Court File No. 28026

IN THE SUPREME COURT OF CANADA
(On Appeal From the Court of Appeal of the Province of British Columbia)

BETWEEN:

DAVID MALMO-LEVINE

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

Court File No. 28148

(On Appeal From the Court of Appeal of the Province of British Columbia)

BETWEEN:

VICTOR EUGENE CAINE

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

Court File No. 28189

(On Appeal From the Court of Appeal of the Province of Ontario)

BETWEEN:

CHRISTOPHER JAMES CLAY

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

FACTUM
OF THE CANADIAN CIVIL LIBERTIES ASSOCIATION
(Interveners)

PART I - STATEMENT OF FACTS

(a) Overview

1. The Canadian Civil Liberties Association ("CCLA") has a long history of involvement in judicial proceedings which raise civil liberties issues, including the appropriate limits to place on the state's power to impose criminal sanctions, and search and seizure powers in relation to criminal conduct. Some notable related cases in which the CCLA has participated include:

- cases involving the threats to civil liberties arising from efforts to detect drug use;

  Entrop v. Imperial Oil Ltd., (2000) 50 O.R. (3d) 18 (C.A.)

  Canadian Civil Liberties Association v. Toronto-Dominion Bank, (1998) 163 D.L.R. (4th) 193 (F.C.A.)

- cases discussing the "harm principle";

  R. v. Butler, [1992] 1 S.C.R. 452

  R. v. Sharpe, [2001] S.C.J. No. 3

  Little Sisters Book and Art Emporium v. Canada (A.G.), [2000] 2 S.C.R. 1120

- cases involving the scope of s.7 and its predecessors generally.

  Morgentaler v. The Queen, [1976] 1 S.C.R. 616

  R. v. Swain, (1986) 53 O.R. (2d) 609 (C.A.)

  Tremblay v. Daigle, [1989] 2 S.C.R. 530

  R. v. Seaboyer; R. v. Gayme, [1991] 2 S.C.R. 577

  Winnipeg Child and Family Services v. G. (D.F.), [1997] 3 S.C.R. 925

  R. v. Mills, [1999] 3 S.C.R. 668

  R. v. Budreo, (2000) 142 C.C.C. (3d) 225 (Ont. C.A.)

2. The CCLA has intervened in these proceedings to make submissions on the principles to be applied when interpreting s.7's guarantee of the right not to be deprived of life, liberty or security of the person, except in accordance with fundamental justice. In particular, the CCLA's submissions focus on the proper approach to the "harm principle". The CCLA submits that s.7 requires that, at a minimum, the state must have a reasoned apprehension that conduct is objectively harmful, before it can make such conduct punishable by incarceration.

3. The B.C. Court of Appeal accepted this principle in *Malmo-Levine* and *Caine* , while the Ontario Court of appeal accepted this principle for the sake of argument in *Clay*. However, the Courts below split on their articulation of the threshold to be applied in determining whether the state had a reasoned apprehension of harm. For a majority of the B.C. Court of Appeal, and for the Ontario Court of Appeal, the requisite threshold was harm that is "not insignificant" or "not trivial". For Justice Prowse, dissenting in the B.C. Court of Appeal, the requisite threshold was harm that is "serious", "substantial", or "significant".

4. The CCLA respectfully submits that the threshold question must take into account whether the apprehended harm is harm to the self, or harm to others. Simply put, society can and should tolerate a higher degree of risk of harm to the self before criminal sanctions with the possibility of incarceration are warranted. Where the apprehended harm is harm to others, however, a lower threshold may apply. This analysis appears to be missing in the judgments of the courts below, which appear to refer indiscriminately to harm to cannabis users themselves, harm to others, and harm to "society" in addressing the harm principle.

5. The CCLA's position is that where only harm to the self is at issue, the state must show (at the very least) that it has a reasoned apprehension of harm that is serious, substantial or significant before it can impose incarceration. Where harm to others is at issue, a lower threshold may be appropriate. The CCLA submits that it is not necessary to define that threshold on the *Caine* and *Clay* appeals, because only harm to the self is at

issue in the prohibition on possession of marijuana for personal use. The CCLA takes no position on the *Malmo-Levine* appeal's challenge to the offence of possession for the purpose of trafficking.

6. The CCLA's position on possession of marijuana for personal use is that the harm at issue (being harm to the self) does not meet the threshold of harm that is serious, substantial or significant. On the record as the CCLA understands it, personal consumption of marijuana is harmless to the vast majority of users. For the small minority of chronic users who suffer adverse health effects, those effects are not nearly as serious as those caused by tobacco, alcohol, or many other legal substances, and are better addressed through health measures rather than incarceration. Accordingly, the criminal prohibition on possession, with the possibility of incarceration, violates the harm principle and is contrary to s.7 of the *Charter*, in a manner that cannot be justified under s.1.

(b) Facts as Found in the Courts Below

7. The CCLA does not take a position on any disputed facts, and relies only upon the factual findings of the courts below. According to these findings, between 4-5 million Canadians have consumed marijuana, 4.2% of Canadians over 15 years of age (approximately 1 million) have done so in the past year alone, and of this latter number, 95% were low/occasional/moderate users for whom marijuana use is not ordinarily harmful to health. Of the remaining 5% who are chronic users, the significant health risk is primarily from the process of smoking.

> Decision of B.C. Court of Appeal, paras. 17, 18 and 29 (per: Braidwood JA.); *Appellant's Record (Malmo-Levine)*, Vol. II, pp.249, 250, 256, 257

8. Of the 1/5 of 1% of Canadians who are chronic users, apart from the acute effects of a user driving, flying or operating complex machinery, their use of marijuana does not involve harm to others or significant harm to society as a whole.

> Decision of B.C. Court of Appeal, para. 26 (per: Braidwood JA.); *Appellant's Record (Malmo-Levine)*, Vol. II, p.255

9. The Courts below further found that:

(a) The occasional to moderate use of marijuana by a healthy adult is not ordinarily harmful to health, even if used over a long period of time;

(b) There is no conclusive evidence demonstrating any irreversible organic or mental damage to the user, except in relation to the lungs. Reports of lung damage are limited to chronic heavy users, such as a person who smokes at least 1 and probably 3-5 marijuana joints per day;

(c) There is no evidence demonstrating irreversible, organic or mental damage from the use of marijuana by an ordinary healthy adult who uses occasionally or moderately;

(d) Marijuana use causes alteration of mental function and should not be used in conjunction with driving, flying or operating complex machinery;

(e) There is no evidence that marijuana use induces psychosis in ordinary, healthy adults who use marijuana occasionally or moderately. In relation to the heavy user, the evidence of marijuana psychosis appears to arise only in those having a predisposition towards such mental illness;

(f) Marijuana is not addictive;

(g) There is a concern over dependence in heavy users, but marijuana is not a highly reinforcing type of drug, like heroin or cocaine. Consequently, physical dependence is not a major problem. Psychological dependence, however, may be a problem for the chronic user;

(h) There is no causal relationship between marijuana use and criminality;

(i) There is no evidence that marijuana is a gateway drug and the vast majority of marijuana users do not go on to try hard drugs;

(j) Marijuana does not make people aggressive or violent, but on the contrary it tends to make them passive and quiet;

(k) There have been no deaths from the use of marijuana;

(l) Consumption of marijuana is relatively harmless compared to the so-called hard drugs and including tobacco and alcohol;

(m) There is no evidence that marijuana causes amotivational syndrome;

(n) Less than 1% of marijuana consumers are daily users;

(o) Consumption in so-called “decriminalized states” does not increase out of proportion to states where there is no decriminalization;

(p) Health related costs of cannabis use are negligible when compared to the costs attributable to tobacco and alcohol consumption.

Decision of B.C. Court of Appeal, para. 18 (per: Braidwood J.A); *Appellant's Record (Malmo-Levine)*, Vol. II pp.249, 250

Decision of Ontario Court of Appeal, para.10; *Appellant's Factum (Clay)*, Appendix

10. Conversely, the Courts below found that the following harm is caused by the prohibition of marijuana possession:

(a) Countless Canadians, mostly adolescents and young adults, are being prosecuted in the “criminal” courts, subjected to the threat of (if not actual) imprisonment, and branded with criminal records for engaging [in] an activity that is remarkably benign (estimates suggest that over 600,000 Canadians now have criminal records for cannabis related offences); meanwhile others are free to consume society’s drugs of choice, alcohol and tobacco, even though these drugs are known killers;

(b) Disrespect for the law by upwards of one million persons who are prepared to engage in this activity, notwithstanding the legal prohibition;

(c) Distrust, by users, of health and educational authorities who, in the past, have promoted false and exaggerated allegations about marijuana; the risk is that marijuana users, especially the young, will no longer listen, even to the truth;

(d) Lack of open communication between young persons and their elders about their use of the drug or any problems they are experiencing with it, given that it is illegal;

(e) The risk that our young people will be associating with actual criminals and hard drug users who are the primary suppliers of the drug;

(f) The lack of governmental control over the quality of the drug on the market, given that it is available only on the black market;

(g) The creation of a lawless sub-culture whose only reason for being is to grow, import and distribute a drug that is not available through lawful means;

(h) The enormous financial costs associated with enforcement of the law; and;

(i) The inability to engage in meaningful research into the properties, effects and dangers of the drug, because possession of the drug is unlawful.

10 Decision of B.C. Court of Appeal, paras. 28 and 147-148 (per: Braidwood J.A); *Appellant's Record (Malmo-Levine)*, Vol. II, pp.255, 256, 325, 326

Decision of Ontario Court of Appeal, para.33; *Appellant's Factum (Clay)*, Appendix

11. The CCLA notes that since the hearing of the appeals in the courts below, the Senate Special Committee on Illegal Drugs ("the Senate Committee") has released a report on this issue. In its September, 2002 Report entitled *Cannabis: Our Position for a* 20 *Canadian Public Policy*, the Senate Committee recommended creating a criminal exemption scheme under which the production and sale of cannabis would be licensed, and an amnesty declared for any person convicted of cannabis possession under current or past legislation. In so doing, one of the Senate Committee's findings was as follows:

> In effect, the main social costs of cannabis are a result of public policy choices, primarily its continuing criminalization, while the consequences of its use represent a small fraction of the social costs attributable to the use of illegal drugs.

30 *Cannabis: Our Position for a Canadian Public Policy - Report of the Senate Special Committee on Illegal Drugs, Summary*, pp. 32, 47-48 [September, 2002]

PART II - POINTS IN ISSUE

12. The CCLA will address the following issues in this appeal:

(a) A suggested approach to the "harm principle" under s.7 of the *Charter* that most accurately strikes the appropriate balance between the interests of the individual and the protection of society. Specifically, the CCLA suggests a "dual" approach whereby the test may vary based on whether the harm at issue is harm to the self or harm to others;

(b) The impact of privacy considerations upon these issues. The CCLA submits that the privacy values embodied in the *Charter* should inform the s.7 analysis under the harm principle, and militate towards a more stringent test being applied where harm to the self is concerned;

(c) The application of these principles to the findings made in the Courts below.

PART III - ARGUMENT

(a) The Harm Principle

13. In some instances, use and possession of marijuana may be protected by a positive *Charter* right. In these instances, no legal sanction (whether criminal or other) may be imposed unless the behavior at issue is demonstrably likely to cause harm of the most serious kind. For example, use of marijuana for *bona fide* medicinal or religious purposes may fall into the category of conduct that can only be limited by meeting this strict test.

R. v. Parker, (2000) 49 O.R. (3d) 481 (C.A.) at 517-518, 531

People v. Woody, 61 Cal. 2d 716 (1964) (use of peyote for native religious ceremonial purposes); *accord Arizona v. Whittingham*, 504 P.2d 950 (1973), *cert. denied* 417 U.S. 946 (1974)

cf. Prince v. President, Cape Law Society, [2002] 2 S.A. 764

14. Where no specific *Charter* protection is claimed for the activity in question, however, there are still limits on the state's power to impose its extraordinary power of incarceration. These limits are based on the "harm principle".

15. There was consensus in the Courts below that under the general "harm principle" embodied in s.7 of the *Charter*, the state must have, at the very least, a "reasoned apprehension of harm" that it seeks to prevent through criminal sanctions with the possibility of incarceration. The CCLA urges this Court to adopt this principle. To allow persons to be incarcerated when the state has no reasoned apprehension that their conduct is harmful constitutes a deprivation of liberty that cannot be said to be in accordance with the principles of fundamental justice. The state should not be permitted to jail people on a whim.

Decision of B.C. Court of Appeal, at paras. 134 (per: Braidwood and Rowles JJA.), and para. 164 (per: Prowse JA.); *Appellant's Record (Malmo-Levine)*, Vol. II, pp.318, 334

R. v. Sharpe, [2001] 1 S.C.R. 45 at para.85 (citing *R. v. Butler*, [1992] 1 S.C.R. 452 at p.504)

Report of the Senate Special Committee, *Summary*, *supra* p.41

16. In the B.C. Court of Appeal, the members of the Court differed on the threshold to be met in defining the harm principle. Justice Braidwood, for the majority, articulated the test as being harm that was "not insignificant" or "not trivial" (This formulation was also accepted for the purposes of the appeal by the Ontario Court of Appeal in *R. v. Clay*.). Justice Prowse, dissenting, would set the threshold as harm that is "serious", "substantial", or "significant".

Decision of B.C. Court of Appeal, at paras. 139 (per: Braidwood JA.), and para. 171 (per: Prowse JA.); *Appellant's Record (Malmo-Levine)*, Vol. II, pp.320, 321, 338

Decision of Ontario Court of Appeal, at paras. 27, 28; *Appellant's Factum (Clay)*, Appendix

17. With respect, however, this analysis did not consistently identify and differentiate between concepts of harm to the self, harm to others, or harm "to society" as a whole. Rather, the members of the Court referred at various times to each as if they were interchangeable.

Decision of B.C. Court of Appeal, at para. 187 (per: Prowse JA.); *Appellant's Record (Malmo-Levine)*, Vol. II, pp.346, 347

Decision of B.C. Court of Appeal, at para. 143 (per: Braidwood JA.); Appellant's Record (Malmo-Levine), Vol. II, pp.324

18. It is possible that the difference of opinion in the B.C. Court of Appeal as to the proper test under the harm principle may have been based in part upon the way in which the majority and the minority framed the question. If one analyzes the issue as being whether the state has a valid interest in prohibiting conduct having the potential to cause harm to other individuals, different considerations may arise than if the issue is perceived as whether the state can prohibit conduct carrying a risk of harm to the self.

19. The CCLA suggests a more refined approach, under which the test under the harm principle may differ according to whether harm to self or harm to others is at issue. With the option of a dual test apparently not before the Courts below, the difference of opinion as to the proper test is not surprising. That difference can potentially be resolved by applying a dual approach.

20. The rationale for this dual approach can be located in the *Charter's* conception of the individual as being neither a totally independent entity disconnected from society, nor a mere cog to be subordinated to the collectivity. As stated by Wilson J. in *Morgentaler*, the individual is "a bit of both". In order to give effect to this dual nature of the individual under the *Charter*, where possible to do so, distinctions should be made between harm to the self (the individual) and harm to others (the collectivity) arising from the conduct of the individual.

R. v. Morgentaler, [1988] 1 S.C.R. 30, at 164 (per: Wilson J.)

21. This distinction is also consistent with this Court's statements that the principles of fundamental justice require, both procedurally and substantively, that a fair balance must be struck between the interests of the person claiming his or her liberty has been limited, and the protection of society. The CCLA submits that this balance is more accurately struck

by applying the dual approach to the harm principle than by the application of a single test for all harm.

> *Cunningham v. Canada,* [1993] 2 S.C.R. 143 at pp.151-52 (per: McLachlin J., as she then was)

22. In *R. v. Sharpe*, this Court recently affirmed the distinction between acts of a private nature and those that harm others, in the context of the s.1 analysis of the *Criminal Code* provisions against the possession of child pornography. In so doing, this Court accepted in part the submissions of the CCLA and others, and carved out exceptions to the prohibition against such possession for:

(a) Possession of expressive material created through the efforts of a single person and held by that person alone, exclusively for his or her private use; and

(b) Possession by a person of visual recordings created by or depicting that person, but only where these recordings do not depict unlawful sexual activity, are held only for private use, and were created with the consent of those persons depicted.

> *R. v. Sharpe,* [2001] 1 S.C.R. 45 at para.128

23. In carving out these exceptions, however, this Court was careful to emphasize that neither exception protected a person harbouring any intention other than private possession.

> *R. v. Sharpe*, *supra*, at para.128

24. In *Sharpe*, this Court found that, apart from the two exceptions set out above, the activities prohibited under the impugned provision (defined as “child pornography”) created a reasoned apprehension of harm to others (specifically, children). By contrast, the materials the exceptions pertained to were found to “arguably pose little or no risk to children, and…deeply implicate the freedoms guaranteed under s.2(b).”

> *R. v. Sharpe, supra*, at para.105

25. While the CCLA has differences with the result in *Sharpe*, the approach adopted by this Court is consistent with the dual approach suggested by the CCLA in the present case. State intrusion into an individual's ability to possess material for private use only and not giving rise to a reasoned apprehension of harm to others, whether it be marijuana, pornography or anything else, should be subject to stricter limits than intrusion into behaviour that harms others.

(i) Harm to the Self

10 26. Where only harm to the self is in issue, it is consistent with civil liberties principles to require the state to show, at the very least, that the harm is serious, substantial or significant, before incarceration could be imposed. Such an approach recognizes that it is desirable to preserve, as far as possible, a significant sanctuary of personal autonomy in respect of decisions that affect only oneself.

Rodriguez v. B.C. (A.G.), [1993] 3 S.C.R. 519 at 618-619 (per McLachlin J., as she then was, dissenting), 587-588 (per: Sopinka J.)

R. v. Morgentaler, [1988] 1 S.C.R. 30, at 166 (per: Wilson J.)

20 27. Where the deprivation of the right in question does little or nothing to enhance the state's interest, a breach of fundamental justice will be established, as the individual's rights will have been deprived for no valid purpose. It is difficult to ascertain what the state's valid purpose could be in incarcerating individuals where the harm to the self is not serious, substantial or significant in light of the necessity of striking a balance between the interests of the individual and the protection of society contemplated by the *Charter.* The CCLA therefore submits that, where harm only to the self is concerned, it is vital and fundamental to our societal notion of justice that the state must bear a significant burden before incarceration is justified.

Rodriguez v. B.C. (A.G.), [1993] 3 S.C.R. 519 at 594 (per: Sopinka J.)

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28. A general presumption that the coercive powers of the state may not be invoked to prevent individuals from engaging in conduct that affects only themselves is also consistent with the philosophical traditions upon which the *Charter* is based. The harm principle was expressed in the following terms by John Stuart Mill:

> That principle is, that the sole end for which mankind is warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral is not a sufficient warrant. He cannot rightfully be compelled to do or forebear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil in case he do otherwise. To justify that, the conduct from which it is desired to deter him, must be calculated to produce evil to someone else. The only part of the conduct of any one for which he is amenable to society, is that which concerns others. In the part, which merely concerns him, over his own body and mind, the individual is sovereign.

J.S. Mill, *On Liberty*, John W. Parker & Son, West Strand, London, 1859, pp. 21-22; *Appellant's Book of Authorities (Caine)*, Vol.III, Tab 41

29. The CCLA recognizes that there is an argument that there can be "externalities" to conduct carrying a risk of harm to the self, such as health and welfare costs to be borne by society generally. For this reason, some argue that harm to the self should be considered to be harm to society. However, even if it is accepted that such "externalities" may constitute a matter "which concerns others" (to use Mill's formulation), at the very least harm to the self that is not serious, substantial, or significant should not result in incarceration, in light of the high value placed upon personal autonomy. One should not equate the diffuse cost to society arising from such externalities with direct harm to other individuals, for the purpose of determining the threshold for application of the harm principle.

30. In the CCLA's view, the instant appeals do not require the Court to determine whether the state can criminalize *any* self-inflicted harm. It is only necessary to decide that no such state prohibition will pass constitutional muster if the harm to the self is less than serious, substantial, or significant.

31. On the other hand, the Respondent's formulation of the harm principle, that it requires (if accepted as part of s.7) no more than a showing of "simple rationality" or a "legitimate reason" for acting, is unduly permissive of intrusive laws that provide for incarceration of individuals for conduct that poses a risk of harm only to the self. Here, the CCLA submits that the analogies drawn by the Respondent to laws affecting judges' compensation, or division of powers cases on the peace, order and good government power, are inapposite. Canadians have a substantially greater interest in requiring proper justification for laws that may result in their incarceration, than they do in issues of judicial compensation or issues of which level of government may legislate in a particular sphere.

Respondent's Factum, paras. 103-104

32. Incarceration is one of the most intrusive of the state's powers in our system. To suggest that the state may incarcerate individuals whenever it has a rational basis for believing this to be in their best interests, is fundamentally inconsistent with our constitutional values. By contrast, for example, much stricter safeguards are imposed before a government may incarcerate a person suspected of posing a danger to himself or herself because of mental disorder.

See, e.g., *Mental Health Act*, R.S.O. 1990, Chap. M.7, ss.20

33. To summarize, for harm to the self the balance between competing interests is best struck if the state must demonstrate at least that it has a reasoned apprehension of harm that is serious, significant or substantial.

(ii) Harm to Others

34. Where the harm at issue is harm to others, a somewhat lower threshold of harm may not be inappropriate. In particular, setting the threshold too high, where harm to others is concerned, may unduly restrict the government's ability to respond to a myriad of problems in the modern regulatory state. There is a wide range of legislation that can result in incarceration (at least in theory), based on the premise that this deterrent is necessary or desirable to prevent harm to others.

35. The CCLA acknowledges that there is more reason to be concerned that the threshold not be set too high in respect of harm to others, particularly in light of the historical experience with "substantive due process" in the United States. There, the due process clause of the Fourteenth Amendment (one of the models upon which s.7 was based) was given a broad reading that was used to invalidate many regulatory measures during the so-called *Lochner* era. Justice Lamer (as he then was) commented on the dangers of an overly broad reading of s.7, based on the U.S. experience, in *Reference re Criminal Code (Man)*. Similar considerations may apply in the present context, in determining the threshold of harm to others required to support criminal sanctions.

> *Reference re Criminal Code (Man.)*, [1990] 1 S.C.R. 1123, at 1164-1165 (per: Lamer J.)

36. The Respondent has raised a similar concern in her factum, as a reason for adopting a minimalist approach to the harm principle generally. The Respondent raises the examples of the offence of driving "over .08" in s.253(b) of the *Criminal Code*, environmental contamination under the *Canadian Environmental Protection Act*, and selling of products not meeting required standards under the *Hazardous Products Act*. However,

each of these examples raises issues of harm to others. They do not support the contention that Parliament must have a free hand (or be required only to demonstrate "simple rationality") when prohibiting, with threat of incarceration, conduct that poses a threat of harm only to the self.

Respondent's Factum, paras. 104, 105, 107

37. The dual approach proposed by the CCLA would allow for a balance between respect for individual rights and deference to the sovereignty of Parliament. The less the general welfare is at issue, the more willing the Court should be to interfere with legislative restrictions on liberty. Conversely, the more the general welfare is at issue, the less willing the Court should be to interfere with such legislative restrictions.

(b) Privacy Considerations

38. The criminalization of conduct that is both widespread and typically harmless carries disturbing implications for the breadth of police powers. The ability of police to conduct searches and surveillance in relation to the "criminal activity" of simple possession of marijuana may have a major impact upon the vulnerability of many Canadians to police intrusion. This is particularly important where the activity, presumably, often takes place in the privacy of one's own home.

39. Further, the criminalization of marijuana use and possession may lead others, such as employers, to conduct invasive searches such as drug testing in the workplace. These privacy concerns, as embodied in s.8 of the *Charter*, may inform the interpretation of s.7, and militate in favour of a meaningful threshold of anticipated harm before criminal sanctions may be imposed.

R. v. Mills, [1999] 3 S.C.R. 668 at 714

R. v. Sharpe, supra, at para. 26

Entrop v. Imperial Oil Ltd., *supra*

40. Of course, this is not to say that the possibility of search and surveillance by the police or employers in relation to unlawful behavior in itself militates towards a finding that the law in issue infringes the *Charter*. Rather, this is to say that where the conduct generally takes place privately, and the harm arising from the conduct can best be characterized as harm to the self, s.8 ought to reinforce the protections conferred by s.7 because of the privacy values underlying both. By contrast, where harm to others is in issue the force of these privacy values may be somewhat attenuated.

R. v. Sharpe, [2001] 1 S.C.R. 45 at para.26

41. The criminalization of conduct engaged in by a very large number of Canadians, often in private settings, dramatically increases the potential scope of police search and surveillance powers. Where there is no real justification for the treatment of such conduct as criminal, this threat to the privacy of a significant portion of the Canadian population exacerbates the infringement involved.

(c) Application of These Principles in the Present Context

42. The CCLA takes the position that the application of these principles should lead to the appeals being allowed.

43. To the extent that the findings below demonstrate there are health concerns with a small minority of users who are potentially dependent or who have a predisposition toward psychosis, a remedial rather than punitive response is called for with respect to those persons.

R. v. M(C), (1995) 30 C.R.R. (2d) 112, 121-123 (Ont. C.A.), *Appellant's Book of Authorities (Clay)*, Tab 16

Entrop v. Imperial Oil Ltd., *supra*

Canadian Civil Liberties Association v. Toronto-Dominion Bank (1998), *supra*

44. The CCLA submits that the harm at issue in these appeals is properly characterized as harm to the self. As set out above, the threshold that should be applied where risk of harm to the self is concerned is whether there is a reasoned apprehension of risk of harm that is at least serious, substantial, or significant. The findings below do not establish any such reasoned apprehension in this case.

45. The only risk of harm other than purely personal harm identified in the Courts below was the purported harm "to society as a whole" arising from costs to the health care and welfare systems (i.e., externalities), which were found to be "negligible" compared to the costs associated with alcohol and tobacco. With respect, this does not constitute the type or magnitude of harm to others that justifies incarceration of Canadians.

46. Many legal, common and generally benign foods have an adverse allergenic effect to a small minority of individuals who ingest them, which may give rise to health costs to society as a whole. It does not follow that the potential criminalization and incarceration of a significant percentage of the Canadian population would be in accordance with the principles of fundamental justice, because of the potential resulting "harm" to society through increased costs if some individuals ingested such foods. If the Respondent's position is correct, Parliament could choose to jail people for simple possession of peanut butter.

47. The harm to society arising from simple possession and use of marijuana was characterized by the courts below as "negligible" in comparison to that arising from alcohol and tobacco. By contrast, the courts found significant harm and cost associated with the existence of the criminal prohibition itself. The CCLA submits that where a criminal prohibition gives rise to greater societal costs than those of the prohibited conduct itself, it is irrational for the state to seek to rely on the latter as "harm" justifying the prohibition.

Report of the Senate Special Committee, Summary, *supra* p.32
Decision of the Ontario Court of Appeal, paras. 10 and 33, *Appellant's Factum (Clay)*

Decision of the B.C. Court of Appeal, paras. 28, 147 and 198, *Appellant's Record (Malmo-Levine)*, Vol. II, pp. 255, 256, 325 and 326

48. The CCLA contrasts the prohibition against simple possession of marijuana with conduct such as driving while impaired by marijuana, which would clearly meet any test of potential harm to others. As noted by the Courts below, s. 253 of the *Criminal Code* already prohibits such conduct. There is accordingly no need to impose criminal sanctions, and the threat of potential incarceration, on millions of Canadians for simple possession of marijuana. Further, if other laws already achieve the state's desired goals, laws aimed at those same goals that also limit constitutional rights are unjustifiable.

R. v. Sharpe, [2001] 1 S.C.R. 45 at para.93

49. For these reasons, the CCLA submits that the offence of possession of marijuana, carrying a risk of incarceration, deprives Canadians of liberty in a manner that is contrary to the principles of fundamental justice, and therefore infringes s.7 of the *Charter*. Nothing in the record, as the CCLA understands it, could amount to justification under s.1 of the *Charter*, and accordingly the possession provisions should be declared to be of no force or effect.

PART IV – NATURE OF ORDER SOUGHT

50. The CCLA respectfully submits that the constitutional questions on the *Caine* and *Clay* appeals should be answered as follows:

(a) 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: Yes.

(b) If the answer to Question (a) is in the affirmative, is the infringement justified under s.1 of the *Charter*?

Answer: No.

(c) Is the prohibition on the possession of Cannabis (marihuana) for persona 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 *Constitutional Act, 1867*; as being enacted pursuant to the criminal law power in s.91(27) thereof; or otherwise?

Answer: The CCLA takes no position on this issue.

51. The CCLA takes no position on the constitutional questions on the *Malmo-Levine* appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Date: November 13, 2002

Paliare Roland Rosenberg Rothstein LLP
Barristers and Solicitors

Andrew K. Lokan
Andrew C. Lewis

Solicitors for the Canadian Civil Liberties Association

PART V - TABLE OF THE AUTHORITIES

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