S.C.C. File No. 39906

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

B E T W E E N :

JANICK MURRAY-HALL

Appellant

- and -

ATTORNEY GENERAL OF QUÉBEC

Respondent

- and -

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Interveners

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PART I—OVERVIEW

1. Home cultivation of cannabis was illegal. Parliament legalized it. Québec and Manitoba then prohibited it. A question of federal paramountcy arises: May a province effectively undo Parliament's legislative initiative by prohibiting that which the federal *Cannabis Act* (the "**federal law**")[1] purposefully authorizes? This Court should answer that question in the negative.

2. Québec's *Cannabis Regulation Act*[2] (the "**provincial law**") came into force at the same time as the federal *Cannabis* Act. Parliament legalized cannabis cultivation and (in the House of Commons' words)[3] "permit[ted]" possession of up to four cannabis plants per household.[4] The provincial law, meanwhile, bans all possession of cannabis plants for the purpose of non-medical personal cultivation.[5] In this way, the provincial law specifically prohibits what the federal law specifically allows. The Cannabis Council of Canada and l'Association québécoise de l'industrie du cannabis (together, the "**Industry Coalition**") make two submissions on this conflict.

3. ***First***, the Constitution limits provincial authority to regulate cannabis in the face of permissive federal legislation. The doctrine of federal paramountcy, applied to cannabis regulation, provides a framework for delineating the scope of provincial authority. The federal law does not leave a void that provinces can fill. Rather, the federal law purposefully allows Canadians to engage in certain activities involving cannabis that were previously subject to criminal penalties. A provincial prohibition of that which Parliament has specifically authorized creates a conflict between federal legislation and provincial legislation. The former says "yes" while the latter says "no".[6]

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1 S.C. 2018, ch. 16 (the "***Cannabis Act***").

2 RLRQ, c. C-5.3.

3 Hon. Ginette Petitpas Taylor, extracts from the transcript of the House of Commons Debates, June 13, 2018, Appellant's Record, Vol. 2, Tab P-3 p. 164; Legislative Background: *An Act respecting cannabis and to amend the Controlled Drugs and Substances Act, the Criminal Code and other Acts* (Bill C-45), May 2019, p. 20, https://publications.gc.ca/pub?id=9.836888&sl=0.

4 *Cannabis Act*, ss. 8(1)(e), 12(4)(b) (the "**home cultivation provisions**"). Section 12(5) of the *Cannabis Act* limits households to no more than four plants.

5 *Cannabis Regulation Act*, *supra* note 1, ss. 5, 10 (the "**impugned provisions**").

6 *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161 at p. 191.

4. The provincial restrictions at issue in this appeal frustrate Parliament's purpose. Parliament considered and rejected leaving scope for provinces to prohibit home cultivation, because Parliament viewed home cultivation as an essential tool to combat the illicit cannabis market. Yet the provincial law forecloses Parliament's intended reliance on home cultivation for this purpose. On federal paramountcy principles, this is an impermissible conflict — one that shows how courts may use the doctrine of federal paramountcy to assess the constitutionality of provincial cannabis restrictions.

5. ***Second***, the Industry Coalition provides an overview of home cultivation regulations in other provinces and territories. This brief jurisdictional survey assists to explain the potential ramifications of the Court's disposition of the present appeal. Since Québec and Manitoba are the only two provinces that prohibit home cultivation, applying the doctrine of federal paramountcy in this context would not disrupt the regulation of cannabis home cultivation generally: the vast majority of jurisdictions have taken an approach that is consistent with Parliament's purpose.

PART II—STATEMENT OF ARGUMENT

1. Federal Paramountcy Offers a Framework To Resolve this Appeal

6. If this Court concludes that the impugned provisions are valid, the Court will then have to consider whether the impugned portions of the provincial law are inoperative because they conflict with the federal law. In the event of a conflict, Parliament has the final say in respect of matters falling with valid federal jurisdiction.[7] Both forms of conflict — operational and frustration of purpose — arise in this case.[8]

7. The *Cannabis Act* is affirmatively permissive: it legalizes activities, including home cultivation of cannabis, which had previously been subject to criminal penalties under the *Controlled Drugs and Substances Act*.[9] Provincial regulations may limit what Canadians can otherwise lawfully do under the federal legislation. For example, provinces may set conditions on

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[7] *British Columbia (Attorney General) v. Lafarge Canada Inc.*, 2007 SCC 23 at para. 83.

[8] *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, 2005 SCC 13 at paras. 11-14.

[9] S.C. 1996, c. 19.

home cultivation, or even reduce the number of plants each person may possess.[10] But paramountcy issues arise when restrictive provincial legislation categorically prohibits what permissive federal legislation affirmatively authorizes. So it is here.

A. Operational Conflict May Arise When a Provincial Law Prohibits What a Federal Law Allows

8. Operational conflict arises "where one enactment says 'yes' and the other says 'no'".[11] This Court has often used the term "express contradiction" to describe an operational conflict. In *Moloney*, the majority clarified that "an express contradiction is nothing more than a clear, direct or definite conflict in operation, as opposed to an indirect or imprecise one."[12] The majority was clear that an express contradiction "is not an additional condition for a finding of actual conflict in operation".[13]

9. This appeal presents an opportunity for this Court to clarify the standard for operational conflict where provincial cannabis regulation is concerned. This Court has never considered federal paramountcy in circumstances in which Parliament has removed a criminal prohibition, as it has done with respect to cannabis.[14]

10. Cases involving provincial prohibitions on legal cannabis products and cultivation may consequently differ from cases in which this Court has held that restrictive provincial legislation in other areas does not conflict with federal legislation in those areas. In such cases, Parliament has not authorized certain activities by removing a criminal prohibition, but rather has prohibited certain activities while leaving other activities unregulated federally. When a province implements

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[10] As discussed below, Parliament specifically contemplated that a province might restrict home cultivation to one plant per household: Hon. Ginette Petitpas Taylor, extracts from the transcript of the House of Commons Debates, June 13, 2018, Appellant's Record, Vol. 2, Tab P-3 p. 166 (emphasis added).

[11] *Orphan Well Association v. Grant Thornton*, 2019 SCC 5 at para. 65; *Multiple Access Ltd. v. McCutcheon*, [1982] 2 SCR 161 at p. 191.

[12] *Alberta (Attorney General) v. Moloney*, 2015 SCC 51 at para. 22.

[13] *Alberta (Attorney General) v. Moloney*, 2015 SCC 51 at para. 22.

[14] In one of the few other instances of Parliament decriminalizing an activity, this Court resolved the federalism contest through validity, not paramountcy: *R. v. Morgentaler*, [1993] 3 S.C.R. 463.

its own cannabis regulations under the aegis of the federal law, by contrast, that provincial regulation may not merely be more restrictive but may also directly contradict the federal law if the provincial regulation denies the very authorization that the federal law has provided by removing specific criminal prohibitions.

11. In *Rothmans*, Parliament had criminalized certain tobacco advertising. Saskatchewan had enacted provincial legislation that imposed stricter restrictions on such advertisements.[15] The Court held that the provincial restrictions did not conflict with the federal legislation because the province had simply prohibited what Parliament had opted not to prohibit (as opposed to what Parliament had affirmatively decided to allow, as it has done with respect to the home cultivation of cannabis).[16]

12. Similarly, in *Lemare Lake*, provincial legislation had the effect of increasing the federally established length of time before which a secured creditor could enforce its security interest against farm land.[17] In other words, the province had gone further — yet, crucially, in the same direction — as Parliament had gone in regulating the matter.

13. In other federal paramountcy cases, the Court has considered circumstances in which federal legislation contemplated and accommodated more restrictive provincial law (*Marine Services*),[18] left space for such provincial law by remaining silent on a matter (*Canadian Owners and Pilots Association*),[19] or authorized what local law then restricted but did not categorically prohibit (*Spraytech*).[20] None of these cases is analogous to the case at bar.

14. In each of these other paramountcy cases, provincial legislation had the effect of placing conditions on what Parliament had allowed. With respect to cannabis regulation, by contrast, the

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[15] *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, 2005 SCC 13.

[16] *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, 2005 SCC 13 at para. 22.

[17] *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53 at para. 25.

[18] *Marine Services International Ltd. v. Ryan Estate*, 2013 SCC 44 at paras. 75-76.

[19] *Québec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39 at para. 65.

[20] *114957 Canada Ltee (Spraytech, Societe d'arrosage) v. Hudson (Town)*, 2001 SCC 40 at para. 35.

federal law has legalized specific activities that were previously criminal. Provincial prohibitions that would have the practical effect of rolling back that legalization — in effect, restoring the pre-legalization *status quo* — do not place conditions on what Parliament has allowed; they disallow it.

15. In this way, cases in which the constitutionality of provincial cannabis regulations are at issue may not be analogous to cases in which this Court has declined to find operational conflict. In particular, operational conflicts may arise with respect to cannabis regulation even when, "at a superficial level, a person who seeks to comply with both enactments can succeed" by "complying with the stricter [provincial] statute [which] necessarily involves complying with the other statute".[21]

B. A Provincial Law That Undermines the Purpose of the Federal Law Is Inoperable

16. If it is technically possible to comply with both the federal law and a provincial cannabis prohibition, the provincial prohibition may nonetheless be inoperable because it frustrates the purpose of the federal legislation. This Court should clarify the proper approach to provincial legislation that may share an objective with federal legislation but that thwarts the federal legislation's chosen means of achieving that objective.

17. The law on frustration of purpose is settled. Provincial legislation that undermines the purpose of federal legislation is inoperable to the extent of the conflict.[22] A party seeking to invoke frustration of purpose must point to clear proof of Parliament's purpose.[23] The analysis with respect to provincial cannabis restrictions — like those at issue in this appeal — should be informed by the text, context, and legislative history of the federal law.[24]

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[21] *Law Society of British Columbia v. Mangat*, 2001 SCC 67 at para. 72. See also: *M&H Farm Ltd. v. Manitoba Agricultural Credit Corp*, [1999] 2 SCR 961 at para. 41.

[22] *Québec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39 at para. 70.

[23] *Québec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39 at para. 68.

[24] *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 at paras. 26-27; *Canada (Canadian Human Rights Commission) v. Canada (Attorney General)*, 2011 SCC 53 at paras. 43-44; *Marine Services International Ltd. v. Ryan Estate*, 2013 SCC 44 at para. 77.

18. The Court of Appeal of Québec's approach in this case did not give proper effect to the principles of federal paramountcy. Specifically, the Court of Appeal failed to identify any specific purpose of the federal law's home cultivation provisions, other than reducing the burden of the criminal justice system.[25] The Court of Appeal held that the impugned provisions did not frustrate the federal purpose because the purpose of the impugned provisions — which it characterized as ensuring a state monopoly on the production of cannabis to protect health and safety — complemented the purpose of the federal law as a whole.[26]

19. But, as this Court held in *Moloney*, "the focus of the paramountcy analysis is instead on the ***effect*** of the provincial law, rather than its purpose."[27] In juxtaposing federal purpose and provincial purpose, rather than federal purpose and provincial effect, the Court of Appeal erred.

20. This Court should correct the Court of Appeal's error. It should clarify that, while the *purpose* of provincial legislation — including a provincial cannabis restriction — may align with the purpose of federal legislation, a provincial law that has the *effect* of frustrating the purpose of a federal law is inoperable.[28]

21. For example, while the federal law and the provincial law may share some objectives, the impugned provisions of the provincial law undermine one of Parliament's chosen means to achieve its objective. As demonstrated below, Parliament's objective in enacting the home cultivation provisions was to displace the illicit market for cannabis. A provincial law that bans home cultivation frustrates that objective. Here, as in *Mangat*, the doctrine of federal paramountcy must apply if "it is impossible to comply with the provincial statute without frustrating Parliament's purpose".[29]

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[25] *Murray-Hall v. Québec (Attorney General)*, 2021 QCCA 1325, at para. 119.

[26] *Murray-Hall v. Québec (Attorney General)*, 2021 QCCA 1325, at para. 139.

[27] *Alberta (Attorney General) v. Moloney*, 2015 SCC 51 at para. 28 (emphasis added). See also: *Québec (Attorney General) v. Canada (Human Resources and Social Development)*, 2011 SCC 60, at paras. 28-29; *Law Society of British Columbia v. Mangat*, 2001 SCC 67 at paras. 68-69; *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121 at pp. 151-152.

[28] *Canadian Western Bank v. Alberta*, 2007 SCC 22 at paras. 73-75.

[29] *Law Society of British Columbia v. Mangat*, 2001 SCC 67 at para. 73.

22. Throughout these proceedings, there has been no dispute that the federal objective of the home cultivation provisions is legitimate. The evidence in the record demonstrates that Parliament intended to combat criminal activities by displacing the market for illicit cannabis. Three sources of evidence shed light on this objective.

23. ***First***, the legislative history of the home cultivation provisions further clarifies Parliament's purpose. In a speech addressing an opposition motion that would have deleted the provisions enabling home cultivation, the Parliamentary Secretary to the Minister of Justice succinctly stated the government's objective:

> ***Permettre aux adultes de cultivar en toute légalité une petite quantité de plants de cannabis sur leur propriété représente une solution de rechange au marché illégal et ne devrait pas être entièrement interdit.*** La prohibition totale de la culture à des fins personnelles, comme le propose la députée de Sarnia—Lambton, pourrait nuire à la capacité du gouvernement de supplanter le marché illégal et de réduire les activités criminelles.[30]

The opposition motion failed and the home cultivation provisions remained.

24. After Bill C-45 (which became the *Cannabis Act*) passed the House, the Senate proposed an amendment that would have empowered provinces to limit or prohibit home cultivation for personal use. The Minister of Health explained why the House should not adopt the Senate's proposal:

> ***[L]imited home cultivation will displace the illegal market***, an unsafe and unregulated market that supports criminals and organized crime. […]
>
> I also have to add that for all provinces and territories, should they choose to add additional limits with respect to home cultivation, they will be able to do so. ***If a province chooses to only allow one plant to be grown, it can absolutely do that.***[31]

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[30] Mr. Marco Mendicino, Parliamentary Secretary to the Minister of Justice and Attorney General of Canada, extracts from the transcript of the House of Commons Debates, November 21, 2017, Appellant's Record, Vol. 4, Tab P-4.8 p. 60-61 (French) (emphasis added).

[31] Hon. Ginette Petitpas Taylor, extracts from the transcript of the House of Commons Debates, June 13, 2018, Appellant's Record, Vol. 2, Tab P-3 p. 166 (emphasis added).

25. The House of Commons voted to reject the Senate's proposal and sent the following message to the Senate:

> [T]his House: […] respectfully disagrees with amendment 3 because the government has been clear that provinces and territories are able to make additional restrictions on personal cultivation but that ***it is critically important to permit personal cultivation in order to support the government's objective of displacing the illegal market*** […][32]

26. ***Second***, the "Legislative Background" document concerning the *Cannabis Act*, which the federal government published in May 2017 to provide an overview of the proposed legislation, buttresses this interpretation. The Legislative Background states:

> Two objectives of Bill C-45 are to provide for the legal production of cannabis to reduce illegal activities in relation to cannabis, and to provide access to a quality-controlled supply of legal cannabis for adults. ***The proposed legislation seeks to achieve these objectives, in part, by permitting personal cultivation of no more than four plants***.[33]

27. ***Third***, the *Cannabis Act* contains a statement of purpose. Section 7 of the *Cannabis Act* states that one purpose of the federal legislation legalizing recreational cannabis is to "provide for the licit production of cannabis to reduce illicit activities in relation to cannabis".[34] Home cultivation is one method of production of cannabis that Parliament has specifically chosen because, in its judgment, home cultivation will reduce "illicit activities".

28. A review of the text, context, and history of the federal law evinces a clear Parliamentary intention to, in the words of the House, "permit personal cultivation". There is clear evidence that Parliament intended to leave no scope for provinces to prohibit home cultivation.[35] Provincial laws

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[32] Hon. Ginette Petitpas Taylor, extracts from the transcript of the House of Commons Debates, June 13, 2018, Appellant's Record, Vol. 2, Tab P-3 p. 164 (emphasis added). The voting record on this motion is missing from the Appellant's Record: House of Commons Debates, June 18, 2018, Vol. 148, No. 316, at 1355.

[33] Legislative Background: *An Act respecting cannabis and to amend the Controlled Drugs and Substances Act, the Criminal Code and other Acts* (Bill C-45), May 2019, p. 20 (emphasis added), https://publications.gc.ca/pub?id=9.836888&sl=0.

[34] *Cannabis Act*, S.C. 2018, ch. 16, s. 7(c).

[35] *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40 at para. 39.

that prohibit what Parliament expressly sought to permit will thwart that federal purpose. As a matter of federal paramountcy, such provincial laws cannot operate.

2. Only Two Canadian Jurisdictions Restrict Home Cultivation

29. Québec's law stands apart from the approach that other provinces and territories have taken to the regulation of cannabis. Most provinces and territories permit home cultivation in accordance with the federal law. No jurisdictions in Canada restrict the permissible number of cannabis plants to more than one but fewer than four per household. The provincial and territorial approaches to home cultivation fall into three categories: permissive, silent, and prohibitive:

(a) Permissive: British Columbia, Saskatchewan, New Brunswick, Newfoundland and Labrador, Yukon and Prince Edward Island have each enacted regulations which specifically reflect the federal four plant limit.[36]

(b) Silent: Ontario, Alberta, Nunavut, the Northwest Territories and Nova Scotia's cannabis legislation and regulations do not address home cultivation. While legislation and regulations in Ontario, Nunavut, the Northwest Territories and Nova Scotia does not mention home cultivation at all, Alberta's *Gaming, Liquor and Cannabis Act* states that "subject to the federal Act, no person may grow cannabis except in accordance with the regulations".[37] Alberta's regulations do not address home cultivation.

(c) Prohibitive: Québec and Manitoba are the only provinces that specifically prohibit home cultivation.[38]

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[36] See, e.g., those provinces and territories which have enacted regulations accommodating the federal four plant limit: *Cannabis Control and Licensing Act*, S.B.C. 2018, c. 29, s. 56(c); *Cannabis Control (Saskatchewan) Regulations*, R.R.S. c. C-2.111 Reg. 1, s. 2-2(1)(b); *Cannabis Control Act*, S.N.B. 2018, c. 2, s. 16(1); *Cannabis Control Regulations*, N.L. Reg. 93/18, s. 7(2); *Cannabis Legalization and Regulation Implementation Act*, SNWT 2018, c.6, Sch. A, s. 28; *Cannabis Control and Regulation Act*, S.Y. 2018, c. 4, s. 58(2); *Cannabis Control Act*, R.S.P.E.I. 1988, c. C-1.2, s. 12(2).

[37] R.S.A. 2000 c. G-1, s. 90.27

[38] *Liquor, Gaming and Cannabis Control Act*, CCSM c L153, s. 101.15.

30. Applying the doctrine of federal paramountcy in the manner that should apply to provincial cannabis prohibitions generally would not disrupt home cultivation regulations in the vast majority of the country. Given the unique nature of cannabis regulation, applying the doctrine to this case would not usurp provincial autonomy in other regulatory contexts.[39]

31. Canada's legal cannabis industry should not face regulatory uncertainty as provinces test the limits of their authority. By articulating how the doctrine of federal paramountcy applies to provincial cannabis restrictions, this Court can keep this from occurring. Indeed, the legislative record demonstrates that Parliament views a robust legal cannabis industry as essential to the *Cannabis Act*'s objective of combatting the illicit cannabis market. Applying the doctrine of federal paramountcy to the impugned provisions will not affect most provinces and will provide much needed clarity on how far provinces may go in regulating legal cannabis.

PART III—SUBMISSIONS CONCERNING COSTS

32. The Industry Coalition requests that no costs be awarded either for or against it.

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

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[39] **Cf.:** *R. v. Comeau*, 2018 SCC 15 at paras. 3 and 51.

PART IV—TABLE OF AUTHORITIES

AUTHORITIES	Paragraph(s) Referenced in Memorandum of Argument
STATUTES / LEGISLATION	
Cannabis Act, S.C. 2018, ch. 16, ss. 7(c), 8(1)(e), 12(4)(b)	1, 2, 27
Cannabis Control (Saskatchewan) Regulations, R.R.S. c. C-2.111 Reg. 1, s. 2-2(1)(b)	29
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