CONROY & COMPANY
Barristers and Solicitors

JOHN W. CONROY, Q.C.

SARAH J. RAUCH

2459 Pauline Street
Abbotsford BC V2S 3S1
Canada

Telephone: (604) 852-5110
Facsimile: (604) 859-3361
Toll Free: 1-877-852-5110
E-mail: jconroy@johnconroy.com

January 13, 2003

"Sent via Facsimile @ 1-(613) 990-7255 & Canada Post"

Minister of Justice & Attorney General of Canada
284 Wellington Street
Ottawa, Ontario
K1A 0H8

Attention: The Honourable Martin Cauchon

Dear Minister of Justice & Attorney General of Canada,

Re: David Malmo-Levine v. Her Majesty the Queen, File no. 28026
Victor Eugene Caine v. Her majesty the Queen, File no. 28148
Christopher James Clay v. Her Majesty the Queen, File no. 28189

I am writing to you on behalf of all the Appellants. A month has now passed since the decision of the Supreme Court of Canada on Friday December 13th, 2002, to adjourn these appeals, over the objection of all counsel, including Counsel for the Crown Respondent in each appeal, namely the Attorney General of Canada, to the Spring term of the Court, which commences in early April.

As you have undoubtedly been advised, this decision was precipitated by your comments in the media on December 10th, 2002 in which you "expressed the intention of the federal government to move ahead with legislation to "decriminalize marijuana", within the first four months of the New Year." (See letter to the parties from the Court dated Dec.10th, 2002 and the front-page article in the Globe and Mail headed, "Ottawa set to ease pot laws" which was continued on page A7 of that newspaper and widely reported elsewhere). The Court in its letter expressed a concern that this "development may impact on the appeals both in terms of the evidence and the positions that may be taken by the Attorney General and other parties" and sought the views of the parties as to adjournment of the appeals.

…\2

Counsel for the intervener, the British Columbia Civil Liberties Association, J. Arvay, QC responded in writing opposing any adjournment and pointed that out your statements in the media were "political statements of intention" leaving us no way of knowing:

(a) Whether a Bill to "decriminalize marijuana" will in fact be introduced;
(b) If it is introduced, whether or not this will be within the first four months of 2003 or whether it may be delayed for a further substantial period;
(c) If such a Bill is introduced, the form it will take;
(d) Whatever its form, whether it will be passed by Parliament;
(e) When and if it is passed, the form the legislation will take as passed; or
(f) When and if it is passed, the length of time between its enactment and its coming into force.

Mr. Arvay further submitted that such last minute out-of-court statements of political intention by a single member of government could not provide an appropriate basis for the adjournment of appeals raising challenges to the constitutional validity of the legislation; that any legislative prohibition of or interference with the possession and the personal choice whether to use marijuana is unconstitutional; and that the government could benefit from the courts rulings in these appeals on the division of powers and/or Charter issues in relation to any contemplated legislation.

Mr.Malmo-Levine on his own behalf, and myself as counsel to the Appellant Caine agreed with Mr. Arvay's submissions and added that similar promises or statements have been made by politicians or government representatives in various years in the past including 1970 (Trudeau), 1972 (Munro), 1975 (Trudeau), 1979 (Clark), 1980 (Chrétien), 1995 (Rock), 1996 (Chrétien), 1997 (K. Martin), and 2001 (K. Martin) and yet the law remains essentially the same as it did in the ‘sixties and that therefore very little weight should be given to such statements in the circumstances.

Counsel for the Appellant Clay, Paul Burstein and Alan Young, took a different view in their letter to the Court, urging an adjournment of that appeal arguing firstly, that the Court would likely be in a better position to decide the issues in the appeal once more was known about the governments position regarding new legislation (taking the view that the position of the Crown before the Court was inconsistent with the Ministers media comments) and would receive the benefit of the parties submissions with respect to the recently released Parliamentary Committee Report of December 12th, 2002 that appeared to have spawned your remarks, and secondly, because of the Crown’s eleventh hour motion to introduce new evidence, namely evidence from Dr.Kalant of alleged "Adverse effects of Cannabis on health - an update of the literature since 1996", an adjournment would enable the parties to properly and fairly consider this material and fairly respond to it, although it added "little to the ‘facts’ as already found by the Court below".

…\3

David Frankel, QC, Counsel for the Attorney General, wrote also opposing any adjournment and pointing out that nothing you said in the media would affect the evidence or position of the parties on the appeals with respect to the "possession" offence, that the Charter and Division of powers issues transcend the offence, and that two of the parties were convicted of "trafficking". He went on to point out that the Parliamentary Report, while of interest would not affect the convictions, and that as far as the motion for new evidence was concerned, concurred in Mr.Burstein's assessment - that it added little, if anything - and invited the court to dismiss it, if it stood as the only impediment to these appeals going forward on the significant issues raised.

Needless to say, these issues significantly distracted our preparation for these appeals. They also heightened our concerns about the already limited amount of time allotted, being further eroded by these matters on the Friday, when these matters were to be heard. We asked that the adjournment question be heard at the end of the day on Thursday, as all counsel were available, it would not take up any of Fridays precious time if not adjourned, and if there was to be an adjournment we would not have to continue our preparation Thursday evening. We were told to be there Friday at 9am as originally scheduled and if the appeals were not adjourned the court would be generous with the remaining time.

These developments led us to believe that the Court, given the position of the parties, including in particular that of the Crown, wished to have the matter formally addressed Friday morning 'on the record', to address the Appellant Clay's position and to then proceed with the appeals. Bearing in mind the time constraints and knowing that the Appellant Clay's counsel were likely going to change their position and oppose any adjournment in light of the Crown's position on the new evidence motion, we did not think much if any time would be spent on the matter and we would proceed. Why else would the Court make us fully prepare for the appeals?

On Friday when the Appellants were called upon we were all very brief and unanimous in our opposition to any adjournment due to the time constraints and our assessment of the likelihood that the appeals would proceed. The Interveners were not called upon. However, when the Crown rose to oppose the adjournment it became apparent that the Court was particularly concerned about your position in the media and how they perceived it to be inconsistent with the position being taken on your behalf before the Court. Mr. Frankel pointed out that he was there as Crown Counsel or on behalf the Queen and not on behalf of Government. This was not acceptable to the Court and they clearly expected him to be "in the loop" as far as what was likely to happen politically when in fact he clearly was not. Your position on behalf of the government or as Minister of Justice, in light of your media comments, was not put before the Court, as Mr.Frankel was not so instructed apparently.

…\4

During the course of oral submissions, members of the Court raised with the Appellants counsel the question of the impact of the Courts decision on others “in the system” and how they might wish to await the Ministers decision or at least have the benefit of it before a decision in these appeals, which might take them out of the system.

Most importantly, some members of the Court raised with the Respondent Attorney General of Canada’s counsel their concerns as to the timing of these appeals in light of your comments in the media. They perceived them as endorsing the findings of the recent House of Commons Committee Report to the effect that the penalties for simple possession of marijuana for personal use are “disproportionate” to the conduct involved and that the status of a drug as licit or illicit has no impact on use. The Court clearly indicated that it wants to know the official position of the Attorney General of Canada and/or the Government of Canada on these issues, before these appeals proceed, as they go to the central issues of “harm” and “rationality” of the law in question. In the Courts view your comments have put them in an awkward position as they cannot ignore them and their ability to decide the Charter and other Constitutional issues is impaired if they are not given the benefit of the fullest information and all of the arguments are not before it.

Notwithstanding the position of the parties in unanimously opposing any adjournment, as set out above, the Court adjourned the appeals to the spring session. In its published decision, the Court once again refers to you as a Respondent in these three appeals who has made certain announcements of an intention to introduce legislation in Parliament to "decriminalize in some way" marijuana offences and as to the gravity of the existing offences. The Court expects that the "process you announced" will "inevitably involve a discussion of what harm comes from the conduct covered by these offences, and its proportionality to conviction and its consequences." The Court says it expects " the underlying basis for the criminalization of marijuana possession and use will be taken up by Parliament and widely discussed in the months to come." It concluded that this "examination and discussion may well prove to be of relevance to the case and of interest to the parties, and may provide guidance to the Court in deciding the present appeals". Given these circumstances, and in particular ”in the interest in a full and fair hearing on these issues,” the court adjourned the appeals to the Spring term, expressing no view on the issues before them.

The Court clearly has high expectations of the Minister and the Government, and indeed Parliament, on these issues and over the next few months, so that the Appeals will be ready to proceed in April and not be further adjourned.

The Court seems to be contemplating an expansion of the “Record”, which is already voluminous, in the interests of “a full and fair hearing.” This will mean more time will be required – likely two days – so that everyone can, at least, have the customary one hour

for submissions, and perhaps more, depending upon how, if at all, you propose to proceed and how that decision will impact on the current issues and Record before the Court. There may be others who feel they should be heard if the Government is going to be given a further opportunity to supplement the Record. It also means there will be further substantial demands on busy counsel's time, and more costs and expenses, to the Appellants, who have been required to fund there own appeals, without any legal assistance from the State and without its corresponding deep pockets. This last adjournment was a substantial imposition on the Appellants.

However, the most recent statements of the Government on this issue, attributed to the Prime Minister, in the Vancouver Sun, Thursday, December 19th, 2002, (PM backs off pot law changes), have been interpreted as contradicting your earlier statements of intention and that your plans, as previously expressed, were not "final", but that "there will be a very vigorous debate." We understand that you have been quoted in the media subsequently indicating that you nevertheless intend to proceed with changes.

Given the decision of the Court to adjourn these appeals for the reasons stated, and the impact of that decision on the Appeals and the Appellants, and the impact of your expected decision on the Court and the Appellants in the near future, we urgently need to know what your intentions are, one way or the other, so we can all plan our schedules accordingly and so these appeals can proceed expeditiously.

Whatever your decision, it is the position of these Appellants, that there will be no reason to adjourn these appeals further whatever you or the government might decide to do, short of outright legalization with amnesty for all persons convicted of any marijuana offence of any kind.

It is our position that:

1. The recent Reports of the Parliamentary Committee and the Senate Committee Report before that are public documents that by their nature will be before the Court and can be referred to by the parties in oral submissions and /or supplemental written submissions;

2. These Reports essentially confirm what every other significant investigation into this subject matter has concluded since the Indian Hemp Commission of 1897 and certainly since LeDain in 1973 – that the possession and use of marijuana is remarkably benign and penal consequences are not warranted and are unfair – they are disproportionate and ineffective and therefore not rational;

…\6

3. The trial courts below have made extensive and remarkably congruent findings of fact after the examination and cross- examination of witnesses by the parties in these separate appeals. Those findings were accepted by all judges in the Courts below and in both Courts of Appeal to the effect that - the possession and use of marijuana does not pose a serious, significant or substantial risk of harm to the public or to others but that the risk is more than trivial;

4. There is nothing in support of the Crowns Motion to introduce new evidence that adds anything of significance to the Record since 1996. If it is the intention of the Crown to proceed with it, the parties will want, as a matter of fairness, a fair opportunity to respond to it, at least to the extent set out in the affidavit of Mr.Paul Burstein in opposition to that motion;

5. While nothing was said by you as the Minister of Justice that hasn't been said or promised before, nevertheless, what was said did appear to endorse, to some extent, the findings and conclusions of the House of Commons Committee's Report – namely that the conduct is relatively benign, does not warrant the threat of the imposition of any types of criminal sanction and any such consequences are disproportionate, and should be removed by way of some sort of "decriminalization". We would argue that any legislative response should also include a broad amnesty for all Canadian citizens forthwith and that all pending cases be adjourned to await the outcome of the Governments deliberations and these appeals;

6. That, in the circumstances, the focus should be on the harms caused by the law itself, as found by the Courts below (see paragraph 28 of the decision of the Court of Appeal in the appeals of Malmo-Levine and Caine, repeating the specific findings of the trial judge, Howard PCJ, in Caine).It must be recognized that any further delays only serve to compound and continue those harms unnecessarily for a great many citizens without any justification. If there is to be further delay for debate, all outstanding charges should be stayed or adjourned pending the outcome of all these unnecessary continued deliberations;

7. The Court should proceed as soon as possible, after the Governments intentions are made clear, to determine the critical constitutional questions that arise in these appeals, quite irrespective of what the level of risk of harm from the conduct might ultimately be found in fact to be. It is for the Court to determine as a matter of law:

(a) The threshold question of what level of risk of harm must exist before the Government can threaten our liberty in a free and democratic society that is a constitutional democracy;

(b) Whether or not the “Harm Principle” is a “principle of fundamental justice” under s.7 of the Charter and does it protect from government intrusion, by way of threats of criminal sanctions, all conduct that does not meet the threshold level of risk of harm i.e the right to be left alone if the conduct is trivial or presents no more than a trivial risk that can be reasonably mitigated;
(c) Whether or not there is a free standing right to possess and use marijuana as a “decision of fundamental personal importance” involving autonomy over one’s body and what to put in it even if potentially harmful to the self, under s.7 of the Charter;
(d) The parameters of the interests of the individual and those of the government under s.7 of the Charter in the circumstances and what must the Appellants establish before there is a shifting of onus to the government Respondent, bearing in mind the importation of s.1 principles into s.7 in the circumstances;
(e) The jurisdiction of the federal and provincial governments over a question of the health of the user if the risk is small so as to remove the threat of the criminal law;
(f) Whether the penalties for the conduct are proportionate or disproportionate and therefore ‘rational’ or otherwise.

These are only some of the major constitutional questions that the Court will be called on to grapple with in these appeals and any new legislation introduced ought to be able to be considered in the same way as it has in the past, without further delaying the hearing of these matters.

These questions remain:

1. Does the Attorney General of Canada and/or the Government of Canada accept the findings of the House of Commons Committee Report to the effect that the penalties for simple possession of marijuana for personal use are disproportionate and ineffective and its conclusion that the law in that regard should be, in some way, “decriminalized”?

2. Will you or the Government be getting involved in these issues in the next short while in a manner that might impact on the issues, evidence and position of the parties before the court?

We require your urgent response as soon as possible.

May we please hear from you in this regard forthwith?

Yours very truly,

CONROY & COMPANY
Per:

John W. Conroy, Q.C.
JWC*sss
cc: Anne Roland, Registrar at Supreme Court of Canada, via fax (613) 996-9138
cc: Mr. David S. Frankel, Q.C. via fax (604) 666-1599
cc: Paul Burstein via fax (416) 204-1849
cc: David Malmo-Levine via fax (604) 859-3361
cc: Milan Rupic via fax (416) 326-4656
cc: Andrew K. Lokan via fax (416) 646-4301
cc: Joseph J. Arvay, Q.C. via fax (250) 388-4456
cc: Robert J. Frater via fax (613) 941-7865
cc: Henry S. Brown, Q.C. via fax (613) 233-1781
cc: Robert E. Houston, Q.C. via fax (613) 236-9665
cc: Leonard M. Shore, Q.C. via fax (613) 233-2374
cc: Alan Young via email @ alan005@sympatico.ca