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

FACTUM OF THE INTERVENOR, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

DAVID MALMO-LEVINE
c/o Conroy & Company
Barristers and Solicitors
2459 Pauline Street
Abbotsford, B.C. V2S 3S1
(Tel. No. (604) 852-5110,
Fax No. (604) 859-3361)

Appearing in Person
CONROY & COMPANY
Barristers and Solicitors

GOWLING LAFLEUR HENDERSON LLP
Barristers and Solicitors
P.O. Box 366, Station D
Suit 2600 - 160 Elgin Street
Ottawa, Ontario K1P 1C3
(Tel. No. (613) 232-1781,
Fax No. (613) 563-9869)

Ottawa Agent
GOWLING LAFLEUR HENDERSON LLP
Barristers and Solicitors

2459 Pauline Street
Abbotsford, B.C. V2S 3S1
(Per: John W. Conroy, Q.C.
(Tel. No. (604) 852-5110
Fax No. (604) 859-3361))

Counsel for the Appellant Caine

P.O. Box 366 Station D
2600 - 160 Elgin Street
Ottawa, Ontario K1P 1C3
(Tel. No. (613) 232-1781
Fax No. (613) 563-9869)

Ottawa Agent

PAUL BURSTEIN & ASSOCIATE
Barristers and Solicitors
127 John Street
Toronto, Ontario M5V 2E2
(Per: Paul Burstein
(Tel. No. (416) 204-1825
Fax No. (416) 204-1849))

Counsel for the Appellant Clay

SHORE, DAVIS
Barristers and Solicitors
800 - 200 Elgin Street
Ottawa, Ontario K2P 1L5
(Per: Leonard M. Shore, Q.C.
(Tel. No. (613) 233-7747
Fax No. (613) 233-2374))

Ottawa Agent

ATTORNEY GENERAL OF CANADA
Department of Justice
900 - 840 Howe Street
Vancouver, B.C. V6Z 2S9
(Per: S. David Frankel, Q.C.
(Tel. No. (604) 666-0211
Fax No: (604) 666-1599))

Counsel for the Respondent

MORRIS. A. ROSENBERG
Deputy Attorney General of Canada
284 Wellington Street
Ottawa, Ontario K1A 0H8
(Per: Robert J. Fraser
(Tel. No. (613) 957-4763
Fax No. (613) 941-7865))

Solicitor for the Respondent

MINISTRY OF THE ATTORNEY GENERAL
Crown Law Office - Criminal
720 Bay Street - 10th Floor
Toronto, Ontario M5G 2K1
(Per: Milan Rupic
(Tel. No. (416) 326-4595
Fax No. (416) 326-4656))

Counsel for the Intervenor,
Attorney General of Ontario

BURKE ROBERTSON
Barristers and Solicitors
70 Gloucester Street
Ottawa, Ontario K2P 0A2
(Per: Robert E. Houston, Q.C.
(Tel. No. (613) 566-2058
Fax No. (613) 235-4430))

Ottawa Agent

PALIARE ROLAND
Barristers and Solicitors
501 - 250 University Avenue
Toronto, Ontario M5H 3E5
(Per: Andrew K. Lokan
(Tel. No. (416) 646-4324
Fax No. (416) 646-4323))

Counsel for the Intervenor,
Canadian Civil Liberties Association

GOWLING LAFLEUR HENDERSON LLP
Barristers and Solicitors
P.O. Box 366 Station D
Ottawa, Ontario K1P 1C3
(Per: Henry S. Brown, Q.C.
(Tel. No. (613) 786-0139
Fax No. (613) 563-9869))

Ottawa Agent

ARVAY FINLAY
Barristers and Solicitors
4000 - 888 Fort Street
Victoria, B.C. V8W 1H8
(Per: Joseph J. Arvay, Q.C.
(Tel. No. (250) 388-6868
Fax No. (250) 388-4456))

Counsel for the Intervenor,
British Columbia Civil Liberties Association

BURKE ROBERTSON
Barristers and Solicitors
70 Gloucester Street
Ottawa, Ontario K2P 0A2
(Per: Robert E. Houston, Q.C.
(Tel. No. (613) 566-2058
Fax No. (613) 235-4430))

Ottawa Agent

INDEX

PART I – STATEMENT OF FACTS

1. The British Columbia Civil Liberties Association ("BCCLA") is the oldest and most active civil liberties group in Canada. Involved in case work, public education, and public policy and law reform, the mandate of the BCCLA is to preserve, defend, maintain and extend civil liberties and human rights in British Columbia and across Canada. The BCCLA intervenes in this appeal to argue that the prohibition of possession of marijuana in the *Narcotic Control Act* ("*NCA*") and the *Controlled Drugs and Substances Act*, is unconstitutional.

Narcotic Control Act, R.S.C. 1985, c. N-1, ss. 3(1),(2), Schedule ss. 3(1) to 3(6). ("*NCA*")
Controlled Drugs and Substances Act, S.C. 1996, c. 19. ("*CDSA*")

2. The trial courts made the following findings of fact:

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 of a chronic, heavy user (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;

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

9.animal studies 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;

(...)

Apart from [risks to others where an intoxicated individual drives, flies aircraft, or operates complex machinery], there is no evidence to suggest that harm of any kind will befall individual members of society as a result of any actions by individual marijuana users.

(...)

The current widespread use of marihuana does not appear to have had any significant impact on the health care system of this province and, more importantly, it has not been perceived by our health care officials as a significant health concern, either provincially or nationally.

Reasons for Judgment (Howard P.C.J.), Caine Rec., Vol 7, pp. 1135-6,1140.
See also **Reasons for Judgment (McCart J.)**, Clay Rec., Vol. XVI, pp. 3363-5.

6. The trial judges also found that the decision to add Cannabis to the schedule of substances prohibited under the federal statute – then titled the *Opium and Narcotic Drug Act* – took place in "a climate of irrational fear" spawned by "sensational and racist articles" based on "wild and outlandish" "reckless assertions of fact" now recognized to be simply "untrue".

Reasons for Judgment (Howard P.C.J.), Caine Rec., Vol 7, pp. 1132-3.
See also Reasons for Judgment (McCart J.), Clay Rec., Vol. XVI, pp. 3357-8.

PART II – POINTS IN ISSUE

7. This factum will address the following questions (as stated for the *Caine* and *Clay* appeals):

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?

PART III – ARGUMENT

8. The impugned provisions: (a) are *ultra vires* the Parliament of Canada and, subject to the *Charter*, fall within the constitutional jurisdiction of the Provinces; and (b) contravene section 7 of the *Charter* without justification, and as such are of no force or effect.

A. DIVISION OF POWERS

9. The impugned provisions cannot be supported by the residual Peace, Order and Good Government power ("POGG") or the s.91(27) criminal law power.

Peace, Order, and Good Government

10. The Respondent relies on *Hauser* and the "national concern" branch of POGG. In *Hauser* the question was whether the federal Attorney General could be empowered to prosecute *NCA* offences. Under the law at the time, this turned on whether the *NCA* was enacted under POGG or s. 91(27). The Court characterized the *NCA* as an exercise of POGG. In light of subsequent decisions of this Court, the correctness of the result in *Hauser* no longer turns on the Court's reasoning therein as to the constitutional characterization of the *NCA*.

R. v. Hauser, [1979] 1 S.C.R. 984. ["*Hauser"*]
A.-G. Can v. CN Transportation, [1983] 2 S.C.R. 206.
R. v. Wetmore, [1983] 2 S.C.R. 284.
Hogg, *Canadian Constitutional Law* (Looseleaf) (Toronto: Carswell, 1997) at 17-16 to 17-18.

11. Subsequent to the decision in *Hauser*, this Court further defined the necessary conditions for a piece of legislation to be characterized as an exercise of the POGG power. It held that for a matter to qualify as a matter of national concern it must, among other things, have a singleness, distinctiveness and indivisibility that clearly distinguishes it from

matters of provincial concern, and a scale of impact on provincial jurisdiction that is reconcilable with the fundamental distribution of legislative power under the Constitution.

R. v. Crown Zellerbach Canada Ltd., [1988] 1 S.C.R. 401 at para 33. ["*Crown Zellerbach"*]

18. In *Hauser* the basis for classifying the *NCA* as POGG legislation was that it involved the subject matter of abuse of dangerous addictive substances. The findings of fact of the trial judges demonstrate that marijuana does not form part of a single, distinct and indivisible matter of "dangerous addictive substances". Marijuana use is not a causative "gateway" to use of other prohibited substances. It is not an addictive substance; consequently, it cannot form part of the same subject-matter as addictive substances. There are no serious health dangers or psychotic episodes associated with marijuana use; consequently it cannot form part of the same subject-matter as drugs that pose a serious health danger to the user or others. While marijuana is a "psychoactive substance", this is true of many other substances such as chocolate, caffeine, nutmeg, and alcohol. It could not reasonably be argued that chocolate is part of a single, distinct and indivisible matter together with heroin and crack cocaine, sufficient to support its prohibition under the POGG power.

Criminal Law Power

19. Where the Crown relies on the federal criminal law power to support legislation, the law must include the prohibition of an act with penal consequences associated with the prohibition. The prohibition and penal consequences must be directed at an "evil or injurious effect upon the public". The purpose of the prohibition and penalty must be one of the ordinary ends of criminal law, i.e. public peace, order, security, health and morality.

RJR-MacDonald Inc. v. Canada (Attorney General), [1995] 3 S.C.R. 199 at paras. 28-29.
Reference Re Validity of Section 5(a) of the Dairy Industry Act, [1949] 1 D.L.R. 433 at 472-473 (SCC), aff'd [1950] 4 D.L.R. 689 (P.C.). [*Margarine Reference*]

21. To the extent that its provisions are directed toward substances which carry serious risks of addiction and risk of death or serious injury to the user or others, the prohibition of those substances may constitute a valid exercise of Parliament's criminal law power.

However, marijuana does not carry such risks and its inclusion cannot be justified under s. 91(27).

Canada v. Industrial Acceptance Corp. Ltd., [1953] 2 S.C.R. 273.

22. A proponent of legislation in distribution-of-powers cases must show a rational basis for the legislative facts that are prerequisite to the validity of legislation.

Anti-Inflation Reference, [1976] 2 S.C.R. 337 at 423.
Hogg, *Canadian Constitutional Law* (Looseleaf) (Toronto: Carswell, 1997) at 57-15.

23. Here, the Respondent must establish a rational basis for the existence of the "evils" that Parliament sought to address through the prohibition of marijuana under the *NCA,* and that the evil is related to one or more of the "ordinary ends" of criminal law. The BCCLA submits that the record is clear that evils originally associated with marijuana have now been demonstrated to have been entirely irrational. Consequently, the prohibition of marijuana under the *NCA* cannot be supported by s. 91(27).

Reasons for Judgment (Howard P.C.J.), Caine Rec., Vol 7, pp. 1132-3.
Reasons for Judgment (Court of Appeal), Malmo-Levine Rec., Vol. 2, pp. 279-290.
See also Reasons for Judgment (McCart J.), Clay Rec., Vol. XVI, pp. 3357-8.
Report of the Senate Special Committee on Illegal Drugs: Cannabis (Ottawa: Queen's Printer, September 2002) ["*Senate Report*"] at pp. 245-295.

24. In continuing the marijuana prohibition under the *CDS*, Parliament did not substantially revisit the irrational basis for the original prohibition in the *NCA*. The *CDS* simply consolidated, modernized and enhanced (to cover "designer" and "look alike" drugs and "precursors") and streamlined the *NCA*. The foundation of the prohibition remains the same.

House of Commons Debates (18 February 1994) at 1561-3; (30 October 1995) at 15951, 15959,15978; (March 6 1996) at 365.

25. Indeed, in the 1995 debate on the *CDS*, the government maintained that it had no choice but to criminally prohibit marijuana because of international treaties. The inclusion of marijuana in those treaties was itself based on the same irrational fears cited by the trial judges. The legislature cannot avoid an absence of rational basis for domestic legislation by relying on an irrationally-based international treaty.

House of Commons Debates (30 October 1995) at 15951,15959,15984.
Senate Report, *supra* at 439-468.

26. To avoid the established irrationality of the true purposes of the marijuana prohibition, the Respondent relies instead primarily on potential bronchial effects for the very small number of chronic heavy users of marijuana, and the effects of driving while impaired by marijuana [see paras. 119 to 123 of Respondent's Factum]. The BCCLA submits that nowhere on the record is there evidence that these concerns played any substantial part in Parliament's decision to maintain marijuana among the prohibited substances under the *NCA* and *CDS* and to apply criminal sanctions for its possession. By relying on purported harms that played no part in Parliament's original purposes in prohibiting *cannabis*, the Respondent implicitly relies on the "shifting purpose" doctrine, which has been soundly rejected by this Court.

R. v. Big M Drug Mart Ltd., [1985] 1 S.C.R. 295; 18 C.C.C.(3d) 385 at 416-17 (C.C.C.).
R. v. Zundel, [1992] 2 S.C.R. 731 at 761-762.

27. Even if one were to ignore the irrational origins of the prohibition (and the BCCLA respectfully submits one cannot for constitutional purposes), the findings of the trial judges demonstrate that the outright prohibition of simple possession of marijuana cannot be rationally directed at an evil or injurious effect relating to peace, order, safety, or health.

28. The only other "ordinary end" of the Criminal Law identified in the jurisprudence to date is morality. The Respondent has not sought to support the prohibition of marijuana on the grounds of morality. Consequently, the BCCLA submits that the prohibition must be struck down as lacking a rational basis in relation to evils concerning peace, order, safety or health, regardless whether it could be supported as a morally-based prohibition.

29. In the alternative, if this Court concludes that the prohibition of marijuana is, in fact, based on the premise that marijuana use is <u>morally</u> evil, the BCCLA accepts that the prohibition might constitute valid federal criminal law under the <u>traditional</u> division-of-powers analysis. Of course, if enforcement of moral beliefs <u>is</u> the real basis for the prohibition of marijuana, while this might support the legislation for division-of-powers purposes, it will have serious implications for the analysis of the validity of the prohibition under the *Charter*.

R. v. Butler, [1992] 1 S.C.R. 452 at paras 79 and 81. [*Butler*]

B. SECTION 7 OF THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS

30. In the alternative, if the prohibition of marijuana is valid federal legislation as criminal law under s. 91(27) or quasi-criminal law under the residual POGG power, the BCCLA submits that the prohibition constitutes an unjustified infringement of s. 7 of the *Charter*.

31. The BCCLA submits, with respect, that insufficient attention has been given by the other parties and lower courts to the reasons why individuals choose to use marijuana for non-medical purposes and the importance of such use to them. The answer to this question provides context to the determination of the *Charter* issues. It demonstrates that any prohibition of adult use of marijuana, regardless of the severity of penalty, engages the right to life, liberty and security of the person under s. 7. It must also be considered in the application of the principles of fundamental justice.

32. The following conclusions can be drawn from the literature:

(a) Marijuana has been used for non-medical purposes for thousands of years.

(b) Many of the individuals who use marijuana for non-medical purposes use it for the personal pleasure of its effect on perception and the mind, including euphoria and a heightened awareness of and sensitivity to sensory stimulation.

(c) Some individuals use marijuana for relaxation.

(d) Marijuana use includes a social aspect that is highly valued by many users.

(e) Many users perceive marijuana as boosting their creativity and enhancing their perception and appreciation of music, literature, and other art.

(f) Marijuana use helps individuals to see beyond obvious or usual associations between concepts or things and to discover new connections between seemingly unconnected concepts. Similar such insights are celebrated in the fields of art, science, and invention as "breakthroughs", "innovations", "inventions", or "strokes of genius".

(g) For some users marijuana use has a spiritual element.

Abel, ***Marihuana: The First Twelve Thousand Years*** (New York: Plenum Press, 1980) at 13-14.
Senate Report*, supra,* at 111-113, 116.
Goode, ***The Marijuana Smokers*** (New York: Basic Books Inc., 1970) at 74-80, 83-85.
Grinspoon, ***Marihuana Reconsidered*** (Cambridge, Mass.: Harvard University Press, 1971) at

15, 55-116, 173-184.
Novak, ***High Culture*** (New York: Knopf, 1980) at 13-16, 46-53, 84-98, 134-141, 150-156.
Erickson "Living with Prohibition: Regular Cannabis Users, Legal Sanctions, and Informal Controls" (1989) 24(3) Int'l Journal of the Addictions 175 at 179 [Clay Rec., Vol.VIII, p. 1665].
Hathaway "Marijuana and Lifestyle: exploring tolerable deviance" (1996) 18 Deviant Behavior: An Interdisciplinary Journal 213 at 219, 221-229.
Grilly, ***Drugs and Human Behavior, 4th ed.*** (Boston: Allyn and Bacon, 2002) at 278-281.

33. The BCCLA does not itself, nor does it ask this Court to, advocate or endorse the use of marijuana. Rather, the BCCLA supports the individual's right of choice, and takes the position that the merit of marijuana use is for the individual, and not the state (nor the BCCLA), to determine. However, the BCCLA submits that recognition of the important personal interests at stake that inform individuals' choices to use marijuana is critical to understanding the nature and worth of the choice, and must also be weighed in applying the principles of fundamental justice.

Life, liberty, and security of the person

34. The BCCLA submits that the prohibition of adult use of marijuana itself, regardless of the penalty imposed, constitutes a deprivation of life, liberty and security of the person. This submission is based on the reasons why Canadians choose to use marijuana and the importance of those reasons and that use to the individual as described in paragraph 32.

35. The Respondent seeks to minimize the value to individuals of the choice whether to use marijuana: its factum describes the right asserted in this appeal as a right to get "stoned." Even if one accepts the assumption inherent in the Respondent's submissions that individuals use marijuana purely for personal physical pleasure (which, as demonstrated above, is clearly incorrect), the BCCLA submits that the ability to choose to experience personal pleasure or happiness is indeed of fundamental importance to individuals and constitutes an inherently private choice within the sphere of personal autonomy, and this makes it worthy of protection by s. 7.

B.(R.) v. Children's Aid Society of Metropolitan Toronto, [1995] 1 S.C.R. 315 at 368-369.
Universal Declaration of Human Rights, G.A. Res. 217 A (III), U.N. Doc. A/810 (1948), Art. 24.
Husak, ***Drugs and Rights*** (Cambridge: Cambridge University Press, 1992) at 44-47.

36. One need only imagine an individual who is deprived of personal pleasure or happiness

for his or her lifetime, or a society in which the state outlaws personal pleasure or happiness, to recognize that an individual's ability to choose to experience personal pleasure or to pursue happiness is of fundamental personal importance. To the same point:

(a) Personal pleasure or happiness is a major component of sexual activity, both between consenting adults, whether heterosexual or homosexual, and by individuals alone. Laws prohibiting particular forms of consensual or individual sexual activity would impact individuals in fundamentally important and personal ways, and it is inconceivable that individuals' interests in personal pleasure and happiness through consensual or individual sexual activity would not find protection under s. 7.

(b) Obesity is on the increase in Canada and poses serious health risks to individuals and a burden to the public health care system. The BCCLA submits that it is inconceivable that a law prohibiting consumption of sweet or fatty foods, or prohibiting consumption of food for pleasure or happiness, would not be subject to scrutiny under s. 7.

(c) Celebrating one's birthday or marriage or other important events with family or friends is an important occasion structured around personal pleasure and happiness. Again, it is inconceivable that legislative prohibition of such celebrations would not be subject to scrutiny under s. 7.

37. In any event, it is clear that the reasons why individuals choose to use marijuana go beyond physical pleasure, and include relaxation, social connection and interaction, enhancement of the senses, enhancement of creativity and enhancement of their perception and appreciation of culture, discovering unusual associations of ideas, and spirituality. Again, all of these reasons are intimately involved in individual happiness. The BCCLA submits that these reasons demonstrate that the choice to use marijuana can be and is involved in fundamental personal choices going to the underlying reasons <u>why</u> human beings value life, liberty and security of the person and so is worthy of protection under s. 7 of the *Charter*.

See also, **Universal Declaration of Human Rights**, Art. 22 and 27.

38. In this respect, recognizing that each of the rights in the *Charter* informs the others, it

should be recognized that the reasons for marijuana use resemble in some respects the reasons for expression and for its protection. McLachlin C.J. recently stated as follows in *R. v. Sharpe*:

> [Freedom of expression] makes possible our **liberty**, our **creativity** and our democracy. It does this by protecting not only "good" and popular expression, but also unpopular or even offensive expression. The right to freedom of expression rests on the conviction that **the best route to truth**, **individual flourishing** and **peaceful coexistence** in a heterogeneous society in which people hold divergent and conflicting beliefs lies in **the free flow of ideas and images**. If we do not like an idea or an image, we are free to argue against it or simply turn away. But, absent some constitutionally adequate justification, we cannot forbid a person from expressing it.

R. v. Sharpe, [2001] 1 S.C.R. 45 at para 21. [emphasis added]

39. The BCCLA submits that receiving expression from others and physically and intellectually experiencing the world are closely related concepts of equal fundamental importance to individuals. As such, the choice whether to use marijuana should be protected as part of life, liberty and security of the person. Absent some constitutionally adequate justification, the state ought to be no more able to forbid a person from choosing how he or she experiences the world in his or her "heart and mind" than it is able to forbid a person from expressing what is in his or her "heart and mind."

R. v. Sharpe, [2001] 1 S.C.R. 45 at para 23, quoting ***Irwin Toy***.
Kymlicka, ***Contemporary Political Philosophy*** (Oxford: Clarendon Press, 1990) at 200.

40. Further, the ability of individuals to choose to experience pleasure, or to feel that they are expanding their consciousness, by using marijuana involves the individual's control over his or her body and psychology. This too places it within the interests protected by s. 7.

Blencoe v. B.C. (Human Rights Commission), [2000] 2 S.C.R 307 at 340-344.
Rodriguez v. British Columbia, [1993] 3 S.C.R. 519 at 586-588, 618-619.

41. A further ground for concluding that the first branch of the s. 7 analysis is satisfied is the possibility of imprisonment as penalty for violating the prohibition on marijuana.

Hogg, *supra* at 44-7.
Re ss. 193 and 195.1 of Criminal Code, [1990] 1 S.C.R. 1123, at 1140.

Principles of Fundamental Justice

42. The principles of fundamental justice are legal principles of some precision upon which there is some consensus that they are vital or fundamental to our societal notion of justice are required. They can be discerned by examining any number of sources, including the common law, statutes, governmental commissions, and academic writing.

Rodriguez v. British Columbia (Attorney General), [1993] 3 S.C.R. 519 at 590-591.

43. The BCCLA submits that the following principles of fundamental justice are applicable to the case at bar: the harm principle, moral neutrality, overbreadth, privacy, and rational/non-arbitrary liability to criminal penalty.

1. The Harm Principle

44. The BCCLA submits that the BCCA's review of authorities and confirmation of the harm principle as a principle of fundamental justice, at paragraphs 98 to 134 of its judgment, were largely correct and should be for the most part affirmed by this Court. The principle is, in essence, that no activity should be prohibited under threat of penalty unless there is a potential that the activity will cause harm to others**.**

Reasons for Judgment (Court of Appeal), Malmo-Levine Rec., Vol. 2, pp. 395-317.
See also J. Bentham, *An Introduction to the Principles of Morals and Legislation* (London: Athalone Press, 1970 [1789]) at 286 [Ch. 17 §10]; see also 159 [Ch.8 §3].

45. The September 2002 Report on Cannabis by the Senate Special Committee on Illegal Drugs also recognized and reinforced that as a "guiding principle" that "only offences involving significant direct danger to others should be matters of criminal law."

Senate Report at pp. 37-45 [emphasis added].

The B.C.C.A. was unanimous in concluding that not just any degree or risk of harm would satisfy the harm principle; the Justices agreed there must be some minimum threshold of seriousness of the harm to others before criminal law can be applied to the activity. The Court divided on the appropriate articulation of this threshold, Braidwood and Rowles JJ. concluding that the harm to others need only be "not insignificant" or "not trivial", while Prowse J. held it must be "serious", "significant" or "substantial".

46.

47. The BCCLA submits that the formulation articulated by Prowse J. is more consonant with the purposes and values embodied in the *Charter* and correctly states the appropriate threshold, and that she correctly applied the test to the prohibition of adult use of marijuana as the findings of fact disclose that no serious, significant or substantial harm to other individuals arises from use of marijuana by adults. In the alternative, the BCCLA submits that if the test stated by the majority of the BCCA is correct, the majority did not apply the test correctly. As will be described below, when the harm principle is considered together with the other applicable principles of fundamental justice, it becomes apparent that any harm to other individuals associated with the prohibition of marijuana use by adults of full capacity is insignificant or trivial.

48. The trial judge found that, apart from the risks associated with operation of a motor vehicle, "there is no evidence to suggest that harm of any kind will befall individual members of society as a result of any actions by individual marijuana users."

49. The majority of the Court of Appeal referred to at one point to risk of "harm to others and society." The BCCLA submits that caution must be exercised when considering "harm to society." As Mill warned, an appeal to "social rights" can all-to-easily undermine the harm principle by defining "society" in accordance with a particular set of tastes and moral beliefs. The BCCLA submits that "harm to society" cannot mean harm to the state, as this is inconsistent with the very purpose of protection of liberty from the state; "harm to society" can only mean harm that is indirectly visited upon all individuals in the society, as opposed to direct consequences unique to particular individuals.
Mill, *On Liberty*, *supra* at 160-161.

50. The risk of harm to others apparently relied upon by the majority of the Court of Appeal in holding that the prohibition of marijuana use by adults is consistent with the harm principle were: (a) risks from operation of vehicles while using marijuana; (b) costs to the health care system.

51. With respect to the operation of vehicles, the trial judge held such risks "cannot be said to be significant" at current rates of use. The BCCLA submits that this finding does not

meet the threshold tests as stated by either Braidwood J.A. or Prowse J.A. in the Court of Appeal so as to provide a basis for criminal or quasi-criminal prohibition.

Reasons for Judgment (Howard P.C.J.), Caine Rec., Vol 7, p. 1163.
See also, ***Senate Report***, *supra* at 167-190, .

52. Further, other sections of the *Criminal Code*, including the impaired driving provision, address this harm through more tailored measures. In *On Liberty*, J.S. Mill in rejecting the outright prohibition of alcohol as inconsistent with the harm principle, addressed an analogous situation as follows:

> No person ought to be punished simply for being drunk; but a soldier or a policeman should be punished for being drunk on duty.

Mill, *On Liberty* [Caine authorities, Tab 41, pp. 146-7]

53. Further, operating a vehicle always includes a risk of harm to others. Thus, the underlying risk of the harm relied upon by the Courts below does not arise from the use of the marijuana, but rather the operation of the vehicle.

54. With respect to costs to the health care system from marijuana use, the trial judge held any such costs were "negligible" compared to the costs associated with alcohol and drugs, and that current "widespread" use of marihuana had no significant impact on the health care system nor had it been perceived by health care officials as a significant health concern provincially or nationally. Again, the BCCLA submits that this finding does not meet the threshold tests as stated in the Court of Appeal so as to provide a basis for criminal or quasi-criminal prohibition.

Reasons for Judgment (Howard P.C.J.), Caine Rec., Vol 7, p. 1140.
See also, ***Senate Report***, *supra* at 131-166.

55. In the alternative, the BCCLA submits that costs to the public health system attributable to self-harming activities does not constitute a "harm" in the sense of the "harm principle" under s. 7:

(a) The cost to the public arises not from the choice to engage in the activity but rather from the choice of the legislature to extend universal health care coverage to all citizens for all injuries and the choice of the individual to access the coverage.

> The application of the harm principle can no more turn on the fact that Parliament and the provinces have chosen to create and contribute to a particular health insurance scheme, than it could turn on whether an individual had obtained a private insurance policy covering the prohibited activity, though in either case the fact of insurance could lead to a cost to others.
>
> (b) Almost all human activity, especially when taken to excess, carries with it some risk of injury to oneself. To allow the possibility of increased health care costs to constitute a "harm" for the purposes of grounding a criminal prohibition would permit Parliament to impose incarceration for virtually any activity. By enacting universal health care, Parliament would have indirectly repealed the harm principle. This is inconsistent with the harm principle's status as a principle of fundamental justice.

56. The trial judge held that there was a risk that, with legalization, user rates might increase, thereby increasing the costs. However, the trial judge also noted that current use is "widespread" and the costs are not significant. The BCCLA submits that the appellants having established that there is no presently existing harm serious enough to justify the prohibition, if the Crown wishes to rely on some future harm an evidentiary burden falls to it to demonstrate that the harm is more than mere speculation.

> **Reasons for Judgment (Howard P.C.J.)**, Caine Rec., Vol 7, p. 1140.

The BCCLA further submits that there is nothing in the statute, nor has the Crown otherwise provided evidence of legislative history to support the proposition that, the prohibition of marijuana was or is primarily intended to address either potential risks from driving after using marijuana or costs to the health care system from lung injury in the less than 5% of users for whom this is potentially an issue. It would be inconsistent with constitutional principles and the harm principle to *ex post facto* rely on a purpose other than the actual purpose of the statute to support an otherwise unconstitutional law.

57.[See "shifting purpose" at paragraph 26 above.]

58. At paragraphs 124 to 127 of the Respondent's factum, the Respondent argues against any consideration of the fact that alcohol and tobacco are not prohibited. The BCCLA submits that the Court can and should consider this legislative fact in construing and assessing the validity of the prohibition on marijuana in that the legislative fact gives rise to an inference that prevention of impaired driving and risk of lung injury are not in fact the purpose of the prohibition of marijuana.

59. The BCCLA submits that the harm principle applies primarily only to prohibitions of choices or activities of adults who have legal capacity and capable of acting with free will. Thus, the result of its application in this case may well differ from the result with respect to: (a) other drugs, such as heroin, where the drug's effect on the users' free will may very well be one of the primary values the prohibition seeks to protect; or (b) prohibitions against choices or activities of children or other individuals who are not adults of legal capacity to make choices for themselves generally. As the Court of Appeal recognized, these concerns do not arise on this appeal, which relates only to possession and use of marijuana by adults of full legal capacity.
Reasons for Judgment (Court of Appeal), Malmo-Levine Rec., Vol. 2, p. 317.

2. Moral Neutrality

60. The BCCLA submits that a further principle of fundamental justice raised by this appeal is that Parliament may not threaten or suspend liberty merely to enforce a particular morality upon members of society. To do so is to use the coercive power of the state in its most extreme form to unreasonably constrain private choices and personal autonomy based upon nothing more than private ethics. The only exception to this rule is legislation that enforces a moral rule that is specifically enshrined in the *Charter*.

61. In *Morgentaler*, Wilson J. expressed this basic principle as follows:

> [T]he state will respect choices made by individuals and, to the greatest extent

> possible, will avoid subordinating those choices to any one conception of the good life.

R. v. Morgentaler, [1988] 1 S.C.R. 30 at para 229. [*Morgentaler*]

62. In *Butler*, this Court held as follows:

> [T]o impose a certain standard of public and sexual morality, solely because it reflects the conventions of a given community, is inimical to the exercise and enjoyment of individual freedoms, which form the basis of our social contract.

Butler, *supra*, at para 79.

63. The moral neutrality principle of fundamental justice is recognized in the works of classic and contemporary philosophers and legal theorists.

J.S. Mill, *On Liberty*.
Dworkin, *A Matter of Principle* (Cambridge, Mass.: Harvard University Press, 1985) at 191-2 and ***Sovereign Virtue*** (Cambridge, Mass.: Harvard University Press, 2000) at 120-183, 211-284.
Kymlicka, "Liberal Individualism and Liberal Neutrality" (1989) 99 Ethics 883.
Kymlicka (1990), *supra* at 199-237.

64. This rule does not mean that Parliament cannot act to prevent harms that are also generally viewed as immoral. Where the purpose and effect of the law is not to enforce a particular morality, but to prevent harm to others, the concern with legal moralism does not arise.

65. The prohibition of marijuana seeks to enforce an abstract moralism that, without recourse to concepts of harm, regards the use of substances to alter one's perception of the world, however slightly, as inherently *wrong*, unless the substance is prescribed by a medical professional. That is, the continued inclusion of marijuana in the prohibited substances list is based on a moral proposition that it is inherently immoral to choose to perceive the world differently from a majority-established norm of objective "reality". In this sense, the prohibition is the enforcement of a particular way of looking at the world, and verges on the policing of conscience or consciousness by the state.

Goode, *supra* at 50-68.

66. Further, the prohibition is grounded in a moral rejection of physical or emotional pleasure in favour of an exclusive focus on work, rational scientific examination of the world, and

solemn worship. While individuals are free to chose an exclusive focus on work, rational scientific examination of the world, and solemn worship, neither they nor the state are entitled to enforce that choice on others or even a particular conception of work, rationality or solemnity.

67. The Courts below found that the inclusion of marijuana in the prohibitions and punishments set out in the *NCA* originated in irrational fears that it caused addiction, insanity, depravity, violence, and a "gateway" effect leading marijuana smokers to crave every more addictive and destructive drugs. Each of these fears has, on the evidence, been disproved. There is no evidence before the Court to support any claim that the continued inclusion of marijuana in the *NCA* and now the *Controlled Drugs and Substances Act* was in fact motivated by new aims of protecting pedestrians from individuals driving under the influence of marijuana or protecting the lungs of marijuana smokers from the effects of the smoke.

68. The BCCLA submits that the true intention of Parliament in maintaining the inclusion of marijuana in the prohibitions and penalties amounts to either a bare moralism or the desire to placate other countries whose international demands for the criminalization of personal marijuana use are ultimately based on the same bare moralism, through treaties that were themselves entered into based on the irrational fears set out above and the simple moralism that followed.

***Senate Report**, supra* at pp. 439-468.

3. Overbreadth

69. Any law that seeks to detract from individual liberty must meet certain strictures in terms of its scope and sweep. In *Heywood*, the Court recognized that overbroad laws offend the tenets of fundamental justice. The "overbreadth principle" protects the civil liberties of individuals by ensuring that Parliamentary interferece with individual liberty does not extend to situations that are not reasonably connected to the harm to be prevented. As stated by Cory J., "the effect of overbreadth is that in some applications the law is

arbitrary or disproportionate" because, in cases of overbreadth, "the individual's rights will have been limited for no reason."

R. v. Heywood, [1994] 3 S.C.R. 761 at para 49. [also reported at 94 C.C.C.(3d) 481]

70. The primary ground relied upon by the majority of the BCCA for finding the prohibition to be consistent with the harm principle seems to have been the risk of injury from driving while under the influence of marijuana. Provisions of the *Criminal Code*, including the impaired driving provision, address this harm in a targeted and proportionate way. Therefore, if outright prohibition of marijuana is intended to address risks associated with impaired driving, the blunt and broad means adopted clearly runs afoul of the overbreadth principle.

71. To the extent that the Court of Appeal may have relied on concern about "vulnerable groups", primarily children, the BCCLA submits that, again, the outright prohibition of possession or use by adults violates the overbreadth principle as set out in *Heywood*.

72. Even if the prohibition were not invalid in light of the absence of any specific harm to others arising from marijuana use by adults, and protection of the health of chronic users were the true animus for the prohibition of marijuana (and the BCCLA submits that the legislative history demonstrates that this was not the primary animus for the prohibition of marijuana), the result of the outright prohibition is to unnecessarily criminalize and stigmatize the conduct and threaten the basic liberty of the at least 95% of marijuana users in Canadian society for whom no health effects arise from marijuana use, and for whom the choice to use marijuana is intimately associated with fundamental personal autonomy. The fundamental rights of these Canadians "will have been limited for no reason" and, as such, the prohibition and criminal penalty is contrary to section 7.

Heywood*, supra,* at para 49.

4. Privacy

A further principle of fundamental justice at issue is that the individual's liberty interest of privacy cannot be unreasonably interfered with by the state. In *Mills* and *Sharpe*, this Court recently reconfirmed that the right to privacy free from unreasonable interference

73. constitutes a principle of fundamental justice. Indeed, this Court has underlined the broad and critical nature of the right as located "at the heart of liberty in a modern state" and including a general "right to be free from intrusion or interference." In ***R. v. Sharpe***, the Court recognized that "freedom from state intrusion and conformist social pressures is integral to individual flourishing and diversity."

R. v. Mills, [1999] 3 S.C.R. 668 at para 62, 79.
R. v. Sharpe, *supra* at para. 26.

74. Thus, legislation must strike a proper balance between the broad public interest and the right of the individual to be free from intrusion or interference. Criminal or quasi-criminal prohibitions concerning what one chooses to take into one's body, or how one chooses to experience the world, are the most invasive means of interference with private life and autonomy available to the state. In particular, the reasons why individuals use marijuana indicate that the choice to use marijuana for some individuals is intimately associated with fundamental personal autonomy and privacy. The BCCLA submits that the outright prohibition of the simple possession of marijuana, including use in private residences, is inconsistent with the fundamental principle of the right to enjoy privacy without unreasonable interference by the state.

75. Again in response to paragraphs 124 to 127 of the Respondent's factum (concerning the fact that alcohol and tobacco are not prohibited), the BCCLA submits that this legislative fact further demonstrates that the interference with individual's privacy to autonomously choose to use marijuana is unreasonable and arbitrary, and so not in accordance with s. 7.

5. Rational, Non-Arbitrary Liability to Criminal Penalty

76. In the alternative, if the prevention of harm to the user or others in the form of impaired driving or health consequences from use is the basis for the prohibition, BCCLA submits that by legislating a prohibition of marijuana while enacting no similar prohibition of alcohol or tobacco is contrary to the principles of fundamental justice in that it leads to irrational and arbitrary differences in individuals' liability to imprisonment or other

criminal penalty. Alcohol and tobacco are known to cause far more serious damage than marijuana in the areas at which the Crown says the prohibition is aimed. Thus, the determination under the legislation of who, among persons engaging in use of alcohol, tobacco and marijuana, is liable to imprisonment and criminal punishment in order to deter impaired driving or health injury, is irrational, arbitrary, discriminatory, and, further, is inconsistent with the Rule of Law.

R. v. Arkell, [1990] 2 S.C.R. 695; 59 C.C.C.(3d) 65 at 69-70, 72, 75-76 (C.C.C.).
R. v. M.(C.) (1992), 75 C.C.C.(3d) 556 (Ont.Gen.Div.); (1995), 30 C.R.R.(2d) 112 (Ont.C.A.).
Rodriguez v. B.C. (A.-G.), *supra* at 594-595.

77. The BCCLA respectfully submits that the Court of Appeal in *R. v. Hamon* erred in relying on "cultural traditions" under the "rational and non-arbitrary" principle analysis in s. 7. The BCCLA submits that irrational and arbitrary distinctions contained in "cultural traditions" cannot render an otherwise irrational and arbitrary legislative scheme rational and non-arbitrary. In any event, the findings of fact in these proceedings with respect to the "risks" of marijuana use substantially differ from those in *Hamon*.

R. v. Hamon (1993), 85 C.C.C.(3d) 490 (Que.C.A.).

E. Section 1

78. The Respondent has not attempted to demonstrate that any breach of section 7 is justified under s. 1. In any event, the BCCLA takes the position that the breach is not justified.

PART IV – NATURE OF THE ORDER SOUGHT

79. The BCCLA respectfully asks that the Court allow the appeals and answer the constitutional questions in the following manner:

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: YES

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

Answer: NO

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: NO

80. As the trafficking provisions were not dealt with by the Courts below and a full record on that issue has not been established, the BCCLA submits that if the simple possession provisions are struck, the validity of the trafficking provisions should be remitted to the trial judge to be decided in light of the Court's reasons with respect to simple possession.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.
DATED THIS ___ DAY OF NOVEMBER 2002
IN VICTORIA, BRITISH COLUMBIA.

_____
Joseph J. Arvay, Q.C.
Counsel for the Intervenor B.C.C.L.A.

LIST OF AUTHORITIES

CASES: **PAGE NO.**

STATUTES:

SECONDARY MATERIAL:

Hogg, ***Canadian Constitutional Law*** (Looseleaf)
(Toronto: Carswell, 1997) 3, 5, 10

House of Commons Debates
(18 February 1994); (30 October 1995); (March 6 1996) 5

Husak, ***Drugs and Rights*** (Cambridge: Cambridge University Press, 1992) 8

Kymlicka, "Liberal Individualism and Liberal Neutrality"
(1989) 99 Ethics 883 16

Kymlicka, ***Contemporary Political Philosophy***
(Oxford: Clarendon Press, 1990) 10, 16

Mill, ***On Liberty***
(John W. Parker and Son, West Strand, London,1859) 12, 13, 15

Novak, ***High Culture*** (New York: Knopf, 1980) 7

Report of the Senate Special Committee on Illegal Drugs: Cannabis .....
(Ottawa: Queen's Printer, September 2002) 5,7,11,12,13,17

Universal Declaration of Human Rights,
G.A. Res. 217 A (III), U.N. Doc. A/810 (1948).....8, 9