S.C.C. File No. 39906

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

B E T W E E N:

JANICK MURRAY-HALL

Appellant
(Respondent)

- AND -

ATTORNEY GENERAL OF QUEBEC

Respondent
(Appellant)

- AND -

ATTORNEY GENERAL OF ONTARIO, ATTORNEY GENERAL OF BRITISH COLUMIA, 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

Interveners

FACTUM OF THE INTERVENER, CANNABIS AMNESTY

(Pursuant to Rules 37 and 42 of the *Rules of the Supreme Court of Canada*)

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PART I. OVERVIEW

1. In most paramountcy cases, legislative intent can be assessed with reference to a single legislative act. Interpretive aids relating to that federal statute include the language of the statute itself, transcripts of legislative debates, government-authored research publications and legislative summaries. These will often provide sufficient evidence of the federal statute's purpose and background, including its social, economic and cultural context, as well as its animating policy objectives. But legislatures do not always express their intentions through a single bill, especially where they are pursuing significant, transformative changes to the *status quo*.

2. The federal government pursued such sweeping change in Bill C-45, the federal *Cannabis Act*, SC 2018, c 16 (the "*Cannabis Act*").[1] The significance of this statute must not be understated. The *Cannabis Act* not only sought to transform Canada's relationship with cannabis on a forward-going basis, it also heralded a fundamental reorientation towards the impact that cannabis convictions have on the lives of Canadians.

3. The *Cannabis Act* was an important expression of the federal government's policy objectives regarding the end of cannabis prohibition and the beginning of cannabis regulation, but those objectives were further developed in subsequent and ancillary remedial legislation. Cannabis Amnesty submits that consideration of such subsequent and ancillary legislation—particularly Bill C-93—is both appropriate and necessary when discerning the legislative purpose of Bill C-45, and determining whether it has been frustrated through an act of uncooperative federalism.

PART II. INTERVENER'S POSITION ON THE QUESTIONS IN ISSUE

4. Cannabis Amnesty respectfully submits that:

(a) Ancillary or subsequent legislation that alters, enhances, or clarifies the purpose of a federal statute should be considered when assessing whether a provincial act frustrates that purpose, particularly where the federal statute is remedial in nature; and

[1] *Cannabis Act*, SC 2018, c 16 (*Cannabis Act*).

(b) A narrow analytical approach in assessing the pith and substance of impugned legislative provisions is inappropriate, and a wider range of extrinsic evidence should be considered, including the timing and context of the adoption of a provincial statute.

5. While consideration of "pith and substance" is the first step in any paramountcy analysis, these submissions focus on, and therefore begin with, the assessment of federal legislative intent.

PART III. STATEMENT OF ARGUMENT

A. Frustration of Purpose: Ancillary and Subsequent Legislation Should be Considered

6. A provincial law will be rendered inoperative to the extent that 1) it creates an "operational conflict" with a valid federal law, or 2) the effect of the provincial law "frustrate[s] the purpose of the federal law, even though it does 'not entail a direct violation of the federal law's provisions'".[2]

7. When assessing Parliament's legislative purpose in adopting a particular law, it will typically suffice to examine the language of the law and relevant extrinsic evidence about it.[3] However, in some situations, Parliament embarks on a policy journey that results in multiple pieces of related legislation which, read together, provide a truer reflection of the federal government's intent and legislative purpose. This is especially so where the Parliament's policy goals represent a marked departure from the *status quo*.

8. In 2018, the federal government embraced such a marked departure with the adoption of the *Cannabis Act*. By enacting the *Cannabis Act*, Parliament rejected Canada's longstanding, absolute prohibition on the possession and home cultivation of cannabis for personal use.

9. However, the full scope of what Parliament intended to accomplish through the legalization of cannabis—and how—is not captured exclusively within the four corners of *Cannabis Act*. When

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[2] *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, at para. 25 [***Moloney***], citing *Canadian Western Bank v. Alberta*, 2007 SCC 22, at para. 73

[3] For example, academic texts concerned with the law may assist the court in understanding the context of the federal legislation, and its policy objectives. See e.g. *Moloney v Alberta (Administrator of the Motor Vehicle Accident Claims Act)*, 2012 ABQB 644 at paras. 31-32 (citing a leading textbook on insolvency while assessing the legislative purpose of the *Bankruptcy and Insolvency Act*), aff'd *Moloney v Alberta (Administrator, Motor Vehicle Accident Claims Act)*, 2014 ABCA 68; aff'd *Alberta (Attorney General) v. Moloney*, 2015 SCC 51.

governments pursue large scale policy initiatives through multiple legislative acts, each act may provide context for the other. In the present case, as a fundamental policy re-orientation touching on various federal heads of power, the purpose of cannabis legalization can only properly be understood by considering the companion, subsequent and ancillary legislation that form the universe of this fundamental policy reorientation.

10. For example, the purpose of the legalization of cannabis involved some decriminalization, but it did not include the complete decriminalization of all aspects of cannabis consumption. Cannabis consumption leading to impaired driving not only remained criminal, but with the passage of Bill C-46, parliament sought to ensure that an enhanced drug-impaired driving regime was in place before Bill C-45 came into force.[4]

11. Parliament, under the same government that passed the *Cannabis Act*, subsequently passed Bill C-93, "An Act to provide no-cost, expedited record suspensions for simple possession of cannabis",[5] to reduce the significant burden of historical convictions related to non-violent cannabis offences that are no longer criminal. Bill C-93 received Royal Assent on June 21, 2019, exactly one year after the *Cannabis Act* did.[6]

12. With the passage of Bill C-93, Parliament sought to express that the purpose of cannabis legalization was not only to "reduce the burden on the criminal justice system in relation to cannabis,"[7] but, in fact, encompassed a more ambitious purpose with respect to the criminal justice.

13. It was not a surprise that the federal government adopted related, remedial legislation that would address the historical convictions that resulted from the absolute prohibition on the possession of cannabis. These federal policy goals—the creation of safe, legal sources of cannabis and the reduction of harm associated with historical convictions for simple cannabis possession—have been linked since before Parliament passed the *Cannabis Act* or Bill C-93. As Liberal MP

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[4] Bill C-46, "An Act to amend the Criminal Code (offences relating to conveyances) and to make consequential amendments to other Acts", SC 2018, c 21, 1st session, 42nd Parliament.
[5] Bill C-93, "An Act to provide no-cost, expedited record suspensions for simple possession of cannabis", SC 2019, c 20, 1st session, 42nd Parliament.
[6] *Ibid*; *Cannabis Act*.
[7] *Cannabis Act*, s 7(e).

Nathaniel Erskine-Smith stated during Parliament's first day of debate regarding the *Cannabis Act* on May 30, 2017:

> I will end where I began. Once we pass the legislation, it is important to undo the past injustices of this incredibly outdated law and to suspend the criminal records of any Canadian affected by a possession charge and a record. This was part of the original Liberal Party of Canada policy resolution, and we should certainly see that policy through.[8]

14. This sentiment was supported by MPs from other parties, including NDP MP Alistair MacGregor:

> We feel that those who have received previous convictions for marijuana possession should have some form of amnesty offered. I have heard some encouraging words from Public Safety Canada lately, but the government should be following through on that, and we would certainly like to see a firm commitment spoken by a minister in this House at some point in the future.[9]

15. Specific reference was made, in the context of passing the *Cannabis Act*, to the need to remediate the long-term effects of historical convictions for simple possession of cannabis as well. As NDP MP Anne Minh-Thu Quach stated:

> To prevent discrimination and life-long consequences for youth and to help our judicial system, I am asking the government to decriminalize marijuana immediately and to give an amnesty to those with a criminal record for simple possession of cannabis. That is also one of the recommendations of the minister's task force on cannabis legalization.[10]

16. These comments represent the considerations that animated the intent of federal legislators who sought to legalize cannabis through the *Cannabis Act* and are reflected in the various statutes that were passed before, during and after the passage of the *Cannabis Act* and represent the full body of Canada's legalization regime (i.e. Bill C-46 and Bill C-93).

17. Examining these statutes together, Parliament evinced a clear federal cannabis policy designed to permit the cultivation of small numbers of cannabis plants at home as part of its

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[8] Canada, Parliament, House of Commons Debates, 42nd Parl, 1st Sess, Vol 148, No 183 (30 May 2017) at 2335, Appellant Record [***AR***], Vol 3, Tab P-4.1 at p 44.

[9] Canada, Parliament, House of Commons Debates, 42nd Parl, 1st Sess, Vol 148, No 183 (30 May 2017) at 1331, AR Vol 3, Tab P-4.1 at p 11.

[10] Canada, Parliament, House of Commons Debates, 42nd Parl, 1st Sess, Vol 148, No 185 (1 June 2017) at 1830, AR Vol 3, Tab P-4.2 at p 50.

strategy to control the illegal cannabis market, and also to reduce stigma related to non-violent cannabis offences, to facilitate "second chances" for individuals convicted of such offences, and to recognize the disproportionately large effect that cannabis prohibitions have had on racialized communities in Canada.

18. When should the paramountcy analysis consider subsequent or ancillary legislation for the purpose of assessing federal legislative purpose? Cannabis Amnesty submits that several factors should guide the analysis:

(a) **Clear Language** – Does the subsequent or ancillary legislation make express reference to the legislation under review?

(b) **Subject Matter** – Does the subsequent or ancillary legislation deal with the same subject matter as the legislation under review? Do the two federal laws, read together, illustrate a coherent federal policy objective?

(c) **Timing** – Is the subsequent or ancillary legislation temporally proximate to the legislation under review?

(d) **Government** – Were the two federal acts promulgated by the same government, during the same legislative session? Do they advance policy objectives that the ruling party (or coalition) campaigned on?

(e) **Explicit Links** – Do legislative debates, legislative summaries, government-authored research publications, or the legislation itself draw explicit connections between two separate pieces of legislation?

(f) **Necessary Implication** – Absent an explicit link, is it nevertheless rational to treat two valid pieces of federal legislation as illustrating a legible federal policy objective? Does the subsequent legislation alter, enhance, or clarify a discernible policy objective of the federal legislation under review?

19. Cannabis Amnesty submits that where these factors point towards the consideration of subsequent and ancillary legislation, consideration of such legislation would assist in the assessment of the content and contours of broad federal policy transformations like the legalization of cannabis.

20. In the case of the *Cannabis Act*, it is apparent that Parliament did not restrict its interest in the regulation of cannabis to that one legislative act. Rather, it has subsequently considered and adopted other cannabis-related legislation, including Bill C-93, which illustrates a broader federal purpose and intent. The *Cannabis Act* and Bill C-93 were passed by the same Government, one year apart. They address the same subject matter: a sea change in Canada's historical prohibition on cannabis possession. They are linked explicitly through Parliamentary debates. Taken together, the *Cannabis Act* and Bill C-93 demonstrate a federal purpose that links cannabis legalization with alleviating the burdens associated with criminalizing the possession and home cultivation of cannabis for personal use.

21. The Quebec *Cannabis Regulation Act* (the "*CRA*"),[11] on the other hand, revives that burden. It reinstates an absolute ban on the private cultivation of cannabis in Quebec. While the federal government exercised its exclusive jurisdiction over criminal law to facilitate the home cultivation of small numbers of cannabis plants, the *CRA* eliminates that legal source of cannabis through the creation of a new regulatory offence. In so doing, the provincial legislature has also undermined the federal government's remedial approach to cannabis regulation.

22. The *CRA* frustrates the purpose of this remedial scheme by effectively reinstating a penal regime that the federal government sought to eliminate and remedy as a result of its disproportionally harmful impacts on visible minorities, Indigenous people and those from marginalized communities.

23. This Court has recognized that rehabilitation is a valid legislative purpose when considering conflicts between federal and Provincial legislation. In *Alberta (Attorney General) v. Moloney*,[12] the appellant argued that Alberta's *Traffic Safety Act* ("*TSA*") should permit the Province to suspend a person's driver's license and vehicle permits until they reimburse the province for monies paid to a third party accident victim. Under the *TSA*, those consequences would persist despite a full discharge from bankruptcy under the federal *Bankruptcy and Insolvency Act* ("*BIA*"). In considering the remedial purpose of the BIA, the majority held:

> The second purpose of the BIA, the financial rehabilitation of the debtor, is achieved through the discharge of the debtor's outstanding debts at the end of the bankruptcy: *Husky Oil*, at para. 7. Section 178(2) of the *BIA* provides:

[11] *Cannabis Regulation Act*, CQLR c C-5.3 ("*CRA*").
[12] *Moloney*.

> (2) Subject to subsection (1), an order of discharge releases the bankrupt from all claims provable in bankruptcy.
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> From the perspective of the creditors, the discharge means they are unable to enforce their provable claims: *Schreyer v. Schreyer*, 2011 SCC 35, [2011] 2 S.C.R. 605, at para. 21. This, in effect, gives the insolvent person a "fresh start", in that he or she is "freed from the burdens of pre-existing indebtedness": Wood, at p. 273; see also *Industrial Acceptance Corp. v. Lalonde*, [1952] 2 S.C.R. 109, at p. 120. This fresh start is not only designed for the well-being of the bankrupt debtor and his or her family; rehabilitation helps the discharged bankrupt to reintegrate into economic life so he or she can become a productive member of society: Wood, at pp. 274-75; L. W. Houlden, G. B. Morawetz and J. Sarra, Bankruptcy and Insolvency Law of Canada (4th ed. rev. (loose-leaf)), at p. 6-283. In many cases of consumer bankruptcy, the debtor has very few or no assets to distribute to his or her creditors. In those cases, rehabilitation becomes the primary objective of bankruptcy: Wood, at p. 37.[13] [Emphasis added]

24. The same purpose can be seen in Canada's new approach to the regulation of cannabis. The federal government has occupied the field via its exclusive jurisdiction over criminal law, creating a complete code that addresses how cannabis is produced and distributed, in what quantities, and the circumstances in which cannabis offences are both prosecuted and forgiven.

25. The fact that provinces share responsibility for managing this regime, and have the power to tailor certain aspects of its implementation, does not derogate from the core, valid policy objectives being pursued by the federal government: battling the black market for cannabis through legal production and cultivation, including at home, and fostering rehabilitation for people with convictions for conduct that is no longer illegal.[14]

26. Moreover, following the analytical approach taken by this Honourable Court in *Alberta (Attorney General) v. Moloney*, and *407 ETR Concession Co. v. Canada (Superintendent of Bankruptcy)*, there exists an operational conflict between the federal and provincial laws at issue

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[13] *Moloney* at para 36.

[14] See e.g. *Moloney* at para 40 ("On the one hand, given the procedural nature of the *BIA*, the bankruptcy regime relies heavily on the continued existence of provincial substantive rights, and thus the continued operation of provincial laws […] The ownership of certain assets and the existence of particular liabilities depend upon provincial law […]. On the other hand, the *BIA* cannot operate without affecting property and civil rights." (internal citations omitted)).

in this appeal because the *Cannabis Act* is not merely permissive; it creates a freestanding right, or positive entitlement. When a federal statute creates a positive entitlement, provincial legislation cannot conflict with the right created in the federal provision.[15]

27. Given Parliament's clear granting of a freestanding right to own and grow cannabis plants for personal use, the *CRA* – a more restrictive provincial law – creates an operational conflict and frustrates the federal purpose, as described below.

B. Pith & Substance: A Narrow Analytical Approach is Inappropriate When Assessing the Pith and Substance of Impugned Legislative Provisions

28. The QCCA considered whether the *CRA* was truly intended to regulate matters within Provincial jurisdiction, or whether it was "disguised legislation" that encroached on the exclusive federal criminal law jurisdiction conferred by s. 91(27) of the *Constitution Act*. In considering whether the *CRA* was truly motivated by a valid interest in promoting public health and safety within the province, the Court relied on extrinsic evidence that the absolute ban would be revisited periodically to assess whether the ban should be modified or lifted.[16]

29. The QCCA's approach suffers from two flaws. First, its approach was narrow and selective, focusing only on extrinsic evidence that was confirmatory of a valid Provincial purpose. Second, the QCCA gave insufficient consideration to the context in which the *CRA* was adopted.

30. While the QCCA purported to examine the *CRA* as a whole to determine its pith and substance, its selection of extrinsic evidence was limited to National Assembly debates and, within that selection, focused only on excerpts that supported a conclusion that the purpose of the Act was to protect public health and safety.[17] It excluded from its analysis consideration of the parliamentary debates and public statements demonstrating Quebec's opposition to the legalization of cannabis and its intent to restrict the impact of federal legalization on its territorial jurisdiction—legislation that it did not want in the first place:

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[15] *Quebec (Attorney General) v. Canada (Human Resources and Social Development)*, 2011 SCC 60, [2011] 3 SCR 635 at paras 23, 32-33 and 36; *Law Society of British Columbia v. Mangat*, 2001 SCC 67 at para 72.

[16] *Procureur général du Québec c Murray-Hall*, 2021 QCCA 1325 (CanLII) at paras 75–76 [***Murray-Hall QCCA***]

[17] *Murray-Hall* QCCA at paras 72-77.

> This bill positions and prepares Quebec for the upcoming entry into force of the legalization of cannabis, imposed, it must be said, there, Madam Speaker, unilaterally by the federal government. I want the citizens to understand that it is not the Government of Quebec, then it is not the members of the opposition, and it is not anyone here in Quebec City who asked for this [translation].[18]

31. In other words, there is clear extrinsic evidence that supports the conclusion that the government of Quebec viewed the *Cannabis Act* as a unilateral and unwelcome imposition and that the *CRA* was actually intended to limit the impact of the federal government's exercise of its jurisdiction within the territorial boundaries of the province.

32. This conclusion is strengthened by the timing of the CRA, as well as its purpose and effect. As this Court found in *Rogers Communications Inc. v. Châteauguay (City)*,[19] it is relevant to consider the timing of the adoption of the impugned legislation, and whether its practical effect is to rebut a valid exercise of federal jurisdiction. In that case, the Minister of Industry authorized Rogers to install an antenna at specific address in the City. When Rogers declined to postpone the installation of the antenna, the City cited potential risks to the health and safety of nearby residents, and adopted a municipal resolution prohibiting any construction at the specified address. The Court was called upon to assess whether the City's resolution was, in pith and substance, an encroachment into the federal government's exclusive jurisdiction over telecommunications.

33. The Court confirmed that the pith and substance analysis is concerned with the purpose and effect of the impugned law.[20] In that case, the Court determined that the timing of the City's resolution was evidence of its intention to interfere with the valid exercise of the Minister's federal jurisdiction. As well, the Court found that, "[e]ven a flexible and generous interpretation of this evidence leads to but one conclusion: the purpose of the notice of a reserve was to prevent Rogers from installing its radiocommunication antenna system on the property at 411 Boulevard

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[18] "Bill 157, An Act to constitute the Société Québécoise du cannabis, to enact the Cannabis Regulation Act and to amend various highway safety-related provisions", *Journal des débats* (Hansard) of the National Assembly, 41-1, Vol 44, No 346 (6 June 2018) at 21972–21973 (Hon Lucie Charlebois). See also *Ibid* at 21985–21986 (Hon Marc Bourcier); 21987–21988 (Hon Diane Lamarre).

[19] 2016 SCC 23.

[20] *Ibid* at para 36.

Saint-Francis by limiting the possible choices for the system's location."[21] In other word, the effect of the Provincial law was to frustrate the exercise of a federal power.

34. The same analysis applies here. The *CRA* was tabled on November 16, 2017, in direct response to the introduction of the *Cannabis Act* in April of that year. While much of the *CRA* falls within the appropriate scope of provincial power, its absolute prohibitions on the ownership of any cannabis plants for personal use is a direct frustration of the home cultivation provisions of the *Cannabis Act*. There can be little doubt that the *CRA* is intended to undo the federal government's exercise of jurisdiction in this regard.

35. The pretextual nature of the province's position is underscored by it attempts to justify current prohibitions on cannabis cultivation with future promises to examine its impact on public health and safety. This amounts to a promise of future compliance with this Court's approach to federalism, and should not be relied upon in assessing the pith and substance of impugned legislation.

PART IV. SUBMISSIONS REGARDING COSTS AND ORDER SOUGHT

36. Cannabis Amnesty takes no position on the disposition of this appeal and makes no submissions on the ultimate order to be made.

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

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[21] *Ibid* at para 44.

PART VI. TABLE OF AUTHORITIES

Authority	**Paragraph(s) Referenced in Memorandum of Argument**
Jurisprudence	
Procureur général du Québec c Murray-Hall, 2021 QCCA 1325	72-77
Moloney v Alberta (Administrator of the Motor Vehicle Accident Claims Act), 2012 ABQB 644	31-32
Moloney v Alberta (Administrator, Motor Vehicle Accident Claims Act), 2014 ABCA 68	N/A
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407 ETR Concession Co v Canada (Superintendent of Bankruptcy), 2015 SCC 52	N/A
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Cannabis Regulation Act, CQLR c C-5.3	21-22, 27-32, 34