament "did not grant, and could not have granted, retailers a positive entitlement to display tobacco products", because defining the scope of a criminal offence does not create freestanding rights.[60] Given the restrained application of the doctrine of paramountcy, the Court was unwilling to impute that Parliament intended to "occupy the field" and render inoperative provincial legislation in the absence of very clear statutory language to that effect.[61] Likewise, an intention to remove the ability of the provinces to prohibit home cultivation should not imputed to Parliament in the absence of express statutory language.

43. Manitoba also submits that while not determinative, the fact that the Attorney General of Canada has not intervened in these proceedings regarding the purpose of the *Cannabis Act* and the jurisdiction of the federal criminal law power is relevant. This Court has stated that courts "should be particularly cautious about invalidating a provincial law when the federal government does not contest its validity".[62] The Attorney General of Canada's decision not to intervene in these proceedings militates against a finding that the Quebec and Manitoba legislation frustrates a federal purpose.

PART IV – COSTS

44. Manitoba does not seeks costs in this appeal and submits that no costs should be awarded against it.

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[58] *R. v. Khill*, 2021 SCC 37, para. 111; *Canadian National Railway,* para. 47.
[59] *Reference re Genetic Non-Discrimination Act*, para. 45.
[60] *Rothmans*, paras. 18-19.
[61] *Rothmans*, para. 21; see also *Lemare Lake Logging* at para. 27, citing *Canadian Western Bank v. Alberta*, 2007 SCC 22, para. 74.
[62] *Kitkatla Band*, paras. 72-73, citing *O.P.S.E.U. v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, pp. 19-20.

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

for:

DEBORAH CARLSON
KATHRYN HART

Counsel for the Intervener, Attorney General of Manitoba

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