V Canada – In Contrast and In Compliance

i) The Canadian Criminal Justice System and the Drug War

331. Canada is one of the most civilized nations of the world. It is a multi-cultural, free and democratic nation, governed as a constitutional democracy since 1982 when the Constitution was repatriated and the ***Canadian Charter of Rights and Freedoms*** came into force. Since that time, the Canadian Federal Government and the **Canadian Parliament**, as well as **Provincial legislatures** and their executive governments, have taken numerous steps to bring their legislation and policies into line with the *Charter* and the independent judiciary, at all levels, has stood firmly against abuses of power and the erosion of *Charter* rights. In particular, the judiciary has ensured that those charged with offences whose liberty and security of the person are at risk, are, by virtue of sections 7 and 11 of the *Charter,* in particular, subjected to an eminently fair and just criminal justice system both substantively and procedurally. Sections 7 and 11 of the *Charter* and the vigilance of the Courts have guaranteed Canadian citizens and others that an independent judiciary exists to ensure compliance by Government with the principles of fundamental justice in proceedings involving criminal and penal matters.

332. While Canada is not perfect, and there is always room for improvement and constant vigilance is always required in human affairs, the Canadian criminal justice system suffers from very few of the complaints leveled by police officers, lawyers and judges at their system in the United States of America. The right to know the case against you and thereby obtain adequate disclosure and the right to a fair hearing and a fair opportunity to defend oneself, the basic principle of fairness, are rarely violated in the public criminal courts.

333. While Canada's rates of incarceration are high at approximately 135 per 100,000, they are a far cry from the rates imposed on our neighbours to the south. **The purposes and principles of sentencing in Canada** are set out in the ***Criminal Code*** and proportionality between the gravity of the offence and the degree of the responsibility of the offender is the fundamental principle of sentencing in Canada. Further, the Code expressly provides that an offender should not be deprived of liberty if less restrictive sanctions may be appropriate in the circumstances and that all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders, with particular attention to circumstances of aboriginal offenders. The Parliament of Canada enacted these provisions to respond to the problem of overincarceration in Canada and in particular to the acute problem of the

disproportionate incarceration of aboriginal people. Our Parliament has directed sentencing judges to apply principles of restorative justice along with more traditional sentencing principles.

334. There are few **mandatory minimum sentences** in Canada and those that exist pertain to firearms or the use thereof in the commission of offences and certain driving offences like impaired driving and driving while under prohibition. The mandatory minimum of 7 years for importing a narcotic into Canada pursuant to our earlier version of the *Controlled Drugs and Substances Act*, namely the *Narcotic Control Act*, was struck down by the Supreme Court of Canada as amounting to "cruel and unusual punishment" in violation of section 12 of the *Charter*. In Canada, for a punishment to be "cruel and unusual", the Court has to find it to be so excessive as to outrage standards of decency or that it is grossly disproportionate to the offence or is arbitrarily imposed. The Court looks at the gravity of the offence and the personal characteristics of the offender as well as the particular circumstances of the case and also looks at the effect of the sentence, not just in terms of quantum or duration but also in terms of its effects and its nature and conditions under which it will be applied. Further, judges are not subjected to mandatory sentencing guidelines and their discretion to impose a fit sentence in the circumstances remains and has not been transferred to the prosecution or probation service.

***Canadian Charter of Rights and Freedoms*, generally and, in particular, Sections 7, 11 and 12;**

***Criminal Code of Canada*, generally and s. 718 and 718.1, and 718.2 particularly;**

***R. v. M.(C.A.)*, [1996] 1 S.C.R. 500 (S.C.C.);**

***R. v. Smith*, [1987] 34 C.C.C. (3d) 97 (S.C.C.).**

335. Nevertheless, and perhaps inevitably given the size, weight and power of our neighbour to the south, Canada has been significantly influenced by the United States of America in relation to many matters including the Drug War. While the origins of Canada's participation in the prohibition of drugs were similar to those factors affecting the United States of America, it was not until more recent times that Canada would be persuaded by the United States of America to sign or accede or ratify certain international instruments, such as the **1988 *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*** and would then press the Canadian Government to implement such conventions and

treaties by new domestic legislation. The present ***Controlled Drugs and Substances Act*** was not a burning issue for the Conservative Government when it introduced Bill C-85 in 1993 any more than it was for the Liberal Government that came to power in 1994 and proclaimed the law in force in 1997. It was Canada's accession to the 1988 Convention and the influence of the U.S. Drug War bureaucracy that pressed for this new legislation. Given the nature of Canada's relationship with the United States and our lengthy and porous border, it is easy to understand the U.S. concerns given their current stance in the "War on Drugs". Given Canada' s overall relationship with the U.S.A. it is also easy to understand the Canadian government's complicity.

336. While opium was known and used in the American colonies in the 18th century by physicians for medical treatments and England became involved in the opium trade to Chinese merchants which led to the Opium Wars, there was little concern or problem in relation to opium smoking in Canada until the creation of "morphine" in 1803 and the invention of the syringe in 1843. This led to increased use of opium during the American Civil War. The use of opium was introduced into Canada by the Chinese labourers who immigrated to the country in the 1860's which led to the "opium dens" in the Chinese sections of Vancouver, Victoria and New Westminster in particular. Thereafter, Canada participated to some extent in the patent medicine craze. It was in 1898 when the German laboratory developed "heroin" which was originally thought to be non-addictive and was widely used in the treatment of morphine dependency. It was not until 1923, however, that heroin was added to the Schedules pursuant to the then ***Opium and Narcotic Drug Act***.

"Drug Offences in Canada", (Second Edition) by Bruce A. MacFarlane, chapter 1, pp. 5 – 8.

337. According to **MacFarlane**, a series of seemingly unrelated events and factors such as the construction of the railroad, anti-ethnic fever on the West Coast and a report on property damage suffered during riots, together with "undercover" drug purchases by the Deputy Minister of Labour, **MacKenzie King**, combined to form the basis for our original *Opium Act* of 1908. While the Chinese immigrants were well received initially, the building of the transcontinental railroad led to significant immigration which ultimately resulted in jealousy in the part of the white population in British Columbia, leading to a public demand for legislation to restrict the flow of immigrants in order to minimize the effects of "yellow peril".

"Drug Offences in Canada", (Second Edition) by Bruce A. MacFarlane, chapter 1, pp. 11 – 12, footnote 4, p. 12;

"The Report of the Royal Commission on Chinese Immigration" (Report and Evidence), Ottawa, 1885 at p. vii.

338. The use and distribution of opium was not prohibited in Canada in 1885. It was regarded as a legitimate source of tax revenue. The **Royal Commission on Chinese Immigration** looked into the impact of immigration by the Chinese and the use and spread of opium use throughout Canada at the time. It particularly dealt with the involvement of the Chinese with opium and opium dens, as well as other habits deemed to be part of the "unsavory moral character" of the Chinese. The **police evidence** before the Commission singled out the smoking of opium as the single most dangerous threat to North American society. **Medical evidence**, on the other hand, suggested that few persons used opium and that the country need not concern itself over the issues. This view was supported by the then **Chief Justice of the Province of British Columbia**, the **Honourable Sir Matthew Begbie**. While that Royal Commission report did not make specific recommendations concerning the use or distribution of opium, it did lead to restrictions being placed on Chinese immigrants and by 1902 another Royal Commission was appointed to inquire into Chinese and Japanese immigration. In 1907, western Canada endured an economic recession and the Chinese immigration issue came to a head.

339. In September of 1907, there were riots against the Chinese in Vancouver leading to considerable property damage by Chinese residents. The **Deputy Minister of Labour**, **W. L. MacKenzie King**, was appointed to investigate and report on the losses suffered by the Chinese during the riots. In his final report, he drew to the attention of the Government claims for loss of opium products. He investigated opium manufacturing plants and was shocked at their scope. He recommended that Parliament give immediate attention to this so-called problem as an "evil" which was the source of human degradation and destruction and that it should be controlled, save for medicinal purposes. MacKenzie King also prepared a separate private report to the Governor General of Canada entitled "**Report on the Need for the Suppression of the Opium Traffic in Canada**". This report detailed the representations of the "anti-opium league" and MacKenzie King's investigations into the opium dens and shops themselves. He even made an "undercover" purchase and documented this in his report. He canvassed the attitudes of other nations and concluded that "to be indifferent of the growth of such an evil in Canada would be inconsistent with those principles of morality which

ought to govern the conduct of a Christian nation". He recommended that the only effective remedy was to prohibit the importation, manufacture and sale of opium save and except in so far as it may be necessary for medicinal purposes. Within 20 days of his submission to the Federal Cabinet, "**an Act to prohibit the importation, manufacture and sale of opium for other than medicinal purposes**" received royal assent. Apparently, MacKenzie King personally formulated and drafted the legislation and he became known as the "resident expert" on matters relating to the control of opium.

"Drug Offences in Canada", (Second Edition) by Bruce A. MacFarland, chapter 2, pp. 11 – 19.

340. **The *Opium Act* of 1908** was the first piece of legislation passed by the Canadian Federal Parliament that was directed at the use of narcotics for non-medical purposes. This statute was replaced in 1911 by the ***Opium and Drug Act*** which also prohibited cocaine, morphine and eucaine in addition to opium. During this period, Canada had become a signatory to a number of international agreements arising out of the conventions that had been held, such as the **International Opium Convention** at The Hague on January 23, **1912**, the agreement concerning the manufacture of, internal trade in and use of prepared opium, February 11, 1925, and the **International Opium Convention** of February 19, **1925**. The purpose of these laws was to stamp out the drug traffic due to the quote "evils" that these substances purportedly inflicted upon the nation's health and morality.

R. Solomon & M. Green "The First Century: The History of Nonmedical Opiate Use and Control Policies in Canada, 1870-1970" (1982) 20 *University of Western Ontario Law Review* 307;

***R. v. Malmo-Levine* and *R. v. Caine*, 2000 BCCA 335 (B.C.C.A.), per Braidwood, J.A. at paragraphs 72 – 74.**

ii) <u>The History of Canadian Marijuana Laws and Current Issues</u>

341. The ***Opium and Drug Act* of 1911** permitted the Cabinet to add or delete new drugs to a schedule as they deemed it to be in the public interest. In 1923, Parliament enacted a consolidated ***Opium and Narcotic Drug Act*** and "Cannabis Indica (Indian hemp) or hasheesh" was added to the Schedule. Even less time was spent on adding it to the Schedule in

Canada than was spent in the United States. There was no discussion in the House of Commons to explain why it was being added to the Schedule beyond the Minister of Health's comments as follows:

> "There is a new drug in the Schedule".
>
> ***House of Commons Debates****,* 2nd sess., 14th Parl., 23 April 1923, at p. 2124.

R. v. Malmo-Levine **and** ***R. v. Caine*****, 2000 BCCA 335 (B.C.C.A.), per Braidwood, J.A. at para. 75.**

342. The addition of cannabis to the Schedule apparently derived from the writings of **Emily Murphy**, a crusading Edmonton, Alberta magistrate who wrote a series of articles about Canada's drug problem in **McLean's** magazine under the name "Janey Canuck." Her writings were collected in a book entitled ***The Black Candle*** (Toronto: Thomas Allen, 1922). Her articles and her book were sensationalist and racist and her information was derived primarily from correspondence with U.S. police officials which consisted of wild and outlandish claims for which there was no truth. An example from her book was quoted by the trial judge in *Caine* and repeated by the Court of Appeal as follows:

> "The [marihuana] addict loses all sense of moral responsibility. Addicts to this drug, while under the influence, are immune to pain, and could be severely injured without having any realization to their condition. While in this condition they becoming [*sic*] raving maniacs and are liable to kill or indulge in any form of violence to other persons, using the most savage methods of cruelty without, as said before, any sense of moral responsibility."

It is apparent, therefore, that a climate of irrational fear led to the inclusion of cannabis in the Schedules pursuant to the *Opium and Drug Act* and thus the beginning of the imposition of criminal sanctions against cannabis users in Canada.

R. v. Malmo-Levine **and** ***R. v. Caine*****, 2000 BCCA 335 (B.C.C.A.), per Braidwood, J.A. at para. 76.**

343. The ***Opium and Narcotic Drug Act*** was amended again in 1929. The offence of simple possession now carried a minimum 6 month sentence and $200 fine and gave the Courts the discretion to sentence the offender to hard labour or whipping, as well.

***R. v. Malmo-Levine* and *R. v. Caine*, 2000 BCCA 335 (B.C.C.A.), per Braidwood, J.A. at para. 77.**

344. The impact of developments in the United States appeared to have clearly influenced developments in Canada throughout the '30's. Articles and statements by **Harry Anslinger**, then the United States Commissioner of Narcotic Drugs and the passage of legislation in the U.S., such as the ***Marijuana Taxation Act* of 1937**, led to discussions about the "marijuana menace" in Parliament. Indeed, some of Mr. Anslinger's claims even found themselves into the judgments of the Courts in Canada. In ***R. v. Forbes*** (1937), 69 C.C.C. 140, the Court sentenced Mr. Forbes to 18 months hard labour plus a $200 fine for possession of a small quantity of marijuana. In sentencing Mr. Forbes, the Court quotes from H. Anslinger as follows at p. 141 of judgment:

> "This narcotic is now commonly used in the form of cigarettes, being comparatively new to the United States and still rarer in Canada and it is as dangerous to youth as a rattlesnake.
>
> H.J. Anslinger] states that murders, suicides, robberies, criminal sexual assaults, hold-ups, burglaries and deeds of maniacal insanity are yearly being caused by the use of this deadly narcotic drug." [Emphasis added]

***R. v. Malmo-Levine* and *R. v. Caine*, 2000 BCCA 335 (B.C.C.A.), per Braidwood, J.A. at paragraphs 78 & 79.**

345. In 1954, Parliament amended the ***Opium and Narcotic Drug Act*** once again. The new offence of the possession for the purpose of trafficking was created and penalties for trafficking were greatly increased. While penal provisions were maintained for simple possession, including the mandatory minimum 6 months imprisonment, the discretionary penalty of hard labour or whipping was removed. The offences of possession for the purpose of trafficking and trafficking did not carry similar mandatory minimum sentences. From the House of Commons debates at the time, the intent of Parliament with respect to the offence of simple possession is unclear but it appeared that the offence was retained as part of the plan to treat drug addicts although there were few such "addicts" in Canada at the time and few, if any, institutions to treat drug addictions.

***R. v. Malmo-Levine* and *R. v. Caine*, 2000 BCCA 335 (B.C.C.A.), per Braidwood, J.A. at paragraphs 81 & 81.**

336. The following year, a **Senate Committee on the Traffic in Narcotic Drugs in Canada** reported:

> "Marijuana is not a drug commonly used for addiction in Canada…no problem exists in Canada at present in regard to this particular drug."
>
> "Final Report and Recommendations" in ***Proceedings of the Senate Committee on the Traffic in Narcotic Drugs in Canada*** (Ottawa: Queen's Printer, 1955) p. xii.

R. v. Malmo-Levine **and** ***R. v. Caine*****, 2000 BCCA 335 (B.C.C.A.), per Braidwood, J.A. at paragraph 80.**

337. In March of 1961, Canada became a signatory to the **Single Convention on Narcotic Control**, a United Nations treaty or convention that replaced 9 earlier treaties. Cannabis was listed along with drugs like heroin. Shortly thereafter, Parliament replaced the ***Opium and Narcotic Drug Act*** with the ***Narcotic Control Act***. By this time, as in the United States of America, the "gateway drug" theory had developed as the rational for this legislation in so far as marijuana was concerned. The debate in the House of Commons with respect to the new Act focused on hard drugs like heroin and, when marijuana was discussed, the **Minister of National Health and Welfare** commented:

> "The use of marijuana as a drug of addiction in Canada is fortunately not widespread. It, however, may well provide a stepping stone to addiction to heroin."
>
> ***House of Commons Debates***, 4th Sess., 24th Parl., 7 June 1961 at p. 5981

R. v. Malmo-Levine **and** ***R. v. Caine*****, 2000 BCCA 335 (B.C.C.A.), per Braidwood, J.A. at paragraphs 83 - 85.**

338. Part II of the new Act contained provisions for the treatment of addicts. The Minister of Justice at the time explained that the rational for these provisions was:

> "... to reduce the demand for illegal drugs by providing effective treatment for existing addicts ... [and] prevent[ing]

> the creation of additional demand by preventing, so far as possible, the creation of new addicts."

He added that:

> "[t]he drug traffic, after all, like any commercial activity obeys the laws of supply and demand."
>
> ***House of Commons Debates***, 4th Sess., 24th Parl., 7 June 1961, at p. 5982

R. v. Malmo-Levine **and** ***R. v. Caine*****, 2000 BCCA 335 (B.C.C.A.), per Braidwood, J.A. at paragraphs 83 - 85.**

339. Parliament, while providing for the identification of drug addicts and their treatment envisaged this legislation as complementing provincial legislation and treating drug addicts, bearing in mind the Constitutional limits of power of the Federal Parliament vis à vis the Provincial legislature. Reference was made in the 1955 Senate report to distinction between "criminal addicts" and "non-criminal addicts" with Provincial legislation likely covering the latter. Persons convicted of simple possession could be remanded for observation to determine whether they were "drug addicts". If found to be such, they could be remanded for drug treatment to an institution.

R. v. Malmo-Levine **and** ***R. v. Caine*****, 2000 BCCA 335 (B.C.C.A.), per Braidwood, J.A. at paragraphs 87 - 88.**

340. The new Act did remove the mandatory minimum sentence of 6 months for simple possession. However, the maximum of 2 years was raised to 7 years. In the 1960's, the Courts interpreted the statute as requiring significant penalties and even first offenders charged with simple possession were sentenced to imprisonment.

R. v. Malmo-Levine **and** ***R. v. Caine*****, 2000 BCCA 335 (B.C.C.A.), per Braidwood, J.A. at paragraphs 89 and 90.**

341. Then, in the '60's, the recreational use of marijuana skyrocketed. The 1969 amendments to the *Narcotic Control Act* allowed offenders to be prosecuted by way of summary conviction instead of on indictment and

the maximum penalty for a first offence was dropped from 7 years to a maximum of 6 months. This led to a significant increase in recorded convictions for simple possession and a reduction in the number of people actually being sentenced to imprisonment for that offence.

***R. v. Malmo-Levine* and *R. v. Caine*, 2000 BCCA 335 (B.C.C.A.), per Braidwood, J.A. at paragraph 91.**

342. In 1972, the **LeDain Commission** published it preliminary report entitled "**Cannabis**" which was followed by its final report in 1973. This Commission thoroughly investigated the use of recreational drugs in Canada and recommended that the prohibition on marijuana possession be lifted.

The **LeDain Commission** arrived at many conclusions concerning drug use in Canada. With respect to cannabis in particular, the Commission concluded that:

i. cannabis is not a "narcotic";

ii. few acute physiological effects have been detected from current use in Canada;

iii. that few consumers (less than 1%) of cannabis move on to use harder and more dangerous drugs;

iv. that there is no scientific evidence indicating that cannabis use is responsible for other forms of criminal behaviour;

v. at present levels of use, the risks or harms from consumption of cannabis are much less serious than the risks or harms from alcohol use, and

vi. that the short term physical effects of cannabis are relatively insignificant and there is no evidence of serious long term physical effects.

***R. v. Malmo-Levine* and *R. v. Caine*, 2000 BCCA 335 (B.C.C.A.), per Braidwood, J.A. at paragraph 92;**

***Regina v. Clay*, unreported, August 14th, 1997, Ontario Court (General Division), File Number 3887F per McCart, J. at pp.13, 16 and 17**

343. As a result of the conclusions and recommendations of the **LeDain Commission**, in the 1970's, every political party in Canada promised some form of decriminalization.

344. In 1972 the government of **Prime Minister Trudeau**, through then **Health Minister John Munro** introduced amendments to the *Criminal Code* to allow for the imposition of an absolute or conditional discharge (see s.730 of the *Criminal Code of Canada*). This was intended to enable a person convicted of simple possession of marihuana to be deemed not to be convicted if not contrary to the public interest and in the accused's interests. The intention was to enable the individual to avoid receiving a criminal record. However, at the time the ***Criminal Records Act*** still applied, as did the ***Identification of Criminals Act*** and the scheme did not live up to its expectations at least in relation to the offence of simple possession of marihuana.

345. Then in 1974 the Trudeau government introduced **Bill S-19** which would have made simple possession of marihuana prosecutable on summary conviction only and, by virtue of a Senate amendment, a person obtaining an absolute or conditional discharge would have been deemed to have obtained a pardon. This was another effort to avoid the consequences of a criminal record for such conduct. However, this proposal died on the order paper.

346. In 1980, at the beginning of the **32nd Parliament, the Liberal Government** under **Pierre Trudeau** promised once again to reduce the penalties for marijuana use. The Throne Speech proclaimed:

> "It is time ... to move cannabis offences to the ***Food and Drugs Act*** and <u>remove the possibility of imprisonment</u> for simple possession." [Emphasis added]
>
> ***House of Commons Debates***, 1st Sess., 32nd Parl., 14 April 1980, at p. 17.

Justice Minister Jean Chretien (as he then was) made similar promises. Nevertheless, the Governments in the 1980's did not carry through on their promises.

R. v. Malmo-Levine **and** ***R. v. Caine*****, 2000 BCCA 335 (B.C.C.A.), per Braidwood, J.A. at paragraph 92.**

347. In 1988, Canada became a signatory to **United Nations Convention against illicit traffic in narcotic drugs and psychotropic substances**. A "narcotic" was defined as a substance listed in the Schedule to the 1961 Treaty and, consequently, marijuana was included. Article 3 of this Convention required signatories to adopt measures to criminalize simple possession "subject to its constitutional limitations".

***R. v. Malmo-Levine* and *R. v. Caine*, 2000 BCCA 335 (B.C.C.A.), per Braidwood, J.A. at paragraph 93.**

348. Then, in 1993, Bill C-85 was introduced by the Conservative government, but was not passed before they were defeated in an election. The Liberal government that came to power reintroduced the Bill in 1994 as C-7 and later it was continued as C-8 and ultimately this Bill became law in the form of the ***Controlled Drugs and Substances Act*** proclaimed May 14th, 1997. In the period leading up to passage of the Bill, it was referred to the **Standing Senate Committee on Legal and Constitutional Affairs** which concluded that decriminalization would be the best course of action to take. However, that Committee, in its official recommendation to Parliament stopped short of making such a recommendation. Instead, it advised the government that the LeDain Commission's findings should be revisited and that the government should study whether or not decriminalization would lead to increased use and abuse. A **House of Commons Standing Committee on Health** was set up to undertake a review of Canada's drug policies, however, that Committee's mandate does not stipulate that it should revisit the LeDain Commission findings, nor is it required to expressly explore any issues specific to cannabis use.

349. The ***Controlled Drugs and Substances Act*** essentially provides the same old penalties upon summary conviction that have existed since 1969. If the amount involved is under 30 grams, then the offence is only prosecutable on summary conviction. This removes the applicability of the ***Identification of Criminals Act*** so that a person does not have to be fingerprinted or photographed. However, a person will still receive a criminal record under the ***Criminal Records Act*** unless he or she obtains an absolute or conditional discharge. Consequently, the inapplicability of the *Identification of Criminals Act* simply makes the criminal record hard to trace.

350. Apparently neither Bill C-85, nor C-7 or C-8 which culminated in the new *Controlled Drugs and Substances Act* originated within the caucus or cabinet of either the Conservative or Liberal governments. Rather, the Bills originated through the bureaucracy and it is suspected as a result of pressure from the United States government on our bureaucracy to modernise our drug laws in line with the **1988 Vienna Convention on Psychotropic Substances**. Consequently, while politicians in our country were promising to decriminalize and their political parties were passing resolutions to that effect, they proceeded to do the opposite.

351. Interestingly, while our politicians and our bureaucracies were continuing to say one thing and do another, it was the police and the judiciary that observed the relative harmlessness of simple possession of marihuana in relation to other offences coming before the Courts. Consequently it is now not unusual for the police to not charge and simply confiscate the substance and warn the individual. If someone is charged, diversion is now available and in urban areas charges of simple possession are rarely proceeded with apparently as a result of government policy that involves a weighing of the cost of proceeding versus the amount involved and the person's record and factors of that kind. In rural areas charges are still proceeded with from time-to-time, but absolute and conditional discharges or minimal fines in the area of $100 are not unusual.

352. Consequently, notwithstanding the LeDain Commission report and extensive lobbying, cannabis remains prohibited substance under the Schedules to the *Controlled Drugs and Substances Act* and the potential for imprisonment as a result of simple possession of cannabis remains. While Court challenges to the constitutionality of the law had been raised in the past without success, new challenges were mounted, firstly in British Columbia in 1993 involving a charge of simple possession of a very small amount of marijuana by one **Victor Eugene Caine** and in 1995 in Ontario by **Christopher Clay** who, along with Jordan Prentice, was charged with trafficking and possession for the purpose of trafficking. Mr. Clay was also charged with those counts by himself, as well as a count of simple possession along with another co-accused. Further, in December of 1996, **David Malmo-Levine** was charged with possession of marijuana for the purpose of trafficking in connection with the Harm Reduction Club that he established in Vancouver, British Columbia. He, too, raised a Constitutional challenge relying in particular on the evidence developed in the Caine case. Because Clay and his co-accused and Malmo-Levine were charged with indictable offences, they elected to be tried in the superior Courts of their respective provinces. Caine, on the other hand, involved a summary conviction offence within the absolute jurisdiction of

the provincial Court judge. In the result, the Malmo-Levine decision of Mr. Justice Curtis refusing to hear the evidence which was essentially the same as produced on the voir dire in Caine, was decided on February 18th, 1998, dismissing **Malmo-Levine's** challenge and convicting him of possession for the purpose of trafficking. He was sentenced to a one year conditional sentence. Because this decision emanated from a Superior Court in the Province of British Columbia, it was found in part to be binding upon the lower Court in **Caine**. The decision of the Ontario Court (General Division) in **Clay** was delivered August 14, 1997, dismissing that Constitutional challenge. The decision in **Caine** in British Columbia was given on April 20, 1998, dismissing the Constitutional challenge. Appeals were then taken from all of these decisions to their respective provincial Courts of Appeal. The **Caine** case proceeded through British Columbia Supreme Court and was then heard together with **Malmo-Levine** in the British Columbia Court of Appeal in November of 1999. The **Clay** appeal was before the Ontario Court of Appeal in October of 1999.

353. While these test cases challenging the constitutionality of the cannabis laws arose in relation to section 3(2) of the *Narcotic Control Act*, that law was supplanted by the *Controlled Drugs and Substances Act* S.C. 1996 which came into force on the May 14, 1997, and consequently the challenges are being continued as challenges to the appropriate provisions of that new law.

354. The cases of **Caine** and **Malmo-Levine** were heard together in the British Columbia Court of Appeal in November of 1999 and judgment was rendered on June 2, 2000, dismissing both appeals with Prowse, J.A. dissenting. All three members of the panel accepted that the "harm principle" was a principle of fundamental justice in Canada within the meaning of section 7 of the *Canadian Charter of Rights and Freedoms*. Further, all three members of the panel accepted that **the risk of harm to others from one's possession and use of marijuana was non-existent and that the risk of harm to the public generally from such conduct was not large, nor serious, significant nor substantial**. However, the majority held that the Canadian Constitution only demanded that a "reasoned apprehension of harm" that was not insignificant or trivial exist and that it was for Parliament to determine what level of risk was acceptable and what level of risk required action. Consequently, they deferred to Parliament. The minority judgment of Madam Justice Prowse, on the other hand, held that the Constitution required that the risk of harm be serious, substantial or significant before resorting to the use of the criminal law and its attendant sanctions which include the threat of imprisonment.

***R. v. Malmo-Levine* and *R. v. Caine*, 2000 BCCA 335 (B.C.C.A.), per Braidwood, J.A. at paragraphs 155 – 163 and per Prowse, J.A. in dissent at paragraphs 165, 176 – 178 and 185 – 187.**

355. **Section 691(1)(a) of the *Criminal Code of Canada*** gives a person convicted of an indictable offence whose conviction is affirmed by the Court of Appeal an appeal to the Supreme Court of Canada on any question of law on which a judge of the Court of Appeal dissents. Consequently, **Malmo-Levine** has a right of appeal to the Supreme Court of Canada and such an appeal has been filed. **Caine**, on the other hand, because his conviction was for a summary conviction offence must seek leave to appeal from the Supreme Court of Canada. Similarly, Malmo-Levine will have to seek leave to appeal on those grounds not dealt with in the dissenting judgment. Such applications for leave to appeal to the Supreme Court of Canada will be made in the near future.

356. On July 31, 2000, the Ontario Court of Appeal rendered its decision in **Clay** dismissing that appeal and Constitutional challenge. The Court held that at this stage in the development of the Charter, it was not possible to delineate the aspects of personal autonomy that would receive protection under section 7 of the *Charter*. For the purposes of the appeal, the Court accepted that the "harm principle" was a principle of fundamental justice following the decision of the British Columbia Court of Appeal in **Caine** and **Malmo-Levine**. The Court specifically agreed with the majority judgment and disagreed with the higher test posed by Prowse, J.A. in dissent. As in **Caine** and **Malmo-Levine**, the Ontario Court of Appeal accepted that the evidence established that there was a reasoned apprehension of harm that was neither insignificant nor trivial in relation to the possession and use of marijuana.

***R. v. Clay*, [2000] O.J. No. 2788 (Ont. C.A.) per Rosenberg, J.A. at paragraphs 13 – 15, 17, 29, 34 and 35.**

357. It is understood that an application for leave to appeal will be made by Mr. **Clay** to appeal to the Supreme Court of Canada and that that application for leave will be made simultaneously with the applications for leave on behalf of **Caine** and **Malmo-Levine** referred to above.

Personal Communication from Counsel for Mr. Clay, Mr. Paul Burstein, dated August 23, 2000.

358. It follows from the above that the issue of the constitutionality, or otherwise, of the possession and use of marijuana together with the offences of possession of marijuana for the purpose of trafficking, trafficking in marijuana and cultivation in marijuana will be considered by the Supreme Court of Canada within the next year. .

359. At the same time, media reporting on this issue and public opinion polls in Canada appear to clearly support the decriminalization or legalization of simple possession and use of marijuana. A summary of every news article in Canada since 1997 and particularly since January 16, 2000, can be reviewed on www.marijuananews. com under the heading "Uh Oh, Canada". It appears that every major newspaper in Canada has now come out in favour of the decriminalization of possession of marijuana and most certainly supports that availability of medicinal marijuana

www.marijuananews.com;

"Two Conservative Papers Endorse Legalization Of Marijuana", posted April 10, 2000;

"The Racist Origins Of Canada's Marijuana Prohibition Reported in the National Post", posted April 18, 2000;

"Great Canadian Editorial Calls for Legalization: Decries Justice Minister's Giving Narks Veto Over Changing Marijuana Laws", posted May 9, 2000;

"Canada's Globe and Mail Says They Should "Go Dutch" – Is That The Way Out of the Marijuana Prohibition Trap? Appeasing DEAland?", posted August 2, 2000;

"We Are Winning! Support Grows For Full Legalization of Marijuana in Canada", posted August 8, 2000;

"Legalizing marijuana reflects today's reality". Canadians Prepare to Confront DEAland Over Marijuana Laws – An Editorial and An Op-ed, posted August 9, 2000.

iii) Medical Marijuana in Canada and Current Issues

a) The Legislation and Government Policy

360. Unlike the United States of America, the *Narcotic Control Act* and its Regulations and now the ***Controlled Drugs and Substances Act*** and its Regulations provides in **Regulation 53** as follows:

> (1) No practitioner shall administer, prescribe, give ,sell or furnish a narcotic to any person or animal except as provided in this section.
>
> (2) Subject to subsection (3), a practitioner may administer, prescribe, give, sell or furnish a narcotic to a person or animal if
>
> (a) the person or animal is a patient under his professional treatment; and
>
> (b) the narcotic is required for the condition for which the person or animal is receiving treatment.
>
> (3) No practitioner shall administer, prescribe, give, sell or furnish methadone to any person or animal unless the practitioner has been named in an authorization issued by the Minister pursuant to subsection 68(1).

***Narcotic Control Regulations*, C.R.C., c. 1041, now forming part of C38-8, the *Controlled Drugs and Substances Act* Regulations, S.C. 1996, c.19.**

361. On its face this would appear to enable a practitioner, namely a physician, to "administer, prescribe, give, sell or furnish" a "narcotic" or now a "controlled drug" to a patient under his or her professional treatment for a particular condition. The only problem is that there is no licensed grower or producer or dealer from whom the practitioner can obtain a lawful and safe supply for the patient. While there are provisions in the Act and Regulations to allow for the establishment of licensed dealers that are entitled to manufacture, import or export, sell, give, transport, send, deliver or distribute a controlled drug, such as cannabis, no such permits have been granted to supply the medical marijuana market at this time.

***Controlled Drugs and Substances Act* Regulations, C38-8, S.C. 1996, c.19.**

362. The only provision of the *Controlled Drug and Substances Act* which comes close to allowing for a medical exemption is **section 56** which provides as follows:

56. The Minister may, on such terms and conditions as the Minister deems necessary, exempt any person or class of persons or any controlled substance or precursor or any class thereof from the application of all or any of the provisions of this Act or the regulations if, in the opinion of the Minister, the exemption is necessary for a medical or scientific purpose or is otherwise in the public interest.

Controlled Drugs and Substances Act **Regulations, C38-8, S.C. 1996, c.19.**

363. Notwithstanding these provisions, it was not until recent times that they have attracted attention with respect to the provision of exemptions by the Minister of Health for those requiring cannabis for medical purposes. Recently the Government announced of an intention to conduct clinical trials to determine the safety and efficacy of providing cannabis to patients in appropriate circumstances.

"**Interim Guidance Document for exemption under Section 56 for Medical Purposes", (Health Canada, Therapeutic Products Division, April 27, 1999);**

"Research Plan for Marijuana for Medical Purposes", (Health Canada, Therapeutic Products Division, June 9, 1999).

(b) <u>The Case Law</u>

364. The leading case on medical marijuana is the recent decision of the Ontario Court of Appeal ***in R. v. Parker***, decided July 31, 2000. Eaerlier on, **Terry Parker**, was successful on December 15, 1987, in being found not guilty of simple possession of cannabis on grounds of medical necessity for his epilepsy, a verdict that was upheld on appeal by Mr. Justice B. Shapiro on November 8, 1988. It was not until December 10, 1997, before the Ontario Court of Justice (Provincial Division) that he successfully obtained a Constitutional exemption from the law on the basis that the *Controlled Drugs and Substances Act* legislation was overbroad in that it did not provide by legislation a procedural process for an individual in these circumstances to be exempt from prosecution when personal possession and cultivation was for a legitimate, medical use. The Court found that it did not accord with principles of fundamental justice to criminalize a person suffering a serious chronic medical disability for possessing a vitally helpful substance not legally available to him in Canada. Consequently, his Charter rights pursuant to section 7 of the *Canadian Charter of Rights and Freedoms* were violated and this violation was not saved by section 1 of the *Charter*. The Court concluded that the appropriate remedy for Mr. Parker was to read in an exemption and to

grant him a Constitutional exemption from the law enabling him to cultivate and possess cannabis for his own medical purposes. The Court ordered the return of his plants. The Court ordered, pursuant to section 52 of the *Canadian Charter of Rights and Freedoms* that specific provisions of the *Controlled Drugs and Substances Act* be read down so as to exempt from its ambit persons possessing or cultivating cannabis for their personal medically approved use.

R. *v. Parker* [1997] O.J. No. 4550 (Ont. Ct. Prov. D.)

365. The Crown appealed the **Parker** decision and it was heard in the **Ontario Court of Appeal** in October of 1999. On July 31, 2000, the Ontario Court of Appeal dismissed the Crown's appeal and concluded that the trial judge was correct in finding that the appellant Parker required marijuana to control the symptoms of his epilepsy. The Court concluded that the prohibition on the cultivation and possession of marijuana was unconstitutional based on the principles established by the Supreme Court of Canada, particularly in ***R. v. Morgentaler***, [1988] 1 S.C.R. 30 and ***Rodriguez*** *vs.* ***British Columbia (Attorney General),*** [1993] 3 S.C.R. 519. The Court held that forcing Mr. Parker to choose between his health and imprisonment violated his right to liberty and the security of his person and that those violations did not accord with principles of fundamental justice and, therefore, his rights pursuant to section 7 of the *Charter* had been violated. Further, the Court found that the section **56 exemption procedure** set out in the *Controlled Drugs and Substances Act* gave the Minister of Health an unfettered and unstructured discretion which was not consistent with principles of fundamental justice either. The Court upheld the stay of proceedings against Parker but disagreed with the remedy of a constitutional exemption given below. Instead, the Court declared the prohibition against the possession of marijuana to be unconstitutional and, therefore, to be of no force and effect but, because this would have left a gap in the regulatory scheme, suspended the declaration of invalidity for a year to give Parliament an opportunity to amend the legislation to comply with the *Charter*. Mr. Parker, of course, remains subject to a personal exemption throughout this period.

***R. v. Parker* [2000] O.J. No. 2787 (Ont. C.A.)**

366. In their decision, the **Ontario Court of Appeal** thoroughly reviewed the background circumstances and medical situation of Mr. Parker and how it came to be determined that marijuana greatly helped his medical situation. The Court also reviewed the harmful and therapeutic effects of marijuana, including the evidence of medicinal value and use and concluded that unlike conventional medications, marijuana has an extremely wide safety margin. The Court referred to a study by the **British Medical Association** entitled "**Therapeutic Uses of Cannabis**" which concluded

that cannabinoids appear to be effective for a number of ailments, including epilepsy and as an anti-nauseant and that while further research was needed, “cannabinoids have a margin of safety superior to many conventional drugs”.

R. v. Parker **[2000] O.J. No. 2787 (Ont. C.A.) per Rosenberg, J.A. at paragraphs 48 – 51.**

367. The Court reviewed the regulation of marijuana in Canada and the legal means for obtaining it as medicine, including the development of **section 56** of the Act as a medical exemption process in the discretion of the Minister. The Court held that the deprivation by means of a criminal sanction of access to medication reasonably required for the treatment of a medical condition that threatens life or health constitutes a deprivation of the security of the person.

R. v. Parker **[2000] O.J. No. 2787 (Ont. C.A.) per Rosenberg, J.A. at paragraphs 97.**

368. In addition, the Court noted that in 1999 the House of Commons overwhelmingly passed a **motion, M-381**, urging the Government to legalize the medicinal use of marijuana and to establish clinical trials and a legal supply of the drug.

R. v. Parker **[2000] O.J. No. 2787 (Ont. C.A.) per Rosenberg, J.A. at paragraph 133.**

369. The Court also did a survey of the legislation in other countries and noted that it indicated an increasing tolerance for possession of marijuana for personal use although no country had fully decriminalized possession. The Court noted some movement towards actual decriminalization for medical use and pointed to 34 states in the United States that have legislation that recognizes the medical value of marijuana and theoretically makes the substance available as medicine. Apparently, only a few states, such as **California** and **Hawaii**, have actually enacted legislation to implement the initiative. The Court attached as appendices to the judgment copies of the legislation from both California and Hawaii. The Court noted, however, the complication in the United States of the opposition by the United States Federal Government to legalization for this purpose.

R. v. Parker **[2000] O.J. No. 2787 (Ont. C.A.)per Rosenberg, J.A. at paragraph 140.**

370. The Court also noted that the scheme of the Canadian legislation holds out a defence to be "authorized by the regulations" to be in possession. However, it notes that the practical unavailability of marijuana due to the administrative structure prevented the appellant Parker and people like him who required the drug for medical purposes from obtaining a prescription for the drug because of the absence of a legal supply. In other words, the defence held out under the legislation was practically unavailable. The Court held that this produced unconstitutional effects for the group of people like Mr. Parker who required marijuana for medical purposes. The Court held that this constituted a violation of the principles of fundamental justice.

R. v. Parker **[2000] O.J. No. 2787 (Ont. C.A.) per Rosenberg, J.A. at paragraphs 155, 160 and 163.**

371. With respect to **section 56**, the Court held that the lack of any adequate legislated standard for medical necessity and the vesting of on an unfettered discretion in the Minister deprived Mr. Parker of his right to security of the person and did not accord with the principles of fundamental justice. The Court noted that it might well be consistent with the principles of fundamental justice to require the patient to obtain the approval a physician and it might also be consistent with such principles to legislate certain safe guards to ensure that the marijuana does not enter the illicit market. These, the Court held, were matters for Parliament.

R. v. Parker**, [2000] O.J. No. 2787 (Ont. C.A.) per Rosenberg, J.A. at paragraph 188.**

372. Further, in considering whether or not the legislation could be saved under **section 1 of the *Charter***, the Court held that the broad nature of the marijuana prohibition and its effect on impairing the health of Mr. Parker and others who required it for medical purposes, caused the legislation to work in opposition to one of the primary objectives and thus could be described as "arbitrary" or "unfair". Further, it held that the prohibition failed the minimal impairment test. The Court held that there was no need to prosecute people like Mr. Parker who require marijuana for medical purposes to achieve any of the three objectives identified by the Crown: preventing harm, international treaty obligations, and control of the trade in illicit drugs. Less intrusive means were available to meet these objectives. Again, the Court pointed to the Californian and Hawaiian legislative schemes as examples.

R. v. Parker**, [2000] O.J. No. 2787 (Ont. C.A.) per Rosenberg, J.A. at paragraphs 191 – 194.**

373. The first case in which this issue was raised in B.C. was ***R. v. Lieph***, a decision of the **British Columbia Court of Appeal** in 1989 under the old *Narcotic Control Act*. James Lieph was charged with cultivation and possession for the purpose of trafficking in Sooke, British Columbia in August of 1988. He ultimately pled guilty to cultivating and simple possession and was granted a conditional discharge subject to 6 months probation on the cultivation count and an absolute discharge on the possession count. The Crown appealed to the Court of Appeal. Mr. Lieph was found to be growing some 74 plants, weighing approximately 23 pounds wet. Apparently, Mr. Lieph did not smoke marijuana but rendered it down to an oil which he combined with coal tar or other oil bases, including Vaseline, to make a topical cream. He applied this to his very severe affliction of psoriasis that he had been suffering from since 1984. He had been injured in an explosion in 1984 that had caused extensive burns to his legs, arms and scalp and the **psoriasis** had developed on the burned areas. Other medical treatment for it had proved ineffective in reducing the terrible itching symptoms. Medications were producing detrimental side effects. The Court of Appeal dismissed the Crown's appeal.

R. v. Lieph **(1989) Unreported, July 17, 1989, B.C.C.A., Victoria Registry V00939.**

374. On July 14, 1998, in ***R. v. Czolowski***, **Her Honour Judge J. E. Godfrey** of the **Provincial Court of British Columbia** in Vancouver imposed a conditional discharge subject to one year's probation with the only requirement that he keep the peace and be of good behavior. The Court referred to both the **Lieph** decision and the lower Court decision in **Parker** on Ontario. The Facts disclosed that Mr. Czolowski was growing a large quantity of marijuana at his residence to be used by himself from a severe condition of **open angle glaucoma** and was selling some of it to the **B.C. Compassion Club Society** for others requiring it for medical conditions. He had suffered from glaucoma for 25 years and the consumption of marijuana, along with other glaucoma medications, greatly eliminated the side effects of the regular medications and gave him a quality of life that he otherwise would not have had. It also reduced his inter-ocular pressure, stimulated his appetite and prevented nausea from the other drugs. Mr. Czolowski was a professional photographer by trade. The Court found that the use of marijuana for this condition was supported by the medical literature and granted the conditional discharge.

R. v. Czolowski **(14 July 1998) No. 23347-01-D, Vancouver Registry (Prov. Ct. B.C.)**

375. Meanwhile in Ontario, **James Wakeford** brought an application against the Crown in the **Ontario Court of Justice (General Division)** seeking an

exemption from the *Controlled Drugs and Substances Act* to enable him to self medicate to relieve the pain and suffering caused by his **Acquired Immune Deficiency Syndrome ("AIDS")**. Wakeford was diagnosed to be HIV positive in 1989 and was under a regime of numerous medications which left him with debilitating side effects, in addition to the effects of the illness itself. His physician had prescribed marinol for nausea and loss of appetite, the synthetic THC drug. However, this had made him more ill and he began using marijuana. He commenced doing this under a doctor's supervision in 1996 and he found that not only did it help as an anti-emetic (anti-nauseant) and as an appetite stimulant but it also countered many of the side-effects experienced from the other medications. He sought a Constitutional exemption allowing him to possess and cultivate marijuana and sought to compel the Government to provide him with a safe and secure supply so that he could avoid dealing with the black market. The Court stated that personal health and medical care must surely qualify as fundamental matters of personal choice and referred to the lower Court decision in Clay and went on to state that it must surely be acknowledged that the harms associated with smoking marijuana are negligible and that Mr. Wakeford's specific use could hardly be said to impact on international and domestic control and treaty obligations with respect to illicit drugs. The Court concluded that the prohibition depriving Mr. Wakeford of his reasonable and fundamental choice to smoke marijuana for medicinal purposes constituted a deprivation of his liberty interests. It also constituted a deprivation of the security of his person as he had a right to make autonomous decisions with respect to his own bodily integrity.

***Wakeford v. Canada* (1998) Q.J. No. 3522 (September 8, 1998) (Ont. Ct. Gen. Div) at paragraphs 29, 32 and 34 – 38.**

376. The Court held that it was not necessary for **Mr. Wakeford** to demonstrate that the only effective treatment for his loss of appetite was marijuana. It was enough for him to show that he derived significant beneficial treatment for a serious health concern. The Court was satisfied that Mr. Wakeford suffered from a life threatening and terminal illness and that appetite and weight maintenance were essential to health and, therefore, helped prolong his life. The Court found that there was no doubt that marijuana effectively treated his serious and often violent bouts of nausea which were brought on by the AIDS disease and the significant amounts of prescription medication that he had to take to combat AIDS, not to mention the further medication he had to take to combat the side effects of the medicine. The Court described the amount and degree of suffering that Mr. Wakeford endured and the vast daily quantity and variety of the prescription medication he took to be "mind numbing". It held that he was entitled to choose his own method of treatment.

Wakeford v. Canada **(1998) Q.J. No. 3522 (September 8, 1998) (Ont. Ct. Gen. Div) at paragraphs 39, 41 and 43.**

377. The Court held that there was a compelling need for Parliament to address the medicinal use of marijuana issue with dispatch. It then went on to consider the provisions of the current legislation for the approval of new drugs, the special access program and the section 56 exemption process. The Court found that the first two did not afford Mr. Wakeford or others in his position a reasonable opportunity for an exemption as these were illusory for persons like Mr. Wakeford. He would have to show that there was a licensed dealer in Canada, that clinical testing proved that marijuana was life saving and that the "medicine" met the requirements of "effectiveness, quality and consistency". However, in considering the section 56 exemption process, notwithstanding that no such exemption had ever been granted up to that point in time, it held that Mr. Wakeford had to first avail himself of this statutory remedy before seeking a Constitutional remedy. Consequently, the Court held that he had not been deprived of his liberty or the security of his person in a manner that was not in accordance with the principles of fundamental justice.

Wakeford v. Canada **(1998) Q.J. No. 3522 (September 8, 1998) (Ont. Ct. Gen. Div) at paragraphs 55 – 60 and 90.**

378. While dismissing Mr. Wakeford's application, the Court stated as follows:

> "It should be obvious by now that our society must begin to seriously give consideration to the medicinal benefits of marijuana. Medical evidence and opinion, albeit not complete, clearly indicate that the time has come to examine this sincerely. In the case at bar, anecdotal evidence was submitted that attempts to demonstrate the many ways in which marijuana has brought medical assistance and relief to persons suffering debilitating and deadly ailments. These include prominent professionals and others who suffer from cancer, AIDS and epilepsy, to mention only some. All speak of the relief and benefits obtained from marijuana smoking during their illnesses and treatment, all of which is described as painful and debilitating until then. In this regard they express the same concerns as Mr. Wakeford as to the availability of "clean" and affordable marijuana. All of these concerns are, in my view, valid and ought to be dealt with by Parliament if it has not done so or is not doing so. If such is not the case, the courts of this land will, without question, continue to be called upon and expected to provide a remedy for this very pressing and fundamentally important issue. Unlike government, the courts do not have the luxury of avoiding this difficult and sensitive matter until a more suitable time. Our duty is to decide such issues as they are

> presented to us on a case by case basis. Such an approach, in my opinion, cannot be either satisfactory or the most beneficial to the interests of our society.

Wakeford v. Canada **(1998) Q.J. No. 3522 (September 8, 1998) (Ont. Ct. Gen. Div), paragraph 67.**

379. In the result, **Mr. Wakeford** applied for an exemption under section 56 of the Act and it was determined that there was no process or protocol for such applications as section 56 was never intended for that purpose. Consequently, he brought a motion to reopen the Court's earlier decision and was granted permission to adduce new evidence to show that at the time that he filed his original application, there was no process whereby the Minister of Health could have granted him an exemption and that that continued to be the case after the Court released its first judgment. The evidence established that an exemption for medical purposes, such as Mr. Wakeford's, was not the real or intended objective of section 56 but, as a result of Mr. Wakeford's application, the Government began developing such a process. Consequently, the Court granted Mr. Wakeford the Constitutional exemption originally sought pending the granting of an exemption to him by the Minister under the new section 56 process

Wakeford v. Canada **(1999) O.J. No. 1574 (Ont. SCJ) at paragraphs 7, 8, 31 and 32.**

380. In reviewing the matter, the Court had before it the official proceedings of Parliament during "**Question Period**" of **March 3, 1999**, at which time the **Minister of Health, the Honourable Allan Rock**, was quoted as follows:

> "…[T]his government is aware there are Canadian suffering, who have terminal illnesses, who believe that using medical marijuana can help ease their symptoms. We want to help.
>
> As a result, I have asked my officials to develop a plan that will include clinical trials for medical marijuana, appropriate for guidelines for its medical use and access to a safe supply of this drug.
>
> …There are people who are dying. They want access to something they believe will help with their symptoms. We want to help. Clinical trials would allow us to get research to know more about how we can help."

Wakeford v. Canada **(1999) O.J. No. 1574 (Ont. SCJ) at paragraphs 7, 9 and 10.**

381. On September 15, 1999, **Her Honour Judge Howard** of the **Provincial Court of British Columbia** at **Vancouver** sentenced **Alan Davis** to a conditional discharge and 6 months probation with the only requirement be that he keep the peace and be of good behavior, when Mr. Davis pled guilty to cultivating marijuana for his medical condition of "**polymyalgia rheumatica**", a type of auto-immune syndrome. Its symptoms include hip pain and hip stiffness, shoulder pain and stiffness, neck pain and stiffness, muscle pain, fever, weight loss, anemia, fatigue and general ill feeling as well as face pain and other joint pain. Mr. Davis had a rather amateurish grow operation consisting of 102 plants. He was 72 years old and was a Korean war veteran. He had suffered a fracture many years before and then developed this condition which required extensive medication, including Pregnazone, which contained a list of adverse reactions which the Court described a "intimidating in the extreme". The Court found that the medication was likely infinitely more toxic to Mr. Davis than any marijuana that he might be consuming. The Court made reference to the **Institute of Medicine** report entitled "**Marijuana and Medicine, Assessing the Science Base**" and its conclusion that cannabinoids likely have a natural role in pain modulation, control of eating and memory. Mr. Davis was scared to mention the use of marijuana to his doctor and decided to try and grow it for his own use.

R. v. Davis **(September 15, 1999), Vancouver Registry, No. C40172-01-D (B.C. Prov. Ct.).**

382. Similarly, on December 3, 1999, his **Honour Judge Devitt** in the **Provincial Court of British Columbia** at Surrey, British Columbia granted an absolute discharge to **Nicole Louis Gionet** who had been charged with cultivating and possessing for the purpose of trafficking but who pled guilty to a count of simple possession by agreement with Crown. It was clear that she was growing marijuana for medicinal purposes, namely her **fibromyalgia**. She would make cookies and eat them because she had difficulty smoking. She also had found that only a particular strain worked for her. The Court reviewed the previous cases and the medical evidence and granted the absolute discharge. The Court indicated that it did not see any social benefit in granting a conditional discharge which required her to keep the peace and be of good behavior and Ms. Gionet did not strike the Court as a person that was not keeping the peace. Consequently, the absolute discharge was granted.

R. v. Gionet **(December 3, 1999), Surrey Registry, No. 94505-01 (B.C. Prov. Ct.).**

383. On January 26, 2000, his **Honour Judge Parodis** of the **Provincial Court of British Columbia** at North Vancouver, British Columbia, having convicted Marcus Richardson in June of 1999 for possession of marijuana

for the purpose of trafficking and the possession of cannabis of resin had to determine what sentence to impose. Mr. Richardson had been found transporting 6 kilograms in the trunk of his car as well as $6,000 in Canadian currency and had a small amount of resin on his person. The evidence supported that he was a wholesaler of marijuana who obtained the substance from growers and was transporting it to his home for later distribution at the **B.C. Compassion Club Society**. The Court reviewed the history of that society and how it provides cannabis to patients who present a letter or "prescription" from their doctors recommending its use for a particular illness. The Court reviewed the record keeping practices of the Club in great detail and was satisfied that the funds held by Mr. Richardson constituted part of the "float" that was used to acquire marijuana for the Club. The evidence supported that Mr. Richardson on attending at a grower would also perform a quality control function, checking to make sure that the grower was not using pesticides or was flushing appropriately, bearing in mind that the product was ultimately destined to be used by sick people including some suffering from immuno deficiency type diseases. Evidence was also put before the Court disclosing that the **Vancouver Police** were aware of the Club and did not consider it to be a priority in terms of drug investigation. The Court reviewed the cases to date, both on the Constitutionality of the law and medical use and noted the developments of the part of the Government and Health Canada, in particular, with respect to the development of a reliable source of affordable marijuana for section 56 exemption recipients. The Court noted that if certain persons could be exempted from the legislation that this could not mean that only those who had the knowledge, an appropriate location and the financial wherewithal to grow their own marijuana to take advantage of such an exemption. Patients would have to secure their medicinal marijuana from some kind of retail outlet. The Court pointed out that those in need of other drugs, the possession of which was prohibited for recreational purposes, may get their drugs from their neighborhood pharmacy. The Court noted that the "pharmacy" in this case, known to and tolerated by the police, was the B.C. Compassion Club Society. The Court said:

> "Marijuana will not fall into its hands as manna from heaven. It must be obtained either directly from growers, as is now the case, or through a middleman, such as Mr. Richardson, as was the case in November of 1998.
>
> In my view, no serious distinction can be drawn between Mr. Parker, who grew his own, and the grower, wholesaler and the retailer who provide the drug to persons, like Mr. Parker, who are in medical need."

R. v. Richardson **(2000) Unreported, January 26, 2000, Provincial Court of British Columbia, North Vancouver, British Columbia, File No: 33558, Paradis P.C.J. at p. 10.**

384. In determining what sentence to impose on **Mr. Richardson**, the Court indicated that it could not conclude that it would contribute to respect for the law and the maintenance of a just, peaceful and safe society to impose anything more than a minimum sentence on Mr. Richardson with respect to the count of possessing for the purpose of trafficking. It found that the important factors under consideration to be as follows:

> "1) I accept that the accused was a wholesaler for the purpose of providing the Compassion Club Society of B.C. with a quantity of marihuana to distribute to its members;
>
> 2) those members are in need of marihuana for medical purposes in the same way as the Courts in Ontario found Mr. Parker and Mr. Wakeford to be in need;
>
> 3) many people who suffer from a number of debilitating diseases in this society and who derive some benefit from marihuana, are not in a position to grow their own and must rely on such retailers as the Compassion Club Society;
>
> 4) that club cannot secure its necessary substance without the assistance of growers and wholesalers, of which Mr. Richardson is one;
>
> 5) there is no evidence to suggest that Mr. Richardson was involved in any other way in trafficking in marihuana for recreational purposes.
>
> Therefore, if those who ultimately use the drug for medical purposes may be exempt from the prohibition against possession or cultivation of marihuana, and taking into account the sentences imposed in *Czolowski* and *Lieph*, I consider that it would not reflect a just, peaceful and safe society to impose a punitive sanction on Mr. Richardson, who acted as nothing more than a conduit for the provision of marihuana for medical purposes.

R. v. Richardson **(2000) Unreported, January 26, 2000, Provincial Court of British Columbia, North Vancouver, British Columbia, File No: 33558, Paradis P.C.J. at p. 11.**

385. Because of the amount involved in the case and the specific provisions of section 5(3) of the *Controlled Drugs and Substances Act* in conjunction

with Schedule VII and the sentencing provisions of the Code, the Court was unable to grant an absolute or conditional discharge and the minimum sanction that could be imposed was a suspended the passing of sentence with a period of probation. Consequently, the Court suspended sentence and placed Mr. Richardson on probation for a period of 6 months with the only requirement that he keep the peace and be of good behavior and report to the Court if and when required. With respect to the simple possession of cannabis resin, he gave him a conditional discharge subject to 3 months probation. Finally, while the Court was satisfied that the sum of $6,000 was "offence related property" in that the funds were originally obtained from the Compassion Club Society and passed on to Mr. Richardson for the purpose of paying for marijuana should a grower so demand, the Court nevertheless, in its discretion, declined to order forfeiture to the Government.

R. v. Richardson **(2000) Unreported, January 26, 2000, Provincial Court of British Columbia, North Vancouver, British Columbia, File No: 33558, Paradis P.C.J.**

386. The evidence before the Court in **Richardson** included an excerpt from the **Journal of the Canadian Medical Association** dated October 19, 1999, which described in considerable detail the operation of the **B.C. Compassion Club Society**. The final paragraph of the article reflected the view of the **Vancouver City Police** with respect to the Compassion Club, stated as follows:

> "What do the Police think of the Compassion Club? "It has not been one of our priorities in terms of our drug investigations," says Constable Anne Drennan of the Vancouver Police. "There are some things we won't tolerate, such as when it becomes evident that the drug being sold is not strictly for medicinal purposes, but if the Club abides by certain rules and regulations, they are not a priority for us. We are very much aware of the organization and what is going on."

Mr. Richardson has appealed his conviction based on a number of Charter violations by the police. For obvious reasons, he has not appealed his sentence.

R. v. Richardson **(2000) Unreported, January 26, 2000, Provincial Court of British Columbia, North Vancouver, British Columbia, File No: 33558, Paradis P.C.J. at p. 4.**

387. On March 1, 2000, his **Honour Judge H. J. McGivern** in the **Provincial Court of British Columbia** in **Vancouver**, British Columbia had before him **Joseph Anthony Slykerman** on one count of production of marijuana

and a count of possession for the purpose of trafficking. Mr. Slykerman was producing a romula strain of marijuana for the Compassion Club**.** Similar evidence to that presented to the Courts in **Czolowski, Davis** and **Richardson** was presented and the Court accepted that although there was the potential for profit, the purpose of the operation was to assist those who are in need of some form of assistance. Describing the circumstances as peculiar, the Court imposed a suspended sentence for a period of 15 months, requiring Mr. Slykerman to keep the peace and be of good behavior.

R. v. Slykerman **(March 1, 2000) Vancouver Registry No. 98973 (B.C. Prov. Ct.).**

388. A few weeks later, on March 10, 2000, his **Honour Judge T.D. McGee** of the **Provincial Court of British Columbia** at **Vancouver**, British Columbia, sentenced **William Small** who pled guilty to producing cannabis marijuana for the **B.C. Compassion Club Society**. In this case, the marijuana was being grown in a residence at Roberts Creek leased by Mr. Small. The police found 254 plants which they valued at over $100,000. The evidence established that it was being sold to the Compassion Club Society at $1,500 per pound. The Court had before it the similar evidence as was before the Court in **Richardson**, **Slykerman**, **Czolowski** and **Davis** with respect to the Compassion Club Society and evidence that Mr. Small was one of the founding members. The Crown sought a period of imprisonment of 4 months, not objecting to it being served as a conditional sentence in the community. The defence sought a conditional discharge. Because the Court found that the accused stood to make a considerable profit, it felt that it was contrary to the public interest to impose a discharge. At the same time, it did not feel that a jail term was warranted. It accepted that the accused was sincere and genuine in wanting to help others and commended him and his motivation as a matter in mitigation. Out of a concern for deterrence, the Court imposed a $3,000 fine and 12 months probation with the requirement that he keep the peace and be of good behavior and report to the Court as and when directed. He was given 6 months to pay the fine. Mr. Small has appealed the sentence as being excessive to the British Columbia Court of Appeal.

R. v. Small **(March 10, 2000) Vancouver Registry, No. 103360-01-T (B.C. Prov. Ct.).**

389. The above case involved the grow operation where **Renee Boje** and Perry Puentes. Ms. Boje and Mr. Puentes and another U.S. citizen were initially charged with the same offences but when **Mr. Small** agreed to plead guilty as the person in control of the operation on behalf of the Compassion Club Society, the **Attorney General of Canada** in its wisdom, through its prosecutorial agent, entered a stay of proceedings

against Ms. Boje and the others. In contrast to the actions of the U.S. prosecutorial authorities in relation to Ms. Boje's role in the McCormick grow operation in California, it is significant to note that Canadian prosecutorial authorities were prepared to drop the charges against Ms. Boje in Canada even though there was some evidence that she was residing on the premises and may well have assisted in some measure in the cultivation. Canada dropped the charges. The U.S.A. is seeking a 10 year minimum.

R. v. Small **(March 10, 2000) Vancouver Registry, No. 103360-01-T (B.C. Prov. Ct.).**

390. As previously indicated, **William Small** was a founding member of the Compassion Club Society and an original grower. The case noted above was actually the second grow operation in which Mr. Small had been implicated. The first Compassion Club operation had been busted on September 17, 1998, in **Sechelt**, British Columbia. The police had found 37 large plants and 193 clones in this house and an indication that it was being dismantled and the tenancy terminated. The grow clearly indicated, however, that it was for the **B.C. Compassion Club Society**. Mr. Small initially took a preliminary hearing in Provincial Court and was committed for higher Court trial and then pled guilty before **the Honourable Mr. Justice Wong** in the **Supreme Court of British Columbia** on March 10, 2000. At sentencing, the Court heard, once again, from the Executive Director of the **Compassion Club Society**, **Hilary Black**, and extensively canvassed its development and operating procedures and practices. The Court noted the section 56 exemption process and the fact that by that time there were 20 persons across Canada who had such certificates. Some of them belonged to the B.C. Compassion Club Society. While the Court noted that the Government plans to develop an available source of medical marijuana, it also noted that it was unlikely that this would occur in the near future whereas those who required if for medicinal purposes had an immediate and pressing need. The Court also heard from a number of members of the Compassion Club, both in oral testimony and letters of support. The Court was satisfied that Mr. Small's motives were humane and altruistic to fulfill what he believed was a pressing need to assist others who needed the marijuana for medical purposes. The Court reviewed the recent **Caine** and **Malmo-Levine** decision of the Court of Appeal and how those decisions would like be going to **the Supreme Court of Canada**. The Court also noted the recent announcement of Canada's Minister of Health to set up a protocol for clinical trials to test the medical benefits of marijuana use. The Court was aware of the decision of **Judge McGee** in relation to Mr. Small's second offence that had been dealt with before the sentencing for this first offence and was also aware of the fact that Mr. Small had appealed that sentence.

Consequently, the Court determined to leave that issue for the Court of Appeal and granted Mr. Small an absolute discharge for this first offence.

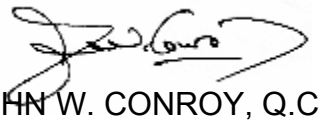
R. v. Small **(June 27, 2000) Vancouver Registry, No. CC991259 (S.C.B.C.).**

391. On May 31, 2000, in the case of ***R. v. W. H. Kruse***, his **Honour Judge R. G. Fabbro** of the **Provincial Court of British Columbia** at **Nakusp**, B.C., imposed a conditional discharge subject to one year's probation on the sole terms that Mr. Kruse keep the peace and be of good behavior and report to the Court when required to do so. Mr. Kruse pled guilty to production which involved some 500 plants that were being grown for a medical purpose, namely to supply to the Universal Compassion Center in Calgary, in the Province of Alberta, a sister compassion club to the B.C. Compassion Club in Vancouver, B.C. In arriving at its decision, the Court reviewed the **Richardson** decision and concurred with the comments of Paradis, P.C.J. Mr. Kruse was also required to perform 50 hours of community work service as part of his sentence.

R. v. Kruse **(31 May 2000) Nakusp Registry, No. 3189C (B.C. Prov. Ct.).**

All of which is respectfully submitted.

Dated the 14th day of September, 2000.



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