Court File No. 39906

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC)

BETWEEN:

JANICK MURRAY-HALL

APPELLANT
(Respondent)

-and-

ATTORNEY GENERAL OF QUEBEC

RESPONDENT
(Appellant)

-and-

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

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

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PART I – OVERVIEW AND STATEMENT OF FACTS

1. The federal criminal law power cannot be interpreted in a manner that enables the creation of intractable issues at the local/provincial level.

2. While it is acknowledged that this Honourable Court is not a court of correction, the inevitable trajectory of the trial decision in these proceedings is (1) federal intrusion into provincial legislative jurisdiction under the auspices of permissive federal criminal law, and (2) provincial inability to address local/provincial issues arising from such intrusion.

3. It is well-established that permissiveness under the criminal law does not create substantive rights. Therefore, what is permitted under the criminal law may be prohibited by the provinces for valid provincial purposes without triggering paramountcy.

4. Alberta's intervention in these proceedings is motivated by the concern that current cannabis prohibitions under Alberta's *Gaming, Liquor, and Cannabis Act*[1] (*GLCA*) would be open to challenge under the trial court's reasoning. More broadly, Alberta is concerned that any of its regulatory prohibitions that co-exist with federal legislation might be open to challenge.

5. As a general proposition, it cannot be correct that provinces are not only precluded from legislatively addressing local conditions created by federal law, but are further relegated to expending scarce provincial resources to address the "fallout" of federally created issues.

6. Such a construal of the federal criminal power is absolutely contrary to principles of federalism and subsidiarity – the "dominant tide" of constitutional interpretation that favours the ordinary operation of statutes enacted by both levels of government – and the historical judicial restraint of this Court in applying the doctrines of paramountcy and interjurisdictional immunity in order to avoid a "centralizing" effect that undermines provincial legislative jurisdiction.

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[1] *Gaming, Liquor and Cannabis Act*, RSA 2000, c G-1.

(a) Alberta's cannabis regime

7. Alberta's *GLCA* regulates the importation, distribution, growth, transportation, storage, purchase, sale, possession, and use of cannabis in the province.

8. Currently, s. 90.27 of the *GLCA* permits individuals over 18 to grow cannabis in accordance with the federal *Cannabis Act* (that is, to grow a maximum of four plants).[2]

9. However, the *GLCA* features numerous prohibitions on possession and use of cannabis that are absent in *Cannabis Act*. Notably:

- Section 90.26 of *GLCA* prohibits minors from possessing cannabis (s. 8(1)(c) of the *Cannabis Act* permits individuals under 18 to possess a maximum of 5 grams of dried cannabis)

- Section 90.28 of the *GLCA* sets out prohibitions on the smoking and vaping of cannabis:

    - any area or place where that person is prohibited from smoking under the *Tobacco and Smoking Reduction Act* or any other Act or the bylaws of a municipality,

    - on any hospital property, school property or child care facility property,

    - in or within a prescribed distance from playgrounds, sports or playing fields, skateboard and bicycle parks, zoos, outdoor theatres, outdoor pools and splash pads.

- Section 115 of the *GLCA* prohibits individuals of all ages from being intoxicated in a public place through use of cannabis.

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[2] GLCA, *supra*, s 90.27.

PART II – STATEMENT OF POSITION ON CONSTITUTIONAL QUESTIONS

10. The Attorney General for Alberta takes the following position with respect to the stated constitutional questions in this Appeal:

(i) Did the judges of the Quebec Court of Appeal err in concluding that ss. 5 and 10 of the provincial Act are constitutionally valid? No.

(ii) Should the judgment of the Quebec Court of Appeal be reversed? No.

PART III – ARGUMENT

(a) Permissiveness and Paramountcy

11. This Court has established that (1) permissiveness under the criminal law does not create rights, (2) permissiveness does not preclude stricter provincial legislation where there is a provincial aspect to the matter, and (3) paramountcy is not triggered where provinces restrict or prohibit what the federal law merely permits.

12. In *Rothmans, Benson & Hedges Inc. v Saskatchewan* this Court upheld a provincial ban on the retail display of tobacco products in premises where minors are present despite permissiveness under the federal *Tobacco Act*.[3] Writing for a unanimous Court, Major J. stated,

> 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; *Ross v. Registrar of Motor Vehicles*, [1975] 1 S.C.R. 5; and *Spraytech*.[4]

13. In *R v Morgentaler*,[5] Beetz J. addressed the nature of a statutory exception to the criminalization of abortion under s. 251(4) of the Criminal Code:

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[3] *Rothmans, Benson & Hedges Inc. v Saskatchewan*, 2005 SCC 13 [*Rothmans*].
[4] *Ibid.* at para 19. [emphasis added]
[5] *R v Morgentaler*, [1988] 1 SCR 30.

> Given that it appears in a criminal law statute, s. 251(4) cannot be said to create a "right", much less a constitutional right, but it does represent an exception decreed by Parliament pursuant to what the Court of Appeal aptly called "the contemporary view that abortion is not always socially undesirable behaviour".[6]

14. In *Reference re Assisted Human Reproduction Act*, McLachlin C.J. again affirmed that legislative exceptions do not create positive rights:

> The federal criminal law power may only be used to prohibit conduct…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…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).[7] [emphasis added]

15. Because permissiveness under the criminal law does not create substantive rights, provincial prohibitions cannot trigger paramountcy:

- Operational conflicts cannot exist where provincial laws are more restrictive than federal laws (that is, dual compliance is always possible); and

- More restrictive provincial laws can only frustrate the purpose of federal legislation that provides a positive entitlement – more restrictive provincial laws cannot frustrate the purpose of merely permissive federal laws.[8]

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[6] *Ibid.* at 86. [emphasis added]
[7] *Reference re Assisted Human Reproduction Act*, 2010 SCC 61 at para 38 [*AHRA Reference*].
[8] *Alberta (Attorney General) v. Moloney*, 2015 SCC 51 at para 26.

16. Given the current state of the law, the trial decision is clearly incorrect. Moreover, it contains an unresolved contradiction that appears to completely undermine the court's reasoning: the trial court holds that provinces cannot prohibit what is authorized under federal criminal law (namely, the cultivation/possession of up to 4 cannabis plants) but they can legislate more restrictively for provincial purposes (anything more than 0).[9] This does not make sense. Surely, anything less than 4 plants constitutes a prohibition of the 4-plant authorization under the *Cannabis Act*. If this is the case, the trial decision actually supports the provincial ability to prohibit what is permitted in the *Cannabis Act*.

(b) Occupying the field, Federalism, and Subsidiarity

17. Fundamentally, the trial decision is simply an iteration of the long discredited "occupying the field" conception of federal jurisdiction that has been firmly rejected by Canadian courts. In this case, the trial court has concluded that permissiveness under the criminal law precludes provincial prohibitions touching upon the same subject matter even if they are not contradictory or inconsistent.[10]

18. The trial decision is in direct conflict with *Rothmans*, which is factually on all fours with this Appeal (indeed, *Rothmans* alone should be determinative of this Appeal). In *Rothmans*, Major J. for a unanimous Court found that permission to display tobacco products under the federal *Tobacco Act* did not preclude a provincial prohibition:

> I do not accept the respondent's argument that Parliament, in enacting 30, intended to make the retail display of tobacco products subject only to its own regulations. In my view, to impute to Parliament such an intention to "occup[y] the field" in the absence of very clear statutory language to that effect would be to stray from the path of judicial restraint in questions of paramountcy that this Court has taken since at least *O'Grady* (p. 820).[11]

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[9] *Murray Hall c Procureure générale du Québec*, 2019 QCCS 3664 at para 87.
[10] See P. W. Hogg, *Constitutional Law of Canada* (Toronto: Thomson Reuters, 2007) (loose-leaf ed.) at 16-20 – 16-26; *Chatterjee v Ontario (Attorney General)*, 2009 SCC 19 at para 35.
[11] *Rothmans* at para 21.

19. A "covering the field" conception of the federal criminal power necessarily creates inability at the provincial level. This is contrary to principles of federalism and subsidiarity.

20. The principle of federalism recognizes the diversity of the component parts of Confederation, and the autonomy of provincial governments to develop their societies within their respective spheres of jurisdiction. The federal structure of our country also facilitates democratic participation by distributing power to the government thought to be most suited to achieving the particular societal objective having regard to this diversity.[12]

21. The Canadian federation rests on the organizing principle that the orders of government are coordinate and not subordinate one to the other. As a consequence, a federal head of power cannot be given a scope that would eviscerate a provincial legislative competence. This is one of the principles that underlies the Constitution.[13]

22. The Constitution must be interpreted with a view to discerning the structure of government that it seeks to implement. The assumptions that underlie the text and the manner in which the constitutional provisions are intended to interact with one another must inform our interpretation, understanding, and application of the text."[14]

23. The "dominant tide" of constitutional interpretation finds its principled underpinning in the concern that a court should favour, where possible, the ordinary operation of statutes enacted by both levels of government. In the absence of conflicting enactments of the other level of government, the Court should avoid blocking the application of measures which are taken to be enacted in furtherance of the public interest. The court should try to restrict itself to role of interpreting statutes of different jurisdictions in the same area, in order to avoid conflict, and applying a doctrine of paramountcy in the few situations which remain.[15]

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[12] *Reference re Secession of Quebec*, [1998] 2 SCR 217 at para 58.
[13] *Reference re Securities Act*, 2011 SCC 66 at para 71.
[14] *Reference Re Senate Reform*, 2014 SCC 32 at para 26.
[15] *Canadian Western Bank v Alberta*, 2007 SCC 22 at para 37 [*Canadian Western Bank*].

24. Subsidiarity explicitly entered Canadian case law in *Spraytech*, where L'Heureux Dube J. stated that the principle "is the proposition that law-making and implementation are often best achieved at a level of government that is not only effective, but also closest to the citizens affected and thus most responsive to their needs, to local distinctiveness, and to population diversity."[16]

25. It is accepted that the division of powers in the *Constitution Act, 1867*,[17] adheres to the principle of subsidiarity, and the principle has been historically reinforced by decisions of this Court that have given provincial power over property and civil rights a broad interpretation.[18]

26. While subsidiarity can have both a centralizing or decentralizing effect due to the "effectiveness" requirement, this Court appears to view subsidiarity as an interpretive tool that can support a robust construal of provincial jurisdiction.

27. As an underlying constitutional principle, subsidiarity has a normative force that is binding upon courts and governments.[19]

28. Indeed, the case law demonstrates that subsidiarity has had a normative effect upon the decisions of this Court. Limitations upon the use of interjurisdictional immunity and the narrow threshold triggering paramountcy exist precisely because these doctrines have "asymmetrical" centralizing effects that undermine principles of federalism and subsidiarity.[20] Similarly, the "ancillary powers" doctrine can be viewed as means of ensuring that provinces are not rendered "incapable" of dealing with local matters.

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[16] *114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town)*, 2001 SCC 40 at para 3 [*Spraytech*].
[17] *Constitution Act, 1867*, (UK), 30 & 31 Vict, c 3, s 91, reprinted in RSC 1985, Appendix II, No 5.
[18] Hogg, *supra* at 5-14.
[19] *Reference re Secession of Quebec*, *supra* at para 54.
[20] See for example, *Canadian Western Bank*, *supra* at para 45.

29. Because constitutional doctrine must facilitate, and not undermine, principles of federalism and co-operative federalism,[21] subsidiarity should be construed as a substantive normative principle that prevents the unnecessary limitation or sterilization of provincial legislative jurisdiction.

30. In *Reference re Assisted Human Reproduction Act*, McLachlin C.J. limited the principle of subsidiarity to matters involving a double aspect:

> [S]ubsidiarity does not override the division of powers in the *Constitution Act, 1867*. L'Heureux-Dubé J. cautioned that "there is a fine line between laws that legitimately complement each other and those that invade another government's protected legislative sphere" (*Spraytech*, at para. 4), and she noted that subsidiarity allows only the former. Subsidiarity might permit the provinces to introduce legislation that complements the Assisted Human Reproduction Act but it does not preclude Parliament from legislating on the shared subject of health. The criminal law power may be invoked where there is a legitimate public health evil, and the exercise of this power is not restricted by concerns of subsidiarity.[22] [emphasis added]

31. The principle of subsidiarity applies in this case because Quebec's provincial prohibition on cultivation/possession is complementary to the purposes of the *Cannabis Act*.

32. In *Rothmans*, the Court upheld a provincial prohibition on tobacco display, *inter alia*, on the basis that the federal permission itself appeared to undermine the federal legislative purpose:

> [I]t is difficult to imagine how granting retailers a freestanding right to display tobacco products would assist Parliament in providing "a legislative response to a national public health problem of substantial and pressing concern" (*Tobacco Act*, s. 4). To put it slightly differently, an interpretation of s. 30 as granting retailers an entitlement to display tobacco products is unsupported by, and perhaps even contrary to, the stated purposes of the *Tobacco Act*.[23]

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[21] *Ibid.* at para 24.
[22] *AHRA Reference*, *supra* at para 72.
[23] *Rothmans*, *supra* at para 20.

33. Similarly, in the present proceedings it is difficult to see how federal permission allowing adults to cultivate and possess up to four cannabis plants, and minors to possess up to 5 grams of cannabis actually supports legislation that is explicitly targeted at public health and safety, and the protection of young persons. On this basis then, provincial prohibitions clearly support the purposes of the *Cannabis Act*, and so are complementary to the federal legislation.

34. In this case then, the principle of subsidiarity supports the proposition that the challenged provincial prohibitions should be upheld by the Court on the basis that they are in the first instance "effective", and are also being enacted by the most proximate level of government to address the matter.

(c) Provincial authority to address local issues

35. This Appeal provides an opportunity for this Court to re-affirm that provinces have considerable latitude to deal with the suppression of crime, public health, and issues of local morality, without thereby intruding upon the federal criminal power.

36. With respect to issues of public safety, this Court has stated that "it is the duty of the legislature to do the utmost it can within its power to anticipate and remove, so far as practicable, whatever is likely to tend to produce crime; and yet not produce worse forms of it, or tending thereto."[24] And with respect to public health, "the criminal law cannot be used to eviscerate the provincial power to regulate health."[25]

37. Further, it is clear that provincial prohibitions touching upon moral issues do not constitute *de facto* intrusions into the federal criminal law.

38. In *Nova Scotia Board of Censors v McNeil*, [26] the Court upheld provincial legislation prohibiting the exhibition of the movie, *Last Tango in Paris*:

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[24] *Bédard v Dawson*, [1923] SCR 681 at 684
[25] *AHRA Reference*, *supra* at para 77.
[26] *Nova Scotia Board of Censors v McNeil*, [1978] 2 SCR 662.

> [M]orality and criminality are far from coextensive and it follows in my view that legislation which authorizes the establishment and enforcement of a local standard of morality in the exhibition of films is not necessarily "an invasion of the federal criminal field" as Chief Justice MacKeigan thought it to be in this case…Even if I accepted the view that the impugned legislation is concerned with criminal morality, it would still have to be noted that it is preventive rather than penal and the authority of the Province to pass legislation directed towards prevention of crime is illustrated by the case of *Bédard v. Dawson.*

39. In *Siemens v Manitoba (Attorney General)*[27], the Court upheld municipal prohibitions of video lottery terminals in local establishments. The Court rejected the argument that the dominant purpose of the legislation was to regulate public morality, while also holding that moral considerations do not necessarily invalidate provincial laws. Writing for a unanimous Court, Major J. stated,

> [T]he presence of moral considerations does not *per se* render a law *ultra vires* the provincial legislature. In giving Parliament exclusive jurisdiction over criminal law, the *Constitution Act, 1867* did not intend to remove all morality from provincial legislation. In many instances, it will be impossible for the provincial legislature to disentangle moral considerations from other issues. For example, in the present case, it is difficult to ignore the various social costs associated with gambling and VLTs. As the Desjardins Report, *supra*, examined in detail, government-run gambling can have adverse social consequences, including addiction, crime, bankruptcy, and reductions in charitable gaming. The provincial government can legitimately consider these social costs when deciding how to regulate gaming in the province. The fact that some of these considerations have a moral aspect does not invalidate an otherwise legitimate provincial law.[28]

(d) Absurd Consequences

40. It is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. An interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment. Absurdity can also be attached to

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[27] *Siemens v Manitoba (Attorney General)*, 2003 SCC 3 [*Siemens*].
[28] *Ibid.* at para 30.

interpretations which defeat the purpose of a statute or render some aspect of it pointless or futile.[29]

41. While the presumption against absurdity is a principle of statutory interpretation, it has a constitutional analog in the observation by this Court that "a federal head of power cannot be given a scope that would eviscerate a provincial legislative competence".[30] Judicial interpretation of the criminal law power in a manner that eviscerates provincial jurisdiction results in absurdity because it is contrary to the principles of federalism that guide our understanding of the division of powers.

42. The *Cannabis Act* explicitly recognizes that provinces have the ability to prohibit the sale, production, and distribution of cannabis. As set out in s. 2(1) of the *Cannabis Act*,

> **illicit cannabis** means cannabis that is or was sold, produced or distributed by a person prohibited from doing so under this Act or any provincial Act or that was imported by a person prohibited from doing so under this Act.[31] [emphasis added]

43. Contrary to the Appellant's assertions, this is obviously not a delegation of the federal criminal power to the provinces.[32] This is an example of cooperative federalism, wherein the federal legislation recognizes that provinces have legislative jurisdiction under ss. 92(13) and (16) of the *Constitution Act, 1867*, to prohibit the sale, production, and distribution of cannabis for provincial purposes.

44. The situation here is the same as that in *Siemens*, where the Court noted that "Parliament has intentionally designed a structure for gaming offences that affirms the double aspect of gaming and promotes federal-provincial cooperation in this area."[33]

45. The wording of the *Cannabis Act* acknowledges that regulation of cannabis is a matter having both provincial and federal aspects.

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[29] *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 at para 27.
[30] *Reference re Securities Act*, *supra* at para 71.
[31] *Cannabis Act*, SC 2018, c 16, s 2(1).
[32] Appellant's factum at para 26.
[33] Siemens at para 35. [emphasis added]

46. In these proceedings then, it is absolutely clear that Parliament did not intend to create a situation whereby provinces are rendered incapable of prohibiting the sale, production, and distribution of cannabis for provincial purposes. Parliament did not intend that the *Cannabis Act* would have absurd consequences at the provincial level.

47. The fact that the Attorney General of Canada is not intervening in these proceedings supports this view. Clearly, the Attorney General of Canada understands that every intervening province would take the uncontentious position that provinces have the ability to prohibit activities that are merely permitted under federal law.

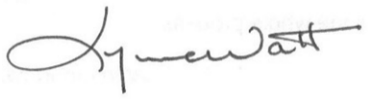
PART IV – SUBMISSIONS CONCERNING COSTS

48. The Attorney General of Alberta does not seek any costs and requests that no order for costs be made against the Attorney General of Alberta.

PART V – RELIEF REQUESTED

49. The Attorney General of Alberta supports the Respondent's request that this Appeal be dismissed.

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



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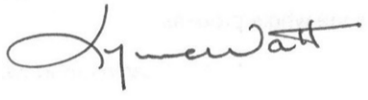

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PART VII – AUTHORITIES & LEGISLATION

Case Law:	**Paragraph References (to Factum)**
114957 Canada Ltée (Spraytech, Société d'arrosage) v Hudson (Town), 2001 SCC 40	24
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