File No. 39906

SUPREME COURT OF CANADA

(ON APPEAL FROM A JUDGMENT OF THE COURT OF APPEAL OF QUÉBEC)

BETWEEN:

JANICK MURRAY-HALL

APPELLANT
(Respondent)

- and -

ATTORNEY GENERAL OF QUÉBEC

RESPONDENT
(Appellant)

- and -

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CANNABIS AMNESTY
CANNABIS COUNCIL OF CANADA AND
QUEBEC CANNABIS INDUSTRY ASSOCIATION

INTERVENERS

FACTUM OF THE INTERVENER, CANADIAN ASSOCIATION FOR PROGRESS IN JUSTICE

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

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FACTUM OF THE INTERVENER, CANADIAN ASSOCIATION FOR PROGRESS IN JUSTICE

PARTS I & II – OVERVIEW, STATEMENT OF POSITION AND FACTS

1. This is a case of uncooperative federalism. Parliament's adoption of the *Cannabis Act*, SC 2018, c. 16 ("**CA**") represents not only a sea change in the Canadian approach to regulation of cannabis but also an innovative attempt to use interjurisdictional cooperation to manage the roll-back of the criminal law. Specifically, the federal legislation prohibits certain forms of possession, sale, and consumption of cannabis, but it also invites, and depends upon, provinces to pass their own laws to regulate the legal market for cannabis. In this regard, Quebec has enacted the *Cannabis Regulation Act*, CQLR c. C-5.3 ("**CRA**").

2. What happens when a province chooses, in some material respect, to not really cooperate? The CRA directly countermands the new line drawn in the criminal law with respect to possession and cultivation of cannabis plants in a dwelling-house. This Court is now asked to determine whether certain provisions of the CRA exceed provincial jurisdiction or cannot operationally coexist with the federal law. To do so requires revisiting the application of the doctrines of colourability and paramountcy in the context of a cooperative federal criminal law.

3. At the stage of determining a law's validity, "colourability" is best understood as a description of a state of affairs in which legislation that facially may appear to come within the enacting legislature's power is actually outside it. In this sense, analysis of colourability asks fundamentally the same questions as the "ordinary" pith and substance analysis. As has been clear since the *Firearms Reference*, the validity inquiry is *always* about the law's "true meaning or essential character, its core", discerned with reference to purpose and legal effect.[1] When a provincial law comes cloaked in the sheep's clothing of a licensing offence, but actually has as its essential character the reversal of the legal consequences of a criminal law, that law is "colourable". If that is the law's essential character, it does not matter that the province may *also* have acted in pursuit of a provincial purpose. It is in pith and substance a matter of criminal law, and hence, invalid.

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1 *Reference re Firearms Act (Can.)*, 2000 SCC 31, para. 16 [***Firearms Reference***]

4. Likewise, in the assessment of the operability of provincial legislation, determining whether a provincial law frustrates a federal purpose requires a careful assessment of the interaction between the federal and provincial laws, and their respective legal consequences, viewed in light of the objectives that legitimize Parliament's exercise of federal power. In this respect, while it may not be Parliament's prerogative to "occupy the field" (which clearly it did not intend here to do in any event), at the same time it is not for a province to examine the field, and then decide to move the line that Parliament has drawn.

5. The courts below failed to sufficiently consider the legal effects of the interaction of the federal and provincial laws in question, through either of the lenses described above. Sections 5 and 10 of the CRA create not just regulatory prohibitions but, because of their interplay with the *Cannabis Act*, also *criminal* ones. Consequently, (1) these provisions are colourable, because their essential character is directed at the making of criminal law — it is to undo the effects of Parliament's legislative decision to decriminalize possession and cultivation of small quantities of cannabis plants; or, alternatively, (2) these provisions are inoperative, because they frustrate Parliament's objective of decriminalizing certain acts to lessen the cannabis-related burden on the criminal justice system.

PART III – STATEMENT OF ARGUMENT

A. Sections 5 and 10 of the *Cannabis Regulation Act* create criminal offenses

6. Until late 2018, possession of cannabis was generally prohibited across Canada by virtue of the *Controlled Drugs and Substances Act*, SC 1996, c. 19 ("**CDSA**"), which Parliament adopted through its power to enact criminal laws pursuant to s. 91(27) of the *Constitution Act, 1867*.[2] Cannabis was Item 1 on Schedule II of the CDSA; possession, sale, and distribution of scheduled items are generally prohibited.[3]

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[2] The validity under s. 91(27) of the CDSA's predecessor legislation, the *Narcotic Control Act*, was confirmed by this Court in *R. v. Caine; R. v. Malmo-Levine*, 2003 SCC 74, paras. 73-78

[3] See CDSA ss. 4(1), 4(2), 5(1), and 7(1)

7. The coming into force of the *Cannabis Act* on October 17, 2018 represented Parliament's decision to shift from a completely prohibitory approach to a regulatory one. This shift was marked notably by the adoption of s. 204(1) of the CA, which repealed Item 1 of Schedule II, removing cannabis from the CDSA altogether. Cannabis would no longer be subject to a near-total ban.

8. Instead, Parliament adopted a cooperative approach to the regulation of cannabis as both a licit and illicit substance. The CA itself, still an exercise of Parliament's criminal law power, is principally prohibitory legislation, but through tailored prohibitions of specific activities it carves out space for the existence of a legal market for cannabis. The provinces and territories are then each responsible for enacting legislation to regulate such legal markets within their respective jurisdictions.

9. The combined effect of the removal of cannabis from Schedule II of the CDSA and the creation of new, tailored prohibitions, is that acts in relation to cannabis that fall outside the scope of these prohibitions are no longer subject to the threat of criminal prosecution. The legal effect of s. 8(1)(a) CA, for instance, is twofold: possession of over 30 g of dried cannabis in a public place becomes a crime; simultaneously, possession of 30 g or fewer is *decriminalized.*

10. Similarly, ss. 8(1)(e) and 12(4) CA prohibit, respectively, possession of more than four cannabis plants as well as their cultivation in a dwelling-house. The legal effect of these provisions is at once the prohibition of these specific activities and, as the Court of Appeal correctly noted (para. 117), the decriminalization of possession and cultivation in a dwelling-house of four plants or fewer.

11. However, Parliament has also created criminal offences whose content is not established by the CA alone, through the adoption of prohibitions on the possession, distribution, and cultivation of "illicit cannabis".[4] "Illicit cannabis" is defined in s. 2 as "cannabis is or was sold, produced or distributed by a person prohibited from doing so under this Act or any provincial Act."

12. In this respect the novelty of Parliament's endeavour at cooperative federalism comes into focus: the content of some of the CA's criminal prohibitions depends in part on the content of provincial

[4] See ss. 8(1)(b), 9(1)(a)(iv), 12(4)(a), and 13(1) CA

legislation. Where a province prohibits, e.g., the sale of certain types of cannabis, that cannabis becomes "illicit" under federal law and thus, subject simultaneously to the provincial law *and* to the criminal prohibitions in ss. 8(1)(b), 9(1)(a)(iv), 12(4)(a), and 13(1) CA.

13. Sections 5 and 10 of Quebec's CRA must be examined in this context. Section 5 prohibits possession of a cannabis plant; s. 10 prohibits the cultivation of cannabis plants for personal purposes. Contravention of these prohibitions may result in a fine ranging from $250 to $750.

14. The legal effect of ss. 5 and 10 is twofold. Certainly, these prohibitions create *provincial* offences relating to the possession and cultivation of cannabis plants in the domicile. But these prohibitions also transform such plants into "illicit cannabis" whose possession, cultivation, and production have been prohibited by Parliament through the exercise of its criminal law jurisdiction.

15. In short, while ss. 8(1) and 12(4) of the CA *decriminalize* possession and cultivation in a domicile of four or fewer plants, the legal effect of the interaction of ss. 5 and 10 of the CRA with the CA's definition of "illicit cannabis" is that these very same activities are *recriminalized*.

B. The impugned provisions are colourable

16. The Superior Court judge concluded her analysis of the pith and substance of ss. 5 and 10 CRA with a determination that these provisions are colourable, or "*legislation déguisée*" (QCCS para. 98). To the Court of Appeal, this determination was untenable because the declared purpose of the impugned provisions, i.e. protection of public health through the control of distribution of quality cannabis product, was in fact their actual purpose (QCCA para. 77).

17. While colourability is most often assessed by searching for a dissonance between the stated objective of a law and its "true" purpose, typically as revealed through legislative debates,[5] that does not exhaust the inquiry. In *Morgentaler*, the Court noted that "the colourability doctrine really just restates the basic rule … that form alone is not controlling in the determination of constitutional character, and that the court will examine the substance of the legislation

[5] See e.g. *Reference re: Upper Churchill Water Rights Reversion Act,* [1984] 1 SCR 297, p. 332

to determine what the legislation is really doing."[6] While extrinsic evidence of "improper" purpose can certainly be revealing of colourability, the legal effects of the law considered in their entire context may also be relevant.[7]

18. Thus, in *Morgentaler*, this Court looked "beyond the four corners" of Nova Scotia's abortion restrictions by examining the operation of the provincial law in the broader context of federal criminal prohibitions on abortion. Among other things, the Court observed that the provincial law "has an impact and effect on abortions in private clinics virtually indistinguishable from that of" a then-defunct criminal provision.[8] While acknowledging that identical legal effect is not necessarily determinative of the provincial law's invalidity, the Court noted that "duplication of *Criminal Code* language may raise an inference that the province has stepped into the realm of the criminal law,"[9] and further stated that "[t]he guiding principle is that the provinces may not invade the criminal field by attempting to stiffen, supplement or replace the criminal law or to fill perceived defects or gaps therein."[10]

19. Ultimately, the Court concluded that the overlap of legal effects between the defunct criminal provision and the impugned provincial legislation was "a piece in the puzzle" which, along with other evidence, demonstrated the true aim and operation of the provincial legislation.[11]

20. The analysis of the legal effects of impugned provisions in the assessment of colourability is not restricted to *Morgentaler*. In the *Upper Churchill Water Rights Reversion Act Reference,* the fact that the effect of the impugned Act would be to destroy Hydro-Quebec's right to receive power according to the terms of its contract with Newfoundland (that is, it would affect the rights of a party in another province, which Newfoundland could not constitutionally do) contributed to the Court's conclusion that the Act was "a colourable attempt to interfere with the Power Contract and thus to derogate from the rights of Hydro-Quebec."[12]

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6 *R. v. Morgentaler,* [1993] 3 SCR 463, p. 497

7 See also *Firearms Reference,* para. 18: "a law may say that it intends to do one thing and actually do something else", where "the effects of the law diverge substantially from the stated aim" (emphasis added)

8 *R. v. Morgentaler,* citing the Court of Appeal decision at pp. 367 and 371-372

9 *R. v. Morgentaler,* p. 498 (emphasis added)

10 *Ibid* (emphasis added), citing *Scowby v. Glendinning,* [1986] 2 SCR 226, p. 238

11 *R. v. Morgentaler,* p. 499

12 *Reference re: Upper Churchill Water Rights Reversion Act,* p. 333

21. At the end of the day, the question is whether a law is "one that in form appears to relate to a matter within the legislative competence of the enacting order of government, but in substance addresses a matter falling outside its competence."[13] While a finding that the real objective of legislation is something other than its stated purpose[14] is one means of establishing colourability, and legislative debates may certainly assist in making such a determination, the true substance of a law can also be detected by analyzing the law's effects in the entire context.

22. In the present case, as the Court of Appeal's decision demonstrates, the legal effects of ss. 5 and 10 CRA examined alone might not give rise to any reason to question their validity. That changes when the interaction of the impugned provisions with the federal legislation is considered.

23. The Court's more recent decision in *Quebec (Attorney General) v. Canada (Attorney General)* provides a crucial lynchpin for this analysis. That case was about the abolition of the long gun registry and involved a challenge to the provision of the repealing legislation that required destruction of the registration data. Because the *Firearms Reference* had classified the registration scheme as criminal law, a majority of the Court held that the repealing legislation must be characterized in the same way. In other words: when Parliament relaxes criminal law in a managed way, the legislation by which it does so is *still criminal law*. Coupling that holding with the more general contextual approach described in *Morgentaler*, it follows that a provincial attempt to unroll the roll-back of the CDSA (itself already classified as criminal law) must likewise be characterized as an attempt at *making* criminal law.

24. Thus, while ss. 5 and 10 might not duplicate any provisions of the *Criminal Code* or CDSA, their true legal effect is to undo what Parliament has done by removing cannabis from the list of substances subject to a near-total ban and tailoring the criminal prohibitions in ss. 8(1) and 12(4) of the CA to forbid specific types of behaviour. Despite Parliament's decriminalization of possession and domicile cultivation of four or fewer plants, the provincial prohibitions on those very same activities[15] recriminalize them.

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13 *Quebec (Attorney General) v. Canada (Attorney General)*, 2015 SCC 14, para. 31; see also *RJR-MacDonald inc. v. Attorney General of Canada*, [1995] 3 SCR 199, p. 236

14 *Reference re: Impact Assessment Act*, 2022 ABCA 165, para. 287

15 In fact, s. 10 of the CRA even explicitly refers to "cultivating four cannabis plants or less" in a dwelling-house (emphasis added)

25. If that alone were not enough, then the extrinsic evidence relating to the adoption of ss. 5 and 10 provides the other piece of the puzzle. The Court of Appeal itself identified statements that demonstrate that the Quebec legislator acted to counter Parliament's decision to leave room for licit possession and cultivation of cannabis plants.[16] While Quebec apparently did so to protect health – a legitimate provincial purpose – this, again, is not determinative of the inquiry. The legislators in *Morgentaler* similarly said that their intention was the ordinary regulation of health services in the province. In this case, the potential co-existence of a valid provincial purpose does not negate the fact that (1) Quebec's legislators sought to counteract or limit the effects of the federal legislation, and (2) the consequence of ss. 5 and 10 is ultimately to stiffen the criminal law by replacing the criminal prohibitions that Parliament had repealed.

26. In short, while ss. 5 and 10 CRA appear in form to relate to a matter within the legislative competence of the province, in substance they undo Parliament's decriminalization of certain forms of possession and cultivation of cannabis plants, and thus, colourably address a matter falling outside the province's jurisdiction.

27. That said, not all provincial regulations that result in the creation of criminal prohibitions through the CA's definition of "illicit cannabis" will be colourable. The provinces retain substantial scope to craft regulatory frameworks for cannabis. Here, a finding of colourability flows from the legal effects of ss. 5 and 10 (namely, direct reversal of decriminalization), as well as the extrinsic evidence that Quebec legislators consciously sought to reverse Parliament's actions. While one or the other may suffice to indicate colourability, in most cases, neither indicator will be present.

C. The impugned provisions frustrate Parliament's purpose

28. The Court has cautioned that "clear proof of purpose is required to successfully invoke federal paramountcy on the basis of frustration of federal purpose."[17] In this vein, while s. 7 of the CA contains an expansive statement of the multiple purposes of the Act as a whole, the paramountcy analysis requires establishing the purpose of ss. 8 and 12 specifically.

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16 QCCA, paras. 73-76 and extracts of legislative debates cited therein

17 *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, para. 45; see also *Alberta (Attorney General) v. Moloney*, 2015 SCC 5, para. 86

29. The Court of Appeal held that the intrinsic and extrinsic evidence in relation to ss. 8 and 12 CA did not provide clear proof that these provisions were adopted to provide for the licit production of cannabis (s. 7(c)). Rather, ss. 8 and 12 seem most closely related to s. 7(e) of the CA, namely the aim of reducing the burden on the criminal justice system in relation to cannabis. The federal provisions are one of the means Parliament chose to achieve this goal: "[*l*]*a décriminalisation des cas de possession et de culture de quatre plantes ou moins permet sans doute l'atteinte de l'objectif d'allégement relatif du fardeau du système de justice pénale*" (QCCA para. 119). In this respect, the Court of Appeal got it right.

30. However, both the Court of Appeal and the Respondent then focus exclusively on the legal effects of the provincial provisions alone: both ask whether the *monetary penalties* imposed by ss. 5 and 10 CRA thwart Parliament's aim of reducing the burden on the criminal justice system in relation to cannabis (QCCA para. 119; RF para. 109). In this regard, the Court of Appeal concluded that "*les montants relativement modestes de ces amendes font en sorte qu'elles sont peu susceptibles d'inciter les contrevenants à s'engager dans des procès longs et coûteux*" (para. 120).

31. Respectfully, this analysis is incomplete. The Court of Appeal failed to fully assess the legal effects of the impugned provisions. Notably, the Court said that contravention of the provincial law does not result in the *criminalization* of the offenders (para. 120); but this ignores the interaction of ss. 5 and 10 CRA with the CA's criminal prohibitions relating to "illicit cannabis". Direct *re*-criminalization *is* the consequence of the CRA.

32. The question then becomes whether the resulting recriminalization of activities that Parliament expressly decriminalized frustrates the purpose of ss. 8 and 12 of the CA.

33. To be clear, to answer this question, this Court need not conclude that in adopting ss. 8 and 12 of the CA, Parliament sought to *permit* possession or cultivation of cannabis. In rejecting the Appellant's argument to this effect, the Court of Appeal correctly pointed out that the jurisprudence has not yet recognized the possibility of Parliament using the criminal law power to *authorize* behaviours as opposed to simply prohibiting them (para. 137). That, probably, is as it should be.

34. That said, if the goal of decriminalizing possession and cultivation of four plants or fewer is to reduce the burden on the criminal justice system in relation to cannabis, it is difficult to see how

Parliament's purpose is *not* frustrated here. By bringing that conduct within the ambit of "illicit cannabis", the impugned provisions essentially undo one of Parliament's chosen means of attaining its objective by reimposing the very same burden of investigation, prosecution, and other enforcement that ss. 8 and 12 CA intended to eliminate.

35. This Court's decision in *Moloney* provides a helpful point of comparison. The majority in that case held in *obiter* that the impugned provincial legislation, which allowed Alberta to enforce a debt resulting from an accident caused by an uninsured but bankrupt driver, frustrated Parliament's purpose in adopting s. 178(2) of the *Bankruptcy and Insolvency Act* – which provides for the discharge of certain debts in bankruptcy – because the aim of s. 178(2) is to permit the financial rehabilitation of the bankrupt. In this regard, Gascon J. noted that "[i]n furthering financial rehabilitation, Parliament expressly selected which debts survive bankruptcy and which are discharged."[18]

36. The tailored prohibitions in ss. 8 and 12 CA likewise represent an express selection of the activities that Parliament has decided should be subject to criminal prosecution, versus those whose prosecution Parliament considers would needlessly tax the criminal justice system. As stated at the outset: when Parliament has drawn this kind of line, it is not for a province simply to move it. Where Parliament has made an explicit choice to exempt certain acts from criminal liability, the recriminalization of these same acts through the operation of provincial legislation runs contrary to Parliament's choice to reduce the burden on the criminal justice system in relation to cannabis.

37. Of course, this is not to say that in adopting the CA, Parliament sought to rule out all possible provincial action in respect of cannabis use.[19] As with the analysis of validity, it does not follow that *any* limit a province imposes on the possession, sale, or cultivation of cannabis will necessarily frustrate Parliament's intent. The CA obviously envisions the enactment of provincial legislation, with the reference to provincial law in the definition of "illicit cannabis" confirming that Parliament assumes and expects that valid provincial laws that are compatible with Parliament's

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18 *Moloney*, para. 79

19 *Canadian Western Bank v. Alberta,* 2007 SCC 22, para. 74; see also *Rothmans, Benson & Hedges Inc. v. Saskatchewan,* 2005 SCC 13, para. 21

objectives will be enacted and apply.[20] For the most part, the broadly worded prohibitions on "illicit cannabis" leave the provinces great latitude to adopt different approaches to the regulation of the cannabis market.

38. However, where Parliament has adopted more tailored criminal prohibitions, that tailoring must matter. It would be illogical to find that mere contemplation of provincial laws demonstrates an intention to permit the recriminalization of acts that Parliament had expressly decriminalized through other provisions of the CA, particularly where such decriminalization aims to reduce the burden on the criminal justice system in relation to cannabis. Accordingly, the CA cannot be considered "purely" permissive, or "mere permissive federal legislation",[21] like the federal laws at issue in *Spraytech*, *Ryan Estate*, and *Canadian Western Bank*. Were that the case, Parliament would have refrained from creating tailored prohibitions in this respect of these activities – or would simply have left the CDSA in place.

PARTS IV & V – COSTS AND ORDER SOUGHT

39. This intervener takes no position on the disposition of the appeal, and seeks no order as to costs, for or against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Montréal, August 12, 2022

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20 See *Canadian Western Bank*, para. 103; *Marine Services International Ltd. v. Ryan Estate*, 2013 SCC 44, paras. 76-77; *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40, para. 35

21 See Respondent's Factum, para. 112

PART VI –TABLE OF AUTHORITIES
