IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

No. 28026

BETWEEN:

DAVID MALMO-LEVINE

APPELLANT

AND:

HER MAJESTY THE QUEEN

RESPONDENT

(ON APPEAL FROM THE COURT OF APPEAL FOR BRITISH COLUMBIA)

No. 28148

BETWEEN:

VICTOR EUGENE CAINE

APPELLANT

AND:

HER MAJESTY THE QUEEN

RESPONDENT

(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

No. 28189

BETWEEN:

CHRISTOPHER CLAY

APPELLANT

AND:

HER MAJESTY THE QUEEN

RESPONDENT

RESPONDENT'S FACTUM

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PART I

STATEMENT OF FACTS

INTRODUCTION

1. The Appellants were separately convicted under the provisions of the now repealed ***Narcotic Control Act***, R.S.C. 1985, c. N-1, of various marihuana offences. They challenge those convictions on constitutional grounds. All submit that prohibiting possession of marihuana for recreational use violates s. 7 of the ***Charter of Rights and Freedoms***. The Appellants Caine and Clay also take the position that this prohibition is ***ultra vires*** the Parliament of Canada on a division of powers basis. The Appellant Malmo-Levine argues that the offence of possession of

marihuana for the purpose of trafficking is discriminatory, and infringes his rights under s. 15(1) of the ***Charter***.

2. Non-constitutional issues are also raised. Malmo-Levine argues that he is entitled to a new trial because the trial Judge dismissed his constitutional challenge without giving him an opportunity to call evidence. Clay takes the position that, as a matter of statutory interpretation, only intoxicating marihuana is a "narcotic", and that the Crown failed to prove this with respect to the drugs that are the subject matter of the charges against him.

3. In light of the common issues, the Respondent has elected to file a single factum. She does not accept the Appellants' Joint Statement of Legislative Facts as an accurate recitation of the facts pertinent to the disposition of these matters. To some extent, it is a rehearsal of conflicting evidence adduced in the ***Caine*** and ***Clay*** trials, rather than a statement of the nearly identical finding of facts on which the trial judges in those matters based their respective judgments. As well, certain portions are irrelevant, while others are argument.

(Note: In paragraph 2 of their respective factums, Caine and Malmo-Levine state that they accept the findings of the trial courts only to the extent that they are "not inconsistent" with the facts in the Joint Statement.)

4. Both Courts of Appeal accepted and based their decisions on the findings made in the trial courts. Accordingly, those facts govern the resolution of these appeals.

See: ***R. v. Van Der Peet***, [1996] 2 S.C.R. 507 @ paras. 81, 82; ***Housen v. Nikolaisen*** (2002), 211 D.L.R. (4th) 577, 2002 SCC 33 @ para. 25

(Note: As discussed below, little evidence was called at the ***Malmo-Levine*** trial. Rather, the trial Judge elected to deal with the constitutional issue on the basis of the facts defence counsel averred could be established to support that challenge. These were the same facts relied on by the defence in the ***Caine*** trial. In dealing with both the ***Caine*** and ***Malmo-Levine*** appeals together the Court of Appeal for British Columbia proceeded on the basis of the findings in ***Caine***.)

5. The Respondent's position is that the impugned legislation is constitutional, and that all appeals should be dismissed.

(Note: All three trials concluded after the coming into force of the ***Controlled Drugs and Substances Act***, S.C. 1996, c.8, on May 17, 1997 (SI/97-47, ***Canada Gazette*** Part II, Vol. 131, p. 1502). By reason of s. 62 of this enactment, the Appellants were sentenced in accordance with its provisions.)

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

6. ***Constitution Act, 1867*:**

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

. . .

27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

91. Il sera loisible à la Reine, de l'avis et du consentement du Sénat et de la Chambre des Communes, de faire des lois pour la paix, l'ordre et le bon gouvernement du Canada, relativement à toutes les matières ne tombant pas dans les catégories de sujets par la présente loi exclusivement assignés aux législatures des provinces; mais, pour plus de garantie, sans toutefois restreindre la généralité des termes ci-haut employés dans le présent article, il est par la présente déclaré que (nonobstant toute disposition contraire énoncée dans la présente loi) l'autorité législative exclusive du parlement du Canada s'étend à toutes les matières tombant dans les catégories de sujets ci-dessous énumérés, savoir:

. . .

27. La loi criminelle, sauf la constitution des tribunaux de juridiction criminelle, mais y compris la procédure en matière criminelle.

7. ***Charter of Rights and Freedoms*:**

1. The ***Canadian Charter of Rights and Freedoms*** guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

1. ***La Charte canadienne des droits et libertés*** garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

15. (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

8. *Narcotic Control Act*:

2. In this Act,

"marihuana" means ***Cannabis sativa L.***

"narcotic" means any substance included in the schedule or anything that contains any substance included in the schedule.

2. Les définitions qui suivent s'appliquent à la présente loi.

« chanvre indien » ou « marihuana » Le ***Cannabis sativa L.***

« stupéfiant » Substance énumérée à l'annexe, ou toute préparation en contenant.

3.(1) Except as authorized by this Act or the regulations, no person shall have a narcotic in his possession.

(2) Every person who contravenes subsection (1) is guilty of an offence and liable

3. (1) Sauf exception prévue par la présente loi ou ses règlements, il est interdit d'avoir un stupéfiant en sa possession.

(2) Quiconque enfreint le paragraphe (1) commet une infraction et encourt, sur déclaration de culpabilité:

(a) on summary conviction for a first offence, to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding six months or to both and, for a subsequent offence, to a fine not exceeding two thousand dollars or to imprisonment for a term not exceeding one year or to both; or

b) on conviction on indictment, to imprisonment for a term not exceeding seven years.

a) par procédure sommaire, pour une première infraction, une amende maximale de mille dollars et un emprisonnement maximal de six mois, ou l'une de ces peines, et, en cas de récidive, une amende maximale de deux mille dollars et un emprisonnement maximal d'un an, ou l'une de ces peines;

b) par mise en accusation, un emprisonnement maximal de sept ans.

4.(1) No person shall traffic in a narcotic or any substance represented or held out by the person to be a narcotic.

(2) No person shall have in his possession any narcotic for the purpose of trafficking.

(3) Every person who contravenes subsection (1) or (2) is guilty of an indictable offence and liable to imprisonment for life.

4.(1) Le trafic de stupéfiant est interdit, y compris dans le cas de toute substance que le trafiquant prétend ou estime être tel.

(2) La possession de stupéfiant en vue d'en faire le trafic est interdite.

(3) Quiconque enfreint le paragraphe (1) ou (2) commet un acte criminel et encourt l'emprisonnement à perpétuité.

Schedule

3. ***Cannabis sativa***, its preparations, derivatives and similar synthetic preparations, including:

(1) Cannabis resin,
(2) Cannabis (marihuana),
(3) Cannabidiol,
(4) Cannabinol,
(4.1) Nabilone,
(5) Pyrahexyl,
(6) Tetrahydrocannabinol.

but not including:

(7) non-viable Cannabis seed.

Annexe

3. Chanvre indien (***Cannabis sativa***), ses préparations, dérivés et préparations synthétiques semblables, notamment:

(1) Résine de cannabis,
(2) Cannabis (marihuana),
(3) Cannabidiol,
(4) Cannabinol,
(4.1) Nabilone,
(5) Pyrahexyl,
(6) Tétrahydrocannabinol.

mais non compris:

(7) Graine de cannabis stérile.

(Note: The respective chemical formulas for items (4)-(5) have been omitted.)

9. ***Controlled Drugs and Substances Act:***

2.(1) In this Act,	2.(1) Les définitions qui suivent s'appliquent à la présente loi.
"controlled substance" means a substance included in Schedule I, II, III, IV or V;	« substance désignée » Substance inscrite à l'une ou l'autre des annexes I, II, III, IV ou V.
Schedule II	Annexe II
1. Cannabis, its preparations, derivatives and similar synthetic preparations, including:	1. Chanvre indien (Cannabis), ainsi que ses préparations et dérivés et les préparations synthétiques semblables, notamment:
(1) Cannabis resin	(1) résine de cannabis
(2) Cannabis (marihuana)	(2) cannabis (marihuana)
(3) Cannabidiol	(3) cannabidiol
(4) Cannabinol	(4) cannabinol
(5) Nabilone	(5) nabilone
(6) Pyrahexyl	(6) pyrahexyl
(7) Tetrahydrocannabinol	(7) tétrahydrocannabinol
but not including	mais non compris:
(8) Non-viable Cannabis seed, with the exception of its derivatives	(8) graines de cannabis stériles - à l'exception des dérivés de ces graines
(9) Mature Cannabis stalks that do not include leaves, flowers, seeds or branches; and fiber derived from such stalks	(9) tige de cannabis mature - à l'exception des branches, des feuilles, des fleurs et des graines - ainsi que les fibres obtenues de cette tige

(Note: The respective chemical formulas for items (4)-(7) have been omitted.)

MALMO-LEVINE

Circumstances of the Offence

10. Malmo-Levine was charged with possession of marihuana for the purpose of trafficking. The underlying facts are summarized in the reasons of the Court of Appeal:

> [3] The appellant David Malmo-Levine described himself to the Court as a "marihuana / freedom activist." Beginning in October 1996, he helped operate an organization in East Vancouver known as the "Harm Reduction Club" which was a co-operative, non-profit association of its members. The stated object of the club was to educate its users and the general public about marihuana and provide unadulterated marihuana to its users at club cost. The club had approximately 1800 members.

[4] The Club educates its members on a wide variety of "safe smoking habits" to minimize any harm from the use of marihuana. Members are required to sign a pledge not to operate motor vehicles or heavy equipment while under the influence of the substance.

[5] On 4 December 1996, police entered the premises of the Club and seized 316 grams of marihuana, much of it in the form of "joints." Mr. Malmo-Levine was charged with possession of marihuana for the purpose of trafficking contrary to section 4 of the *NCA*.

Indictment, Malmo-Levine Rec., Vol. 1, p. 1; Statement of Adjudicative Facts, Malmo-Levine Rec., Vol. 1, pp. 58-62; Reasons for Judgment (Braidwood J.A.), Malmo-Levine Rec., Vol. 2, pp. 243, 244

Proceedings at Trial (Curtis J.)
([1998] B.C.J. No. 1025 (QL) (S.C.))

11. Malmo-Levine was jointly charged with Chad Rowsell. Both filed notices, pursuant to s. 8 of the ***Constitutional Questions Act***, R.S.B.C. 1996, Chap. 68, challenging the provisions of the ***Narcotic Control Act***, as they apply to marihuana. They alleged violations of ss 2(a), 2(b), 2(c), 2(d), 7, 8, and 12 of the ***Charter***.

Notice of Constitutional Question (December 9, 1997), Amended Notice of Constitutional Question (January 24, 1998), Supplementary Notice of Constitutional Question January 27, 1998), Malmo-Levine Rec., Vol. 1, pp. 2-14

12. Malmo-Levine and Rowsell sought to call evidence to support their application. After hearing briefly from one witness (Malmo-Levine's mother) the trial Judge asked their counsel to state what facts they expected to prove.

Testimony of C.L. Malmo, Malmo-Levine Rec., Vol. 1, pp. 19, 20; Ruling (Curtis J.), Malmo-Levine Rec., Vol. 2, pp. 229, 230

13. A statement of the proposed evidence was put before the trial Judge. This was done primarily by filing the written submissions, including the assertions of fact, prepared by defence counsel in the then on-going ***Caine*** trial in the Provincial Court of British Columbia. This contained, ***inter alia***, a summary based on the ***viva voce*** evidence of the six experts called in that case (five for the defence, one for the Crown).

Statement of Adjudicative Facts (Exhibit 1), Addendum to Legislative Facts (Exhibit 2), Defence Submission in Support of ***Voir Dire*** (Exhibit 3), Statement of Facts (Exhibit 4), List of Witnesses and Summary of Evidence (Exhibit 5), Malmo-Levine Rec., Vol. 1, pp. 58-193

14. After hearing submissions, Curtis J. held that even accepting the facts counsel claimed could be proven the constitutional challenge could not succeed. Accordingly, he declined to embark upon an evidentiary hearing, and dismissed the substantive motion. With respect to s. 7 of the ***Charter***, he stated:

> Interpreting the ***Charter*** in light of the common law and legal traditions of Canada, I find no basis for holding that freedom to use marihuana constitutes a matter of fundamental, personal importance, such that it is included within the meaning of the word liberty in s. 7 of the ***Charter***. There being no right to use marihuana created by the right to life, liberty and security of the person, the question of the principles of fundamental justice need not be considered. The ***Narcotic Control Act*** does not infringe Mr. Malmo-Levine's or Mr. Rowsell's rights under s. 7.
>
> Ruling (Curtis J.), Malmo-Levine Rec., Vol. 2, p. 233

15. Malmo-Levine was convicted, and sentenced to one year (conditional). Rowsell was acquitted.

CAINE

Circumstances of the Offence

16. Caine was charged with simple possession of marihuana (by way of summary conviction). The facts relating to the offence were agreed to, and are summarized in the reasons of the Court of Appeal:

> [6] The facts in the ***Caine*** appeal are not in dispute. During the late afternoon of 13 June 1993, two R.C.M.P. officers were patrolling a parking lot at a beach in White Rock. They observed the appellant Victor Eugene Caine and a male passenger sitting in a van owned by Mr. Caine. The officers observed Mr. Caine, who was seated in the driver's seat, start the engine and begin to back up. As one officer approached the van, he smelled a strong odour of recently smoked marihuana.
>
> [7] Mr. Caine produced for the officer a partially smoked cigarette of marihuana which weighed 0.5 grams. He possessed the marihuana cigarette for his own use and not for any other purpose.
>
> Information, Caine Rec., Vol. 1. p. 1; Agreed Statement of Facts, Caine Rec., Vol. 1, pp. 5-5(b); Reasons for Judgment (Braidwood J.A.), Malmo-Levine Rec., Vol. 2, pp. 244, 245

Proceedings at Trial (Howard P.C.J.)

([1998] B.C.J. No. 885 (QL) (Prov.Ct.))

17. Prior to the commencement of the trial Caine gave notice, pursuant to the ***Constitutional Question Act*** (B.C.), challenging the offence of possession of marihuana and related substances in the ***Narcotic Control Act***, under s. 7 of the ***Charter***. He later filed an Amended Notice.

Following the coming into force of the ***Controlled Drugs and Substances Act***, he filed a Further Amended Notice, with respect to the continued prohibition of possession of cannabis related substances.

Notice of Constitutional Challenge (January 7, 1994), Amended Notice of Constitutional Challenge (September 29, 1995), Further Amended Notice of Constitutional Challenge September 30, 1997), Caine Rec., Vol. 1, pp. 2-4(b)

Evidence Relating to the Constitutional Challenge

18. Both parties filed what were styled as "Brandeis Briefs". Caine called five expert witnesses: Professor Neil Boyd (a criminologist), Dr. Shaun H. Peck (a medical doctor, and Deputy Provincial Health Officer for British Columbia), Dr. Allan K. Connolly (a psychiatrist), Dr. Barry Beyerstein (a psychologist), and Dr. John P. Morgan (a medical doctor and pharmacologist). The Crown called one witness in reply, Dr. Harold Kalant (a medical doctor, with expertise in psychopharmacology).

Reasons for Judgment (Howard P.C.J.), Caine Rec., Vol. 7, pp. 1129, 1131

(Note: (a) The trial Judge noted that Dr. Beyerstein had a tendency in his testimony "to depart from his role as 'witness' and to assume the role of an 'advocate'." On the other hand, she found Dr. Kalant to be "a particularly knowledgeable, articulate, careful, fair, and dispassionate witness": Caine Rec., Vol. 7, p. 1131; (b) At the ***Clay*** trial Professor Boyd and Dr. Morgan testified as defence witnesses. The Crown called Dr. Kalant: see paras. 46, 47 below.)

Findings of Fact

19. With respect to the health risks of marihuana, the trial Judge found:

After reviewing the testimony of the witnesses, and the written material filed by the parties, I have concluded that the evidence does establish the following facts:

1. the occasional to moderate use of marihuana by a healthy adult is not ordinarily harmful to health, even if used over a long period of time;
2. there is no conclusive evidence demonstrating any irreversible organic or mental damage to the user, except in relation to the lungs and then only to those of a chronic, heavy user such as a person who smokes at least 1 and probably 3-5 marihuana joints per day;
3. there is no evidence demonstrating irreversible organic or mental damage from the use of marihuana by an ordinary healthy adult who uses occasionally or moderately;
4. marihuana use does cause alteration of mental function and as such should not be used in conjunction with driving, flying or operating complex machinery;

5. there is no evidence that marihuana use induces psychosis in ordinary healthy adults who use occasionally or moderately and, in relation to the heavy user, the evidence of marihuana psychosis appears to arise only in those having a predisposition towards such a mental illness;

6. marihuana is not addictive;

7. there is a concern over potential dependence in heavy users, but marihuana is not a highly reinforcing type of drug, like heroin or cocaine and consequently physical dependence is not a major problem; psychological dependence may be a problem for the chronic user;

8. there is no causal relationship between marihuana use and criminality;

9. there is no evidence that marihuana is a gateway drug and the vast majority of marihuana users do not go on to try hard drugs; recent animal studies involving the release of dopamine and the release of cortico releasing factor when under stress do not support the gateway theory;

10. marihuana does not make people aggressive or violent, but on the contrary it tends to make them passive and quiet;

11. there have been no deaths from the use of marihuana,

12. there is no evidence of an amotivational syndrome, although chronic use of marihuana could decrease motivation, especially if such a user smokes so often as to be in a state of chronic intoxication;

13. assuming current rates of consumption remain stable, the health related costs of marihuana use are very, very small in comparison with those costs associated with tobacco and alcohol consumption;

Reasons for Judgment (Howard P.C.J.), Caine Rec., Vol. 7, pp. 1135, 1136

(Note: The trial Judge noted her findings were "consistent with the findings of McCart J. in ***Regina v. Clay***": Caine Rec., Vol. 7, p. 1136 (see paras. 48, 49 below).)

Ruling on the *Charter* Challenge

20. In rejecting Caine's submission that prohibiting the recreational use of marihuana violates what he contends is the "harm principle" of fundamental justice, Howard P.C.J. stated:

> The evidence before me demonstrates that there is a reasonable basis for believing that the following health risks exist with use [sic] marihuana.
>
> There is a general risk of harm to the users of marihuana from the acute effects of the drug, but these adverse effects are rare and transient. Persons experiencing the acute effects of the drug will be less adept at driving, flying and other activities involving complex machinery. In this regard they represent a risk of harm to others in society. At current rates of use, accidents caused by users under the influence of marihuana cannot be said to be significant.
>
> There is also a risk that any individual who chooses to become a casual user, may end up being a chronic user of marihuana, or a member of one of the

> vulnerable persons [sic] identified in the materials. It is not possible to identify these persons in advance.
>
> As to the chronic users of marihuana, there are health risks for such persons. The health problems are serious ones but they arise primarily from the act of smoking rather than from the active ingredients in marihuana. Approximately 5% of all marihuana users are chronc [sic] users. At current rates of use, this comes to approximately 50,000 persons. There is a risk that, upon legalization, rates of use will increase, and with that the absolute number of chronic users will increase.
>
> In addition, there are health risks for those vulnerable persons identified in the materials. There is no information before me to suggest how many people might fall into this group. Given that it includes young adolescents who may be more prone to becoming chronic users, I would not estimate this group to be miniscule.
>
> All of the risks noted above carry with them a cost to society, both to the health care and welfare systems. At current rates of use, these costs are negligible compared to the costs associated with alcohol and drugs. There is a risk that, with legalization, user rates will increase and so will these costs.
>
> In view of these facts, I am satisfied that there is a reasonable basis for Parliament to have concluded that the possesion [sic] and use of marihuana poses a risk to the health of users and to society as a whole. The risk is not large. It need not be in order for Parliament to be entitled to act. It is for Parliament to determine what level of risk is acceptable and what level of risk requires action.
>
> In conclusion, the legal prohibition against the possession of marihuana does not offend against any principle of fundamental justice that is related to the "harm" principle asserted by the applicant.
>
> Reasons for Judgment (Howard P.C.J.), Caine Rec., Vol. 7, pp. 1163, 1164

21. With respect to "vulnerable persons", the trial Judge had earlier noted that all witnesses, with the possible exception of Dr. Morgan, were in general agreement with many of the conclusions in the 1994 Australian ***Hall Report***, which identified the following "high risk groups":

> (1) Adolescents with a history of poor school performance whose educational achievements may be further limited by cognitive impairments if chronically intoxicated, or who start using cannabis at an early age (there being a concern that such youths are at higher risk of becoming chronic users of cannabis as well as other drugs);
>
> (2) Women of childbearing age, because of the concern with the effects of smoking cannabis while pregnant; and
>
> (3) Persons with pre-existing diseases such as cardiovascular diseases, respiratory

diseases, schizophrenia or other drug dependencies, all of whom may face a risk of precipitating or exacerbating the symptoms of their deceases [sic].

Reasons for Judgment (Howard P.C.J.), Caine Rec., Vol. 7, p. 1139

(Note: The full title of this report is, ***The health and psychological consequences of cannabis use***, prepared for the Australian National Task Force on Cannabis, by Hall, Solowji, and Lemon (Tab 5 of the Crown's Brandeis Brief, reproduced on the CD filed as part of the Caine Record.))

22. In holding that the law does not violate constitutionally protected dignity and autonomy, Howard P.C.J. felt bound by the judgment of Curtis J. in ***Malmo-Levine***:

> In my view, whatever thoughts I had on the above position of the applicant "went up in smoke", so to speak, with the arrival of the February 1998 decision of our Supreme Court in ***Melmo-Levine*** [sic] ***and Rowsell***, (***supra***). Notwithstanding the applicant's position, noted above, Mr. Justice Curtis was clearly satisfied that the issue was more properly characterized as a question of whether S. 7 of the ***Charter*** guarantees the right to use marihuana. I am bound by this decision of Curtis J. The fact that the charge before him was possession of marihuana for the purpose of trafficking, rather than simple possession, is of no significance. It is clear from the decision that he was ruling on the question of simple possession, independent of any considerations about the trafficking aspect of the charge.
>
> The background to the ***Melmo-Levine*** [sic] ***and Rowsell*** decision is of some importance. The constitutional challenge before the court included a S. 7 ***Charter*** challenge identical to the one before me. In fact, with the consent of the Crown, argument proceeded on the basis that all of the findings of fact (legislative facts) sought by the applicant before me had been proven. The written submissions of the applicant before me were then presented to Mr. Justice Curtis. In effect, Mr. Justice Curtis has ruled on precisely the same factual and legal issues as are before me, the only difference being that the applicant's argument on the facts was, for the purpose of argument, assumed to have been proven.
>
> In view of the decision in ***Melmo-Levine*** [sic] ***and Rowsell***, (***supra***), I conclude that there has been no infringement of the applicant's liberty or security of person as these concepts relate to his right to make decisions regarding his own health and bodily integrity.
>
> Reasons for Judgment (Howard P.C.J.), Caine Rec., Vol. 7, p. 1156

Ruling on Division of Powers Challenge

23. This attack was dismissed on the basis of ***R. v. Hauser***, [1979] 1 S.C.R. 984. In this connection, the trial Judge stated, ***inter alia***:

> Finally, the applicant submits that the prohibition against the possession of marihuana (as opposed to the ***Narcotic Control Act*** as a whole) cannot be justified under the "Peace, Order and Good Government" power, in that there has never been any evidence that the use of marihuana presents a problem or "emergency" of

national dimensions within the meaning of ***Labatt Breweries of Canada Ltd. v. Attorney General of Canada et al., Breweries of Canada Ltd. v. Attorney General of Canada et al.***, [1980] 1 S.C.R. 914, 52 C.C.C. (24) 433 at 465-466. The applicant further asserts that the possession of marihuana, to the extent that it is a health concern, clearly is a matter of a "merely local or private nature", there being no evidence that the health issues relevant to the use of marihuana are a matter of "national" concern transcending the power of each province to adequately address in its own way. This argument presumes that marihuana must, in its own right, satisfy the "Peace Order and Good Government" tests set out in the authorities before it can be the subject of prohibitory legislation under the federal residual power. I do not think that this presumption is sound. Once the general character and purpose of the ***Narcotic Control Act*** has been determined and once this purpose has been determined to be a matter which properly falls under the federal domain, it is not necessary that each and every drug listed in the Schedule to the ***Narcotic Control Act*** meet the character and purpose test. The field has been validly occupied by the federal parliament. The field is broad. It is not limited to only those drugs which give rise to health concerns that have a national dimension to them.

Reasons for Judgment (Howard P.C.J.), Caine Rec., Vol. 7, pp. 1146, 1147

24. Caine was convicted, and granted an absolute discharge.

Summary Conviction Appeal (Thackray J.)

25. A summary conviction appeal was dismissed without reasons.

Formal Order (Thackray J.), Caine Rec., Vol. 7, p. 1165

COURT OF APPEAL DECISION IN MALMO-LEVINE AND CAINE
((2000), 145 C.C.C. (3d) 225, 34 C.R. (5th) 91, 138 B.C.A.C. 218, 226 W.A.C. 218)

26. Although Malmo-Levine's appeal was from conviction on a charge of possession for the purpose of trafficking, the Court of Appeal restricted its consideration to whether the prohibition on marihuana possession is constitutional. As it noted, if the offence of possession "passes constitutional muster", then there would be no need to consider the trafficking provisions.

Reasons for Judgment (Braidwood J.A.), Malmo-Levine Rec., Vol. 7, p. 261, para. 34

27. Mr. Justice Braidwood (Madam Justice Rowles concurring) upheld the prohibition, and dismissed both appeals. Madam Justice Prowse, in dissent, found a violation of s. 7, and directed the parties to file further written submissions on the issue of s. 1 justification. However, because of the disposition by the majority no further submissions were made.

Formal Order (B.C.C.A.), Malmo-Levine Rec., Vol. 2, pp. 238-240; Formal Order (B.C.C.A.), Caine Rec., Vol. 7, pp. 1166-1168

28. The Court dealt with both matters on the facts found by Howard P.C.J. in ***Caine***. At the hearing it declined to receive additional material from the parties.

> Reasons for Judgment (Braidwood J.A.), Malmo-Levine Rec., Vol. 7, p. 278, para. 68, p. 334, para. 165

29. Although all members of the Court accepted the Appellants' contention that the "harm principle" is a principle of fundamental justice under s. 7 of the ***Charter***, they disagreed with respect to its boundaries. The majority held that it is open to Parliament to impose penal sanctions when the prohibited activity creates "a reasoned apprehension of harm" that is neither "insignificant" nor "trivial". The dissent would require the potential harm to be "serious" or "substantial".

Majority Reasons

30. Braidwood J.A. dealt first with the "harm principle", and then went on to consider whether the impugned provision of the ***Narcotic Control Act*** "strikes the right balance between the individual and the state." In summarizing his findings, he stated:

> [158] In conclusion, the deprivation of the appellants' liberty caused by the presence of penal provisions in the *NCA* is in accordance with the harm principle. I agree that the evidence shows that the risk posed by marihuana is not large. Yet, it need not be large in order for Parliament to act. It is for Parliament to determine what level of risk is acceptable and what level of risk requires action. The ***Charter*** only demands that a "reasoned apprehension of harm" that is not significant [sic] or trivial. The appellants have not convinced me that such harm is absent in this case.
>
> [159] Therefore, I find that the legal prohibition against the possession of marihuana does not offend the operative principle of fundamental justice in this case.
>
> [160] Determining whether the *NCA* strikes the "right balance" between the rights of the individual and the interests of the State is more difficult. In the end, I have decided that such matters are best left to Parliament. The LeDain Commission recommended the decriminalization of marihuana possession nearly thirty years ago based on similar arguments raised by the appellants in this case. Parliament has chosen not to act since then, although there are moves afoot to make exceptions for the medical use of marihuana in wake of recent decisions. Nevertheless, I do not feel it is the role of this Court to strike down the prohibition on the non-medical use of marihuana possession at this time.
>
> [161] As discussed earlier, the conviction in ***R. v. Malmo-Levine*** also related to possession of marihuana for the purpose of trafficking. It therefore follows, in the totality of the analysis set forth above, that if the s. 7 challenge to the provisions relating to the simple possession of marihuana fails, then so too would a challenge relating to the possession of marihuana for the purpose of trafficking.

Reasons for Judgment (Braidwood J.A.), Malmo-Levine Rec., Vol. 2, pp. 331, 332

31. With respect to Curtis J.'s decision declining to hold an evidentiary hearing in ***Malmo-Levine***, Braidwood J.A. held this to be an error of no consequence:

> [162] Finally, it should be noted that the learned trial judge in ***Malmo-Levine*** refused to hear evidence that had been tendered by Mr. Malmo-Levine for the reason that it would be irrelevant. He convicted the appellant on the evidence tendered by the Crown. I am of the opinion that the learned trial judge should have admitted the evidence. However, the result would not have been different if the evidence had been admitted.
>
> Reasons for Judgment (Braidwood J.A.), Malmo-Levine Rec., Vol. 2. , p. 332

Dissenting Reasons

32. Prowse J.A. summarized her reasons as follows:

> [187] In the result, because the test I would apply is different from that applied by Mr. Justice Braidwood, I conclude that the balancing of interests under the third stage of the s. 7 analysis must be resolved in favour of the individual. In my view, the evidence does not establish that simple possession of marijuana presents a reasoned risk of serious, substantial or significant harm to either the individual or society or others. As a consequence of this finding, I conclude that the appellants have established that they have been deprived of their right to life, liberty and security of the person in a manner which is not in accordance with the principles of fundamental justice insofar as s. 3(1) of the ***NCA*** is concerned. I would not be prepared to make this finding with respect to the count of possession of marijuana for the purpose of trafficking under s. 4 of the ***NCA*** for several reasons: first, the trial judges did not address this issue; second, very little argument was addressed to this issue during the course of submissions; third, this issue would be moot if the Crown were able to justify s. 3(1) of the ***NCA*** under s. 1 of the ***Charter***; and, finally, these are dissenting reasons.
>
> Reasons for Judgment (Prowse J.A.), Malmo-Levine Rec., Vol. 2. , pp. 346, 347

(Note: The Court did not deal with Caine's division of powers ground. Neither did it address Malmo-Levine's equality rights argument, raised for the first time on appeal without giving the notice required under the ***Constitutional Question Act*** (B.C.).)

CLAY

Circumstances of the Offences

33. Clay was charged, by indictment, with several marihuana offences. The underlying facts were not disputed, and are summarized in the reasons of the Court of Appeal:

> [2] The appellant owned a store called "The Great Canadian Hemporium". In addition to selling items such as hemp products, marihuana logos and pipes, the

appellant sold small marihuana plant seedlings from his store. The appellant is an active advocate for the decriminalization of marihuana. The appellant does not require marihuana for any personal medical reason although he did sell marihuana cuttings from his store to persons who did.

[3] An undercover police officer bought a small marihuana cutting at the store. The police also seized marihuana cuttings [16 plants] and a small amount of marihuana [6.8 grams] when they executed search warrants at the appellant's store and home. As a result, the police charged the appellant under the former ***Narcotic Control Act*** with possession of cannabis sativa, trafficking in cannabis sativa, possession of cannabis sativa for the purpose of trafficking and the unlawful cultivation of marihuana.

Indictments, Clay Rec., Vol. 1, pp. 1, 5, 6, 14; Admissions of Facts, Clay Rec., Vol. 7, pp. 1428-1430; Evidence of Constable R.G. Bornais, Clay Rec., Vol. 1, pp. 58-62, 80-86; Evidence of Detective T.J. Gaffney, Clay Rec., Vol. 1, pp. 89, 90; Reasons for Judgment (Rosenberg J.A.), Clay Rec., Vol. 16, p. 3432

(Note: Clay was convicted on charges of trafficking, possession for the purpose of trafficking, and possession. He was acquitted of cultivation. Gordon James Prentice, a co-accused on the trafficking and possession for the purpose of trafficking charges, was acquitted at trial.)

Proceedings at Trial (McCart J.)
((1997), 9 C.R. (5th) 349 (Ont.Ct.(G.D.))

34. Prior to trial Clay gave written notice challenging the constitutional validity of the inclusion of marihuana in the Schedule to the ***Narcotic Control Act*** under s. 7 of the ***Charter***, and on the basis it is beyond the authority of Parliament.

Notice of Application and Notice of Constitutional Issue (April 1997), Clay, Rec., Vol. 1, pp. 8-12

Analysis of the Marihuana

35. The Crown called David D. McLerie, a "designated analyst" under the ***Narcotic Control Act***, employed by Health Canada. He testified regarding the tests he performed before signing Certificates of Analyst stating that the substances relating to the charges contain a "narcotic" within the meaning of the ***Act***, namely, "cannabis (marihuana)". He followed a protocol approved by Health Canada, and also by the United Nations.

Evidence of D.D. McLerie, Clay, Rec., Vol. 1, p. 114, 115, 129; Certificates of Analyst (Exhibit 12), Clay Rec., Vol. 7, pp. 1449-1455

36. The first step is to screen the sample, by visual and microscopic examination, looking for physical characteristics of the cannabis plant.

Evidence of D.D. McLerie, Clay Rec., Vol. 1, pp. 115, 116, 130, 132

37. Next is the Duquenois test. The sample is soaked in a petroleum ether solution, and a colouring agent is added to a portion of the liquid. Marihuana will turn the liquid a certain colour. A positive result is required to be able to certify a substance as marihuana.

Evidence of D.D. McLerie, Clay Rec., Vol. 1, pp. 116, 133, 134, 142, 144

38. The final test, thin layer chromatography, is used to determine whether specific compounds, known as cannabinoids, are present. Although marihuana contains many cannabinoids Health Canada tests for only four, *viz.*, cannabinol (C.B.N.), cannabidiol (C.B.D.), cannabichromene (C.B.C.), and delta 9 tetrahydrocannabinol (T.H.C.). T.H.C. is the psychoactive substance in marihuana. Two cannabinoids must be present before a certificate will be issued. Although analysts prefer that one is T.H.C., this is not a requirement.

Evidence of D.D. McLerie, Clay Rec., Vol. 1, pp. 116, 118, 134-136, 144, 145, 147

39. The above procedure will not determine the percentage of any of the cannabinoids present in a sample. Additional, more time-consuming testing, known as quantitation, can do this.

Evidence of D.D. McLerie, Clay Rec., Vol. 1, pp. 117, 136, 137

Botanical Classification of Cannabis

40. The Crown called Dr. Ernest Small, a research scientist with Agriculture Canada, and an expert in plant taxonomy specializing in cannabis.

Evidence of E. Small, Clay Rec., Vol. 1, pp. 152, 153; ***C.V.***, Clay Rec., Vol. 7, pp. 1472-1475

41. Dr. Small stated that, from a botanical classification perspective, there is only one species of cannabis plant, ***cannabis sativa*** (i.e., it is monotypic). He would designate plants with relatively higher amounts of T.H.C. as a subspecies, ***cannabis indica***.

Evidence of E. Small, Clay Rec., Vol. 1, pp. 157-160, 203

(Note: From a photograph, Dr. Small identified the cutting sold by Clay as a cannabis plant: Clay Rec., Vol. 1, p. 171; Photograph (Exhibit 2), Clay Rec., Vol. 7, p. 1431.)

42. He explained that "hemp" is not a scientific term, but a "common or vernacular name" used to refer to cannabis plants primarily useful for harvesting the fibres in their stalks. It was not until the late 1960s that T.H.C. was isolated, and understood as the psychoactive substance in cannabis. Based on two papers he published in 1973, there has been some recognition

throughout the world, including by Health Canada, of 0.3% T.H.C. (by weight) as a "dividing line or cutoff", between non-intoxicating and intoxicating marihuana. However, there is no botanically accepted classification (i.e., species) of cannabis based on T.H.C. content.

Evidence of E. Small, Clay Rec., Vol. 1, pp. 162, 167, 168, 207, 211-216, 219, 222, 223

(Note: At the time of trial (i.e., in 1997) Health Canada licensed the growing of cannabis for research purposes only. However, if upon testing the T.H.C. level is found to exceed 0.3%, then the material must be destroyed: Clay Rec., Vol. 1, pp. 228, 229; Vol. 2, pp. 308-311.)

43. Dr. Small chose this percentage following an experiment conducted in Ottawa in which he grew hundreds of strains of cannabis from around the world. Plants from areas above 30 degrees north latitude tended to have relatively lower amounts of T.H.C. than those from southern regions. The 0.3% figure is "kind of a rough boundary between the two."

Evidence of E. Small, Clay Rec., Vol. 1, pp. 163, 164, 202

44. Even with extensive expertise, such as possessed by Dr. Small, it is impossible to identify a particular plant as having high or low T.H.C. solely by a visual examination of its physical (morphological) characteristics. However, applying very refined mathematical techniques to analyze data that includes non-visually apparent physical characteristics, it is possible to differentiate between intoxicating and non-intoxicating plants with a high degree of accuracy. This is not a practical method for making this determination, as it requires sophisticated computers, standardized growing conditions, and the taking of samples over an entire growing season.

Evidence of E. Small, Clay Rec., Vol. 1, pp. 171, 176, 230, 232-234, 236, 248

45. The percentage of T.H.C. varies between different parts of a plant, and is not consistent throughout the growth cycle. However, the ratio between T.H.C. and C.B.D. in a given plant appears to remain constant. It is, accordingly, possible, through chemical analysis, to determine whether a seedling will mature into a plant with relatively high or low T.H.C.

Evidence of E. Small, Clay Rec., Vol. 1, pp. 164, 245-248

Defence Expert Witnesses on Constitutional Challenge

46. In support of his constitutional challenge Clay called the following persons to give opinion and other evidence:

(a) Professor Patricia G. Erickson, a criminologist at the University of Toronto: Clay Rec., Vol. 2, pp. 463ff, *C.V.*, Clay Rec., Vol. 8, pp. 1647;

(b) Dr. Diane M. Riley, a psychologist, and policy analyst with the Harm Reduction Network, University of Toronto: Clay Rec., Vol. 3, pp. 564ff, *C.V.*, Clay Rec., Vol. 8, pp. 1781;

(c) Professor Marie-Andrée Bertrand, a recently retired professor of criminology, and a member of the LeDain Commission into the Non-Medical Use of Drugs (1969-1973): Clay Rec., Vol. 3, pp. 649ff, *C.V.*, Clay Rec., Vol. 7, p. 1557;

(d) Eugene L. Oscapella, a member of the Ontario Bar, with expertise in federal drug law, and drug policy: Clay Rec., Vol. 3, pp. 700ff, *C.V.*, Clay Rec., Vol. 7, p. 1569;

(e) Dr. Heinz E. Lehmann, professor of psychiatry, McGill University, and a member of the LeDain Commission: Clay Rec., Vol. 4, pp. 746ff; *C.V.*, Clay Rec., Vol. 12, p. 2578;

(f) Dr. Eric W. Single, a professor of sociology at the University of Toronto: Clay Rec., Vol. 4, pp. 773ff, *C.V.*, Clay Rec., Vol. 11, 2327;

(g) Professor Neil Boyd, School of Criminology, Simon Fraser University: Clay Rec., Vol. 4, pp. 822ff, *C.V.*, Clay Rec., Vol. 9, p. 1838;

(h) Dr. Lester Grinspoon, associate professor of psychiatry, Harvard Medical School: Clay Rec., Vol. 4, pp. 866ff, *C.V.*, Clay Rec., Vol. 11, p. 2426;

(i) Bruce Rowsell, Director, Bureau of Drug Surveillance, Health Protection Branch, Ottawa: Clay Rec., Vol. 5, pp. 1001ff; and

(j) Dr. John P. Morgan, professor, City University of New York Medical School: Clay Rec., Vol. 5, pp. 1047ff, *C.V.*, Clay Rec., Vol. 12, p. 2591.

Crown Expert Witness on Constitutional Challenge

47. Dr. Harold Kalant was the only witness called by the Crown regarding the use and effects of marihuana. He is Professor Emeritus (Pharmacology), at the University of Toronto, and Director Emeritus (Biobehavioural Research), of the Addiction Research Foundation of Ontario.

Clay Record, Vol. 6, pp. 1218ff; *C.V.*, Clay Rec., Vol. 16, p. 3287

(Note: It is the Respondent's position that the evidence given by Clay and a number of other defence witnesses is not relevant to the issues on appeal; i.e., his parents (Robin and Louise Clay), persons who use marihuana for medical reasons (Brenda Rochford and Lynn Harichy), someone who lost employment as an elementary school teacher after pleading guilty to charges of possessing and cultivating 70 marihuana plants (Jeffrey J. Shurie), someone who volunteers to assist persons with A.I.D.S., and testified as to the relief they obtain from smoking marihuana (Neev Tapiero). Of marginal relevance at best is the evidence of Gordon Scheifele, who has grown low T.H.C. marihuana under Health Canada licences, and expressed his views with respect to the industrial / commercial viability of hemp. He is neither a taxonomist nor a pharmacologist.)

Findings of Fact

48. With respect to the effects of marihuana, McCart J. stated:

I heard from a most impressive number of experts, among whom there was a general consensus about effects of the marijuana consumption. From an analysis of their evidence I am able to reach the following conclusions:

1. Consumption of marijuana is relatively harmless compared to the so-called hard drugs and including tobacco and alcohol;
2. There is no hard evidence demonstrating any irreversible organic or mental damage from the consumption of marijuana;
3. That cannabis does cause alteration of mental functions and as such, it would not be prudent to drive a car while intoxicated;
4. There is no hard evidence that cannabis consumption induces psychoses;
5. Cannabis is not an addictive substance;
6. Marijuana is not criminogenic in that there is no evidence of a causal relationship between cannabis use and criminality;
7. That the consumption of marijuana probably does not lead to "hard drug" use for the vast majority of marijuana consumers, although there appears to be a statistical relationship between the use of marijuana and a variety of other psychoactive drugs;
8. Marijuana does not make people more aggressive or violent;
9. There have been no recorded deaths from the consumption of marijuana;
10. There is no evidence that marijuana causes amotivational syndrome;
11. Less that [sic] 1% of marijuana consumers are daily users;
12. Consumption in so-called "de-criminalized states" does not increase out of proportion to states where there is no de-criminalization;
13. Health related costs of cannabis use are negligible when compared to the costs attributable to tobacco and alcohol consumption.

Reasons for Judgment (McCart J.), Clay Rec., Vol. 16, pp. 3363-3365

49. Turning to the detrimental effects of the drug, the trial Judge continued:

Harmful Effects of Marijuana and the Need for More Research

Having said all of this, there was also general consensus among the experts who testified that the consumption of marijuana is not completely harmless. While marijuana may not cause schizophrenia, it may trigger it. Bronchial pulmonary damage is at risk of occurring with heavy use. However, to be fair, there is also general agreement among the experts who testified that the moderate use of marijuana causes no physical or psychological harm. Field studies in Greece, Costa Rico and Jamaica generally supported the idea that marijuana was a relatively safe

drug - not totally free from potential harm, but unlikely to create serious harm for most individual users or society.

The LeDain Commission found at least four major grounds for social concern: the probably harmful effect of cannabis on the maturing process in adolescence; the implications for safe driving arising from impairment of cognitive functions and psycho motor abilities, from the additive interaction of cannabis and alcohol and from the difficulties of recognizing or detecting cannabis intoxication; the possibility, suggested by reports in other countries and clinical observations on this continent, that the long term, heavy use of cannabis may result in a significant amount of mental deterioration and disorder; and, the role played by cannabis in the development and spread of multi-drug use by stimulating a desire for drug experience and lowering inhibitions about drug experimentation. This report went on to state that it did not yet know enough about cannabis to speak with assurance as to what constitutes moderate as opposed to excessive use.

The Report of the National Task Force on Cannabis, Canberra, Australia, was delivered on September 30, 1994. This Task Force concluded in general, that the findings on the health and psychological effects of cannabis suggest that cannabis use is not as dangerous as its opponents might believe, but that its' [sic] use is not completely without risk, as some of its opponents [sic] would argue. As it is most commonly used, occasionally, cannabis presents only minor or subtle risks to the health of the individual. The potential for problems increase [sic] with regular heavy use. While the research findings on some potential risks remain equivocal, there is clearly sufficient evidence to conclude that cannabis use should be discouraged particularly among youth.

Sometime prior to the Canberra Report, the Royal Commission into the non-medical use of drugs in South Australia was released. This Commission concluded that marijuana is not an addictive drug and "is comparatively harmless in moderate doses, although there are effects on skills such as those required for driving, and its' [sic] effects may be greater if it is taken in combination with other drugs. It is almost certainly harmful, to some extent, in high doses. The summary of the scientific and medical evidence does not entirely resolve the policy questions, since further value judgments have to be made."

Finally, I would refer to a commentary by Dr. Harold Kalant on three reports which appeared in 1982 respecting the potential health damaging consequences of chronic cannabis use. The one report is that of an expert group appointed by the Advisory Council on the misuse of drugs in the United Kingdom. The second is that resulting from a scientific meeting sponsored jointly by the Addiction Research Foundation of Ontario and the World Health Organization. The third is that of a committee set up by the Institute of Medicine, National Academy of Sciences, of the United States of America. There was general agreement by the three groups after a review of essentially the same body of evidence. In brief, the verdict in each case has been that the available evidence is not nearly complete enough to permit an identification of the full range and frequency of occurrence of adverse effects from cannabis use, but that the practice can certainly not be considered harmless and innocent.

> I can only conclude from a review of these reports and the other *viva voce* evidence which I heard that the jury is still out respecting the actual and potential harm from the consumption of marijuana. It is clear that further research should be carried out. While it is generally agreed that marijuana used in moderation is not a stepping stone to hard drugs, in that it does not usually lead to consumption of the so-called hard drugs, nevertheless approximately 1 in 7 or 8 marijuana users do graduate to cocaine and/or heroin.
>
> Reasons for Judgment (McCart J.), Clay Rec., Vol. 16, pp. 3365-3369

0.3% T.H.C. Issue

50. The trial Judge did not resolve the conflict in the evidence as to whether marihuana with a T.H.C. level of less than 0.3% (by weight) can have any intoxicating effect.

51. Dr. Morgan expressed the view that even 1.0% T.H.C. marihuana can have no effect:

> … .3 per cent marihuana has no psycho-activity, at least in terms of the studies that humans have conducted. In reality, let me say with what I know is well documented in the literature. .5 and less has no psycho-activity. Humans can smoke it 'til the cows come home, they won't get high.
>
> In fact, there is significant evidence, I'll soften a little bit, to say that marihuana less then one percent has no psycho-activity, and I say that because the medical literature documents that, and that humans given one percent marihuana versus placebo marihuana, that's marihuana that has no T.H.C. in it, usually cannot distinguish one per cent from zero per cent T.H.C., now I say that with some hesitation because actually I believe that in some instances, one per cent marihuana will produce an effect.
>
> But let's say anything less than one per cent marihuana is ineffective and certainly .3 per cent is wholly ineffective.
>
> Evidence of J.P. Morgan, Clay Rec., Vol. 5, p. 1079

(Note: Dr. Morgan, who described himself as "a conscientious objecter [sic] in the war on drugs", advocates the decriminalization of all drugs for personal use, including heroin and cocaine: Clay Rec., Vol. 6, p. 1195.)

52. Dr. Kalant, who was present when Dr. Morgan testified, did not agree that the proportion of T.H.C. is in and of itself determinative of whether a given quantity of marihuana will have an intoxicating effect. Although a more potent drug will produce greater effects, the dose is what is significant. With marihuana, this is the T.H.C. percentage times the volume of smoke inhaled.

> Evidence of H. Kalant, Clay Rec., Vol. 6, pp. 1222, 1223, 1300

53. When asked, in cross-examination, whether Health Canada would be "seriously mistaken" if it were of the view that 0.3% T.H.C. was unlikely to produce toxic effects, Dr. Kalant responded:

> Yes, I would say so, and I would point out that some of the other statements that I heard made in court here are equally mistaken, for example the claim that I believe was made by both Dr. Grinspoon and Dr. Morgan, if I'm not mistake [sic], that anything below one per cent is extremely unlikely to have any psycho-active effect flies in the face of all the experience of the LeDain Commission and of Health and Welfare.
>
> As the LeDain Commission pointed out in the early '70s, the typical street marihuana was .5 per cent and people were quite happy smoking it and getting the effect, and I did ask Health and Welfare analytical labs to give me a list of the analytical results for all the samples which they had looked at year by year from 1971 on, and there was a, for the first two or three years, .5 per cent was the mean value. .6 per cent at the beginning was the highest value they found, and both the mean and the highest value gradually increased over time.

Evidence of H. Kalant, Clay Rec., Vol. 6, p. 1300

54. He agreed, however, that the lower the potency, the less likely it is that someone will be willing to smoke marihuana to achieve the desired effect. With regard to his calculation that it would take 75 puffs of 0.1% T.H.C. to produce an effective dose, he stated:

> That's right, yeah, and this is why the probability of that happening gets less and less, the lower the potency. In other words, there is a limit to first of all the cigarette would not last that long, you would have to use several cigarettes to achieve it.
>
> Secondly, the intake of 75 puffs might very well become disagreeable, the amount of smoke and the effort of taking it in might become more than a person is willing to do, so that the lower the potency, the less probable that anyone is going to do it for psycho-active effect.
>
> My calculation was meant to show simply that .3 per cent is feasible within the limits of the experimental conditions which they used.

Evidence of H. Kalant, Clay Rec., Vol. 6, pp. 1317, 1318

55. Mr. Rowsell testified that Health Canada's 0.3% licence guideline is based on European Union regulations, and was adopted to permit studies to be done on growing marihuana for industrial use. When Canadian regulations are developed this may not be the level permitted. The guideline is not based on an acceptance that marihuana of this potency constitutes "no real potential harm"

Evidence of B. Rowsell, Clay Rec., Vol. 5, pp. 1015, 1016, 1024-1030

(Note: On March 12, 1998 (i.e., after the trial) the ***Industrial Hemp Regulations***, SOR/98-156, ***Canada Gazette*** Part II, Vol. 132, p. 947, came into force. These permit the licensing of commercial / industrial activities in relation to "industrial hemp", defined, in s. 1, to include cannabis plants "which do not contain more than 0.3% THC w/w.")

Ruling on Proof of "Narcotic"

56. In holding that the marihuana in issue is a "narcotic", McCart J. stated:

> Aside from the constitutional issues, the accused Clay submitted that the Crown failed to prove beyond a reasonable doubt that the accused was in possession of, trafficked in or cultivated a "narcotic". He submitted that the certificate of analysis which identified the plant substance as cannabis (marijuana) did not sufficiently identify a prohibited narcotic. He submitted that the failure of the certificate of analysis to specify the level of THC found in the plant substance renders the certificate deficient in properly identifying a prohibited narcotic. I have carefully considered both the written and oral submissions of counsel and I am of the view that ***Perka et al v. The Queen*** (1984), 14 C.C.C. (3d) 385 is a complete answer to the defence submissions.
>
> Reasons for Judgment (McCart J.), Clay Rec., Vol. 16, pp. 3354, 3355

Ruling on *Charter* Challenge

57. In rejecting a submission founded on the "harm principle", McCart J. stated:

> With apparent reliance on the decision of the Supreme Court in ***Reference Re: s. 94(2) of the Motor Vehicle Act*** (1985), 23 C.C.C. (3d) 289, it is the applicants' position that the illegal conduct causes actual harm before Parliament is entitled to legislate against that conduct. I could find no authority for that proposition and in any event I believe I have amply demonstrated that the consumption of marijuana does cause harm, albeit and perhaps not as much harm as was first believed. ...
>
> Reasons for Judgment (McCart J.), Clay Rec., Vol. 16, p. 3380

58. With respect to "arbitrariness", he said:

> I believe it is the applicant's submission that it is a violation of the principles of fundamental justice to create an arbitrary and legislative classification in which marijuana is subject to the same legislative regime as the harder drugs is answered by the passage of the ***Controlled Drugs and Substances Act***. In this ***Act,*** marijuana is listed in a separate schedule from the so-called hard drugs and the penalties for simple possession of small amounts of marijuana have been significantly reduced. Given the actual and potential harm which results from the consumption of marijuana, there can hardly be any argument that its prohibition is arbitrary or irrational.
>
> Reasons for Judgment (McCart J.), Clay Rec., Vol. 16, p. 3381

59. Turning to "overbreadth", he held:

> The applicants submit that the prohibition on the use and distribution of marijuana is overbroad in that (a) no meaningful exemptions are provided for legitimate medical use and (b) the legislation fails to make any meaningful distinction between personal and private acts of consumption or distribution and acts which form part and parcel of the illicit drug trade. I have already dealt with (a), finding that the applicants have no standing in that neither of them have need to consume marijuana for therapeutic purposes. With respect to (b) I believe the simple answer is that, in certain circumstances, the consumption of marijuana is harmful in a variety of respects. Furthermore, as many of the studies have indicated, further research is necessary to determine the long-range effects of marijuana consumption.
>
> Reasons for Judgment (McCart J.), Clay Rec., Vol. 16, pp. 3381, 3382

60. Lastly, in finding that the law does not infringe personal privacy and autonomy, the trial Judge, after quoting from the reasons of Lamer C.J. in ***B.(R.) v. Children's Aid Society***, [1995] 1 S.C.R. 315, continued:

> In my view, the critical words in the above quotations are "fundamental personal importance", "fundamental concepts of human dignity", "personal autonomy", "privacy and choice in decisions going to the individual's fundamental being". The therapeutic value of marijuana aside, it was generally agreed among the experts that, in the words of Dr. Morgan, marijuana is primarily used for occasional recreation. One might legitimately ask whether this form of recreation qualifies as of "fundamental personal importance" such as to attract ***Charter*** attention. In this regard, I quote from the ***Alaska*** decision [***Ravin v. State***, 537 P. 2d 494 (Alaska S.C., 1975)] at p. 502:
>
> > "Few would believe they have been deprived of something of critical importance if deprived of marijuana."
>
> Again, in the ***Bell*** decision [***N.O.R.M.L. v. Bell***, 488 F. Supp. 123 (Dist. Columbia, 1988)] at p. 133:
>
> > "Private possession of marijuana ... cannot be deemed fundamental."
>
> Finally, in ***Cunningham v. Canada***, ***supra***, I quote from the judgment of McLachlin J. at p. 498 where she says:
>
> > "The ***Charter*** does not protect against insignificant or 'trivial' limitations of rights."
>
> Reasons for Judgment (McCart J.), Clay Rec., Vol. 16, pp. 3383, 3384

Ruling on Division of Powers Challenge

61. In the course of addressing the ***Charter*** issues, McCart J. stated:

> On the basis of my findings, there can be no doubt that the ***Narcotic Control Act*** addresses a concern which is national in scope and in my view it falls within the

competence of the Parliament of Canada as affecting the peace, order and good government of Canada.

Reasons for Judgment (McCart J.), Clay Rec., Vol. 16, p. 3384

62. Clay was convicted. In respect of each charge, he was ordered to pay a fine ($400.00 in total), and placed on probation for three years.

Court of Appeal Decision
((2000), 146 C.C.C. (3d) 276, 37 C.R. (5th) 170, 188 D.L.R. (4th) 468, 135 O.A.C. 66, 49 O.R. (3d) 577)

63. In dismissing the appeal, Mr. Justice Rosenberg (Mr. Justice Catzman and Madam Justice Charron concurring), accepted that the evidence supported the findings of the trial Judge.

Reasons for Judgment (Rosenberg J.A.), Clay Rec., Vol. 16, p. 3434, para. 10, p. 441, para. 34

(Note: The Court heard this matter together with ***R. v. Parker*** (2000), 146 C.C.C. (3d) 193 (Ont.C.A.), which raised issues concerning the medical use of marihuana. Judgments in both were released at the same time.)

64. Before addressing Clay's main argument, based on the "harm principle", Rosenberg J.A. dealt with his alternative submission that the right to use intoxicants, including marihuana, in the privacy of one's home is a fundamental aspect of personal autonomy and human dignity:

> [14] The Supreme Court of Canada has also confirmed that s. 7 protects a right to personal autonomy as an aspect of security of the person. As Sopinka J. wrote in ***Rodriguez v. British Columbia (Attorney General)***, [1993] 3 S.C.R. 519 at p. 588:
>
> > There is no question, then, that personal autonomy, at least with respect to the right to make choices concerning one's own body, control over one's physical and psychological integrity, and basic human dignity are encompassed within security of the person, at least to the extent of freedom from criminal prohibitions which interfere with these. [emphasis by Rosenberg J.A.]
>
> [15] In my view, the decision to use marihuana for recreational purposes similarly does not fall within this aspect of security of the person. I do not agree that such a decision is basic to human dignity. This case is not at all like ***Rodriguez*** where, at p. 588, Sopinka J. described the impact of the ***Criminal Code*** prohibition on assisted suicide on the appellant's ability to make personal decisions in these terms: ...
>
> [16] Other cases engaging this aspect of security of the person have included ***R. v. Morgentaler***, [1988] 1 S.C.R. 30, where delays in the therapeutic abortion procedure put the pregnant woman's life and health at risk, and ***Fleming v. Reid*** (1991), 4 O.R. (3d) 74 (C.A.), where a psychiatric patient was medicated contrary to instructions he had given when he was still competent. I have also held in ***R. v. Parker*** that the accused's right was infringed where he was denied access to marihuana that he

> required to control epileptic seizures that threatened his life and health. Again, the affront to autonomy and human dignity in these cases is far removed from the claim made by the appellant in this case.
>
> [17] At this stage in the development of the ***Charter***, it is not possible to delineate the aspects of personal autonomy that will receive protection under s. 7. The result for any given fact situation must be informed by the situations where a deprivation of liberty or security of the person has been found in the past.
>
> [18] I agree with the trial judge that the recreational use of marihuana, even in the privacy of one's home, does not qualify as a matter of fundamental personal importance so as to engage the liberty and security interests under s. 7 of the ***Charter***.
>
> Reasons for Judgment (Rosenberg J.A.), Clay Rec., Vol. 16, pp. 3437, 3448

65. Expressing some reservations with respect to adopting the "harm principle" as a standard for judicial scrutiny of legislation, he stated:

> [24] In ***Rodriguez v. British Columbia (Attorney General)*** at p. 590, Sopinka J. cautioned that the court must be careful that the principles of fundamental justice do not become principles in "eye of the beholder only". As he said at pp. 590-91:
>
> > Principles of fundamental justice must not, however, be so broad as to be no more than vague generalizations about what our society considers to be ethical or moral. They must be capable of being identified with some precision and applied to situations in a manner which yields an understandable result.
>
> [25] The harm principle as a principle of fundamental justice evokes many of these concerns when it is taken out of the context from which it is derived. While it is a good basis for legislative policy, a helpful guide for the exercise of discretion by prosecutions [sic] and an important principle for judges in exercising discretion in sentencing, it is a difficult principle to translate into a means of measuring the constitutionality of legislation. For example, how much harm is sufficient to warrant legislative action? And, can the harm principle be applied outside the ***mens rea*** area in a manner that yields an understandable result?
>
> Reasons for Judgment (Rosenberg J.A.), Clay Rec., Vol. 16, p. 3439

66. However, having regard to the reasons of Braidwood J.A. in ***Malmo-Levine***; ***Caine***, ***supra***, Rosenberg J.A. continued:

> [28] I am prepared to accept for the purpose of this appeal that a harm principle is a principle of fundamental justice in the terms suggested by Braidwood J.A. I do not agree with the higher test propounded by Prowse J.A. which, in my view, could lead to an unjustifiable intrusion into the legislative sphere. Moreover, the principle, as derived by Braidwood J.A., appears to be consistent with the argument made by the appellant in this court, which in turn was based on some of the language from ***R. v. Butler***, [1992] 1 S.C.R. 452. In that case, Sopinka J., in applying s. 1 to the alleged violation of freedom of expression from the obscenity prohibition in the ***Criminal***

> *Code*, held at p. 504 that a rational connection between the impugned measure and the objective of the legislation was made out if Parliament had a "reasoned apprehension of harm". Later he held at p. 505, in applying the minimal impairment test, that it was sufficient that the prohibited material "creates a risk of harm to society" and "that it is sufficient in this regard for Parliament to have a reasonable basis for concluding that harm will result and this requirement does not demand actual proof of harm".
>
> Reasons for Judgment (Rosenberg J.A.), Clay Rec., Vol. 16, p. 3440

67. On the basis of the facts found by the trial Judge, Rosenberg J.A. concluded, "that there is a reasoned apprehension of harm that is neither insignificant nor trivial."

Reasons for Judgment (Rosenberg J.A.), Clay Rec., Vol. 16, p. 3441, para. 34

68. With reference to his reasons in ***Parker, supra***, Rosenberg J.A. noted that, except for medical use, there is no international consensus favouring the legalization of marihuana. He viewed as inapt a submission that Parliament's failure to prohibit alcohol and tobacco precluded it from acting with respect to marihuana.

Reasons for Judgment (Rosenberg J.A.), Clay Rec., Vol. 16, p. 3441, paras. 35, 36

69. An argument that the legislation is overly broad because by reason of the definition sections in the ***Narcotic Control Act*** both intoxicating and non-intoxicating marihuana are prohibited was dismissed:

> [39] The appellant also submits that the prohibition is over broad because it applies to all forms of cannabis, not merely those with a sufficient level of Tetrahydrocannabinol (THC) to produce the psychoactive effect. It does not appear that this issue was raised before the trial judge as a constitutional matter. In any event, there is a rational basis for Parliament prohibiting all cannabis in order to effectively control the harm from psychoactive cannabis. This is because there is not a clear distinction between "narcotic" and "non-narcotic" cannabis and, therefore, it is difficult to distinguish between the two. For example, while some scientists consider cannabis with 0.3% THC "narcotic", there is evidence that even cannabis with less than this amount of THC is psychoactive.
>
> Reasons for Judgment (Rosenberg J.A.), Clay Rec., Vol. 16, p. 3442

70. With respect to Parliament's jurisdiction to regulate the use of marihuana, Rosenberg J.A. rejected Clay's arguments that (a) ***Hauser, supra***, was wrongly decided, (b) subsequent decisions of this Court have called into question reliance on the federal "residual power" (i.e., peace, order, and good government) as support for the ***Narcotic Control Act***, and (c) the

legislation is also not supportable as criminal law (i.e., s. 91(27)). In connection with the latter, he stated:

> [45] In my view, the findings by the trial judge concerning the harm from marihuana use and the other objectives of the ***Narcotic Control Act***, including Canada's international obligations and controlling the domestic and international trade in illicit drugs, are sufficient to dispose of this argument. Moreover, in view of the binding effect of the decision in ***Hauser***, this argument is not available to the appellant. Finally, acceptance of the reservations expressed by Dickson J. in ***Hauser*** and Laskin C.J.C. in ***Schneider*** about the use of the federal residual power would merely result in the ***Act*** being justified as an exercise of the federal criminal law power.
>
> Reasons for Judgment (Rosenberg J.A.), Clay Rec., Vol. 16, pp. 3442-3444, paras. 40-45

71. The final point raised was that the Crown failed to prove that the marihuana Clay possessed and sold was a prohibited drug, because there was no evidence it contained the psychoactive cannabinoid T.H.C. It was contended that, as a matter of statutory interpretation, only marihuana with more than 0.3% T.H.C. falls within the definition of a "narcotic". Citing ***R. v. Perka***, [1984] 2 S.C.R. 232, Rosenberg J.A. found no ambiguity in the definition provisions, and that the prohibition applies to all marihuana.

Reasons for Judgment (Rosenberg J.A.), Clay Rec., Vol. 16, pp. 3444-3446, paras. 46-51

72. Rosenberg J.A. declined to grant constitutional remedies, which he had done in ***Parker, supra*** (at paras. 195-209). In that decision the prohibition on possession of marihuana in the ***Controlled Drugs and Substances Act*** was found to violate s. 7 of the ***Charter***, because the legislative scheme did not adequately address therapeutic use of the drug. However, the declaration of invalidity was suspended for 12 months to provide Parliament with an "opportunity to fill the void." Parker, who had established a medical need for marihuana, was granted a constitutional exemption from the law during the period of suspension. In addition, the judicial stay of the charges against him granted at trial was affirmed. However, as Clay had not asserted a personal medical need for marihuana, and his challenge based on recreational use had failed, Rosenberg J.A. concluded it was appropriate to permit his convictions to stand.

Reasons for Judgment (Rosenberg J.A.), Clay Rec., Vol. 16, pp. 3446-3449, paras. 52-61

(Note: Subsequent to ***Parker,*** the federal government addressed the medical marihuana issue in the ***Marihuana Medical Access Regulations***, SOR/2001-227, ***Canada Gazette*** Part II, Vol. 135, p. 1330.)

PART II

ISSUES / CONSTITUTIONAL QUESTIONS

73. The Chief Justice has stated the following constitutional questions:

Malmo-Levine

1. Does prohibiting possession of Cannabis (marihuana) for the purpose of trafficking under s. 4(2) of the ***Narcotic Control Act***, R.S.C. 1985, c. N-1, by reason of the inclusion of this substance in s. 3 of the Schedule to the ***Act*** (now s. 1, Schedule II, ***Controlled Drugs and Substances Act***, S.C. 1996, c. 19), infringe s. 7 of the ***Canadian Charter of Rights and Freedoms***?

2. If the answer to Question 1 is in the affirmative, is the infringement justified under s. 1 of the ***Charter***?

3. Does prohibiting possession of Cannabis (marihuana) for the purpose of trafficking under s. 4(2) of the ***Narcotic Control Act***, R.S.C. 1985, c. N-1, by reason of the inclusion of this substance in s. 3 of the Schedule to the ***Act*** (now s. 1, Schedule II, ***Controlled Drugs and Substances Act***, S.C. 1996, c. 19), infringe s. 15(1) of the ***Charter*** by discriminating against a certain group of persons on the basis of their substance orientation, occupation orientation, or both?

4. If the answer to Question 3 is in the affirmative, is the infringement justified under s. 1 of the ***Charter***?

Caine

1. Does prohibiting possession of Cannabis (marihuana) for personal use under s. 3(1) of the ***Narcotic Control Act***, R.S.C. 1985, c. N-1, by reason of the inclusion of this substance in s. 3 of the Schedule to the ***Act*** (now s. 1, Schedule II, ***Controlled Drugs and Substances Act***, S.C. 1996, c. 19), infringe s. 7 of the ***Canadian Charter of Rights and Freedoms***?

2. If the answer to Question 1 is in the affirmative, is the infringement justified under s. 1 of the ***Charter***?

3. Is the prohibition on the possession of Cannabis (marihuana) for personal use under s. 3(1) of the ***Narcotic Control Act***, by reason of the inclusion of this substance in s. 3 of the Schedule to the ***Act*** (now s. 1, Schedule II, ***Controlled Drugs and Substances Act***, S.C. 1996, c. 19), within the legislative competence of the Parliament of Canada as being a law enacted for the peace, order and good government of Canada pursuant to s. 91 of the ***Constitution Act, 1867***; as being enacted pursuant to the criminal law power in s. 91(27) thereof; or otherwise?

Clay

1. Does prohibiting possession of ***Cannabis sativa*** for personal use under s. 3(1) of the ***Narcotic Control Act***, R.S.C. 1985, c. N-1, by reason of the inclusion of this substance in s. 3 of the Schedule to the ***Act*** (now s. 1, Schedule II, ***Controlled Drugs and Substances Act***, S.C. 1996, c. 19), infringe s. 7 of the ***Canadian Charter of Rights and Freedoms***?

2. If the answer to Question 1 is in the affirmative, is the infringement justified under s. 1 of the ***Charter***?

3. Is the prohibition on the possession of ***Cannabis sativa*** for personal use under s. 3(1) of the ***Narcotic Control Act***, by reason of the inclusion of this substance in s. 3 of the Schedule to the ***Act*** (now s. 1, Schedule II, ***Controlled Drugs and Substances Act***, S.C. 1996, c. 19), within the legislative competence of the Parliament of Canada as being a law enacted for the peace, order and good government of Canada pursuant to s. 91 of the ***Constitution Act, 1867***; as being enacted pursuant to the criminal law power in s. 91(27) thereof; or otherwise?

74. In addition, the following non-constitutional issues are raised:

Malmo-Levine

That the trial Judge's refusal to conduct an evidentiary ***voir dire*** with respect to the constitutional challenge was an error that warrants an order for a new trial.

(Note: This ground is not set out as a Point in Issue on pages 2 and 3 of Malmo-Levine's factum, but is addressed in paragraph 7.)

Clay

Should the Schedule of the ***Narcotic Control Act*** be interpreted and or be construed to criminally prohibit the possession of plants (or other substances) which have no psychoactive effects and are used exclusively as an industrial product or, alternatively, should the Crown bear the burden of proving that the seized substance has a threshold level of THC in order to distinguish the substance from a purely industrial product?

Clay Factum, p. 7, para. 10(C)

PART III
ARGUMENT

INTRODUCTION

75. The principal issue raised on these appeals is Parliament's authority to enact penal sanctions, with the possibility of incarceration, for the possession of, and trafficking in, marihuana. It is said these prohibitions infringe rights guaranteed by the ***Charter*** and are, therefore, beyond the competence of both Parliament and the provincial legislatures. It is further contended that even if these laws do not violate the ***Charter***, they are ***ultra vires*** on a division of powers basis.

76. Although marihuana prosecutions underlie these appeals, the effect of the constitutional determinations the Court is being asked to make are far-reaching. The "harm principle" advanced by the Appellants under s. 7 of the ***Charter***, would circumscribe the use of incarceration as a possible penalty in all circumstances. The division of powers question goes to the very ability of Parliament to enact drug control legislation.

77. It cannot be gainsaid that since the 1970s the marihuana laws have generated considerable study and debate. Various opinions have been expressed with respect to such matters as the harmful effects of marihuana, and the efficacy of the legislation. Reasonable people may differ over these questions. Through the ***Narcotic Control Act***, and more recently the ***Controlled Drugs and Substances Act***, our democratically elected representatives have expressed their considered view on this subject. In so doing they have taken a constitutionally acceptable path.

OVERVIEW OF SUBMISSIONS

78. In summary, the Respondent's position on the constitutionality of the legislation is:

(a) The Appellants' liberty interests are engaged only because imprisonment is a potential penalty for the offence;

(b) The rights to "liberty" and "security of the person" do not encompass a free standing right to possess or ingest one's recreational drug of choice;

(c) The principles of fundamental justice do not include a "harm principle", or any ancillary or corollary principles;

(d) To the extent that the principles of fundamental justice include a consideration of the harm addressed by a particular penal provision, the question to be asked is not whether the state can empirically demonstrate such harm, but rather whether the party challenging the law can establish that the legislature has acted in an irrational or arbitrary manner;

(e) Parliament's decision to prohibit possession of marihuana is neither irrational nor arbitrary;

(f) Neither "substance" nor "occupation orientation" is an analogous ground of discrimination, and the "right to deal", is not protected by s.15(1) of the ***Charter***; and

(g) The ***Narcotic Control Act*** as a whole, and the provisions with respect to marihuana in particular, are ***intra vires*** the Parliament of Canada under both the peace order and good government and criminal law heads of power.

79. With respect to the procedural issue raised by Malmo-Levine, it is submitted the trial Judge did not err in declining to hold a ***voir dire*** but that, in any event, the failure to do so did not occasion any substantial wrong or miscarriage of justice (***Criminal Code***, s. 686(1)(b)(iii)).

80. In response to Clay's final point, it is the Respondent's position that the statutory definition of marihuana encompassed all forms of the cannabis plant regardless of how much T.H.C. is present.

CHARTER, SECTION 7

What are the Principles of Fundamental Justice?

81. The "principles of fundamental justice" constrain, ***inter alia***, the actions of the elected legislative branches of government. Accordingly, they must not only be clear, but more importantly, fundamental to our democratic system. As Sopinka J. noted in ***Rodriguez v. B.C. (Attorney General)***, [1993] 3 S.C.R. 519 (at p. 590):

> Discerning the principles of fundamental justice with which deprivation of life, liberty or security of the person must accord, in order to withstand constitutional scrutiny, is not an easy task. A mere common law rule does not suffice to constitute a principle of fundamental justice, rather, as the term implies, principles upon which there is some consensus that they are vital or fundamental to our societal notion of justice are required. Principles of fundamental justice must not, however, be so broad as to be no more than vague generalizations about what our society considers to be ethical or moral. They must be capable of being identified with some precision and applied to situations in a manner which yields an understandable result. They must also, in my view, be legal principles. The now familiar words of Lamer J. (as

he then was) in ***Re B.C. Motor Vehicle Act***, [1985] 2 S.C.R. 486, at pp. 512-13, are as follows:

> Consequently, the principles of fundamental justice are to be found in the basic tenets and principles, not only of our judicial process, but also of the other components of our legal system. [emphasis added]

And (at p. 607):

> The principles of fundamental justice cannot be created for the occasion to reflect the court's dislike or distaste of a particular statute. While the principles of fundamental justice are concerned with more than process, reference must be made to principles which are "fundamental" in the sense that they would have general acceptance among reasonable people.

Process and Onus

82. The three-stage approach for determining whether there has been a breach of s. 7 is set out in ***R. v. White***, [1999] 2 S.C.R. 417, by Iacobucci J.:

> 38 Where a court is called upon to determine whether s. 7 has been infringed, the analysis consists of three main stages, in accordance with the structure of the provision. The first question to be resolved is whether there exists a real or imminent deprivation of life, liberty, security of the person, or a combination of these interests. The second stage involves identifying and defining the relevant principle or principles of fundamental justice. Finally, it must be determined whether the deprivation has occurred in accordance with the relevant principle or principles: see ***R. v. S. (R.J.)***, [1995] 1 S.C.R. 451, at p. 479, *per* Iacobucci J. Where a deprivation of life, liberty, or security of the person has occurred or will imminently occur in a manner which does not accord with the principles of fundamental justice, a s. 7 infringement is made out.

83. Contrary to this Court's jurisprudence the Appellants seek to place the burden on the Crown to establish that penal legislation does not infringe s. 7. For example, Clay takes the position in paragraph 28 that, "the state must produce sound empirical evidence to show that the criminalization of … activity prevents more harm than it causes." Indeed, he asserts on page 20, that on the basis of some thus far unheard of doctrine of constitutional estoppel the failure of Parliament to implement the recommendations of the LeDain Commission renders the law invalid "unless and until it can be justified."

(Note: Clay's erroneous view is also apparent in paragraph 50. He suggests that as a constitutional remedy this Court should stay all possession of marihuana cases in Canada "until such time as Parliament can present sound scientific evidence which provides a 'reasoned' basis

for concluding that it is necessary to criminalize conduct relating to personal consumption, possession and cultivation of cannabis." No process or forum for adjudication is suggested.)

84. Caine, in paragraph 24, similarly argues that the burden of proving a reasonable basis for penal legislation falls on the state. Under this thesis there would be, for all intents and purposes, a presumption of ***ultra vires*** with respect to every criminal, quasi-criminal, and regulatory offence punishable by imprisonment.

85. The Appellants' position is, in effect, that when a provision providing for imprisonment is challenged under the ***Charter***, the s. 1 analysis immediately collapses into s. 7. Indeed, they support their argument by reference to s. 1 cases. This, of course, ignores the fact that s. 1 considerations are not reached in these appeals unless, and until, the Appellants establish that the law prohibiting possession of marihuana violates a constitutionally protected right.

86. That the burden rests with the challenging party is clear from the judgment of McLachlin J. (as she then was) and Iacobucci J. in ***R. v. Mills***, [1999] 3 S.C.R. 688:

> 65 It is also important to distinguish between balancing the principles of fundamental justice under s. 7 and balancing interests under s. 1 of the ***Charter***. The s. 1 jurisprudence that has developed in this Court is in many respects quite similar to the balancing process mandated by s. 7. As McLachlin J. stated for the Court in ***Cunningham v. Canada***, [1993] 2 S.C.R. 143, at p. 152, regarding the latter: "The . . . question is whether, from a substantive point of view, the change in the law strikes the right balance between the accused's interests and the interests of society." Much the same could be said regarding the central question posed by s. 1.
>
> 66 However, there are several important differences between the balancing exercises under ss. 1 and 7. The most important difference is that the issue under s. 7 is the delineation of the boundaries of the rights in question whereas under s. 1 the question is whether the violation of these boundaries may be justified. The different role played by ss. 1 and 7 also has important implications regarding which party bears the burden of proof. If interests are balanced under s. 7 then it is the rights claimant who bears the burden of proving that the balance struck by the impugned legislation violates s. 7. If interests are balanced under s. 1 then it is the state that bears the burden of justifying the infringement of the ***Charter*** rights. [emphasis added]

See also: ***Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)***, [1995] 2 S.C.R. 97 @ para. 108 (per Cory J.)

87. In citing ***R. v. Bartle***, [1994] 3 S.C.R. 173, Caine would have this Court disregard the context of what is being discussed in the excerpt from the reasons set out in paragraph 23 of his

factum. Lamer C.J.'s comment (at p. 210) regarding the onus "shift[ing] back and forth", relates to matters relevant to whether evidence should be excluded under s. 24(2) of the ***Charter***; an issue that arises only after a breach has been found. For example, if a search is found to be unreasonable and the Crown advances "good faith" as militating in favour of admissibility, then it will have to establish this particular fact. The ultimate burden remains on the accused: p. 209. Neither ***Bartle*** nor any other decision of this Court supports the proposition that the onus is on the state in the first instance to establish that legislation does not violate the ***Charter***.

No Right to Get "Stoned"

88. As imprisonment is a potential penalty for possession of marihuana, it is accepted that the "liberty" interest protected by s. 7 is engaged. Whether such a restriction is in accord with the principles of fundamental justice is addressed below (at paras. 101ff). However, the Appellants go further, and submit that "liberty" and "security of the person" rights afford free standing constitutional protection to the recreational consumption of psychoactive substances. On this basis any restriction on the use of marihuana would ***prima facie*** infringe s. 7, even absent the possibility of incarceration.

89. All three Appellants seek to elevate a recreational pursuit to a constitutional right. Caine, in paragraph 30, describes the decision to use marihuana as one "of fundamental personal importance involving a choice made by the individual involving the individual's personal autonomy." Although Clay, in paragraph 22, is prepared to assume that smoking marihuana does not directly engage s. 7, he nonetheless refers in the following paragraph to the "constitutional values engaged by the personal and private consumption of cannabis". Malmo-Levine, in paragraph 25, citing the writings of 19th Century philosopher John Stuart Mill, takes the position that the right to use cannabis, or any substance, is "unqualified".

90. It is the Respondent's position that a law precluding an individual from possessing or ingesting his or her recreational drug of choice infringes neither "liberty" nor "security of the person". To characterize the smoking of marihuana as going to an individual's fundamental being is to trivialize these concepts. Simply put, there is no free standing right to get "stoned". While political theorists like Mill perhaps contributed to certain of the philosophical

underpinnings of the ***Charter***, it would be imprudent to elevate all of their thinking to the level of constitutionally enshrined principles. To do so would be inconsistent with this Court's jurisprudence holding that the principles of fundamental justice are the primary legal concepts underlying our system of justice.

91. Although liberty means more than freedom from physical restraint, constitutional protection does not extend to all personal choices. As Bastarache J. stated in ***Blencoe v. British Columbia (Human Rights Commission)***, [2000] 2 S.C.R. 307:

> 54 Although an individual has the right to make fundamental personal choices free from state interference, such personal autonomy is not synonymous with unconstrained freedom. [emphasis added]

See also: ***Godbout v. Longueuil (City)***, [1997] 3 S.C.R. 844 @ para. 66 (per La Forest J.): "the autonomy protected by the s. 7 right to liberty encompasses only those matters that can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence"

92. Security of the person in the criminal context has been held to apply to state interference with bodily integrity, and serious state-imposed psychological stress. The former is not relevant to these appeals. With respect to the latter the reasons of Bastarache J. in ***Blencoe***, ***supra***, again are apposite:

> 57 Not all state interference with an individual's psychological integrity will engage s. 7. Where the psychological integrity of a person is at issue, security of the person is restricted to "serious state-imposed psychological stress" (Dickson C.J. in ***Morgentaler***, ***supra***, at p. 56). I think Lamer C.J. was correct in his assertion that Dickson C.J. was seeking to convey something qualitative about the type of state interference that would rise to the level of infringing s. 7 (*G.(J.)*, at para. 59). The words "serious state-imposed psychological stress" delineate two requirements that must be met in order for security of the person to be triggered. First, the psychological harm must be state imposed, meaning that the harm must result from the actions of the state. Second, the psychological prejudice must be serious. Not all forms of psychological prejudice caused by government will lead to automatic s. 7 violations. These two requirements will be examined in turn. [emphasis added]

See also: ***New Brunswick (Minister of Health & Community Services) v. G.(J.)***, [1999] 3 S.C.R. 46 @ para. 60 (per Lamer C.J.): "For a restriction of security of the person to be made out, then, the impugned state action must have a serious and profound effect on a person's psychological integrity." [emphasis added]

93. ***Ravin v. State***, 537 P. 2d 494 (Alaska S.C., 1975) (cited by Clay in paragraph 24), which affords limited constitutional protection to the recreational use of marihuana, is distinguishable. It involves a provision of the ***Alaska State Constitution*** providing that, "the right of the people to privacy is recognized and shall not be infringed." Interpreting this guarantee the Court found that possession of marihuana for personal use by adults at home was constitutionally protected: pp. 504, 511. However, the Court also held (at page 502), that "there is not a fundamental constitutional right to possess or ingest marijuana in Alaska." In ***Belgarde v. State***, 543 P. 2d 206 (Alaska S.C., 1975), it held that ***Ravin*** does not apply to possession of marihuana in a public place: pp. 207, 208.

(Note: That ***Ravin*** rests on a specific constitutional language was recognized in ***R. v. Hamon*** (1993), 85 C.C.C. (3d) 490 (Que.C.A.) (at p. 495) (per Beauregard J.A.), leave refused, [1994] 1 S.C.R. viii, holding that the offences of possession and cultivation of marihuana do not infringe ss 7 or 15 of the ***Charter***.)

94. American courts have declined to follow ***Ravin***, ***supra***, in interpreting other constitutional "privacy" provisions: ***N.O.R.M.L. v. Gain***, 161 Cal.Rptr. 181 (C.A., 1st Dist., 1980) @ p. 184; ***Mallan v. State***, 950 P.2d 178 (Hawaii S.C., 1998) @ pp. 188, 189. They have, however, concurred in the conclusion that marihuana use is not fundamental, and is not entitled to free standing constitutional protection: ***N.O.R.M.L. v. Bell***, 488 F.Supp. 123 (Dist. Columbia, 1980) @ pp. 132, 133; ***Seeley v. State***, 940 P. 2d 604 (Wash.S.C., 1998) @ p. 612.

95. ***Re Sochandamandou*** (5 May 1994), Sentence No. C-221/94 (Columbian Constitutional Court), is also distinguishable. In this case the majority (5:4) struck down a prohibition on possession and use of cocaine (and marihuana and other drugs). The decision appears to turn on Article 16 of the ***Columbian Constitution (1991)*** (translation):

> All persons are entitled to their personal development without limitations other than those imposed by the rights of others and those which are prescribed by the legal system.

(Note: This decision is not cited in the Appellants' arguments, but is referred to in paragraph 68 of their Joint Statement. It also appears in the list of authorities in Caine's factum. A translation of the majority judgment is at Tab 47 of Caine's Book of Authorities.)

96. In reaching its determination the Court interpreted the ***Constitution*** as affording protection to personal liberty and autonomy on a significantly broader basis than ***Blencoe***, ***supra***. Indeed, it

held that the only thing the State can do regarding the personal consumption of drugs (translation), "is to offer its people possibilities to educate themselves": p. 13.

97. More in accord with Canadian constitution norms is the German Constitutional Court's ***Cannabis Case***, BverfGE 90, 145 (1994), a consolidation of several appeals involving charges of possession or trafficking in hashish (i.e., Cannabis resin) under the ***Intoxicating Substances Act***. These laws were found not to violate the ***Basic Law*** (i.e., the German Constitution).

98. One of the provisions considered was paragraph 1 of Article 2 [Personal Freedoms], which provides (translation), "Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law." In holding that the "right to be intoxicated", is not constitutionally protected, the Court stated (at page 171 (translation)):

> Article 2 para 1 of the ***Basic Law*** protects every form of human activity without consideration of the importance of the activity for a person's development (see BVerfGE 80, 137 at 152). However, only the inner core of the right to determine the course of one's own life is accorded absolute protection and thus withdrawn from interference by public authority (see BVerfGE 6, 32 at 41; BVerfGE 54, 143 at 146; BverfGE 80, 137 at 153). Dealings with drugs and, in particular the act of voluntary [sic] becoming intoxicated, cannot be reckoned as part of that absolute core because of the numerous direct and indirect consequences for society. Outside the core the general right to freedom of action is only guaranteed within the limits of second half of the sentence contained in Article 2 para 1 ***Basic Law***. This means that it is subject to the limits placed on it in accordance with the constitutional order [sic] ***Basic Law*** (see BVerfGE 80, 137 at 153). [emphasis added]

(Note: Although upholding the law prohibiting possession of cannabis for personal use, the Court found that, in some circumstances, prosecution for small quantities could amount to excessive state intervention, and thus infringe the constitutional principle of "proportionality". Having regard to statutory provisions dealing with prosecutorial discretion, and the principles of "equality" and "proportionality", it directed state officials, who are responsible for implementing the law, to develop guidelines for the uniform handling of such cases. The Respondent understands that such standardized non-prosecution policies do not yet exist.)

99. More recent is ***R. v. Morgan***, [2002] E.W.J. No. 1244 (QL) (C.A.(Crim.Div.)), dismissing an application for leave to appeal convictions for possession of 14 grams of marihuana, and one cannabis plant. It was argued unsuccessfully at trial that the law prohibiting possession of marihuana breaches Article 8 of the ***European Convention on Human Rights***, which forms part

of the law of England by virtue of the ***Human Rights Act 1998*** (U.K.). Article 8(1) provides that, "Everyone has the right to respect for his private and family life, his home and his correspondence." In affirming the trial judge's ruling, Cooke J. stated (in para. 11):

> A right to private life did not involve or include a right to self intoxication, nor the right to possession or cultivation of cannabis, whether for personal consumption within one's home or otherwise.

See also: ***R. v. Ham***, [2002] E.W.J. No, 2551 (QL) (C.A.(Crim.Div.)); refusing leave to appeal from the ruling followed by the trial judge in ***Morgan***

100. In conclusion, it is submitted that Rosenberg J.A. was correct in stating (at Clay Rec., Vol. 16, p. 3438):

> [18] I agree with the trial judge that the recreational use of marihuana, even in the privacy of one's home, does not qualify as a matter of fundamental personal importance so as to engage the liberty and security interests under s. 7 of the ***Charter***.

"Harm Principle" is not a Principle of Fundamental Justice

101. Given that a person charged with possession of marihuana faces a possible deprivation of liberty, s. 7 is engaged. The next stage in the analysis is to identify and define the relevant principles by which to measure whether such deprivation is in accord with fundamental justice.

102. In advancing the "harm principle" as an independent constitutional norm, the Appellants assert that s. 7 of the ***Charter*** empowers the judiciary not only to investigate whether a legislature has sought to address a harm, but also to pass judgment on such matters as whether the harm is of sufficient degree to permit law-making action, and its effectiveness. The Respondent does not accept this degree of oversight as a basic tenet of our democratic system of government. Rather, it is her position that the supervisory role of the courts is limited to ensuring that the sanction of incarceration is not utilized in an irrational or arbitrary manner.

(Note: The "harm principle" as formulated by Braidwood J.A. was applied in ***R. v. Turmel***, [2002] Q.J. No. 5875 (QL) (S.C.). Based on Dr. Kalant's evidence, Plouffe J. dismissed a challenge to the offences of production and possession of marihuana for the purpose of trafficking: paras. 123-126.)

103. What the Respondent would call the "rational basis" principle is already part of Canada's constitutional fabric. Apposite is ***Reference re: Anti-Inflation Act***, [1976] 2 S.C.R. 373,

upholding federal legislation under the "peace order and good government" power. In discussing the relevance of extrinsic evidence, and judicial notice, Laskin C.J. stated (at p. 423):

> In considering such material and assessing its weight, the Court does not look at it in terms of whether it provides proof of the exceptional circumstances as a matter of fact. The matter concerns social and economic policy and hence governmental and legislative judgment. It may be that the existence of exceptional circumstances is so notorious as to enable the Court, of its own motion, to take judicial notice of them without reliance on extrinsic material to inform it. Where this is not so evident, the extrinsic material need go only so far as to persuade the Court that there is a rational basis for the legislation which it is attributing to the head of power invoked in this case in support of its validity.

See also: p. 425 (per Laskin C.J.); ***Reference re: Validity of the Wartime Leasehold Regulations***, [1950] S.C.R. 124 @ pp. 135 (per Kerwin J., as he then was), 141 (per Taschereau J., as he then was), 151, 154 (per Kellock J.), 157 (per Estey J.), 166 (per Locke J.): "clear evidence" is required to establish there is "no justification" for continuation of emergency legislation enacted under p.o.g.g.

104. As evinced by ***Reference re: Provincial Court Judges***, [1997] 3 S.C.R. 3, this standard has been applied under the ***Charter***. After finding that judicial independence is guaranteed by s. 11(d), Lamer C.J. went on to hold that independent bodies must initially recommend changes in judicial salaries. The executive or legislature, as the case may be, is then obligated to respond. If it fails to implement a recommendation, then judicial review can be taken. However, the decision is not to be subjected to the "rigorous standard of justification" imposed under s. 1 of the ***Charter***. To the contrary, as the Chief Justice explained, citing ***re: Anti-Inflation Act***, ***supra***, the "standard of justification ... is one of simple rationality"; i.e., the government need only articulate a "legitimate reason": paras. 82, 83.

See also: ***R. v. Arkell***, [1990] 2 S.C.R. 695 @ 704 (per Lamer J.): challenge to ***Code***, s. 214(5) dismissed, classifying murder committed in certain circumstances as first degree "neither arbitrary nor irrational"; ***R. v. Heywood***, [1994] 3 S.C.R. 761 @ p. 792, 793 (per Cory J.): overbreadth analysis looks to whether rights have been limited for "no reason"

105. To accept a justiciable harm baseline is to accept that every offence with the potential of imprisonment is subject to curial reassessment on this basis. For example, a person charged under s. 253(b) of the ***Criminal Code*** with driving "over .08", could challenge the law on the basis that the statutory limit is lower than it needs to be to protect the public by keeping presumptively unsafe drivers off the road.

(Note: In some American states the permissible blood alcohol level is 1.0%.)

106. The recognition of a ***Charter*** principle precluding Parliament from criminalizing conduct unless it can demonstrate a potential for serious or substantial harm would be inconsistent with the well-established constitutional principle that the criminal law head of power can be used to enact legislation to address social, political, or economic interests: ***R. v. Hinchey***, [1996] 3 S.C.R. 1128 @ para. 29 (per L'Heureux-Dubé J.). It would also circumscribe the principle that a prohibition is valid if directed to "some legitimate public purpose": ***R. v. Hydro-Québec***, [1997] 3 S.C.R. 213 @ para. 121 (per La Forest J.). Apposite is the judgment of Estey J. in ***Reference re: Bill 30, An Act to Amend the Education Act (Ont.)***, [1987] 1 S.C.R. 1148 (at p. 1206):

> The role of the ***Charter*** is not envisaged in our jurisprudence as providing for the automatic repeal of any provisions of the Constitution of Canada which includes all of the documents enumerated in s. 52 of the ***Constitution Act, 1982***. Action taken under the ***Constitution Act, 1867*** is of course subject to ***Charter*** review. That is a far different thing from saying that a specific power to legislate as existing prior to April 1982 has been entirely removed by the simple advent of the ***Charter***. It is one thing to supervise and on a proper occasion curtail the exercise of a power to legislate; it is quite another thing to say that an entire power to legislate has been removed from the Constitution by the introduction of this judicial power of supervision.

See also: p. 1197 (per Wilson J.): "it was never intended …that the ***Charter*** could be used to invalidate other provisions of the Constitution"

And: ***re: Provincial Court Judges***, ***supra*** @ para. 107 (per Lamer C.J.): "the Constitution is to be read as a unified whole"

107. Even though there is a rational basis for a statutory or regulatory prohibition, the "harm principle" would call for judicial review of what are essentially policy decisions, such as risk assessments with respect to health and the environment. Take, for example, the concentration of dioxins and furans permitted in wastewater under s. 4 of the ***Pulp and Paper Mill Defoamer and Wood Chip Regulations***, SOR/92-268, ***Canada Gazette Part II***, Vol. 126, p. 1955, a breach of which is an offence punishable by imprisonment under s. 272 of the ***Canadian Environmental Protection Act, 1999***, S.C. 1999, c. 33. Under the theory advanced by the Appellants a court could be asked to decide whether discharges above the allowable limits raise concerns significant enough to warrant prohibition. Similarly, persons charged with selling products that do not meet standards set pursuant to the ***Hazardous Products Act***, R.S.C. 1985, c. H-3, or drugs that have

not been approved under the ***Food and Drugs Act***, R.S.C. 1985, c. F-27, could challenge the respective regulations as being unnecessarily stringent.

(Note: The ***Hazardous Products Act*** has been held to be criminal law: ***Reference re: Firearms Act***, [2000] 1 S.C.R. 783 @ para. 29 (per The Court); ***Hydro-Québec***, ***supra*** @ para. 150 (per La Forest J.). The regulatory framework for dealing with "new drugs" has been upheld under both criminal law and p.o.g.g.: ***C.E. Jamieson & Co. v. Attorney-General of Canada*** (1987), 37 C.C.C. (3d) 193 (F.C.T.D.) (per Muldoon J.).)

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108. Whether the courts or the public at large consider Parliament's choices to be good or bad, effective or ineffective, wise or unwise, popular or unpopular, are not yardsticks for measuring constitutionality. While such matters as efficacy, and the proportionality between the salutary and deleterious effects of an enactment, are factors under s. 1 of the ***Charter***, they are not relevant unless, and until, an infringement has been found.

20 See: ***Mills***, ***supra*** @ paras. 65, 66

109. In the non-***Charter*** context this was succinctly expressed by the Court in ***re: Firearms Act***, ***supra*** (at para. 57): "The efficacy of a law, or the lack thereof, is not relevant to Parliament's ability to enact it under the division of powers analysis." Although using different language, Dickson C.J. expressed the same opinion with respect to ***Charter*** review in ***Reference re: Criminal Code (Man.)***, [1990] 1 S.C.R. 1123 (at p. 1142): "The issue is not whether the

30 legislative scheme is frustrating or unwise but whether the scheme offends the basic tenets of our legal system."

See also: ***re: Anti-Inflation Act***, ***supra*** @ p. 425 (per Laskin C.J.): "[I]t is not for the Court to say in this case that because the means adopted to realize a desirable end, ..., may not be effectual, those means are beyond the legislative power of Parliament."; ***RJR-MacDonald Inc. v. Canada (Attorney General)***, [1995] 3 S.C.R. 199 @ paras. 44, 51 (per La Forest J.): the wisdom of Parliament's choice is not relevant to a division of powers analysis

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110. That it is not for courts to examine executive or legislature action at such a level of abstraction is evinced by the pre-***Charter*** decision in ***Berryland Canning Company Ltd. v. The Queen***, [1974] F.C. 91 (T.D.), involving an unsuccessful challenge to regulations under the ***Food and Drugs Act*** banning the use of cyclamates as an additive. A breach of these regulations is punishable by imprisonment (then s. 26, now s. 31.1).

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111. At trial differing expert opinions were tended as to the harmful effects of this substance, if any. Even though the Department of National Health and Welfare itself was of the view "that the danger to humans from cyclamates is undoubtedly very small", it decided to "follow a course of action that affords the greatest protection to the health of the Canadian public": p. 107. In dismissing various challenges to this decision Heald J. found that it had been taken "prudently, expeditiously and reasonably in the public interest": p. 108. In other words, it was rational in the circumstances. These parameters should apply equally under the ***Charter***.

112. Pertinent is the judgment of the South African Constitutional Court in ***Prince v. President, Cape Law Society***, 2002 (2) SA 764, in which the majority (5:4) decline to exempt Rastafarians from the marihuana laws on the basis of freedom of religion. In setting out the approach to be taken, Chaskalson C.J., Ackermann, and Kriegler JJ. stated:

> [108] In a democratic society the legislature has the power and, where appropriate, the duty to enact legislation prohibiting conduct considered by it to be anti-social and, where necessary, to enforce that prohibition by criminal sanctions. In doing so it must act consistently with the Constitution, but if it does that, courts must enforce the laws whether they agree with them or not.
>
> [109] The question before us, therefore, is not whether we agree with the law prohibiting the possession and use of cannabis. Our views in that regard are irrelevant. The only question is whether the law is inconsistent with the Constitution. The appellant contends that it is because it interferes with his right to freedom of religion and his right to practise his religion. It is to that question that we now turn.

113. American judicial oversight of legislative choices is in accord with the above submission. Although, as Gonthier J. noted in ***Ontario v. Canadian Pacific Ltd.***, [1995] 2 S.C.R. 1028 (at para. 75) some caution is to be exercised in considering American constitutional law, it is also true, as stated by Dickson C.J. in ***R. v. Keegstra***, [1990] 3 S.C.R. 697 (at p. 740), that "the practical and theoretical experience [in the United States of America] is immense, and should not be overlooked by Canadian courts."

114. American courts have long recognized that a margin of deference is owed to decisions taken by legislators who are generally better placed than judges to consider conflicting scientific and other evidence, to assess the needs of society, and to make difficult choices between competing considerations. Such deference is an integral characteristic of democratic

government. As Thomas J. stated in ***F.C.C. v. Beach Communications Inc.***, 508 U.S. 307 (1993) (at p. 313):

> Whether embodied in the Fourteenth Amendment or inferred from the Fifth, equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social or economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. [citations omitted] Where there are "plausible reasons" for Congress' action, "our inquiry is at an end." [citation omitted] This standard of review is a paradigm of judicial restraint. "The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process, and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted." [citation omitted] [emphasis added]

115. This approach has been taken repeatedly with respect to both state and federal marihuana laws. In ***People v. Shepard***, 431 N.Y.S. 2d 363 (C.A., 1980), the majority rejected the contention that marihuana is a harmless substance and that, therefore, the state has no legitimate interest in prohibiting its private use or possession (at p. 365):

> It is true that there is disagreement regarding the effects of marijuana. Indeed, there may be some members of this court who believe, based on the available scientific evidence and on the need to assess priorities and conserve the resources and integrity of the criminal justice system, that the private possession of marihuana should be decriminalized for personal use. The Legislature may well, in the near future, consider its use for medicinal reasons. However, the statute now before us represents the current and considered judgment of an elected Legislature acting on behalf of the people of this State. Empirical data concerning the vices and virtues of marijuana for general use is far from conclusive. Time and further study may prove the Legislature wrong, but the Legislature has the right to be wrong. The enactment of legislation, particularly in areas of legitimate controversy, is the business of the Legislature.

See also: p. 367

116. Similarly, in ***N.O.R.M.L. v. Bell, supra***, Tamm Cir. J. stated:

> Congressional action must be upheld as long as a rational basis still exists for the classification. The continuing questions about marijuana and its effects make the classification rational.
>
> Furthermore, judicial deference is appropriate when difficult social, political, and, medical issues are involved. Courts should not step in when legislators have made policy choices among conflicting alternatives. That this court might resolve the

> issues differently is immaterial. "When Congress undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation, even assuming, ***arguendo***, that judges with more direct exposure to the problem might make wiser choices." ***Marshall v. United States***, 414 U.S. 417, 427, 94 S.Ct. 700, 706, 38 L. Ed. 2d 618 (1974). Thus, this court should not substitute its judgment for the reasonable determination made by Congress to include marijuana under the ***CSA***.

See also: ***United States v. Kiffer***, 477 F. 2d 349 (2nd Cir., 1973) @ p.352; ***United States v. Brown***, 1995 WL 732803 (8th Cir.) @ p. 2, ***cert.*** denied, 517 U.S. 1174 (1996); ***United States v. Smith***, 2002 WL 2027233 (6th Cir.) @ p. 2, ***Seeley***, ***supra*** @ p. 618; ***Mallan***, ***supra*** @ pp. 189-192; ***N.O.R.M.L. v. Gain***, ***supra*** @ p. 184; ***Belgarde***, ***supra*** @ p. 208; ***Commonwealth v. Harrelson***, 14 S.W. 3d 541 (Kentucky S.C., 2000) @ p. 548

And: ***United States v. Alexander***, 673 F. 2d 287 (9th Cir., 1982) @ p. 288, ***cert.*** denied, 459 U.S. 876 (1982): classification of cocaine under federal legislation upheld

117. As reflected in the ***Cannabis Case***, ***supra***, such deference is also given under the German ***Basic Law*** (at p. 182 (translation)):

> 4. In undertaking repeated amendments to the ***Intoxicating Substances Act*** and in acceding to the 1988 ***Intoxicating Substances Convention*** the legislature has repeatedly re-considered its view and has repeatedly come to the conclusion that to achieve the aims of the ***Act*** it is necessary to have a prohibition of illegal dealings in Cannabis backed up by penalties. This view is also not objectionable from a constitutional point of view. Even on the basis of the current state of scientific knowledge, which is adequately revealed by the sources reviewed above (point 3), the view of the legislature, that there is no means other than criminal penalties which would be equally effective in attaining the ***Act's*** aims while being less intrusive, is arguable. It is not a satisfactory answer to say that the prohibition of Cannabis products to date has not been able to fully achieve the aims of the ***Act*** and that the unbanning of Cannabis would be a milder instrument with better chances of achieving those aims. The criminal policy discussion as to whether a reduction in the consumption of Cannabis can better be attained through the general preventative effect of the criminal law, or through the unbanning of Cannabis in the hope that this would lead to a separation in the markets for various types of drugs, remains open. There is no scientifically based information indicating firmly that the one view or the other is correct. ... In these circumstances if the legislature remains of the view that a general ban on Cannabis backed up by criminal penalties will scare off more potential users than will a suspension of the criminal penalties, and that therefore criminal penalties are better suited to protecting legal interests, then this must be accepted from a constitutional point of view. In making the choice between several potentially suitable means of attaining the aim of legislation the legislature has the prerogative of forming a view and making a decision (see BverfGE 77, 84 at 106). It is indeed possible in certain circumstances to imagine cases in which clear criminological evidence is so strong that, in examining the constitutionality of a

> particular piece of legislation, the court will conclude that the legislature is obliged by the constitution to follow a particular course in dealing with a problem, or at least that the course chosen by the legislature is unacceptable (see BverfGE 50, 205 at 212 and following). However the conclusions of the debate over a criminally sanctioned ban of all dealings with Cannabis products have not reached such a level of clarity. [emphasis added]

118. As in other western democracies, under our federal system the elected members of Parliament are charged with responsibility for passing laws that, in their considered view, are necessary for the governance of the nation. Apt is the judgment of Dickson C.J., Lamer and Wilson JJ. in ***Irwin Toy Ltd. v. Quebec (Attorney General)***, [1989] 1 S.C.R. 927. Although written with respect to s. 1 of the ***Charter***, the following comments apply ***a priori*** to the question of whether legislators have even encroached on a constitutionally protected area (at p. 993):

> When striking a balance between the claims of competing groups, the choice of means, like the choice of ends, frequently will require an assessment of conflicting scientific evidence and differing justified demands on scarce resources. Democratic institutions are meant to let us all share in the responsibility for these difficult choices. Thus, as courts review the results of the legislature's deliberations, particularly with respect to the protection of vulnerable groups, they must be mindful of the legislature's representative function.

While s. 7 of the ***Charter*** sets boundaries within which legislators must act it does not, in the present context, require more than a rational basis for the exercise of authority conferred by the ***Constitution Act, 1867***.

There is a Rational Basis for the Law

119. Given the parallel findings in ***Caine*** and ***Clay*** the Appellants have not met the burden of establishing that Parliament's decision to prohibit the recreational use of marihuana is irrational or arbitrary. Marihuana clearly is not a benign substance, and potentially is more harmful than presently known.

120. The state's objectives were succinctly stated by Rosenberg J.A. in ***Parker, supra***:

> [143] In the companion case of ***R. v. Clay***, I have reviewed at greater length the state's objectives in prohibiting marihuana. First, the state has an interest in protecting against the harmful effects of use of that drug. Those include bronchial pulmonary harm to humans; psychomotor impairment from marihuana use leading to a risk of automobile accidents and no simple screening device for detection; possible precipitation of relapse in persons with schizophrenia; possible negative effects on

> immune system; possible long-term negative cognitive effects in children whose mothers used marihuana while pregnant; possible long-term negative cognitive effects in long-term users; and some evidence that some heavy users may develop a dependency. The other objectives are: to satisfy Canada's international treaty obligations and to control the domestic and international trade in illicit drugs.

121. This Court expressed its concern regarding marihuana's effects on young persons in ***R. v. M.(M.R.)***, [1998] 3 S.C.R. 393, in supporting the ability of school officials to search for, ***inter alia***, this and other contraband. As Cory J. stated:

> 36 It is essential that our children be taught and that they learn. Yet, without an orderly environment learning will be difficult if not impossible. In recent years, problems which threaten the safety of students and the fundamentally important task of teaching have increased in their numbers and gravity. The possession of illicit drugs and dangerous weapons in the schools has increased to the extent that they challenge the ability of school officials to fulfill their responsibility to maintain a safe and orderly environment. Current conditions make it necessary to provide teachers and school administrators with the flexibility required to deal with discipline problems in schools. They must be able to act quickly and effectively to ensure the safety of students and to prevent serious violations of school rules.

(Note: M. was searched because his junior high school vice-principal had reason to believe he would be selling drugs at a dance. A baggie of marihuana was seized.)

122. In paragraph 27 of his factum Clay points to evidence that the majority of marihuana smokers are modest users who likely will not suffer any adverse effects. While this may be so, it ignores the fact that there is no way to distinguish one user from another. On this theory a company such as Berryland Canning could bring a ***Charter*** challenge to the ban on cyclamates on the basis that only a small percentage of persons would be affected.

123. Although McCart J. in ***Clay*** did not make any specific findings as to the number of high-risk users, Howard P.C.J. did so in ***Caine***. She found there were approximately 50,000 chronic users, and that this number would increase if the prohibition were removed: Caine Rec., Vol. 7, p. 1163. This can hardly be said to be so insignificant as to preclude Parliament from acting.

124. Both Clay (in paragraphs 31 and 35), and Caine (in paragraph 33), point to the availability of alcohol and tobacco as a reason for holding the marihuana prohibition unconstitutional. There is no legal or logical basis for this submission. In effect, they urge the adoption of an all or nothing ***Charter*** rule of legislative competence. That presently there are two harmful substances

in common social use in Canada does not preclude Parliament from prohibiting others. How to deal with each is purely a policy matter. An otherwise rational policy choice does not cease to be so because a different policy is applied in a closely related area.

See: ***RJR-MacDonald Inc., supra*** @ paras. 34, 35 (per La Forest J.)

125. The Court of Appeal for Quebec dealt with this in ***Hamon, supra***. After noting that political reality may well be a factor in why alcohol has not been prohibited, Beauregard J.A. stated (at p. 494):

> But, with respect to marijuana, we do not have a cultural tradition which would prevent the state from acting.
>
> Furthermore, while the state can prohibit both the use of alcohol and marijuana, it can, precisely because of our cultural traditions, prohibit the use of marijuana while still permitting the use of alcohol, without the prohibition against using marijuana being an "arbitrary, irrational, xenophobic, vague and racist" prohibition.

126. American courts have rejected the approach advocated by the Appellants. For example, in ***Kiffer, supra***, Feinberg Cir.J. stated (at p. 355):

> [5] Appellants also argue that marijuana is much less harmful than tobacco and alcohol; the legal availability of the latter substances, they say, proves the irrationality of singling out marijuana for criminal penalties. Our knowledge is not sufficient for us to accept or reject appellants' initial premise. But even if it is correct, see J. Kaplan, ***supra***, at 263-310 (as to alcohol), this does not render the statute here unconstitutional. If Congress decides to regulate or prohibit some harmful substances, it is not thereby constitutionally compelled to regulate or prohibit all. It may conclude that half a loaf is better than none. [emphasis added]

See also: ***N.O.R.M.L. v. Gain, supra*** @ p. 184; ***N.O.R.M.L. v. Bell, supra*** @ p. 138; ***United States v. Greene***, 892 F. 2d 453 (6th Cir., 1989) @ pp. 455, 456; ***Seeley, supra*** @ p. 619

127. The position in Germany is no different, as set out in the headnote of the ***Cannabis Case, supra*** (at p. 147 (translation)):

> 4. The principle of equality does not require that all drugs which are potentially equally harmful should be prohibited or permitted in the same way. The legislature can regulate dealings with Cannabis products differently from dealings with alcohol or nicotine without infringing the constitution.

128. In conclusion, the Respondent submits this Court should uphold the impugned legislation, and endorse the following statement by Rosenberg J.A. in ***Clay*** (at Clay Rec., Vol. 16, p. 3441):

> [36] Mr. Young also pointed to studies showing that cigarette smoking is more dangerous to the smoker's health than marihuana smoking and that alcohol abuse is associated with violent crime whereas marihuana use is not. In my view, this is not an apt comparison. The fact that Parliament has been unable or unwilling to prohibit the use of other more dangerous substances does not preclude its intervention with respect to marihuana, provided Parliament had a rational basis for doing so.
>
> [37] To conclude, given the harms identified by the trial judge and the other objectives of the legislation, I do not agree that there is no rational basis for the marihuana prohibitions. In terms expressed by Sopinka J. in ***Rodriguez***, the legislation is not arbitrary or unfair in that it is unrelated to the state's objectives and lacks a foundation in the legal traditions and societal beliefs that are said to be represented by the prohibitions.

CHARTER, SECTION 15(1)

129. Malmo-Levine asks this Court to hold that the offence of possession of marihuana for the purpose of trafficking infringes s. 15(1) of the ***Charter***, because it discriminates on the basis of "substance" and / or "occupation orientation". In paragraph 37, he contends that the characteristics of those who choose to use, grow, or traffic in marihuana are equivalent to their sexual orientation. In paragraph 38, he submits that, for equality rights purposes, "'orientation' is just a four-syllable word for 'taste'." These arguments are without merit.

(Note: The s. 15(1) constitutional questions only concern possession of marihuana for the purpose of trafficking. However, an affirmative answer on the threshold issue of equality rights infringement would, by a parity of reasoning, extend to all marihuana offences. Indeed, logically it would apply to all drug crimes.)

130. The main purpose of s. 15(1) is to protect against infringement of essential human dignity. When a violation is alleged the analysis focuses on three central issues: (a) whether a law imposes differential treatment between claimants and others, in purpose or effect, (b) whether one or more enumerated or analogous grounds of discrimination are the basis for this differential treatment, and (c) whether the law has a purpose or effect that is discriminatory with reference to such notions as prejudice, stereotyping, and historical disadvantage.

See: ***Law v. Canada (Minister of Employment & Immigration)***, [1999] 1 S.C.R. 497 @ paras. 39, 51 (per Iacobucci J.); ***Lovelace v. Ontario***, [2000] 1 S.C.R. 950 @ paras 53, 54 (per Iacobucci J.)

131. The provisions of the ***Narcotic Control Act*** relating to marihuana apply equally to all persons. The law does not, in either its purpose or effect, create a distinction that imposes differential treatment on anyone.

See: ***Hamon, supra*** @ p. 491 (per Beauregard J.A.); ***R. v. Hunter***, [1997] B.C.J. No. 1315 (QL) (S.C.) @ para. 16 (per Drake J.)

132. Further, as Malmo-Levine cannot rely on any of the enumerated grounds in s. 15(1), to succeed he must show that the law discriminates against him on the basis of an analogous ground, ***viz.***, one which targets "a personal characteristic that is immutable or changeable only at an unacceptable cost to personal identity."

See: ***Corbière v. Canada (Minister of Indian & Northern Affairs)***, [1999] 2 S.C.R. 203 @ para. 13 (per McLachlin and Iacobucci JJ.)

133. Malmo-Levine claims that prohibiting him from possessing and trafficking marihuana amounts to impermissible discrimination, and that his preference to engage in these activities is akin to sexual orientation. This is mere sophistry. He freely chooses to use and distribute this drug. His decision to do so is not an immutable personal characteristic.

134. Moreover, his choice, like the inclination or desire to commit other crimes, is not a group or individual characteristic which bears any resemblance to the anti-discriminatory purposes of s. 15(1). As Beauregard J.A. held in ***Hamon***, ***supra*** (at p. 491), "marijuana users do not constitute a class of persons protected by s. 15." This reasoning applies, ***a priori***, to those who traffic in this or any other prohibited substance.

See also: ***R.v. S.(M.)*** (1996), 111 C.C.C. (3d) 467 (B.C.C.A.) @ pp. 482, 483 (per Donald J.A.), leave refused, [1997] 1 S.C.R. ix: the offence of incest does not discriminate on the basis of sexual orientation

FAILURE TO HOLD A *VOIR DIRE*

135. Regardless of the disposition of his ***Charter*** grounds, Malmo-Levine submits, in paragraph 7, that he is entitled to a new trial on the basis that (a) Curtis J. erred in refusing to allow him to call evidence to support his constitutional challenges, and (b) the Court of Appeal erred in dismissing this ground because the result would have been the same in any event.

Although not referred to, it is implicit that Braidwood J.A. applied s. 686(1)(b)(iii) of the ***Criminal Code***: Malmo-Levine Rec., Vol. 2, p. 332, para. 162.

136. It was open to the trial Judge to control the proceedings as he did. Indeed, the manner in which he exercised his discretion is consistent with other judgments of the Court of Appeal for British Columbia. These hold, rightly in the Respondent's submission, that an accused raising ***Charter*** issues is not entitled to an evidentiary hearing if the trial judge is satisfied that the application cannot succeed in any event.

137. This arose in ***R. v. Vukelich*** (1996), 108 C.C.C. (3d) 193 (B.C.C.A.), leave refused, [1997] 2 S.C.R. xvi. At trial defence counsel applied for a ***voir dire*** to challenge a search warrant. The trial judge asked him to provide some basis, either through submissions or by means of an affidavit, that, if proven, would result in the warrant being ruled invalid. As counsel was unable to do so the trial judge refused to embark on a ***voir dire***, and the warrant was upheld.

138. In dismissing Vukelich's conviction appeal, McEachern C.J.B.C. stated:

> [17] Generally speaking, I believe that both the reason for having, or not having, a ***voir dire***, and the conduct of such proceedings, should, if possible, be based and determined upon the statements of counsel. This is the most expeditious way to resolve these problems: see ***R. v. Dietrich*** (1970), 1 C.C.C. (2d) 49 (Ont.C.A.) at 62; ***R. v. Hamill*** (1984), 14 C.C.C. (3d) 338 (B.C.C.A.); and ***R. v. Kutynec*** (1992), 70 C.C.C. (3d) 289(Ont.C.A.) at 301. I suggest that judges must be more decisive in this connection than they have been in the past because far too much judicial time is consumed by the conduct of these kinds of enquiries.

See also: ***R. v. Khuc*** (2000), 142 C.C.C. (3d) 276 (B.C.C.A.) @ paras. 22-28 (per McEachern C.J.B.C.): trial judge did not err in refusing to hold a ***voir dire*** with respect to the validity of a search in the absence of defence counsel indicating any basis for concluding the accused had "standing" to object; ***R. v. Paterson*** (1998), 122 C.C.C. (3d) 254 (B.C.C.A.) @ paras. 89-91 (per The Court): rather than hearing evidence on an application to ban publication of witnesses' names the trial judge should have proceeded on statements by counsel

139. Other Courts of Appeal have also accepted that ***Charter voir dires*** are not always necessary. As stated by Finlayson J.A. in ***R. v. Kutynec*** (1992), 70 C.C.C. (3d) 289 (at p. 301):

> If the defence is able to summarize the anticipated evidentiary basis for its claim, and if that evidence reveals no basis upon which the evidence could be excluded, then the trial judge need not enter into an evidentiary inquiry. In other words, if the facts as alleged by the defence in its summary provide no basis for a finding of a ***Charter*** infringement, or a finding that the evidence in question was obtained in a manner

which infringed the ***Charter***, or a finding that the test for exclusion set out in s. 24(2) was met, then the trial judge should dismiss the motion without hearing evidence.

See also: ***R. v. Dwernychuk*** (1992), 77 C.C.C. (3d) 385 (Alta.C.A.) @ p. 400 (per The Court), leave refused, [1993] 2 S.C.R. vii

140. The above decisions recognize that trial judges have the ability to perform a screening or gatekeeper function regarding the necessity for a ***voir dire***. This is precisely what Curtis J. did, and the Court of Appeal was wrong in holding that he erred.

141. In any case, the foundation for the challenge was in the record created before Howard P.C.J. in ***Caine***; i.e., what Malmo-Levine describes in paragraph 6 as "his best facts." If this Court dismisses Caine's appeal on those facts, then it follows that the procedure adopted by Curtis J. occasioned no substantial wrong or miscarriage of justice.

MARIHUANA PROHIBITION IS VALID FEDERAL LEGISLATION

142. Both Caine and Clay challenge the prohibition on possession of marihuana as being beyond the authority of Parliament under the ***Constitution Act, 1867***. They specifically ask this Court to reverse ***Hauser***, ***supra***, in which the majority held that the ***Narcotic Control Act*** is supportable under the peace order and good government power. Caine goes so far as to take the position, in paragraph 50, that, "possession [of marihuana] clearly falls into a class of matters of a merely local or private nature, namely the health concern of the user." Clay, in paragraph 46, submits that absent "a sound scientific basis for concluding that the consumption of cannabis is seriously harmful to a significant number of consumers and/or society at large, and that this threatens the Dominion as a whole", it is a matter of "provincial concern". Acceptance of these arguments would require the Court to overrule a longstanding line of authority holding that "health" is a subject that can animate federal legislative action.

143. It is the Respondent's position that ***Hauser***, ***supra***, should not be reversed but that, in any event, the ***Narcotic Control Act*** as a whole, and the marihuana provisions in particular, are supportable under the criminal law head of power (i.e., s. 91(27)).

(Note: In ***Hauser***, this Court held (5:2) that the Attorney General of Canada has authority to prosecute violations of the ***Narcotic Control Act***. Pigeon J., writing for four judges, held that the ***Act*** falls under p.o.g.g. Dickson J., as he then was, on behalf of two judges (dissenting in the result), found it to be criminal law. Spence J., who joined with the majority, agreed the ***Act*** is

valid federal legislation, but did not specify under which head(s) of power. The Court was, therefore, unanimous in holding the ***Act intra vires***.)

Peace, Order, and Good Government

144. Parliament's authority to enact the ***Narcotic Control Act*** (and its successor, the ***Controlled Drugs and Substances Act***) falls within the national concern branch of the federal residuary power. The importation, manufacture, distribution, and use of psychoactive substances are matters having an impact on the country as a whole, and which can only be dealt with on an integrated national basis. Additionally, the international aspects are such that these matters cannot be effectively addressed at the local level.

See: ***R. v. Crown Zellerbach Canada Ltd.***, [1988] 1 S.C.R. 401 @ pp. 431, 432 (per Le Dain J.)

145. As discussed in ***Hauser***, ***supra*** (at pp. 998, 999) there has been federal legislation in this area since 1908, with cannabis being prohibited in 1923. That drug abuse had not become a problem at the time of Confederation was a critical factor in this Court's affirmation of the ***vires*** of the ***Act*** more than 23 years ago. As Pigeon J. stated (at p. 1000):

> In my view, the most important consideration for classifying the ***Narcotic Control Act*** as legislation enacted under the general residual federal power, is that this is essentially legislation adopted to deal with a genuinely new problem which did not exist at the time of Confederation and clearly cannot be put in the class of "Matters of a merely local or private nature". The subject-matter of this legislation is thus properly to be dealt with on the same footing as such other new developments as aviation (***Re Aeronautics***), and radio communications (***Re Radio Communication***).

Criminal Law, Section 91(27)

146. Parliament's integrated approach to the health and social problems caused by psychoactive substances is also supportable under the criminal law power, as it possesses the three necessary prerequisites, ***viz.***, "a valid criminal law purpose backed by a prohibition and a penalty": ***re: Firearms Act***, ***supra*** @ para. 27.

147. The breadth of this power is evinced in the reasons of La Forest J. in ***Hydro-Québec***, ***supra***:

> 121 **The *Charter* apart, only one qualification has been attached to Parliament's plenary power over criminal law. The power cannot be employed colourably.** Like other legislative powers, it cannot, as Estey J. put it in ***Scowby v. Glendinning***,

[1986] 2 S.C.R. 226, at p. 237, "permit Parliament, simply by legislating in the proper form, to colourably invade areas of exclusively provincial legislative competence". To determine whether such an attempt is being made, it is, of course, appropriate to enquire into Parliament's purpose in enacting the legislation. As Estey J. noted in ***Scowby***, at p. 237, since the ***Margarine Reference***, it has been "accepted that some legitimate public purpose must underlie the prohibition". Estey J. then cited Rand J.'s words in the ***Margarine Reference*** (at p. 49) as follows:

> A crime is an act which the law, with appropriate penal sanctions, forbids; but as prohibitions are not enacted in a vacuum, we can properly look for some evil or injurious or undesirable effect upon the public against which the law is directed. That effect may be in relation to social, economic or political interests; and the legislature has had in mind to suppress the evil or to safeguard the interest threatened.

I simply add that the analysis in ***Scowby*** and the ***Margarine Reference*** was most recently applied by this Court in ***RJR-MacDonald***, ***supra***, at pp. 240-41.

122 In the ***Margarine Reference***, ***supra***, at p. 50, Rand J. helpfully set forth the more usual purposes of a criminal prohibition in the following passage:

> Is the prohibition ... enacted with a view to a public purpose which can support it as being in relation to criminal law? Public peace, order, security, health, morality: these are the ordinary though not exclusive ends served by that law.... [underlining by La Forest J., bold added]

148. Also pertinent is La Forest J.'s judgment in ***RJR-MacDonald Inc.***, ***supra*** (in para. 32):

> Given the "amorphous" nature of health as a constitutional matter, and the resulting fact that Parliament and the provincial legislatures may both validly legislate in this area, it is important to emphasize once again the plenary nature of the criminal law power. In the ***Margarine Reference***, ***supra***, at pp. 49-50, Rand J. made it clear that the protection of "health" is one of the "ordinary ends" served by the criminal law, and that the criminal law power may validly be used to safeguard the public from any "injurious or undesirable effect". The scope of the federal power to create criminal legislation with respect to health matters is broad, and is circumscribed only by the requirements that the legislation must contain a prohibition accompanied by a penal sanction and must be directed at a legitimate public health evil. If a given piece of federal legislation contains these features, and if that legislation is not otherwise a "colourable" intrusion upon provincial jurisdiction, then it is valid as criminal law; see ***Scowby***, ***supra***, at pp. 237-38. [emphasis added]

(Note: Both Caine and Clay cite the ***Margarine Reference***, i.e., ***Reference re: Validity of Section 5(a) of the Dairy Industry Act***, [1949] S.C.R 1, affirmed, [1951] A.C. 179 (P.C.), as supportive of their position. It is discussed in detail below, beginning at paragraph 153.)

149. Provided Parliament perceives a risk to health or the public interest it can act. There is no baseline or threshold level of harm that must be reached. Apposite is ***Standard Sausage Co. v.***

Lee (1933), 60 C.C.C. 265 (B.C.C.A.), supplemented by ***addendum*** at (1934), 51 C.C.C. 95. At issue was the ***vires*** of certain sections of the ***Food and Drugs Act*** and regulations dealing with the adulteration of food. More particularly, the case concerned whether Parliament could prohibit the use of sulphur dioxide as a preservative in an amount not injurious to health. In upholding the provisions Macdonald J.A., as he then was, stated, ***inter alia*** (at p. 269):

> These considerations point to the conclusion that, granted the general subject of the adulteration of food may be the subject of legislation by the Dominion Parliament under the heading "criminal law," it must follow, reasonably and necessarily, that it may define precisely the ingredients that may or may not be used. Nor is it any less a crime because it may be shown scientifically that some of the ingredients prescribed may not, if used in proper quantities, be deleterious at all. It is not a ***sine qua non***, as many provisions of the ***Criminal Code*** show that injury to property or to the person must necessarily follow the commission of the unlawful act. This contingency is recognized inasmuch as the penalty is less severe if injurious results do not follow. [emphasis added]

See also: ***Berryland Canning Co., supra*** @ pp. 94-96 (per Heald J.): ban on cyclamates upheld as a valid exercise of the criminal law power, even though danger to humans is "very small"

(Note: ***Standard Sausage Co.*** has been accepted as correctly decided: ***re: Firearms Act, supra*** @ para. 29 (per The Court); ***Hydro-Québec, supra*** @ paras. 129, 150 (per La Forest J.); ***R. v. Wetmore***, [1983] 2 S.C.R. 284 @ p. 289 (per Laskin C.J.).)

150. Although the statute dealing with advertising upheld as criminal law in ***RJR-MacDonald Inc., supra***, was enacted against the background of overwhelming evidence that "tobacco kills" (see paras. 31, 32), there is no principle of constitutional law making anywhere near this degree of certainty a prerequisite to legislative action. As noted by La Forest J. (at para. 48) the health risks of tobacco only began to emerge in the 1950s, and did not become clear until much later. Had Parliament chosen to do so it could have prohibited possession and consumption of tobacco when the threat to the public first became apparent.

151. Caine, in paragraph 48, cites ***Schneider v. The Queen***, [1982] 2 S.C.R. 112, in support of his argument that the ***Narcotic Control Act*** does not fall within the residuary power, and that ***Hauser, supra***, should be overturned. While Laskin C.J., speaking for himself in ***Schneider***, disagreed with Pigeon J.'s reasoning in ***Hauser***, he did agree the ***Act*** is ***intra vires***. Where they diverged is that the Chief Justice would have upheld it under both the criminal law and trade and commerce powers: p. 115.

See also: ***R. v. Simpson, Mack, and Lewis***, [1969] 3 C.C.C. 101 (B.C.C.A.) (per Maclean J.A.): provincial legislation prohibiting possession of L.S.D. and marihuana ***ultra vires***, as matters within federal criminal law jurisdiction

(Criticism of the reasoning, but not the conclusion in ***Hauser***, ***supra***, is found in Hogg, ***Constitutional Law of Canada***, loose-leaf ed., Vol. 1, Scarborough, Ont.: Carswell, 1992, wherein the author states (at p. 18-9) that, "the ***Act*** appears to be the paradigm of a 'criminal' statute.")

152. To the extent that evidence of a health risk is necessary, it is present with respect to marihuana. It is clear from the findings in ***Caine*** and ***Clay*** that marihuana causes certain harms, and possibly others. Further, it impairs psychomotor skills, and thus increases the risk of accidents. Accordingly, a "legitimate public purpose" underlies the prohibition. It is, therefore, within Parliament's criminal law power, and is not a colourable invasion of provincial jurisdiction.

See also: ***Prince v. President, Cape Law Society, supra*** @ para. 114: "It must also be accepted that the [prohibition on marihuana] serves an important governmental purpose in the war against drugs."

Margarine Reference

153. Both Caine (in paragraphs 55 and 56) and Clay (in paragraph 44) cite the ***Margarine Reference*** for the proposition that validly enacted legislation may become invalid with the passage of time. Clay's position is that "a change in the social and political climate or a change in the scientific understanding of an activity can render a federal law ***ultra vires***, notwithstanding the fact that the law may have once been ***intra vires***." While this may be true with respect to legislation enacted under the emergency branch of p.o.g.g., it has no application to other federal heads of power. In any event, whatever changes have occurred since 1961, they are not such as to have moved the ***Narcotic Control Act*** in general, and the marihuana prohibition in particular, into exclusive provincial jurisdiction.

154. As noted by Professor Hogg, "there is one important limitation on the federal emergency power: it will support only temporary measures": p. 17-26. This is because this power permits Parliament to directly invade areas of provincial jurisdiction. Once the emergency passes, there is no longer justification for the encroachment. However, as discussed in ***re: Validity of the Wartime Leasehold Regulations***, ***supra***, citing ***Fort Francis Pulp & Power Co. v. Manitoba***

Free Press Co., [1923] A.C. 695 (P.C.) (at p. 706), "very clear evidence that the crisis had wholly passed away would be required to justify the judiciary … in overruling the decision of the government that exceptional measures were still requisite."

See also*: **re: Anti-Inflation Act, supra*** @ p. 439 (per Ritchie J.)

155. In ***re: Anti-Inflation Act, supra***, Laskin C.J., after upholding the legislation as an emergency measure, stated (at p. 427):

> It is open to this Court to say, at some future time, as it in effect said in the ***Margarine*** case, that a statutory provision valid in its application under circumstances envisaged at the time of its enactment can no longer have a constitutional application to different circumstances under which it would, equally, not have been sustained had they existed at the time of its enactment.

156. Given what was at issue in the case, the Chief Justice's remarks do not support a general proposition that changing circumstances can affect the ***vires*** of existing federal legislation, by shifting exclusive authority to a provincial head of power. For the purposes of a division of powers analysis, if a provision is validly enacted, then it remains so until repealed. There is no authority to the contrary.

157. The ***Margarine Reference, supra***, concerned federal legislation prohibiting the importation, manufacture, and distribution of any butter substitutes (e.g., margarine, oleomargarine). What came before the Court was a provision enacted in 1914, when, as noted by Rand J., there were no health concerns regarding the consumption of these products: p. 48. Rather, as reflected in the summary of the Crown's argument before the Privy Council, it was enacted solely "to give certain protection and encouragement to the dairy industry": p. 181. No attempt was made to support the prohibition on the basis of health. In the result, all but the restrictions on importing were declared ***ultra vires***.

158. As noted by Rand J. (at p.46), the history of the impugned provision is central to a proper understanding of the decision. The starting point is ***An Act to Prohibit the Manufacture and Sale of Certain Substitutes for Butter***, 49 Vict., c. 42 (1886), which applied to oleomargarine, and other substitutes containing animal fat (but not margarine, which is made from vegetable oil). The preamble to the ***Act*** stated that the prohibited products were "injurious to health".

Margarine was not included until the passage of the ***Butter Act, 1903***, 3 Edw. VII, c. 6, which did not contain a preamble. This ***Act*** was incorporated in the ***Inspection and Sale Act***, R.S.C. 1906, c. 5, under Part VIII - "Dairy Products".

159. In 1914, Parliament repealed Part VIII of the ***Inspection and Sale Act***, and re-enacted the prohibition as s. 5(a) of the ***Dairy Industry Act***, 4 & 5 Geo. V, c. 7. It became Chapter 45 of the Revised Statutes, 1927. Section 5(a) of the 1927 statute was referred to this Court for consideration in 1948.

160. Two other historical facts are significant. The first is that from 1917 to 1923, the prohibition was suspended, permitting the manufacture and importation of millions of pounds of oleomargarine. The second is that, as mentioned above, Parliament's purpose in 1914 was not to protect the health of Canadians.

161. Contrary to Clay's submission, this Court did not "invalidate the margarine prohibition as it **no longer** served the valid ends of criminal legislation" [emphasis by Clay]. Rather, it did so because when the section was passed it was, as stated by Lord Morton (at p. 195), "in pith and substance a law for the protection and encouragement of the dairy industry of Canada."

T.H.C. LEVELS ARE IRRELEVANT

162. According to Clay, proof that a substance is cannabis (marihuana) does not establish it is a "narcotic". In effect, he asks this Court to read s. 2 of the ***Narcotic Control Act*** as if the following underlined words had been included by Parliament:

> "marihuana" means ***Cannabis sativa L.*** containing sufficient T.H.C. to produce an intoxicating effect.

Similarly, Schedule II of the ***Controlled Drugs and Substances Act***, would have to be read as if the following underlined words had been added:

> Cannabis containing sufficient T.H.C. to produce an intoxicating effect.

(Note: If accepted, then the altered definitions would apply to all cannabis offences, including trafficking, possession for the purpose of trafficking, and importing.)

163. Both McCart J. and Rosenberg J.A. properly rejected this argument on the basis that ***Perka, supra***, is dispositive. The ***ratio*** of the case is that Parliament, in using the botanical term

Cannabis sativa L. in the ***Narcotic Control Act***, intended to prohibit all cannabis. The passing reference by Dickson J. to "intoxicating marihuana" (at p. 266) does not detract from this conclusion.

(Note: It is equally clear that the term "Cannabis" used in the ***Controlled Drugs and Substances Act***, applies to all forms of marihuana.)

164. In paragraph 52, Clay refers to various interpretative aids, ***viz.***, strict construction, ordinary meaning, contextual and purposive approach, drug policy, and treaties. Notably absent is any reference to the primary rule of statutory interpretation succinctly stated by Lamer C.J. in ***R. v. Multiform Manufacturing Co.***, [1990] 2 S.C.R. 624 (at p. 630):

> When the words used in a statute are clear and unambiguous, no further step is needed to identify the intention of Parliament.

165. Also germane is the recent statement by Iacobucci J., in ***Bell ExpressVu Limited Partnership v. Rex*** (2002), 212 D.L.R. (4th) 1, 2002 SCC 42:

> [28] Other principles of interpretation – such as the strict construction of penal statutes and the "***Charter*** values" presumption – only receive application where there is ambiguity as to the meaning of a provision.

See also: ***R. v. Dunn***, [1982] 2 S.C.R. 677 @ p. 683 (per McIntyre J.): as "the words employed are clear and unambiguous", the listing of Psilocybin as a "restricted drug" in Schedule H to the ***Food and Drugs Act*** also prohibits this substance in its naturally occurring state; i.e., "magic mushrooms"

166. The argument now advanced is but a variation of that rejected in ***Perka, supra***. There what was described as the "botanical defence" was grounded on the post-1961 opinion of some botanists that more than one species of the genus cannabis should be recognized. Based on this the defence unsuccessfully contended that only the ***sativa*** variety was prohibited. The present submission ignores the fact that both before and after 1961, low T.H.C. cannabis has not been recognized as a distinct species.

(Note: Dr. Small noted the irony in the fact that defence counsel in ***Perka*** were asking that ***Cannabis indica***, a subspecies with relatively high amounts of T.H.C., be excluded from the definition of "narcotic": Clay Rec., Vol. 1, pp. 159, 242-244.)

167. As discussed by Dickson J., in ***Perka, supra***, ***Cannabis sativa L.*** is a technical term that had an accepted meaning when the ***Narcotic Control Act*** was enacted, ***viz.***, it applied to all types of cannabis plants (at p. 265):

> [W]here, as here, the legislature has deliberately chosen a specific scientific or technical term to represent an equally specific and particular class of things, it would do violence to Parliament's intent to give a new meaning to that term whenever the taxonomic consensus among members of the relevant scientific fraternity shifted. It is clear that Parliament intended in 1961, by the phrase "***Cannabis sativa L.***, to prohibit all cannabis. The fact that some, possibly a majority, of botanists would now give that phrase a less expansive reading in light of studies not undertaken until the early 1970's, does not alter that intention. [emphasis added]

168. Also apposite is ***R. v. Snyder*** (1968), 65 W.W.R. 292 (Alta.S.C.A.D.), holding that even though marihuana seeds contain no psychoactive ingredients they are nonetheless prohibited. At this time the Schedule to the ***Narcotic Control Act*** read (chemical formulas omitted):

> 3. ***Cannabis sativa***, its preparations, derivatives and similar synthetic preparations, including:
> (1) Cannabis resin,
> (2) Cannabis (marihuana),
> (3) Cannabidiol,
> (4) Cannabinol,
> (5) Pyrahexyl,
> (6) Tetrahydrocannabinol

169. In speaking for the majority, Kane J.A. stated (at p. 294):

> What is forbidden is possession of ***cannabis sativa***, its preparations, derivatives and similar synthetic preparations. The ***Act*** is not speaking of one part of ***cannabis sativa*** that may contain narcotic and another part that may not. It is speaking of ***cannabis sativa*** and that takes in the whole plant as one entity and also any part of that entity. [emphasis added]

See also: ***R. v. Hunter*** (2000), 145 C.C.C. (3d) 528 (B.C.C.A.), leave refused, [2000] 2 S.C.R. ix: discussing the 1987 amendment to the Schedule specifically excluding non-viable cannabis seeds, and holding that viable seeds are prohibited

170. In ***Perka, supra***, Dickson J. referred to numerous American decisions rejecting the "botanical defence": pp. 266, 267. It is, accordingly, noteworthy, that those courts have also rejected the argument that only "intoxicating" marihuana is proscribed.

(Note: The "botanical defence" has as well been rejected in Australia: ***Yager v. The Queen***, (1976), 139 C.L.R. 28 (H.C.).)

171. American federal law, i.e., 21 U.S.C. § 802(16), defines "marijuana" as:

> [A]ll parts of the plant ***Cannabis sativa L.***, whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin. Such term does not include the mature stalks of such plant, fibre produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fibre, oil, or cake, or the sterilized seed of such plant which is incapable of germination.

§§ 841(b)(1)(A)(vii), (B)(vii), and (D), provide different penalties based on the number of plants involved in an offence.

172. In ***United States v. Traynor***, 990 F. 2d 1153 (9th Cir., 1992), Wallace C.J., rejected a submission that since male plants contain low levels of T.H.C. they should be excluded from consideration in sentencing an offender convicted of manufacturing (i.e., growing) marihuana (at p. 1160):

> [11] The language of the statute is plain. As the district court pointed out, "[a] marijuana plant is a marijuana plant." Tetrahydrocannabinol (THC), the psychoactive ingredient in marijuana, is more concentrated in the female plant's flower buds. It is not obviously irrational for Congress not to distinguish between male and female marijuana plants, regardless of THC level, any more than it is irrational for Congress not to consider the weight or size of the plants. It would be improper for us to delve into economic philosophy in order to circumvent the unambiguous language of this statute. We thus join the Eighth Circuit, which recently rejected the "argument that only the female marijuana plants may be counted in calculating" the base offence level. ***United States v. Curtis***, 965 F. 2d 610, 616 (8th Cir.1992). The issue is for Congress, not the courts, to consider further. [emphasis added]

173. More recently, in ***New Hampshire Hemp Council v. Marshall***, 203 F. 3d 1 (1st Cir., 2000), the court affirmed the dismissal of an application for declaratory and injunctive relief seeking to exempt hemp producers from prosecution. In so doing Boudin Cir.J. stated (at p. 6):

> [12] Statutory language is the starting point in statutory interpretation ... it is the ending point unless there is a sound reason for departure. ... Here, nothing in Owen's complaint or arguments warrants a narrower reading, nor have somewhat similar arguments persuaded the several other circuits in which they have been advanced, in attempts to carve out various exceptions for cannabis sativa plants with low THC levels. We take Owen's key arguments one by one.

> Owen's main argument is that plants produced for industrial products contain very little of the psychoactive substance THC. However, the low THC content is far from conclusive. *See, e.g.*, ***United States v. Proyect***, 989 F. 2d 84, 87-88 (2d Cir.), ***cert. denied***, 510 U.S. 822, 114 S.Ct. 80, 126 L.Ed. 2d 49 (1993); ***United States v. Spann***, 515 F. 2d 579, 583-84 (10th Cir., 1975). It may be that at some stage the plant destined for industrial products is useless to supply enough THC for psychoactive effects. But problems of detection and enforcement easily justify a ban broader than the psychoactive variety of the plant. Owen's own expert testified at the preliminary hearing that young cannabis sativa plants with varying psychoactive properties are visually indistinguishable. And the statute does not distinguish among varieties of cannabis sativa. [emphasis added]

See also: ***Harrelson***, ***supra*** @ pp. 546, 547: hemp seeds fall within the plain and unambiguous definition of "marijuana" under state law, ***viz.***, "all parts of the plant cannabis sp., whether growing or not; the seeds thereof ..."

174. ***D.P.P. v. Goodchild***, [1978] 2 All E.R. 161 (H.L.), cited by Clay in paragraph 52, warrants further comment. In that case it was held, having regard to the then wording of the ***Misuse of Drugs Act 1971*** (U.K.), that a charge of possessing a "cannabinol derivative", i.e., a Class A drug, was not made out by proof that the accused possessed cannabis stalk and leaves containing such a substance, namely T.H.C. This reasoning turned, in part, on the fact that "Cannabis", a less serious, Class B drug, was by definition restricted to "the flowering or fruiting tops of any plant of the genus ***Cannabis*** from which the resin has not been extracted, by whatever name they may be designated", i.e., the part of the plant containing the highest concentration of T.H.C. In essence, it was held that given the definition sections of the ***Act***, the prohibition on a drug listed by its scientific name did not extend to naturally occurring substances containing that drug.

175. That ***Goodchild***, ***supra***, is restricted to the statutory language under consideration is clear from ***Dunn***, ***supra***, in which this Court held that the Court of Appeal for British Columbia erred in finding that mushrooms containing Psilocybin are not a "restricted drug". Of note is the fact that the Court of Appeal had followed its previous decision in ***R. v. Parnell*** (1979), 51 C.C.C. (2d) 413 (B.C.C.A.), in which ***Goodchild*** had been applied.

(Note: "Psilocybin" is currently Item 12, in Schedule III to the ***Controlled Drugs and Substances Act***. To accept Clay's argument with respect to marihuana is to accept that it would not be an offence to possess, traffic in, import, etc. "magic mushrooms", unless they contain sufficient Psilocybin to produce a physiological effect. Indeed, all of the Schedules would have to be read this way, e.g., highly diluted heroin would not be a "controlled substance".

176. More pertinent to the present discussion is the decision of the Court of Appeal following Goodchild's first trial, and the legislative response to it. In ***R. v. Goodchild*** (1977), 64 Crim.App.R. 100 (C.A.), Goodchild's convictions for possession of cannabis, and possession of cannabis with intent to supply, were set aside because what was seized did not contain either the "flowering or fruiting tops" of the plant. The case was remanded for trial on the outstanding alternate charge of possession of a "cannabinol derivative". Although no appeal was taken from this decision, in the appeal arising from the second trial, Lord Diplock remarked (at p. 164) that the decision of the Court of Appeal on this point was "obviously right."

177. As noted by Lord Diplock (at p. 165), the definition of "cannabis" was amended in 1977. As a result it now reads:

> [A]ny plant of the genus ***Cannabis*** or any part of any such plant (by whatever name designated) except that it does not include cannabis resin, or any of the following products after separation from the rest of the plant, namely –
>
> (a) mature stalk of any such plant,
> (b) fibre produced from mature stalk of any such plant, and
> (c) seed of any such plant.

The clear effect of this is that, save for the exceptions, all cannabis is prohibited.

See: ***R. v. Harris & Cox***, [1996] 1 Crim.App.R. 369 (C.A.) @ pp. 373B, 374C

178. There is no ambiguity in the straightforward language used in proscribing cannabis in the ***Narcotic Control Act*** and, more recently, the ***Controlled Drugs and Substances Act***. Parliament's intention is clear, ***viz.***, regardless of its physical characteristics or chemical composition, a marihuana plant is a marihuana plant. Accordingly, what Clay sold and possessed is, by definition, a "narcotic" / "controlled substance".

PART IV

NATURE OF ORDER SOUGHT

179. That the within appeals be dismissed, and the constitutional questions answered as follows:

Malmo-Levine

1. Does prohibiting possession of Cannabis (marihuana) for the purpose of trafficking under s. 4(2) of the ***Narcotic Control Act***, R.S.C. 1985, c. N-1, by reason of the inclusion of this substance in s. 3 of the Schedule to the ***Act*** (now s. 1, Schedule II, ***Controlled Drugs and Substances Act***, S.C. 1996, c. 19), infringe s. 7 of the ***Canadian Charter of Rights and Freedoms***?

   Answer: No.

2. If the answer to Question 1 is in the affirmative, is the infringement justified under s. 1 of the ***Charter***?

   Answer: It is not necessary to answer this question.

3. Does prohibiting possession of Cannabis (marihuana) for the purpose of trafficking under s. 4(2) of the ***Narcotic Control Act***, R.S.C. 1985, c. N-1, by reason of the inclusion of this substance in s. 3 of the Schedule to the ***Act*** (now s. 1, Schedule II, ***Controlled Drugs and Substances Act***, S.C. 1996, c. 19), infringe s. 15(1) of the ***Charter*** by discriminating against a certain group of persons on the basis of their substance orientation, occupation orientation, or both?

   Answer: No.

4. If the answer to Question 3 is in the affirmative, is the infringement justified under s. 1 of the ***Charter***?

   Answer: It is not necessary to answer this question.

Caine

1. Does prohibiting possession of Cannabis (marihuana) for personal use under s. 3(1) of the ***Narcotic Control Act***, R.S.C. 1985, c. N-1, by reason of the inclusion of this substance in s. 3 of the Schedule to the ***Act*** (now s. 1, Schedule II, ***Controlled Drugs and Substances Act***, S.C. 1996, c. 19), infringe s. 7 of the ***Canadian Charter of Rights and Freedoms***?

   Answer: No.

2. If the answer to Question 1 is in the affirmative, is the infringement justified under s. 1 of the ***Charter***?

   Answer: It is not necessary to answer this question.

3. Is the prohibition on the possession of Cannabis (marihuana) for personal use under s. 3(1) of the ***Narcotic Control Act***, by reason of the inclusion of this substance in s. 3 of the Schedule to the ***Act*** (now s. 1, Schedule II, ***Controlled Drugs and Substances Act***, S.C. 1996, c. 19), within the legislative competence of the Parliament of Canada as being a law enacted for the peace, order and good government of Canada pursuant to s. 91 of the ***Constitution Act, 1867***; as being enacted pursuant to the criminal law power in s. 91(27) thereof; or otherwise?

   Answer: Yes. The legislation is ***intra vires*** Parliament under both the peace order and good government, and criminal law heads of power.

Clay

1. Does prohibiting possession of ***Cannabis sativa*** for personal use under s. 3(1) of the ***Narcotic Control Act***, R.S.C. 1985, c. N-1, by reason of the inclusion of this substance in s. 3 of the Schedule to the ***Act*** (now s. 1, Schedule II, ***Controlled Drugs and Substances Act***, S.C. 1996, c. 19), infringe s. 7 of the ***Canadian Charter of Rights and Freedoms***?

   Answer: No.

2. If the answer to Question 1 is in the affirmative, is the infringement justified under s. 1 of the ***Charter***?

   Answer: It is not necessary to answer this question.

3. Is the prohibition on the possession of ***Cannabis sativa*** for personal use under s. 3(1) of the ***Narcotic Control Act***, by reason of the inclusion of this substance in s. 3 of the Schedule to the ***Act*** (now s. 1, Schedule II, ***Controlled Drugs and Substances Act***, S.C. 1996, c. 19), within the legislative competence of the Parliament of Canada as being a law enacted for the peace, order and good government of Canada pursuant to s. 91 of the ***Constitution Act, 1867***; as being enacted pursuant to the criminal law power in s. 91(27) thereof; or otherwise?

   Answer: Yes. The legislation is ***intra vires*** Parliament under both the peace order and good government, and criminal law heads of power.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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October 10, 2002

AUTHORITIES