SUPREME COURT OF CANADA

CITATION: Murray-Hall *v.* Quebec (Attorney General), 2023 SCC 10

APPEAL HEARD: September 15, 2022
JUDGMENT RENDERED: April 14, 2023
DOCKET: 39906

BETWEEN:

Janick Murray-Hall
Appellant

and

Attorney General of Quebec
Respondent

- and -

Attorney General of Ontario, Attorney General of Manitoba, Attorney General of British Columbia, Attorney General of Saskatchewan, Attorney General of Alberta, Canadian Association for Progress in Justice, Canadian Cancer Society, Cannabis Amnesty, Cannabis Council of Canada and Quebec Cannabis Industry Association
Interveners

OFFICIAL ENGLISH TRANSLATION

CORAM: Wagner C.J. and Karakatsanis, Côté, Brown,* Rowe, Martin, Kasirer, Jamal and O'Bonsawin JJ.

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REASONS FOR JUDGMENT: (paras. 1 to 106)	Wagner C.J. (Karakatsanis, Côté, Rowe, Martin, Kasirer, Jamal and O'Bonsawin JJ. concurring)

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* Brown J. did not participate in the final disposition of the judgment.

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Janick Murray-Hall *Appellant*

v.

Attorney General of Quebec *Respondent*

and

Attorney General of Ontario,
Attorney General of Manitoba,
Attorney General of British Columbia,
Attorney General of Saskatchewan,
Attorney General of Alberta,
Canadian Association for Progress in Justice,
Canadian Cancer Society,
Cannabis Amnesty,
Cannabis Council of Canada and
Quebec Cannabis Industry Association *Interveners*

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2023 SCC 10

File No.: 39906.

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2023 SCC 10 (CanLII)

Present: Wagner C.J. and Karakatsanis, Côté, Brown,[*] Rowe, Martin, Kasirer, Jamal and O'Bonsawin JJ.

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ON APPEAL FROM THE COURT OF APPEAL FOR QUEBEC

Constitutional law — Division of powers — Double aspect doctrine — Federal paramountcy — Possession and cultivation of cannabis plants in dwelling-house — Parliament enacting legislation prohibiting individuals from possessing or cultivating more than four cannabis plants at home — Quebec legislature enacting legislation regulating cannabis that includes provisions completely prohibiting possession and cultivation of cannabis plants at home — Whether provisions of Quebec legislation prohibiting possession and cultivation of cannabis plants at home are constitutionally valid in light of division of powers — If so, whether they are operative under doctrine of federal paramountcy — Constitution Act, 1867, ss. 91(27), 92(13), 92(16) — Cannabis Regulation Act, CQLR, c. C-5.3, ss. 5, 10.

In June 2018, Parliament passed the *Cannabis Act* ("federal Act"), which decriminalized the recreational use of cannabis. This Act prohibits the possession of cannabis plants and the cultivation of such plants for personal purposes, but it exempts the possession and cultivation of no more than four plants from these prohibitions. At the same time, the Quebec legislature introduced its own scheme to regulate cannabis by passing a bill that, among other things, created the Société québécoise du cannabis ("SQDC"), which has a monopoly on the sale of cannabis in Quebec. It also enacted

[*] Brown J. did not participate in the final disposition of the judgment.

the *Cannabis Regulation Act* ("provincial Act"), ss. 5 and 10 of which completely prohibit the possession of cannabis plants and the cultivation of such plants for personal purposes in a dwelling-house. These prohibitions are accompanied by fines.

In October 2018, M brought an action in the Superior Court on his own behalf and on behalf of all persons who, in Quebec, are liable to be prosecuted for possession of a cannabis plant in their dwelling-house. He argued that ss. 5 and 10 of the provincial Act fall within the federal criminal law power under s. 91(27) of the *Constitution Act, 1867* and outside the heads of power assigned to the provinces. He sought a declaration from the Superior Court that these provisions are *ultra vires* or, in the alternative, that they are of no force or effect pursuant to the doctrine of federal paramountcy. The Superior Court declared ss. 5 and 10 of the provincial Act constitutionally invalid. The Court of Appeal set aside the trial judgment and affirmed the constitutional validity of ss. 5 and 10 on the basis that they are within the powers conferred on the provinces by s. 92(13) and (16) of the *Constitution Act, 1867*. It also found that the impugned provisions are operative.

Held: The appeal should be dismissed.

Sections 5 and 10 of the provincial Act are a valid exercise by the Quebec legislature of the powers conferred on it by s. 92(13) and (16) of the *Constitution Act, 1867*. Further, the provisions do not frustrate the purpose of the federal legislation and are therefore operative.

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To decide whether a law or some of its provisions are constitutionally valid under the division of powers, courts must first characterize the law or provisions and then, on that basis, classify them by reference to the heads of power listed in ss. 91 and 92 of the *Constitution Act, 1867*.

At the characterization stage, the pith and substance of the law must be determined by looking at its purpose and effects. To analyze purpose, courts rely on intrinsic evidence, that is, the actual text of the law, as well as extrinsic evidence, such as parliamentary debates. In looking at the effects of the law, courts consider both its legal effects (those related directly to the provisions of the law itself) and its practical effects (the side effects arising from its application). Where very specific provisions of a law that are alleged to be an integral part of a regulatory scheme are being challenged, courts begin by characterizing the provisions rather than considering the validity of the law as a whole. However, this does not mean that the provisions must be read in isolation. Reading and analyzing the impugned provisions in the context of the regulatory scheme into which they are integrated is crucial in distinguishing the purpose of the law from the means chosen to achieve it.

In this case, it is essential to analyze ss. 5 and 10 of the provincial Act in light of their context and not just their wording. With regard to the intrinsic evidence for analyzing purpose, an overview of the provincial Act reveals a broad regulatory scheme that includes the creation of a state monopoly, granted to the SQDC, to oversee each step leading up to the purchase of cannabis by citizens in order to protect the health

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and security of the public. Sections 5 and 10 do not have the separate and independent objective of prohibiting the possession and cultivation of cannabis plants for personal purposes. The prohibitions themselves are one means, among a broad range of measures, for achieving the provincial Act's public health and security objectives, since they act as strong incentives for the integration of consumers into the legal cannabis market. With regard to extrinsic evidence, the remarks made by the members of the Quebec legislature confirm that the prohibitions help to ensure that consumers will buy from the SQDC. The impugned provisions do not represent a colourable attempt to re-enact the prohibitions against possessing and cultivating cannabis repealed by Parliament, given the complete lack of evidence of any "improper" legislative purpose. As for the effects of the impugned provisions, their practical consequence is to prevent citizens from possessing and cultivating cannabis plants for personal purposes and to force consumers to buy from the SQDC. With regard to legal consequences, the provisions prohibit the possession and cultivation of cannabis plants and impose penal sanctions for any violation. Together, the legal and practical effects confirm the conclusion reached from analyzing the intrinsic and extrinsic evidence: the pith and substance of ss. 5 and 10 of the provincial Act is to ensure the effectiveness of the state monopoly on the sale of cannabis in order to protect the health and security of the public, and of young persons in particular, from the harm caused by this substance.

At the classification stage, what must be determined is whether the impugned provisions fall within the federal criminal law power under s. 91(27) of the *Constitution Act, 1867* or within the powers conferred on the provinces over property

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and civil rights and matters of a merely local or private nature by s. 92(13) and (16), respectively. In this case, even though ss. 5 and 10 seemingly have the characteristics of criminal law, since they contain prohibitions accompanied by penalties and are backed by a valid criminal law purpose, they should still not be classified under s. 91(27). The partial decriminalization of cannabis by Parliament opened the door to provincial legislative action. In prohibiting the possession and cultivation at home of cannabis plants, the Quebec legislature exercised the power conferred on it by s. 92(15) to enact penal measures in order to enforce an otherwise valid law. Sections 5 and 10, which help to ensure the effectiveness of the state monopoly and thus to protect the health and security of the public, are clearly related to provincial heads of power, because provincial legislative action in the field of public health is grounded primarily in broad and plenary jurisdiction over property and civil rights (s. 92(13)) and residual jurisdiction over matters of a merely local or private nature in the province (s. 92(16)). The intent behind the Quebec legislature's action in the field of health in this case was to regulate, not to suppress a threat or an evil. This is important because health, as a matter not assigned in the *Constitution Act, 1867*, is an area of overlapping jurisdiction. According to the double aspect doctrine, Parliament and the provincial legislatures may make laws in relation to matters that, by their very nature, have both a federal aspect and a provincial aspect. The regulation of cannabis use has a double aspect, since it may be addressed from the perspective of the criminal law (under s. 91(27)), by suppressing some evil or injurious or undesirable effect upon the public, and from the perspective of health or trade (under s. 92(13) and (16)), by regulating, among other things, the conditions of production, distribution and sale of the substance. Sections 5

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and 10 of the provincial Act, which regulate cannabis use from this second, normative perspective, are therefore *intra vires* the Quebec legislature.

Provisions of a provincial law that are declared constitutionally valid may nonetheless be declared to be of no force or effect under the doctrine of federal paramountcy when (1) there is an operational conflict or (2) the purpose of a federal law is frustrated. In this case, the only question to be answered is whether there is a conflict of purposes, which involves first establishing the purpose of the federal Act and then determining whether the provisions of the provincial Act are incompatible with that purpose.

The purpose of the federal Act is not to create — with a view to reducing illicit activities in relation to cannabis — positive rights to possess and cultivate up to four cannabis plants for personal purposes. Such an interpretation does not reflect the essentially prohibitory nature of the criminal law power and is not supported by the wording of the federal Act. The prohibitions in ss. 5 and 10 of the provincial Act directly address several of the objectives of the federal Act set out in s. 7 of that Act. Moreover, even though Parliament and the provincial legislature have taken different approaches to the self-cultivation of cannabis, the provincial Act reflects a concern with combating organized crime, just as the federal Act does. The provincial Act's public health and security objectives and its prohibitions in ss. 5 and 10 are therefore in harmony with the objectives of the federal Act, and there is no basis for finding a conflict of purposes.

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Cases Cited

Applied: *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, 2005 SCC 13, [2005] 1 S.C.R. 188; **distinguished:** *R. v. Morgentaler*, [1993] 3 S.C.R. 463; **considered:** *Ward v. Canada (Attorney General)*, 2002 SCC 17, [2002] 1 S.C.R. 569; *Attorney General of Canada v. Canadian National Transportation, Ltd.*, [1983] 2 S.C.R. 206; *Quebec (Attorney General) v. Canada (Attorney General)*, 2015 SCC 14, [2015] 1 S.C.R. 693; *Reference as to the Validity of Section 5(a) of the Dairy Industry Act*, [1949] S.C.R. 1; *Siemens v. Manitoba (Attorney General)*, 2003 SCC 3, [2003] 1 S.C.R. 6; *Schneider v. The Queen*, [1982] 2 S.C.R. 112; **referred to:** *Reference re Genetic Non-Discrimination Act*, 2020 SCC 17, [2020] 2 S.C.R. 283; *Reference re Firearms Act (Can.)*, 2000 SCC 31, [2000] 1 S.C.R. 783; *Canadian Western Bank v. Alberta*, 2007 SCC 22, [2007] 2 S.C.R. 3; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3; *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31, [2002] 2 S.C.R. 146; *Reference re Assisted Human Reproduction Act*, 2010 SCC 61, [2010] 3 S.C.R. 457; *Westendorp v. The Queen*, [1983] 1 S.C.R. 43; *Reference re Securities Act*, 2011 SCC 66, [2011] 3 S.C.R. 837; *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373; *Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297; *R. v. Malmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571; *Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791; *Dupond v. City of Montreal*, [1978] 2 S.C.R. 770; *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R.

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134; *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213; *Rio Hotel Ltd. v. New Brunswick (Liquor Licensing Board)*, [1987] 2 S.C.R. 59; *Desgagnés Transport Inc. v. Wärtsilä Canada Inc.*, 2019 SCC 58, [2019] 4 S.C.R. 228; *Reference re The Farm Products Marketing Act*, [1957] S.C.R. 198; *Nova Scotia Board of Censors v. McNeil*, [1978] 2 S.C.R. 662; *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453; *OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2; *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161; *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327; *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419; *Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307; *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11; *Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39, [2010] 2 S.C.R. 536; *Proprietary Articles Trade Association v. Attorney General for Canada*, [1931] A.C. 310; *R. v. Sharma*, 2022 SCC 39; *Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2, [2007] 1 S.C.R. 38; *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4, [2004] 1 S.C.R. 76.

Statutes and Regulations Cited

Act respecting the Société des alcools du Québec, CQLR, c. S-13, s. 16.1 para. 1.

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*, 1st Sess., 41st Leg., 2018, s. 3.

Bill C-45, *An Act respecting cannabis and to amend the Controlled Drugs and Substances Act, the Criminal Code and other Acts*, 1st Sess., 42nd Parl., 2018.

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Cannabis Act, S.C. 2018, c. 16, ss. 2 "illicit cannabis", 7, 8(1)(b), (e), 9(1)(a)(iv), 12(4), 13(1).

Cannabis Regulation Act, CQLR, c. C-5.3, ss. 1 para. 1, para. 2, 5, 10, 25, 27, 29, 30, 31 para. 2, 33, 34 to 39, 40 to 42, 44, 45, 56, 57.

Constitution Act, 1867, ss. 91, 92.

Controlled Drugs and Substances Act, S.C. 1996, c. 19, ss. 4 to 7.1, Sch. II.

Liquor, Gaming and Cannabis Control Act, C.C.S.M., c. L153, ss. 101.13(1), 101.15.

Opium and Narcotic Drug Act, 1923, S.C. 1923, c. 22.

Regulation respecting training on the retail sale of cannabis and information to be communicated to a purchaser in the course of a cannabis sale, CQLR, c. C-5.3, r. 1, s. 1, Sch. I.

Regulation to determine other classes of cannabis that may be sold by the Société québécoise du cannabis and certain standards respecting the composition and characteristics of cannabis, CQLR, c. C-5.3, r. 0.1.

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APPEAL from a judgment of the Quebec Court of Appeal (Thibault, Pelletier and Rancourt JJ.A.), 2021 QCCA 1325, [2021] AZ-51792418, [2021] J.Q. n° 10432 (QL), 2021 CarswellQue 13667 (WL), setting aside a decision of Lavoie J., 2019 QCCS 3664, [2019] AZ-51625540, [2019] Q.J. No. 7561 (QL), 2019 CarswellQue 18400 (WL). Appeal dismissed.

Maxime Guérin and *Christian Saraïlis*, for the appellant.

Patricia Blair and *Frédéric Perreault*, for the respondent.

Hera Evans and *S. Zachary Green*, for the intervener the Attorney General of Ontario.

Kathryn Hart and *Deborah Carlson*, for the intervener the Attorney General of Manitoba.

Jonathan Penner and *Robert Danay*, for the intervener the Attorney General of British Columbia.

Thomson Irvine, *K.C.*, and *Noah Wernikowski*, for the intervener the Attorney General of Saskatchewan.

David N. Kamal and *Nathaniel Gartke*, for the intervener the Attorney General of Alberta.

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Olga Redko and *Ryan D. W. Dalziel*, *K.C.*, for the intervener the Canadian Association for Progress in Justice.

Robert Cunningham and *Fady Toban*, for the intervener the Canadian Cancer Society.

Ren Bucholz and *Annamaria Enenajor*, for the intervener Cannabis Amnesty.

Adam Goldenberg and *Holly Kallmeyer*, for the interveners the Cannabis Council of Canada and the Quebec Cannabis Industry Association.

English version of the judgment of the Court delivered by

THE CHIEF JUSTICE —

[1] A few years ago, the federal Parliament passed legislation relating to cannabis. Under that legislation, it is prohibited for an individual to possess or cultivate more than four cannabis plants in the individual's home. The provinces and territories subsequently passed their own legislation to regulate such practical matters as the manner in which cannabis was to be sold and stored. Through a broad legislative initiative that included the creation of a monopoly on the sale of cannabis, the Quebec legislature, for its part, enacted provisions that completely prohibit the possession and cultivation of cannabis plants at home, regardless of the number of plants. What must

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be determined in this appeal is whether the Quebec provisions are constitutionally valid in light of the division of powers and, if so, whether they are operative under the doctrine of federal paramountcy. For the reasons that follow, I conclude that the impugned provisions are a valid exercise by the Quebec legislature of the powers conferred on it by s. 92(13) and (16) of the *Constitution Act, 1867*. I also conclude that the impugned provisions do not frustrate the purpose of the federal legislation and are therefore operative.

[2] In these reasons, I express no opinion on the appropriateness or merits of the approaches adopted by Parliament and the Quebec legislature, respectively. I focus on explaining why two approaches to the self-cultivation of cannabis — the more "permissive" federal approach and the more "restrictive" Quebec approach — can coexist from a legal standpoint within the Canadian federation.

I. Background

[3] In 2018, Canada became the second country in the world, after Uruguay, and the very first G7 country to decriminalize the recreational use of cannabis. The decriminalization of this psychoactive substance, also called marijuana, marked a real change in the approach that had been taken in this country for nearly a century. The consumption, possession and sale of cannabis had first been criminalized in 1923, when this substance was added to the list of narcotics banned by the *Opium and Narcotic Drug Act, 1923*, S.C. 1923, c. 22. Many decades later, cannabis was included in the list

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of controlled substances in Sch. II of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 (“*CDSA*”).

[4] On June 19, 2018, Parliament passed Bill C-45, *An Act respecting cannabis and to amend the Controlled Drugs and Substances Act, the Criminal Code and other Acts*, 1st Sess., 42nd Parl. On October 17, 2018, that statute came into force as the *Cannabis Act*, S.C. 2018, c. 16 (“federal Act”). Decriminalizing the recreational use of cannabis is the central feature of this legislation, which excludes this substance from the application of the criminal prohibitions set out in ss. 4 to 7.1 of the *CDSA*. The federal Act prohibits the possession of cannabis plants and the cultivation of such plants for personal purposes, but it *exempts* the possession and cultivation of no more than four plants from these prohibitions. The provisions creating the prohibitions read as follows:

> **Possession**
>
> **8 (1)** Unless authorized under this Act, it is prohibited
>
> . . .
>
> **(e)** for an individual to possess more than four cannabis plants that are not budding or flowering; . . .
>
> . . .
>
> **Production**
>
> **12** . . .
>
> . . .

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Cultivation, propagation and harvesting — 18 years of age or older

(4) Unless authorized under this Act, it is prohibited for an individual who is 18 years of age or older to cultivate, propagate or harvest, or to offer to cultivate, propagate or harvest,

. . .

(b) more than four cannabis plants at any one time in their dwelling-house.

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[5] The enactment of the federal Act represents a paradigm shift in the Canadian legal landscape. Canada has moved from a suppression-based approach to a scheme that gives the provinces responsibility for determining the framework for the sale and distribution of cannabis within their borders. In other words, the provinces are being called upon to make laws, within their fields of jurisdiction, concerning a substance that was previously subject to criminal prohibitions for nearly a century. The statutes and regulations passed by the provinces in parallel with the federal Act primarily establish rules governing the sale of the substance, for example with regard to the location, operation and staff of the stores where the various cannabis products are sold. Much of the provincial legislation also sets out additional restrictions that supplement the federal legislative framework, including with respect to the minimum age required to purchase cannabis, the applicable limit on the possession of this substance and the places where it may be consumed in public.

[6] On June 12, 2018, the Quebec legislature introduced its own scheme to regulate cannabis when it passed 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, 1st Sess., 41st Leg. The creation of the Société québécoise du cannabis ("SQDC"), a subsidiary of the Société des alcools du Québec with a monopoly on the sale of cannabis in Quebec, was one of the most important measures. The enactment of the *Cannabis Regulation Act*, CQLR, c. C-5.3 ("provincial Act"), was another. The provincial Act contains a broad range of provisions concerning the possession, cultivation, use, transportation, storage, sale and promotion of cannabis in Quebec. The specific provisions of the provincial Act being challenged in this case are ss. 5 and 10, which completely prohibit the possession of cannabis plants and the cultivation of such plants for personal purposes in a dwelling-house. These prohibitions are accompanied by fines of between $250 and $750, which are doubled for a subsequent offence:

> **5.** It is prohibited to possess a cannabis plant.
>
> Anyone who contravenes the first paragraph commits an offence and is liable to a fine of $250 to $750. Those amounts are doubled for a subsequent offence.
>
> **10.** It is prohibited to cultivate cannabis for personal purposes.
>
> That prohibition against cultivating cannabis applies, in particular, to the planting of seeds and plants, the propagation of plants from cuttings, the cultivation of plants and the harvesting of their production.
>
> Anyone who contravenes the first paragraph by cultivating four cannabis plants or less in their dwelling-house commits an offence and is liable to a fine of $250 to $750. Those amounts are doubled for a subsequent offence.

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For the purposes of the third paragraph, "dwelling-house" has the meaning assigned by subsection 8 of section 12 of the Cannabis Act (S.C. 2018, c. 16).

[7] Therefore, under ss. 5 and 10 of the provincial Act, the possession and cultivation at home of cannabis plants are subject to penal sanctions in Quebec — just as in Manitoba, which has adopted an approach similar to Quebec's in *The Liquor, Gaming and Cannabis Control Act*, C.C.S.M., c. L153, ss. 101.13(1) and 101.15.

[8] On October 25, 2018, the appellant in this Court, Janick Murray-Hall, brought an action in the Quebec Superior Court on his own behalf and on behalf of all persons who, in Quebec, are liable to be prosecuted for possession of a cannabis plant in their dwelling-house and who may thus face the penal consequences arising from the provincial Act. He argued that ss. 5 and 10 of the provincial Act fall within the federal criminal law power under s. 91(27) of the *Constitution Act, 1867* and outside the heads of power assigned to the provinces. He sought a declaration from the Superior Court that these provisions are *ultra vires* or, in the alternative, that they are of no force or effect pursuant to the doctrine of federal paramountcy.

II. Judicial History

A. *Quebec Superior Court, 2019 QCCS 3664*

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[9] On September 3, 2019, the Quebec Superior Court ruled in favour of Mr. Murray-Hall and declared ss. 5 and 10 of the provincial Act constitutionally invalid.

[10] To make that finding of invalidity, the court began by characterizing the pith and substance of the impugned provisions as being [TRANSLATION] "to completely prohibit the personal cultivation of cannabis because it harms the health and security of the public" (para. 51 (CanLII)). In the court's view, the absolute nature of the prohibitions and the sense of [TRANSLATION] "general disapproval" (para. 46) of cannabis use revealed by the legislative debates pointed to the conclusion that the impugned provisions are not simply intended to protect the health and security of the public. Rather, their purpose is to [TRANSLATION] "suppress the personal production of cannabis" (*ibid.*), as the former provisions of the *CDSA* did. This led the court to find that the impugned provisions are [TRANSLATION] "colourable". With regard to the argument that the prohibitions established by ss. 5 and 10 are means of achieving the public health and security objectives set out in the provincial Act, the court held that this argument was not supported by the intrinsic and extrinsic evidence or by an examination of the effects of the provisions. In its opinion, [TRANSLATION] "the prohibitions in ss. 5 and 10 are not means, but rather the very purpose of these provisions" (para. 76).

[11] The Superior Court continued its analysis of constitutional validity and held that the impugned provisions fall under the federal criminal law power. At the

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classification stage, the court found that the three prerequisites for valid criminal law are met and that the impugned provisions are similar to the provisions of the *CDSA* that formerly prohibited the possession and cultivation of cannabis. The court added that the double aspect doctrine does not apply in this case because, given the absolute nature of the prohibitions they contain, ss. 5 and 10 are related *solely* to the federal criminal law power. Referring to the possibility of limiting the possession and cultivation of cannabis for personal purposes to one, two or three plants, the court noted that [TRANSLATION] "[i]t is clear that, other than zero plants, the province could have legislated, either for health or for security" (para. 87).

[12] Finally, the court held that the provisions found to be invalid cannot be saved under the ancillary powers doctrine. They cannot be regarded as sufficiently integrated into the provincial Act, otherwise considered valid as a whole, because the total prohibitions imposed by them were [TRANSLATION] "not absolutely necessary" (para. 99). In the court's view, the provincial legislature could have achieved its objectives by imposing a stricter limit on the number of plants than the federal Act does rather than by imposing absolute prohibitions.

[13] Having found ss. 5 and 10 of the provincial Act constitutionally invalid, the court held that it was not necessary to consider whether the provisions are operative. It also denied the request to suspend the declaration of invalidity on the ground that no legal vacuum or chaos would result from its decision.

B. *Quebec Court of Appeal, 2021 QCCA 1325*

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[14] In a unanimous decision, the Quebec Court of Appeal set aside the trial judgment and consequently affirmed the constitutional validity of ss. 5 and 10 of the provincial Act on the basis that they are within the powers conferred on the provinces by s. 92(13) and (16) of the *Constitution Act, 1867*.

[15] At the characterization stage, the court found that the pith and substance of the impugned provisions is to [TRANSLATION] "put in place one of the means chosen to ensure the effectiveness of the state monopoly granted to the *SQDC*" (para. 82 (CanLII)), a monopoly created to prevent and reduce cannabis harm and to protect the health and security of the public. The purpose of ss. 5 and 10 of the provincial Act, which prohibit possession and cultivation at home, is therefore to steer consumers to the only source of supply trusted by the Quebec legislature. Contrary to what the Superior Court found, the impugned provisions do not have the [TRANSLATION] "separate and independent objective of prohibiting the personal cultivation of cannabis" (para. 81). In its reasoning, the Court of Appeal stressed the need to consider the provincial Act as a whole rather than reading ss. 5 and 10 in isolation. It also urged caution in analyzing the legislative debates, which in this case did not demonstrate the existence of colourable legislation aimed at morally suppressing the possession and personal cultivation of cannabis as such.

[16] At the classification stage, the Court of Appeal found that the impugned provisions are related to the provincial powers conferred by s. 92(13) and (16) of the *Constitution Act, 1867*. It held that this is a proper case for the application of the double

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aspect doctrine, because the two levels of government are pursuing parallel objectives within their respective fields of jurisdiction. Parliament, it noted, [TRANSLATION] "is seeking to better control the intrusion of criminal organizations" into the cannabis market by replacing a measure it considers ineffective (total prohibition against possession) with a measure it views as more likely to minimize the role of organized crime (decriminalization of the possession of a limited amount) (para. 93). The provincial legislature, for its part, is trying to ensure effective control over access to cannabis by creating a state monopoly on distribution.

[17] Having upheld the constitutional validity of the impugned provisions, the Court of Appeal also found that they are operative under the doctrine of federal paramountcy. Addressing the possibility that the purpose of the federal Act is being frustrated, the court rejected Mr. Murray-Hall's argument that Parliament not only *decriminalized* home cultivation but actually *authorized* it for the purpose of reducing illicit activities in relation to cannabis. The court noted that the text of the federal Act does not expressly confer any positive right to possess or cultivate cannabis plants at home for personal purposes. It added that Mr. Murray-Hall's argument was particularly troubling because it was based on the idea that Parliament's criminal law jurisdiction gives it not only the power to prohibit conduct but also the power to formally authorize it. Finally, the Court of Appeal again emphasized the complementarity of the two statutes in issue, which reflect the same concern with combating the harm associated with cannabis consumption. It is therefore possible, in its view, to interpret the federal Act in a manner consistent with the principle of cooperative federalism and to find that

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it [TRANSLATION] "has not limited the National Assembly's power to prohibit the private cultivation of cannabis in implementing means by which to achieve its objectives" (para. 139).

III. Issues

[18] This appeal raises the following two questions:

A. Did the Quebec Court of Appeal err in law in holding that ss. 5 and 10 of the provincial Act are constitutionally valid?

B. Did the Quebec Court of Appeal err in law in holding that ss. 5 and 10 of the provincial Act are constitutionally operative?

[19] Although Mr. Murray-Hall specifically refers only to the first question in his written submissions, I am of the opinion that this Court should also address the second one. A number of Mr. Murray-Hall's arguments relate to an alleged conflict of purposes between the federal Act and ss. 5 and 10 of the provincial Act. The Court of Appeal also devoted a good part of its reasons to the question of whether the application of the impugned provisions frustrates or undermines the purpose of the federal Act. In these circumstances, I think it wise to address this question, providing all necessary clarifications.

IV. Analysis

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A. *Did the Quebec Court of Appeal Err in Law in Holding That Sections 5 and 10 of the Provincial Act Are Constitutionally Valid?*

[20] As I will explain below, I am of the view that ss. 5 and 10 of the provincial Act are a valid exercise by the Quebec legislature of the powers conferred on it by s. 92(13) and (16) of the *Constitution Act, 1867* and that the Court of Appeal therefore made no error in its analysis of the validity of the impugned provisions. I will begin by setting out the analytical framework that I apply to reach this conclusion.

(1) Analytical Framework

[21] The analytical framework for determining the constitutional validity of laws is well established and is not the subject of any particular controversy in this case, so a brief review will suffice.

[22] To decide whether a law or some of its provisions are constitutionally valid under the division of powers, courts must first characterize the law or provisions and then, on that basis, classify them by reference to the heads of power listed in ss. 91 and 92 of the *Constitution Act, 1867* (*Reference re Genetic Non-Discrimination Act*, 2020 SCC 17, [2020] 2 S.C.R. 283, at para. 26, citing *Reference re Firearms Act (Can.)*, 2000 SCC 31, [2000] 1 S.C.R. 783, at para. 15).

[23] At the characterization stage, what must be determined is the pith and substance of the law (*Reference re Genetic Non-Discrimination Act*, at para. 28, citing

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Canadian Western Bank v. Alberta, 2007 SCC 22, [2007] 2 S.C.R. 3, at para. 26). In its jurisprudence, the Court has described the aim of this exercise as being to identify the "dominant purpose" of the law (*RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 29), its "dominant or most important characteristic" (*Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at pp. 62-63) or its "leading feature or true character" (*R. v. Morgentaler*, [1993] 3 S.C.R. 463, at pp. 481-82). At the classification stage, in turn, what must be determined is whether the pith and substance thereby defined comes within one of the heads of power of the enacting legislature (*Reference re Firearms Act*, at para. 25).

[24] To ascertain the pith and substance of a law, courts look at its purpose and effects (*Reference re Firearms Act*, at para. 16). This essentially interpretative exercise is meant to be neither technical nor formalistic, to use the words of the late Professor Peter W. Hogg (*Constitutional Law of Canada* (loose-leaf ed.), vol. 1, at p. 15-12, cited in *Ward v. Canada (Attorney General)*, 2002 SCC 17, [2002] 1 S.C.R. 569, at para. 18). Indeed, in addition to the words used in the law itself, courts may consider the circumstances surrounding its enactment (*Ward*, at para. 17, citing *Reference re Firearms Act*, at paras. 17-18, and *Morgentaler*, at p. 483).

[25] To analyze the purpose of a law, courts rely on intrinsic evidence, that is, the actual text of the law, including its preamble and purpose clauses, as well as extrinsic evidence, such as parliamentary debates and minutes of parliamentary

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committees (*Canadian Western Bank*, at para. 27; *Kitkatla Band v. British Columbia (Minister of Small Business, Tourism and Culture)*, 2002 SCC 31, [2002] 2 S.C.R. 146, at paras. 53-54; *Reference re Assisted Human Reproduction Act*, 2010 SCC 61, [2010] 3 S.C.R. 457 ("*Reference re AHRA*"), at paras. 22 and 184). In looking at the effects of the law, courts consider both its legal effects, namely those related directly to the provisions of the law itself, and its practical effects, that is, the "side" effects arising from its application (*Kitkatla Band*, at para. 54, citing *Morgentaler*, at pp. 482-83).

[26] That being said, I would nonetheless emphasize that textual analysis is the focus of the characterization exercise. As Kasirer J. noted in *Reference re Genetic Non-Discrimination Act*, "[i]n the final analysis, it is the substance of the legislation that needs to be characterized, not speeches in Parliament or utterances in the press" (para. 165).

[27] I will devote the next few sections to these two stages of the analysis — characterization and classification — in order to determine whether the Court of Appeal correctly held that ss. 5 and 10 of the provincial Act are constitutionally valid.

(2) <u>Characterization of the Impugned Provisions</u>

[28] In my view, the pith and substance of the impugned provisions is to ensure the effectiveness of the state monopoly in order to protect the health and security of the public, and of young persons in particular, from cannabis harm. It follows that the prohibitions against the possession of cannabis plants and their cultivation at home set

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out in ss. 5 and 10 of the provincial Act are a *means* of serving the public health and security *objectives* pursued by that Act. With a few slight differences, my conclusion at the characterization stage is the same as that of the Court of Appeal.

[29] Before embarking on the analysis, I will provide a brief overview of the principles that apply in characterizing provisions that are alleged to be an integral part of a regulatory scheme. It is helpful to clarify the extent to which courts should analyze a law as a whole in order to characterize some of its provisions. The question is relevant in this case because the parties' disagreement at the characterization stage essentially stems from the emphasis they place, respectively, on the impugned provisions and on the provincial Act considered in its entirety. Mr. Murray-Hall focuses on the provisions themselves and criticizes the Court of Appeal for not truly considering the possibility that their purpose differs from that of the Act as a whole. The Attorney General of Quebec instead stresses the role played by the provisions in the scheme, endorsing the Court of Appeal's statement that [TRANSLATION] "their real purpose emerges only when they are analyzed in the overall context of the [provincial Act]" (para. 43).

[30] Where, as in this case, only very specific provisions are being challenged and not the entire law, certain principles apply. A court should begin by characterizing the provisions rather than considering the validity of the law as a whole, a principle articulated by Dickson J. (as he then was) in *Attorney General of Canada v. Canadian National Transportation, Ltd.*, [1983] 2 S.C.R. 206. However, Dickson J. added, this does not mean that the provisions must be read in isolation. A contextual analysis of

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the provisions is necessary when they are part of a regulatory scheme. Dickson J.'s remarks in this regard are as follows:

> It is obvious at the outset that a constitutionally invalid provision will not be saved by being put into an otherwise valid statute, even if the statute comprises a regulatory scheme under the general trade and commerce branch of s. 91(2). The correct approach, where there is some doubt that the impugned provision has the same constitutional characterization as the Act in which it is found, is to start with the challenged section rather than with a demonstration of the validity of the statute as a whole. I do not think, however, this means that the section in question must be read in isolation. <u>If the claim to constitutional validity is based on the contention that the impugned provision is part of a regulatory scheme it would seem necessary to read it in its context. If it can in fact be seen as part of such a scheme, attention will then shift to the constitutionality of the scheme as a whole.</u> [Emphasis added; p. 270.]

[31] This Court has repeatedly emphasized the need to consider the impugned provisions in light of their interaction with the scheme to which they belong. In *Quebec (Attorney General) v. Canada (Attorney General)*, 2015 SCC 14, [2015] 1 S.C.R. 693 ("*Quebec (Attorney General) 2015*"), one of the issues was whether a provision requiring the destruction of long-gun registration data related to the same matter — public safety — as the legislation repealing the registration scheme. Writing for the majority, Cromwell and Karakatsanis JJ. stated the following: ". . . the 'matter' of the provision must be considered in the context of the larger scheme, as its relationship to that scheme may be an important consideration in determining its pith and substance . . ." (para. 30).

[32] The principle enunciated by McLachlin C.J. in *Ward*, where the issue was whether a section of federal fisheries regulations prohibiting the sale of young seals

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was constitutionally valid, is also relevant: "The question is not <u>whether</u> the *Regulations* prohibit the sale so much as <u>why</u> it is prohibited" (para. 19 (emphasis in original)). In that case, therefore, the Court could not simply focus on the fact that the impugned provision imposed a prohibition on sale, trade or barter, which could have suggested that it fell within provincial jurisdiction over property or trade. When the *why* of the prohibition and its interaction with the rest of the scheme were considered, it became apparent that the purpose of the prohibition was to curtail commercial hunting and that Parliament was validly exercising its fisheries power.

[33] I would also note that reading the impugned provisions in the context of the scheme into which they are integrated is crucial in distinguishing the *purpose* of the law from the *means* chosen to achieve it. Indeed, in *Ward*, McLachlin C.J. cautioned against "confus[ing] the purpose of the legislation with the means used to carry out that purpose" (para. 25).

[34] Bearing in mind the principles laid down in *National Transportation* and the note of caution sounded in *Ward*, I will now characterize ss. 5 and 10 of the provincial Act. I will consider the purpose of these provisions first and then their effects.

(a) *Purpose of the Impugned Provisions*

(i) <u>Intrinsic Evidence</u>

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[35] Sections 5 and 10 of the provincial Act set out absolute prohibitions against, respectively, the possession and the cultivation of cannabis plants in a dwelling-house, accompanied by fines of $250 to $750. If we simply focused on the wording of these provisions, as the appellant urges us to do, the concept of prohibition is what would stand out.

[36] However, it is essential to analyze ss. 5 and 10 in light of their context and not just their wording, because it is the Attorney General of Quebec's contention that they are an integral part of the regulatory scheme established by the provincial Act. To echo the words of McLachlin C.J. in *Ward*, it is not just a matter of finding that the prohibitions against possession and cultivation exist; it is important to look at *why* they are incorporated into the provincial Act's very specific regulatory scheme.

[37] It is also my view that the impugned provisions must not be read "separately" or "individually" on the pretext that they may relate to a very different matter than the rest of the provisions. As the Court of Appeal said, [TRANSLATION] "[t]he constitutionality of sections 5 and 10 of the [provincial Act] cannot properly be analyzed in isolation, separately from the [Act] as a whole" (para. 41). Of course, it is quite possible that some provisions of a law may be of "a completely different order" than its other provisions (*Westendorp v. The Queen*, [1983] 1 S.C.R. 43, at p. 51). But such a conclusion cannot be reached without a contextual analysis of the impugned provisions. Logically, it cannot be determined whether there is a marked difference

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between the purpose of ss. 5 and 10 and that of the rest of the provincial Act's provisions, as Mr. Murray-Hall alleges, without having considered the Act as a whole.

[38] An overview of the provincial Act reveals the scope of the regulatory scheme introduced by the Quebec legislature. Like the Court of Appeal, I see this undertaking as involving the creation of a state monopoly that oversees each step leading up to the purchase of cannabis by citizens in order to protect the health and security of the public. The prohibitions set out in ss. 5 and 10, along with the other controls put in place by the Act, are the machinery of this undertaking. Specifically, prohibiting the possession and cultivation of cannabis plants contributes to the effectiveness of the state monopoly by steering consumers to the only legally authorized source of supply, that is, the state-owned enterprise.

[39] It is helpful to recall that, at the same time the provincial Act was enacted, the Quebec legislature amended the *Act respecting the Société des alcools du Québec*, CQLR, c. S-13, to create the SQDC, a subsidiary of the Société des alcools du Québec that would ensure the sale of cannabis "from a health protection perspective, in order to integrate consumers into, and maintain them in, the legal market without encouraging cannabis consumption" (s. 16.1 para. 1; see also s. 3 of Bill 157).

[40] The provincial Act sets out the various aspects governing the exercise of the SQDC's monopoly on the sale of cannabis (s. 25), including control over the location of retail outlets (ss. 27 and 33), control of the quality of the products offered (ss. 29, 44 and 45), a prohibition against selling to persons under 21 years of age (ss. 34

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to 39), education of consumers on the health risks of cannabis (ss. 30, 31 para. 2, 41 and 57 para. 2), and compliance with display, signage and packaging standards (ss. 40 to 42, 56 and 57). In my view, the prohibitions and control mechanisms provided for by the provincial Act must be regarded as *means* chosen to achieve the *purposes* stated in the first paragraph of s. 1, that is, "to prevent and reduce cannabis harm in order to protect the health and security of the public and of young persons in particular" and "to ensure the preservation of the cannabis market's integrity". These prohibitions and control mechanisms follow logically from the stated purposes because they make it possible, as the second paragraph of the same section says, to regulate "the possession, cultivation, use, sale and promotion of cannabis".

[41] Like the provisions just mentioned, ss. 5 and 10 are part of the monopolistic logic intended by the Quebec legislature, and the prohibitions they impose are a means of achieving the objectives of public health and security.

[42] In reality, the impossibility of possessing and cultivating cannabis plants at home without risking penal sanctions has the effect of steering Quebec consumers to the safe source of supply that is the SQDC. As a result, they receive quality-controlled products and advice from sales employees who have been trained on the risks associated with cannabis consumption (on the first point, see ss. 29, 44 and 45 of the provincial Act and the *Regulation to determine other classes of cannabis that may be sold by the Société québécoise du cannabis and certain standards respecting the composition and characteristics of cannabis*, CQLR, c. C-5.3, r. 0.1; on the second

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point, see s. 1 and Sch. I of the *Regulation respecting training on the retail sale of cannabis and information to be communicated to a purchaser in the course of a cannabis sale*, CQLR, c. C-5.3, r. 1). The fact that consumers buy from the SQDC also means that they are subject to a series of requirements, the most important of which seems to me to be the one setting a minimum age of 21 years for purchasing cannabis from the SQDC.

[43] The essence of the position advanced by the appellant in this Court is that the purpose of the provincial Act could have been achieved by regulating — rather than completely prohibiting — home cannabis cultivation, for example by allowing the possession and cultivation for personal purposes of one, two or three cannabis plants. He argues that, by choosing absolute prohibitions instead, the provincial legislature interfered unduly in the exercise of the federal criminal law power. I note that the absolute nature of the prohibitions was also raised by the trial judge, who saw it as an indication that the Quebec legislature [TRANSLATION] "in fact sought to mitigate the repeal of the former provisions criminalizing the personal cultivation and possession of cannabis plants" (para. 45).

[44] In my opinion, however, this distinction between the absolute prohibitions being challenged and the more flexible prohibitions mentioned with respect to the permitted number of plants is of no assistance to the appellant. Even if it is accepted that the objective of protecting the health and security of the public could have been achieved by regulating home cannabis cultivation less strictly *and not only* by

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completely prohibiting it, this argument is far from being determinative in identifying the pith and substance of the impugned provisions. When two approaches are considered to be potentially effective, it falls to legislative bodies to choose the one that is most likely to further the intended objectives. Indeed, this Court has pointed out on several occasions that considerations relating to the efficacy or wisdom of the means chosen are not helpful at the characterization stage (*Ward*, at paras. 18 and 22; *Reference re Firearms Act*, at para. 18, citing *Morgentaler*, at pp. 487-88; *Reference re Securities Act*, 2011 SCC 66, [2011] 3 S.C.R. 837, at para. 90; *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373, at p. 425).

[45] In short, when viewed together with the other provisions of the provincial Act, ss. 5 and 10 do not have the separate and independent objective of prohibiting the possession and cultivation of cannabis plants for personal purposes. The prohibitions themselves must be seen as one means among a broad range of measures that the Quebec legislature has deemed necessary in order to achieve the provincial Act's public health and security objectives. In particular, the prohibitions act as strong incentives for the integration of "consumers into . . . the legal market" that ensures, among other things, control of the quality of the products offered, education on the risks of cannabis consumption and compliance with rules on the minimum age for purchasing cannabis (see s. 16.1 para. 1 of the *Act respecting the Société des alcools du Québec*; see also R.F., at para. 12).

(ii) Extrinsic Evidence

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[46] In my view, the usefulness of the legislative debates in this appeal is relative. I adopt the Court of Appeal's observation that [TRANSLATION] "[r]eading them tends . . . to show that the remarks made about the impugned provisions are consistent with the purpose identified earlier in analyzing the intrinsic evidence" (para. 72). The remarks made by the members of the Quebec legislature thus serve to confirm what was already apparent from the interaction between the impugned provisions and the rest of the prohibitions and control mechanisms provided for by the provincial Act, namely that the prohibitions against possession and cultivation at home help to ensure that consumers will buy from the SQDC.

[47] It can be seen from the proceedings of the Standing Committee on Health and Social Services that the members of the Quebec legislature considered two approaches to home cultivation: one relying on an absolute prohibition against the possession and cultivation of cannabis plants to ensure that consumers would buy from the state, and the other relying on tolerance of these practices as a lever in the fight against organized crime and the "empowerment" of low-income consumers (see National Assembly, *Journal des débats de la Commission permanente de la santé et des services sociaux*, vol. 44, No. 189, 1st Sess., 41st Leg., March 21, 2018, at pp. 22 (S. Jolin-Barrette) and 35 (M. Massé); National Assembly, *Journal des débats de la Commission permanente de la santé et des services sociaux*, vol. 44, No. 191, 1st Sess., 41st Leg., March 27, 2018, at p. 3 (S. Pagé)). The Quebec legislature clearly chose the first of these two approaches.

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[48] A comment made by a member of the opposition, which the Minister responsible for Public Health later endorsed, is revealing: [TRANSLATION] "Out of a concern for public security, out of a concern for public health, out of a concern for proceeding gradually, we make the choice, as a state, not to allow home cultivation, and for purposes of public health and security, we want to guide consumers to the stores of a subsidiary of the state-owned enterprise to make sure that cannabis is consumed responsibly" (*Journal des débats de la Commission permanente de la santé et des services sociaux*, March 21, 2018, at p. 22 (S. Jolin-Barrette)). The legislature's intention was to promote responsible consumption of the substance by establishing a scheme in which individuals, denied the option of cultivating their own cannabis, would be steered to SQDC outlets.

[49] That being said, I acknowledge that the discussion concerning the extrinsic evidence in the Superior Court and the Court of Appeal related mainly to the question of whether the impugned provisions were a form of "colourable legislation". For this reason, the following remarks are in order.

[50] The concept of "colourable legislation" refers to legislation that seemingly deals with a matter within the jurisdiction of the enacting level of government but that is actually addressed to a matter outside that jurisdiction (*Morgentaler*, at p. 496). It has long been accepted that recourse may be had to extrinsic evidence, insofar as it reflects the legislative intent, in order to determine the alleged "colourability" of legislation

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(*Reference re Upper Churchill Water Rights Reversion Act*, [1984] 1 S.C.R. 297, at pp. 318-19).

[51] The appellant submits that the members of the Quebec legislature demonstrated on a number of occasions that their intent was to thwart Parliament's chosen approach to home cultivation and thus to enact, in "colourable" form, the provisions of the *CDSA* that formerly prohibited the possession and cultivation of cannabis. This argument cannot be accepted.

[52] It is true that some uneasiness was expressed within the walls of the National Assembly over the decriminalization bill, which was introduced on the sole initiative of the federal government. The members of the Quebec legislature also deemed it appropriate to reiterate the dangerousness of cannabis because of the risk — perceived or recognized — that this substance would be normalized by the passage of the federal Act. The appellant refers us to the speech made by the Minister responsible for Public Health during the last stages leading to the passage of the final version of Bill 157:

> [TRANSLATION] <u>This bill positions and prepares Quebec for the imminent legalization of cannabis, unilaterally imposed, let us be honest, Madam President, by the federal government. I want citizens to clearly understand that neither the Quebec government nor the members of the opposition nor anyone here in Quebec requested this.</u> It ended up on our agenda following a decision of the federal government. So, we had to work with extremely tight deadlines and a high degree of uncertainty with respect to federal intentions. To say that it was a real challenge is an understatement, Madam President. Our ultimate goal, the same from the outset, was to offer the best possible regulation of this substance on our territory, given the stakes. And, I would like to repeat, Madam President,

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> that cannabis is not a benign, harmless substance. I say to young persons: It is not a great idea to smoke cannabis. [Emphasis added.]
>
> (National Assembly, *Journal des débats*, vol. 44, No. 346, 1st Sess., 41st Leg., June 6, 2018, at pp. 21972-73 (L. Charlebois))

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[53] Statements like these are, however, far from sufficient for a finding of colourability. As Cromwell and Karakatsanis JJ. noted in *Quebec (Attorney General) 2015*, "[c]ourts are, for good reasons, reluctant to find legislation to be colourable" (para. 31). If the colourability doctrine were applied less narrowly, there would be a danger that courts would overstep their judicial role and make decisions based on policy considerations, thereby expressing "disapproval of either the policy of the statute or the means by which the legislation seeks to carry it out" (*ibid.*).

[54] In my view, the Minister's statements do not show an intent to recriminalize what Parliament sought to decriminalize. Rather, they reflect a general concern about the risks arising from cannabis consumption, particularly for younger individuals. As the Court of Appeal pointed out, this concern was expressed repeatedly in the House of Commons when Bill C-45 was being examined (para. 102). Quite a few members of Parliament noted that "Canadians, including children and youth", have some of the highest rates of cannabis use in the world and that the effects of cannabis may be particularly dangerous for young people who use it (*ibid.*, quoting *House of Commons Debates*, vol. 148, No. 183, 1st Sess., 42nd Parl., May 30, 2017, at p. 11706 (M. Mendicino)). Viewed in such a context, the Minister's statements simply show that concerns about the harmful effects of cannabis on health did not disappear merely because this substance was decriminalized. In other words, the concerns expressed by

members of Parliament while debating Bill C-45 were echoed in the National Assembly of Quebec.

[55] A parallel was drawn by the trial judge between the circumstances of this case and those of *Morgentaler*, in which the pith and substance of a Nova Scotia statute that prohibited abortion, other than in a hospital, was not control over private health care institutions but rather the restriction of abortion as a socially undesirable practice that should be suppressed or punished. Among other things, *Morgentaler* reiterated "[t]he guiding principle . . . 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" (p. 498). In the present case, the appellant argues that this principle is undermined by ss. 5 and 10 of the provincial Act, which are designed to remedy the repeal of the provisions that once criminalized the personal production of cannabis.

[56] I agree with the Court of Appeal that the circumstances of this case differ from those of *Morgentaler*. The statements made by the members of the provincial legislature in *Morgentaler* showed direct opposition to freestanding abortion clinics as a "public evil" to be eliminated and left no ambiguity regarding the intent behind the impugned legislation (p. 503). Moreover, many important concerns relating to the stated purpose of the statute — for example, health care costs or objections to a two-tier system of access to medical services — had not been mentioned during the legislative debates. The same cannot be said of the conduct of the debates that led to the enactment

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of the provincial Act and the provisions challenged in this case. When the prohibitions against the possession and cultivation of cannabis plants were debated by the members of the Quebec legislature, they were clearly viewed from the perspective of the stated purposes of the Act, that is, preserving the cannabis market's integrity and protecting the health and security of the public.

[57] Given the complete lack of evidence of any "improper" legislative purpose, and exercising the caution with which this Court has always dealt with allegations of colourability, I cannot accept the appellant's argument. The impugned provisions do not represent a colourable attempt to re-enact the criminal law prohibitions repealed by Parliament.

(b) *Effects of the Impugned Provisions*

[58] The effects of the impugned provisions are clear, and I agree with the manner in which the Superior Court described them in its reasons:

> [TRANSLATION] . . . the practical consequence of applying ss. 5 and 10 is one, to prevent citizens from possessing and cultivating cannabis plants for personal purposes and two, to force consumers to purchase cannabis from the SQDC.
>
> The legal consequences of the provincial provisions are one, to prohibit the possession of cannabis plants and the personal cultivation of cannabis and two, to impose penal sanctions for any violation. They also result in penal consequences for acts that were formerly criminal under federal legislation, the CDSA. [paras. 49-50]

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[59] I would add, however, that while the impugned provisions do bring otherwise decriminalized conduct into the sphere of penal law, the consequences flowing from a contravention are very different from those arising under the provisions of the *CDSA*. Persons who contravene ss. 5 and 10 of the provincial Act are liable to fines that could be said to be relatively modest, since they range from $250 to $750.

[60] Together, the legal and practical effects described above confirm the conclusion I reached earlier after analyzing the intrinsic and extrinsic evidence. The purpose of ss. 5 and 10 of the provincial Act is not to suppress possession and cultivation at home as such, but rather to ensure the effectiveness of the state monopoly in order to protect the health and security of the public from cannabis harm.

[61] One final point concerning the effects of the impugned provisions warrants further comment. The intervener the Canadian Association for Progress in Justice submits that the colourability of the impugned provisions may be revealed by considering their effects, in addition to looking at the legislative debates. Specifically, it argues that ss. 5 and 10 of the provincial Act and a series of criminal offences set out in the federal Act have the *combined* effect of recriminalizing conduct that has nonetheless been decriminalized. The provincial prohibitions allegedly transform cannabis plants possessed or cultivated by individuals in Quebec into a form of "illicit cannabis" within the meaning of s. 2 of the federal Act, which defines this term as follows: ". . . cannabis that is or was sold, produced or distributed by a person prohibited from doing so under this Act or <u>any provincial Act</u> . . . ." The possession,

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distribution, cultivation and production of "illicit cannabis" are the subject of criminal offences under ss. 8(1)(b), 9(1)(a)(iv), 12(4)(a) and 13(1), respectively, of the federal Act. According to the intervener, the impugned provisions of the provincial Act therefore create not only regulatory offences but also criminal offences because of the "illicit" nature of the plants cultivated in Quebec dwelling-houses.

[62] I accept the premise that considering the legislative debates and analyzing effects may be helpful in establishing the colourability of a law. The Court stated this itself in *Reference re Firearms Act*, noting that "the effects of the law may suggest a purpose other than that which is stated in the law" and that a law "is sometimes said to be 'colourable'" where its effects diverge substantially from its stated aim (para. 18). That being said, however, I cannot accept the argument that the recriminalization of conduct that has been decriminalized in this case is an effect of the provincial provisions, when their interaction with the federal Act is taken into account. Parliament drafted the definition of "illicit cannabis" by reference to provincial legislation and in such a way that conduct for which penal sanctions are imposed by the provinces is subject to the criminal prohibitions set out in ss. 8(1)(b), 9(1)(a)(iv), 12(4)(a) and 13(1) of the federal Act. The possibility that the possession or cultivation of one to four cannabis plants at home could be recriminalized therefore arises *solely* from the decision made by Parliament to contemplate provincial regulatory action in s. 2 of the federal Act. To put it simply, any possible recriminalization results not from the provincial provisions but only from the federal provisions.

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[63] To accept the intervener's argument would mean that the enactment by a province of any prohibition against cannabis for regulatory purposes would be *ultra vires* because it would already be covered by the definition of "illicit cannabis" and by the possible application of the criminal prohibitions set out in ss. 8(1)(b), 9(1)(a)(iv), 12(4)(a) and 13(1) of the federal Act. In practical terms, this would negate the provinces' power to regulate the use of this substance. Such a result would be contrary to the view of federalism espoused by this Court and to the clear intention of Parliament. On this last point, Parliament obviously assumed that the provinces would be able to legislate with respect to cannabis within their fields of jurisdiction — hence the reference to provincial legislation in the definition of "illicit cannabis".

(c) *Conclusion on Pith and Substance*

[64] For the reasons given above, I conclude that the pith and substance of ss. 5 and 10 is to ensure the effectiveness of the state monopoly on the sale of cannabis in order to protect the health and security of the public, and of young persons in particular, from the harm caused by this substance. Prohibiting the possession and cultivation of cannabis plants is not in itself the *purpose* of the impugned provisions, but rather a *means* of steering consumers to the only source of supply considered to be reliable and safe.

(3) Classification of the Impugned Provisions

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[65] In this case, the question before us at the classification stage is whether the impugned provisions fall within the federal criminal law power under s. 91(27) of the *Constitution Act, 1867* or within the powers conferred on the provinces over property and civil rights and matters of a merely local or private nature by s. 92(13) and (16), respectively. For the reasons that follow, I conclude that ss. 5 and 10 of the provincial Act are related to the provinces' powers and are therefore *intra vires* the Quebec legislature.

[66] To begin with, I cannot accept the trial judge's reasoning, which the appellant urges us to adopt, to the effect that ss. 5 and 10 of the provincial Act have the three essential elements of valid criminal law and thus fall within federal jurisdiction. With regard to the first two elements, it seems to me to be beyond doubt that the impugned provisions contain prohibitions that are accompanied by penalties (*Reference as to the Validity of Section 5(a) of the Dairy Industry Act*, [1949] S.C.R. 1 ("*Margarine Reference*"), at pp. 49-50). As for the third element, this Court has already recognized that protecting vulnerable groups from the health risks associated with cannabis is a valid criminal law purpose (*R. v. Malmo-Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571, at paras. 76-78). That being said, it should be noted that, in this context, the Quebec legislature was seeking to ensure the effectiveness of the state monopoly in order to protect the health and security of the public.

[67] In my view, even though ss. 5 and 10 seemingly have all the characteristics of criminal law, they should still not be classified under s. 91(27) of the *Constitution*

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Act, 1867. For the reasons that follow, I believe that the classification of the provisions challenged in this case cannot be determined simply on the basis of the correspondence between the three requirements set out in the *Margarine Reference* on the one hand and these provisions on the other.

[68] First, Parliament's decision to decriminalize conduct leaves the field clear for the provinces to enact their own prohibitions accompanied by penalties in relation to that conduct, as long as the prohibitions serve to enforce laws relating to matters within provincial jurisdiction (s. 92(15) of the *Constitution Act, 1867*). It follows that penal regulatory measures adopted by the provinces with regard to decriminalized activities are not necessarily attempts to legislate in criminal matters. This is why Major J. wrote in *Siemens v. Manitoba (Attorney General)*, 2003 SCC 3, [2003] 1 S.C.R. 6, that "[t]he mere presence of a prohibition and a penalty does not invalidate an otherwise acceptable use of provincial legislative power" (para. 25).

[69] Second, it is recognized that the provinces have jurisdiction to make laws in relation to several matters that touch on purposes that otherwise constitute valid criminal law purposes. In the *Margarine Reference*, Rand J. referred to "[p]ublic peace, order, security, health, morality" as the ordinary though not exclusive "ends" served by criminal law (p. 50). Although public peace, order, security, health and morality are classic criminal law purposes, the provinces may consider such imperatives in designing their own regulatory schemes. As explained in *Siemens*, "[t]he fact that some of th[e] considerations [taken into account by the provincial legislature] have a moral

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aspect does not invalidate an otherwise legitimate provincial law" (para. 30). Here, the mere fact that the Quebec legislature considered the real risk that cannabis consumption poses for certain vulnerable populations when it enacted legislation is not in itself an indication of encroachment on the field of criminal law.

[70] Rather than taking the analytical framework developed in the *Margarine Reference* as a starting point, as the trial judge did, I will characterize the impugned provisions by considering the constitutional bases for provincial legislative action in the field of public health.

[71] In this case, the partial decriminalization by Parliament of the possession, sale and distribution of cannabis and the possession and cultivation of cannabis plants opened the door to provincial legislative action. In prohibiting the possession and cultivation at home of cannabis plants, the Quebec legislature exercised the power conferred on it by s. 92(15) to enact penal measures in order to enforce an otherwise valid law. I found above that ss. 5 and 10 of the provincial Act create a scheme that ensures the effectiveness of the state monopoly and that they in fact advance the objectives of public health and security. Characterized in this way, the impugned provisions are clearly related to the provincial heads of power in s. 92(13) and (16). This is because provincial legislative action in the field of public health is grounded primarily in broad and plenary jurisdiction over property and civil rights (s. 92(13)) and residual jurisdiction over matters of a merely local or private nature in the province

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(s. 92(16)) (*Chaoulli v. Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 S.C.R. 791, at para. 18).

[72] A word about these two heads of power as distinct bases for the validity of ss. 5 and 10. In *Dupond v. City of Montreal*, [1978] 2 S.C.R. 770, Beetz J. wrote that the *Constitution Act, 1867* gives the provincial legislatures a general power to "make laws in relation to all matters of a merely local or private nature in the Province", the various heads of power enumerated in s. 92 being only "illustrative" and s. 92(16) establishing a residual power (p. 792). In this case, similarly to what was found in *Dupond*, the impugned provisions derive constitutional validity not only from s. 92(16) but also from s. 92(13). The power conferred by s. 92(13) relates to private law, that is, the law pertaining to interpersonal relationships (H. Brun, G. Tremblay and E. Brouillet, *Droit constitutionnel* (6th ed. 2014), at p. 495, para. VI-2.109).

[73] With this clarified, I must now explain how the intent behind the Quebec legislature's action in the field of health in this case was to regulate, not to suppress a threat or an evil. This is important because health, as a matter not assigned in the *Constitution Act, 1867*, is an area of overlapping jurisdiction (*RJR-MacDonald*, at para. 32; *Schneider v. The Queen*, [1982] 2 S.C.R. 112, at p. 142; *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44, [2011] 3 S.C.R. 134, at para. 68). In *Reference re Genetic Non-Discrimination Act*, Karakatsanis J. described the overlap of powers in this field as follows: "Health is an 'amorphous' field of jurisdiction, featuring overlap between valid exercises of the provinces' general power

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to regulate health and Parliament's criminal law power to respond to threats to health . . ." (para. 93). It is also well established that both levels of government have authority to make laws in relation to the production, distribution and sale of products that present a danger to public health, including tobacco and alcohol (*RJR-MacDonald*, at paras. 36-38; *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213, at para. 131; *Rio Hotel Ltd. v. New Brunswick (Liquor Licensing Board)*, [1987] 2 S.C.R. 59, at pp. 63 and 67-68).

[74] Here, the Quebec legislature saw the possession and personal cultivation of cannabis not as a social evil to be suppressed, but rather as a practice that should be prohibited in order to steer consumers to a controlled source of supply. It is helpful to draw an analogy with this Court's conclusions in *Schneider*, in which British Columbia's *Heroin Treatment Act*, S.B.C. 1978, c. 24, was found to be *intra vires* the provincial legislature under s. 92(16). In the Court's view, the purpose of the legislation was not to punish persons with a drug addiction, but rather to regulate their medical treatment and ensure their safety (*Schneider*, at pp. 132-33). In the instant case, and in a spirit similar to that of the legislation challenged in *Schneider*, the prohibitions set out in ss. 5 and 10 of the provincial Act do not have punitive purposes as such, but instead reflect an approach based on regulating and supervising access to the substance.

[75] In light of the foregoing, ss. 5 and 10 therefore fall not within the sphere of the criminal law but rather within the provinces' general power to regulate health.

[76] While it is true that prohibitions similar to those set out in ss. 5 and 10 have been enacted by Parliament in the past under the federal criminal law power, this can

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be explained by the double aspect doctrine. This doctrine reflects the contemporary view of federalism and constitutional interpretation, which recognizes that overlapping powers are unavoidable (*Canadian Western Bank*, at para. 42). According to the double aspect doctrine, Parliament and the provincial legislatures may make laws in relation to matters that, by their very nature, have both a federal aspect and a provincial aspect (*Desgagnés Transport Inc. v. Wärtsilä Canada Inc.*, 2019 SCC 58, [2019] 4 S.C.R. 228, at para. 84). It will therefore be possible to apply the double aspect doctrine where each level of government has a "compelling" interest in enacting legislation on different aspects of the same activity or matter (para. 85). In practice, without creating concurrent jurisdiction over a matter, the double aspect doctrine "allows for the concurrent application of both federal and provincial legislation" (*Reference re Securities Act*, at para. 66 (emphasis deleted)).

[77] This appeal is a textbook case for the application of the double aspect doctrine. The regulation of the use of drugs, including cannabis, has both federal and provincial aspects, which makes it conceivable that laws enacted by both levels of government will apply concurrently. This matter has a double aspect, since it may be addressed from two different perspectives: (1) that of the criminal law (under s. 91(27)), by suppressing some "evil" or injurious or undesirable effect upon the public; and (2) that of health or trade (under s. 92(13) and (16)), by regulating, among other things, the conditions of production, distribution and sale of the substance. Sections 5 and 10 of the provincial Act regulate cannabis use from this second, normative perspective and are therefore within provincial jurisdiction.

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[78] I conclude this section by emphasizing that the impugned provisions do not encroach on the federal criminal law power merely because they create *absolute* prohibitions. The trial judge expressed the contrary view, explaining that [TRANSLATION] "the province has lost its jurisdiction by deciding to completely prohibit the possession of cannabis plants and the cultivation of cannabis for personal purposes" (para. 86). That inference has no support in law and disregards the fact that many regulatory prohibitions are absolute in nature without being considered criminal law prohibitions. I need only refer, by way of example, to the prohibition against selling tobacco to minors set out, in Quebec law, in ss. 13 and 14.4 of the *Tobacco Control Act*, CQLR, c. L-6.2.

(4) Conclusion on the Constitutional Validity of the Impugned Provisions

[79] The presumption of constitutional validity of legislation remains a cardinal principle of our division of powers jurisprudence (*Reference re The Farm Products Marketing Act*, [1957] S.C.R. 198, at p. 255; *Nova Scotia Board of Censors v. McNeil*, [1978] 2 S.C.R. 662, at pp. 687-88; *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453, at para. 162; *Reference re Firearms Act*, at para. 25). According to this presumption, every legislative provision is presumed to be *intra vires* the level of government that enacted it.

[80] Here, the onus was on the appellant to show that, in pith and substance, ss. 5 and 10 are not related to one of the classes of subjects under provincial jurisdiction. He failed to do so. The matter of the impugned provisions is not the moral suppression

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of personal cannabis production. Rather, their pith and substance is to ensure the effectiveness of the state monopoly on the sale of cannabis in order to protect the health and security of the public from the harm caused by this substance.

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[81] For the reasons stated above, I am of the view that ss. 5 and 10 of the provincial Act are a valid exercise by the Quebec legislature of the powers conferred on it by s. 92(13) and (16) of the *Constitution Act, 1867* and that the Court of Appeal therefore made no error in its review of the validity of the impugned provisions.

[82] Although this is not a determining factor, I note that the Attorney General of Canada did not intervene in this case to contest the constitutional validity of ss. 5 and 10 of the provincial Act. My conclusion on the validity of these provisions is very much in keeping with the spirit of caution that guides courts when the federal government forgoes any participation in the proceedings: ". . . the Court should be particularly cautious about invalidating a provincial law when the federal government does not contest its validity . . ." (*OPSEU v. Ontario (Attorney General)*, [1987] 2 S.C.R. 2, at p. 19).

B. *Did the Quebec Court of Appeal Err in Law in Holding That Sections 5 and 10 of the Provincial Act Are Constitutionally Operative?*

[83] In this second part, I will address whether the doctrine of federal paramountcy applies in this case, which would mean that ss. 5 and 10 of the provincial Act would be declared to be of no force or effect only to the extent of their

inconsistency with the federal Act. Like the Court of Appeal, I am of the view that the impugned provisions are operative. The application of the absolute prohibitions set out in the provincial Act does not frustrate the federal purpose identified by the appellant. Contrary to what he argues, the purpose of the federal Act is not to create — with a view to reducing illicit activities in relation to cannabis — positive rights to possess and cultivate up to four cannabis plants for personal purposes. Such an interpretation of the purpose of the federal Act does not reflect the essentially prohibitory nature of the criminal law power and is not supported by the wording of that Act.

[84] By way of introduction, I will outline the circumstances in which the doctrine of federal paramountcy applies. There is an inconsistency that justifies giving precedence to a federal law over a valid provincial law when there is an operational conflict or when the purpose of the federal law is frustrated. In the former case, the operational conflict means that it is impossible to comply with both laws simultaneously, such as "where one enactment says 'yes' and the other says 'no'", as it was put in *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, at p. 191. In the latter case, "imposing an obligation to comply with provincial legislation would in effect frustrate the purpose of a federal law" (*Canadian Western Bank*, at para. 73). As Major J. noted in *Rothmans, Benson & Hedges Inc. v. Saskatchewan*, 2005 SCC 13, [2005] 1 S.C.R. 188, at paras. 14-15, the existence of *either* of these situations is enough to trigger the application of the federal paramountcy doctrine, but this does not mean that proving their existence is easy.

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[85] Indeed, the burden of proof that rests on the party alleging an operational conflict or a conflict of purposes is a high one (*Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327, at para. 27; *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419, at paras. 21-23). This requirement arises from the cardinal rule of constitutional interpretation that "[w]hen a federal statute can be properly interpreted so as not to interfere with a provincial statute, such an interpretation is to be applied in preference to another applicable construction which would bring about a conflict between the two statutes" (*Attorney General of Canada v. Law Society of British Columbia*, [1982] 2 S.C.R. 307, at p. 356). I am also of the view that the need for the greatest possible precision in the analysis of operability takes on particular importance in circumstances such as those in this case, where the legislative subject matter has a double aspect. It is essential "to avoid eroding the importance attached to provincial autonomy", a concern I expressed in, among other cases, *References re Greenhouse Gas Pollution Pricing Act*, 2021 SCC 11, at para. 128.

[86] For the reasons that follow, and in light of the "restrained" approach to paramountcy that guides the Court, I am of the view that the appellant has not met his burden of proof.

[87] I want to dispel at once any notion that there is an operational conflict between the impugned provisions and the federal Act. When questioned by the Court on this point, the appellant in fact conceded that it is possible to obey both laws, which suggests that there is no operational conflict. By not possessing or cultivating cannabis

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plants in their homes, individuals in Quebec can thus easily comply with both the federal Act, which exempts the possession and cultivation of up to four cannabis plants from the application of its scheme of criminal offences, and the provincial Act, which prohibits the possession and cultivation of any cannabis plant in a dwelling-house.

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[88] Therefore, the only question to be answered is rather whether a federal purpose is being frustrated, which in this case involves first establishing the purpose of the federal Act and then determining whether the provisions of the provincial Act are incompatible with that purpose (*Quebec (Attorney General) v. Canadian Owners and Pilots Association*, 2010 SCC 39, [2010] 2 S.C.R. 536, at para. 66).

[89] The appellant's position on the frustration of the federal Act's purpose can be briefly summarized. He alleges that the incompatibility results from the fact that the provincial Act does not merely limit what the federal Act allows, namely the cultivation and possession of up to four cannabis plants in a dwelling-house, but instead prohibits it completely. In making such an argument, the appellant assumes that ss. 8(1)(e) and 12(4)(b) of the federal Act have in fact created a *positive right* to self-cultivate cannabis. According to the appellant, *positively and expressly authorizing* the home cultivation of a maximum of four cannabis plants is the purpose of the federal provisions. In its more refined form, this argument amounts to suggesting that granting Canadians a positive right to possess or cultivate up to four cannabis plants is the *specific* purpose of ss. 8(1)(e) and 12(4)(b). Such a purpose is allegedly being pursued in order to achieve other more *general* purposes of the federal Act set out in s. 7 of that

Act, including eliminating or reducing the illicit cannabis market (s. 7(c)) (see the distinction drawn between a specific purpose and a general purpose in *Rothmans*, at para. 25).

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[90] In my opinion, the appellant's position cannot be accepted. The purpose of the federal Act's provisions is not to create a positive right to self-cultivate cannabis as part of a broader objective of limiting the influence of organized crime. Such a purpose would be inconsistent with the fact that "the criminal law power is essentially prohibitory in character" (*Rothmans*, at para. 19), a fact that has been recognized in Canadian law since the leading case of *Proprietary Articles Trade Association v. Attorney General for Canada*, [1931] A.C. 310 (P.C.). As McLachlin C.J. noted in *Reference re AHRA*, "[t]he federal criminal law power may only be used to prohibit conduct" (para. 38). It follows that when exceptions are carved out for practices that Parliament does not wish to prohibit, this "only means that a particular practice is not prohibited, not that the practice is positively allowed by the federal law" (*ibid.* (emphasis deleted)).

[91] It is true that, in everyday language and even in the speeches of some parliamentarians, the creation of exceptions or exemptions under a scheme of criminal offences is often described as a "legalization" effort. However, this way of speaking is incorrect and falsely suggests that positive rights authorizing particular conduct have been granted to the public. In this case, the statement by the federal Minister of Health that "limited home growing should be allowed" therefore cannot be seen as a clear

expression of Parliament's intent to confer a positive right to self-cultivation (*House of Commons Debates*, vol. 148, No. 314, 1st Sess., 42nd Parl., June 13, 2018, at p. 20875). I would also point out that courts must be careful when relying on parliamentary debates as an expression of legislative intent. The use of this type of extrinsic evidence must be approached "with caution" given the fact that "statements by members of Parliament can be poor indicators of parliamentary purpose" (*R. v. Sharma*, 2022 SCC 39, at para. 89).

[92] Furthermore, I note that nothing in the language of ss. 8(1)(e) and 12(4)(b) indicates that Parliament's intention was to authorize the self-cultivation of cannabis. On the contrary, these provisions read as classic criminal law: they contain a prohibition and a penalty, and they are directed at an evil relating to public health and safety. They include exemptions for the cultivation and possession of one to four cannabis plants. Their wording leaves no ambiguity regarding the fact that the possession and cultivation of one to four cannabis plants were simply excluded from the scope of the criminal offences provided for in the federal Act. Pointing to the absence of provisions conferring an express right to cultivate cannabis for personal purposes, the Court of Appeal correctly found that [TRANSLATION] "it seems more accurate to say not that the [federal Act] legalized certain aspects related to the use of this substance, but rather that it decriminalized them" (para. 117).

[93] The appellant attaches great importance to the fact that s. 7(c) of the federal Act is framed in much more positive or permissive terms, since it states that one of the

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purposes of the Act is to "<u>provide for</u> the licit production of cannabis to reduce illicit activities in relation to cannabis". He sees this as an indication that Parliament truly intended to confer a positive right to self-cultivate. Once again, I cannot accept the appellant's contentions.

[94] First, it is not clear that Parliament, through the term "licit production" in s. 7(c), was referring specifically to the home production of cannabis. Rather, I believe that this term conveys a general intention to allow production within the legal framework established by the federal Act. The concept of "licit production" could also be seen, *a contrario*, as the converse of the concept of "illicit cannabis", which s. 2 of the federal Act defines as any "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."

[95] Second, even if it is accepted that the concept of "licit production" may refer to home production, the words "provide for" in s. 7(c) cannot be read as indicating that Parliament granted authorization or permission that created positive rights. They cannot be read in this way because, as I noted above, the creation of positive rights is not a valid exercise of the criminal law power and because the federal Act must be presumed to be constitutionally valid in our review of the operability of the provincial provisions.

[96] The guidance provided in *Rothmans* is relevant for the purposes of this appeal. In my view, the principles arising from that case are determinative of the issue

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of the operability of the impugned provisions. The question in *Rothmans* was whether provincial legislation that prohibited the promotion of tobacco products in any place accessible to young persons frustrated the purpose of federal legislation that prohibited the promotion of tobacco products except in retail businesses. The Saskatchewan Court of Appeal had found that the provincial legislation negated the authorization otherwise afforded by the federal legislation for the promotion of tobacco in retail businesses. This Court came to a different conclusion, stating that "Parliament did not grant, and could not have granted, retailers a positive entitlement to display tobacco products" (para. 18 (emphasis added)). In addition, statutes enacted pursuant to the criminal law power "do not ordinarily create freestanding rights that limit the ability of the provinces to legislate in the area more strictly than Parliament" (para. 19 (emphasis added)).

[97] The principle to be drawn from these excerpts is that the making of exceptions or exemptions under a criminal law scheme cannot serve to confer *positive rights* to engage in the activities covered by those exceptions or exemptions. This is an important point in a case like the one before us. The provinces can legitimately undertake regulatory initiatives to provide a framework for decriminalized activities without thereby frustrating a purpose — the creation of positive rights — that by definition is outside the scope of the federal criminal law power.

[98] I acknowledge that the circumstances of *Rothmans* differed from those of this case in one important respect. In *Rothmans*, the exemption for the retail display of tobacco products did not seem closely related to the achievement of the criminal law

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purpose of the legislation as a whole, which was to address a national public health problem. As the Court stated in that case, even if it were to be accepted that the federal legislation granted retailers a positive right to display tobacco products, it would be difficult to imagine that such a right could actually help combat a public health evil (para. 20). In the instant case, on the other hand, it could be argued that the exemptions for the possession and cultivation of cannabis plants at home play a direct part in achieving a criminal law purpose, namely discouraging the illicit trade of cannabis. By this logic, the recognition of a positive right to self-cultivate could thus assist in limiting the demand for cannabis from illicit sources or criminal organizations, a purpose that would be undermined by the application of the absolute prohibitions enacted by the Quebec legislature.

[99] However, I cannot accept that exceptions or exemptions made under a scheme of criminal offences may give rise to positive rights, even where the exceptions or exemptions are closely related to the achievement of criminal law purposes. In recent years, the Court has circumscribed the scope of the federal criminal law power. In *Reference re AHRA*, for example, McLachlin C.J. cautioned that "a limitless definition [of what constitutes a valid criminal law purpose], combined with the doctrine of paramountcy, has the potential to upset the constitutional balance of federal-provincial powers" (para. 43). In my opinion, modifying the principles from *Rothmans* would present a similar risk to the constitutional balance of the federal system. The recognition of positive rights created out of exceptions or exemptions closely related

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to a valid criminal law purpose would improperly extend the scope of the federal criminal law power.

[100] The principles that emerge from *Rothmans* are relevant without having to be modified in any way and are applicable to this appeal. This means that the exemptions set out in ss. 8(1)(e) and 12(4)(b) of the federal Act are not sources of positive rights, despite the fact that they appear to be closely related to the criminal law purpose of combating illicit activities.

[101] Although this is not in itself determinative in deciding the question of operability, I would observe that the objectives pursued by Parliament and the provincial legislature are consistent. Protecting the health and security of the public and of young persons in particular, combating organized crime and ensuring access to quality-controlled products are all considerations that clearly motivated the enactment of the federal Act and the provincial Act.

[102] I note in this regard that the provincial prohibitions directly address several of the objectives set out in s. 7 of the federal Act. The provincial Act's absolute prohibitions against possession and cultivation presumably protect the health of young persons by restricting access to cannabis (s. 7(a)), since home cultivation by persons of full age could make this substance more accessible to minors living under the same roof. The prohibitions also prevent inducements to use cannabis (s. 7(b)), since the presence of cannabis plants in the home may *de facto* be considered an inducement. They assist in controlling the quality of the products offered (s. 7(f)), since

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home-cultivated cannabis is not subject to quality standards, such as the maximum concentration of the main active compound in cannabis, tetrahydrocannabinol (“THC”). They clearly contribute to public awareness of the health risks associated with cannabis consumption (s. 7(g)), since consumers can be provided with information more easily if they are within a regulated selling framework.

[103] Finally, I would add that even though Parliament and the provincial legislature have taken different approaches to self-cultivation, the provincial Act reflects a concern with combating organized crime, just as the federal Act does (s. 7(c) and (d)). The provincial legislature was of the view that, by contributing to the creation of a single market, the absolute prohibitions against possession and cultivation at home would serve to limit trafficking in cannabis from unauthorized sources. Furthermore, it is not this Court’s role to decide which of the two approaches — prohibiting personal production or tolerating it — is most likely to reduce illicit activities in relation to cannabis. It is sufficient to note that this objective is what guided the legislative action of both levels of government in this case.

[104] Accordingly, I conclude that ss. 5 and 10 of the provincial Act do not frustrate the purposes stated in the federal Act, including that of reducing the presence of criminal organizations in the cannabis market, and that they are operative under the doctrine of federal paramountcy. The provincial Act’s public health and security objectives and its prohibitions are, to a large degree, in harmony with the objectives of the federal Act, and there is no basis for finding a conflict of purposes.

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V. Conclusion

[105] Sections 5 and 10 of the provincial Act are valid and operative. I would dismiss the appeal.

[106] The Attorney General of Quebec has requested that costs be awarded to him. In my view, granting that request would not be justified. This Court has the discretion to depart from the usual rule that the successful party is entitled to costs. The fact that a public interest is at stake is one factor in the exercise of this discretion, which is why "a losing party that raises a serious legal issue of public importance will not necessarily bear the other party's costs" (*Little Sisters Book and Art Emporium v. Canada (Commissioner of Customs and Revenue)*, 2007 SCC 2, [2007] 1 S.C.R. 38, at para. 35, citing as an example *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4, [2004] 1 S.C.R. 76, at para. 69). In this case, the appellant is a citizen who has raised important questions of constitutional law relating to an issue of general interest, namely the decriminalization of the recreational use of cannabis and its consequences. In my view, such circumstances weigh in favour of exercising our discretion and, for this reason, the parties will each bear their own costs in this Court and in the courts below.

Appeal dismissed.

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