COURT FILE NO. 65381

SURREY REGISTRY

VANCOUVER REGISTRY

C A N A D A
IN THE PROVINCIAL COURT OF BRITISH COLUMBIA

BETWEEN: **HER MAJESTY THE QUEEN** **Respondent** **AND:** **VICTOR EUGENE CAINE** **Applicant**	**REASONS FOR JUDGMENT OF THE HONOURABLE JUDGE F.E. HOWARD**

Counsel for the Applicant Accused: John W. Conroy, Q.C

Counsel for the Respondent Attorney

General of Canada: Johannes Van Iperen, Q.C. and Michael J. Hewitt

Date of Judgment: April 20, 1998

RULING RE: SECTION 7 OF THE *CHARTER OF RIGHTS AND FREEDOMS*

The accused is charged with being unlawfully in possession of a narcotic, to wit Cannabis (marihuana), contrary to Section 3(1) of the *Narcotic Control Act*, R.S.C. 1985, Chap. N-1. The amount of narcotic in question is 0.5 of a gram.

The accused seeks a declaration that the *Narcotic Control Act* prohibition against the possession of marihuana, to the extent that it prohibits possession for personal use, is contrary to Section 7 of the *Charter of Rights and Freedoms*, in that it violates the accused's constitutional right to liberty and the security of his person in a manner that is not in accordance with the principles of fundamental justice.

I. THE CONSTITUTIONAL ISSUE AND RELEVANT LEGISLATION

The AMENDED NOTICE OF CONSTITUTIONAL CHALLENGE dated September 29th, 1995 (Exhibit 1) sets out the applicant's complaint in the following terms:

> TAKE NOTICE that an application will be made...for relief by way of an appropriate and just remedy pursuant to section 24(1) of the *Canadian Charter of Rights and Freedoms*, Part I, Schedule B of the *Constitution Act*, 1982, on the grounds that:
>
> (1) the inclusion of cannabis sativa, its preparations, derivatives and similar synthetic preparations, including all those substances set out in the Schedule under sections 3(1) to (6) to the *Narcotic Control Act*, R.S.C. 1985, chap. N-1, as amended to date, insofar as it relates to the personal possession and use contrary to sections 3(1) and (2) of the Act, is in violation of the Applicant's constitutional right to liberty and the security of his person and the right not to be deprived thereof except in accordance with the principles of fundamental justice as set out in section 7 of the *Canadian Charter of Rights and Freedoms*;
>
> (2) the Applicant's rights under section 7 of the Charter [are] guaranteed by section 1 thereof subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society and the applicant says that Schedule 3(1) to (6) to

> the *Narcotic Control Act* is not a reasonable limit and is not demonstrably justifiable in a free and democratic society and invites the government to prove otherwise.

The above Notice makes reference to a remedy under Section 24(1) of the *Charter*, (being Part I of the *Constitution Act*), but makes no reference to Section 52 (Part VII) of the same Act. In written submissions, counsel for the applicant also seeks a declaration, pursuant to S.52(1) of the *Constitution Act*, to the effect that all of Section 3 of the Schedule to the *Narcotic Control Act*, R.S.C. 1985, Chap. N-1 is of no force and effect *as it relates to possession for the personal use of the drugs set out therein*, on the grounds that it is inconsistent with the provisions of the Constitution of Canada, to wit, S.7 of the *Charter*.

> The relevant provisions of the *Narcotic Control Act* are as follows:
>
> S.2. "marihuana" means *Cannabis sativa L.*;
>
> "narcotic" means any substance included in the schedule or anything that contains any substance included in the schedule;
>
> S.3. (1) Except as authorized by this Act or the regulations, no person shall have a narcotic in his possession.
>
> (2) Every person who contravenes subsection (1) is guilty of an offence and liable
>
> (a) on summary conviction for a first offence, to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding six months or to both and, for a subsequent offence, to a fine not exceeding two thousand dollars or to imprisonment for a term not exceeding one year or to both; or
>
> (b) on conviction on indictment, to imprisonment for a term not exceeding seven years.
>
> ...
>
> S.22. (1) The Governor in Council may amend the schedule by adding thereto or deleting therefrom any substance, the inclusion or exclusion of which, as the case may be, is deemed necessary by the Governor in Council in the public interest.
>
> SCHEDULE

> 3. Cannabis sativa, its preparations, derivatives and similar synthetic preparations, including:
>
> (1) Cannabis resin,
> (2) Cannabis (marihuana),
> (3) Cannabidiol,
> (4) Cannabinol...,
> (4.1) Nabilone ...,
> (5) Pyrahexyl ..., and
> (6) Tetrahydrocannabinol.

The prospect of a jail sentence under S.3(2) of the *Narcotic Control Act*, upon conviction for the offence of simple possession, has been critical to the applicant's argument. It is the possibility of imprisonment which threatens the applicant's liberty interest under S.7 of the *Charter*.

However, S.3(2) of the *Narcotic Control Act* has since been supplanted by the sentencing provisions of the new *Controlled Drugs and Substances Act*, S.C. 1996, c.19, which came into force on May 14, 1997, that is, after the applicant was charged (under the old *Narcotic Control Act*) but before the passing of any sentence. Now, if convicted, the applicant must be sentenced in accordance with the provisions of the *Controlled Drugs and Substances Act*, so long as the punishment under this new Act is not more severe. (See S.62, *Controlled Drugs and Substances Act*). Under these provisions, the applicant continues to face a possible jail sentence and, to this extent, the sentencing provisions of this new Act are relevant to the application before me.

The applicable sentencing provisions of the *Controlled Drugs and Substances Act* are:

> S.4. (1) Except as authorized under the regulations, no person shall possess a substance included in Schedule I, II, or III.
>
> ...
>
> (5) Every person who contravenes subsection (1) where the subject-matter of the offence is a substance set out in Schedule II in an

amount that does not exceed the amount set out for that substance in Schedule VIII is guilty of an offence punishable on summary conviction and liable to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding six months, or both.

SCHEDULE II

1. Cannabis, its preparations, derivatives and similar synthetic preparations, including:

(1) ...
(2) Cannabis (marihuana)

SCHEDULE VIII

Substance	Amount
1. ...	
2. Cannabis (marihuana)	30 g

II. RULING RE APPLICATION TO FILE A "FURTHER AMENDED" NOTICE OF CONSTITUTIONAL CHALLENGE

After all the evidence was in, and just prior to oral submissions, the applicant sought to file a "FURTHER AMENDED" NOTICE OF CONSTITUTIONAL CHALLENGE, dated September 30, 1997. In this "FURTHER AMENDED" NOTICE, the applicant raised the same constitutional challenge to Schedules II and VIII of the new *Controlled Drugs and Substances Act*, S.C. 1996, c.19 (in force May 14, 1997), as he has to Section 3 of the Schedule to the *Narcotic Control Act*. The new Schedule II, like S.3 of the Schedule to the *Narcotic Control Act*, lists Cannabis and its derivatives as substances which one may not "possess". The new Schedule VIII, when read together with S.4(5) of the *Controlled Drugs and Substances Act*, operates so as set a maximum penalty that might be imposed, when the offence committed involves 30 grams (or less) of Cannabis (marihuana).

Following argument, I dismissed the application to file the "FURTHER AMENDED" NOTICE OF CONSTITUTIONAL CHALLENGE", dated September 30, 1997, with written reasons to follow. Those reasons are set out below.

I recognize that the applicant, if found guilty, must now be sentenced in accordance with S.4(5) of the new *Controlled Drugs and Substances Act*, given that the substance in issue (marihuana) is a Schedule II substance, and the amount in issue (0.5 of a gram) is less than the 30 gram limit set out in Schedule VIII of the Act. The applicant faces the possibility of imprisonment for the offence of possession, even under these new sentencing provisions and, to this extent, S.4(5) and Schedules II and VIII of the *Controlled Drugs and Substances Act* are relevant to the applicant's challenge under S.7 of the *Charter*.

However, the constitutionality of the "sentencing" provisions of the *Narcotic Control Act* (and now the *Controlled Drugs and Substances Act*) are not themselves the subject of a direct challenge by the applicant. To the contrary, the applicant's challenge has been, all along, to that provision in the *Narcotic Control Act* (Section 3 of the Schedule) which makes possession of marijuana for personal use an "offence". Schedule II of the *Controlled Drugs and Substances Act* is, like S.3 of the Schedule to the *Narcotic Control Act*, an "offence" provision. It defines marihuana as one of those substances which one may not possess under S.4(1) of the *Controlled Drugs and Substances Act*. Insofar as the applicant's challenge is to the "offence" of possession of marihuana, my jurisdiction is limited to the offence provision under which he is actually charged, that is, S.3 of the Schedule to the *Narcotic Control Act*, as it relates to S.3(1) of the *Act* itself. I have no jurisdiction to rule upon the constitutionality of Schedule II of the *Controlled Drugs and Substances Act*, this being a statutory provision under which the applicant is not charged. As for Schedule VIII of the *Controlled Drugs and Substances Act*, this Schedule is properly

characterized as a "sentencing" provision which, in combination with S.4(5), defines the penalty which may be imposed. Again, given that the applicant's constitutional challenge is to the "offence" of possession of marihuana, this sentencing provision does not properly belong in the NOTICE OF CONSTITUTIONAL CHALLENGE. Hence, the application to file the "FURTHER AMENDED" NOTICE, dated September 30, 1997, is denied.

III. ADJUDICATIVE FACTS RE: THE ALLEGED OFFENCE

As to the offence allegedly committed by the accused, an Agreed Statement of Facts has been filed (Exhibit 2). On June 13, 1993 at approximately 4:25 p.m., while patrolling a parking lot at the beach in White Rock, British Columbia, two R.C.M.P. officers observed the accused and another male passenger sitting in a Van owned by the accused. The officers observed the accused (the driver) start the Van and begin to back up. As one officer approached the Van, he smelled a strong odour of recently smoked cannabis (marihuana). The accused produced, for the officer, a partially smoked cigarette of cannabis (marihuana) from his right side. The cigarette subsequently weighed in at 0.5 of a gram. The accused possessed the partially smoked cigarette of cannabis (marihuana) for his own use and not for any other purpose.

IV. LEGISLATIVE FACTS

The Supreme Court of Canada has repeatedly stressed that, in *Charter* cases, there must be a sound factual foundation before the court, relating to the "purpose and background of legislation, including its social, eonomic and cultural context". This is generally required in order for the Court to be in a position to properly measure a particular piece of legislation against the provisions of the *Charter. McKay v Manitoba* [1989] 2 S.C.R. 357, Cory J. at 361; R. v. Danson [1990]

2 S.C.R. 1086. Facts which go to these broader issues have been referred to as "legislative facts". Professor Hogg describes such facts in the following terms in his text, *Constitutional Law of Canada* (3rd ed.), at 57-10 to 57-11:

> Legislative facts are the facts of the social sciences, concerned with the causes and effects of social and economic phenomena. Legislative facts...are often in issue in constitutional litigation, where the constitutionality of a law may depend upon such diverse facts as the existence of an emergency, the effect of segregated schooling on minority children, the relationship between alcohol consumption and road accidents, the susceptibility to advertising of young children, the affect of pornography on behaviour, or the affect of advertising on tobacco consumption.
>
> *Re Anti-Inflation Act* [1976] 2 S.C.R. 373; *Brown v. Board of Education* (1954) 347 U.S. 483; *R. v. Hufskey* [1988] 1 S.C.R. 621 and *R. v. Thomsen* [1988] 1 S.C.R. 640, *Irwin Toy v. Que.* [1989] 1 S.C.R. 927; *R v. Butler [*1992] 1 S.C.R. 452; *RJR-MacDonald v. Can.* [1995] 3 S.C.R 199.

In addition, on the question of whether a particular piece of legislation can survive section 1 of the *Charter*, the Supreme Court has made it clear that it "will also need to know what alternative measures for implementing the objective were available to the legislators when they made their decision". *R. v Oakes* [1986] 1 S.C.R. 103 at 138.

For the purpose of finding legislative facts, the trial court has a discretion to admit unsworn evidence, so long as that evidence is relevant to the issues before the Court and not inherently unreliable. The facts put forward may deal with "scientific, social, economic and political aspects" relevant to the issues. *MacKay, (supra)* at 361; *Re Anti-Inflation Act* [1976] 2 S.C.R. 373; *Residential Tenancies Act Reference*, [1981] 1 S.C.R. 714; Hogg, *Constitutional Law of Canada* (3rd ed.), 57-10 to 57-16.

The Court does not always restrict itself to the evidence presented by counsel:

> It is undesirable that an Act be found constitutional today and unconstitutional tomorrow simply on the basis of the particular evidence of broad social and economic facts that happens to have been presented by counsel.
>
> *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713 at 803, *per* LaForest J.

Unsworn evidence offered to establish legislative facts may take many forms:

1. Social science literature: RWDSU v. Saskatchewan (1987) 3 W.W.R. 673 (S.C.C.); *R. v. Video Flicks Ltd.* (1987) 55 C.R. (3d) 193 (S.C.C.); *R. v. Butler* (1992), 70 C.C.C. (3d) 129 (S.C.C.)

2. House of Commons Reports and Debates: *R. v. Butler, supra*, at 165; R. v. Lyons, [1987] 2 S.C.R. 309

3. Statistical information: Reference Re Public Service Employee Relations Act [1987] 1 S.C.R. 313; *R. v. Thomsen* (1988), 40 C.C.C. (3d) 411

4. International Agreements, including treaties: *Reference Re Public Service Employee Relations Act*, (supra)

5. The foreign laws of other free and democratic societies: *R. v. Big M Drugmart*, [1985] 1 S.C.R. 295

A great deal of written material is before me in the form of texts, Commission reports, scientific surveys, scientific research papers, and statistical data. Some of the scientific material is quite complex in nature and not all of it was the subject of review by any of the witnesses. With such material, it is obviously difficult for the trier of fact to come to any firm determination as to the reliability of the material, or its relevance. Questions arise as to whether the methodology is sound, whether the research findings have been duplicated, and whether the study has been the subject of peer review. In the result, I have relied primarily upon the *viva voce* at this hearing, together those written materials, reports and studies which were the subject of meaningful comment by the witnesses, in order to arrive at my conclusions regarding the legislative facts relevant to the issues in this case.

On August 14, 1997, McCart J. of the Ontario Court (General Division), delivered judgment in the case of *R. v. Clay*, (London, Ont., Court File No. 3887P). In *Clay*, the court was faced with a constitutional challenge to the laws relating to marihuana that is very similar to the one before me. The legislative facts were put before the court in the form of Affidavit evidence from a number of witnesses. Counsel for the applicant has filed copies of these *Clay* Affidavits in the proceedings before me, ostensibly for the limited purpose of establishing that the evidence before the court in *Clay* was different from the evidence before me. However, in his written submissions, counsel for the applicant has cited these Affidavits extensively to support his argument on what my findings of legislative facts should be. Counsel for the Crown argues that this is improper on the grounds that these Affidavits are not properly before me as "evidence". I do not agree. I have already noted the degree to which the rules of admissibility have been relaxed when it comes to leading evidence of legislative facts. Presumabley, under these rules, social science papers containing the same information as is set out in the Affidavits, and published by the same persons who authored the Affidavits, could have been filed in the proceedings before me. I am unclear as to why these Affidavits which, being "sworn", must have some modicum of reliability, cannot be filed on the same basis as the many, many papers that have, in fact, been entered as exhibits by both parties. Having said this, I can advise that I have not relied upon the Affidavits in question in order to reach my conclusions on the facts. To do so would, in my view, be unfair to the Crown, given that the Crown's only witness, Dr. Kalant, had no opportunity to offer any rebuttal to the material contained in these Affidavits. They were not put before him by counsel for the Crown (or for the defence), nor should they have been, given the Crown's understanding (and mine) as to the very limited purpose for which the Affidavits were originally being filed.

Turning to the *viva voce* testimony, I have heard from six expert witness, five for the applicant and one (Dr. Kalant) for the Crown. Collectively, these witnesses have produced thirteen volumes of transcripts.

1. Professor Neil Boyd
Professor Boyd is the director of the School of Criminolgy at Simon Fraser University. He has an Honours Psychology degree, and a Masters degree in Law. He was qualified as an expert in the fileds of (a) marihuana distribution and use, and (b) the history of the drug laws and the development of policy issues on drug use and distribution.

2. Dr. S.H. Peck
Dr. Peck testified in his capacity as a medical doctor and as the Deputy Provincial Health Officer for the Province of British Columbia. He gave evidence regarding the question of whether marihuana was considered to be a significant public health concern by the Provincial Health Office.

3. Dr. A. K. Connolly
Dr. Connolly has a B.A. in Physical and Health Education, a B.A. (Zoology), and a Doctorate of Medicine. In the early 1970's he was involved in planning and developing the Youth Addiction Prevention Project under the auspices of the Narcotics Addiction Foundatin of B.C. He became the Medical Director of the project in 1971. From 1971 to 1974, he was also Director of Treatment and Rehabilitation for the Narcotics Addiction Foundation of B.C. During the years 1971-1973, Dr. Connolly worked with a Vancouver medical clinic that was designed to assist transient young people with drug problems (save for heroin or other opiate users who were referred to that Narcotic Foundation to avoid having them mix with the soft drug users). The clinic serviced approximately 1,000 addicts per year. He was, for a time, its Clinical Director. From 1974 to 1981, he worked with the Alcohol and Drug Commission of B.C. Since 1982 to the present, he has worked primarily as a consulting psychiatrist physician to the Greater Vancouver Mental Health Service Society, dealing with the management of the severely psychiatrically ill, from an out-patient clinic. Drug abuse by these patients is an on-going problem. Dr. Connolly has testified for the Crown and the Defence on numerous occasion as an expert on alcohol and drug issuess.

Dr. Connolly was qualified to give expert evidence in the fields of (a) medicine, (b) the effects of alcohol and psychotropic drugs on individuals and the management of people affected by alcohol and psychotropic drugs, (c) the relationship between the use of psychotropic drugs and mental health, (d) policy issues relating to the control and regulation of legal and illict drugs, and (e) health education, both mental and physical.

I have gone over Dr. Connolly's baackground in some detail since it is apparent that he is the only witness to have spent many years "in the trenches", so to speak, working one-on-one with drug users. His

> knowledge about marihuana derives mainly from his very extensive practical experiences. He has also developed some very strong opinions as a result of his experiences working within the health care system. Still, I am satisfied that these opinions do not impair the reliability of his testimony about marihuana.
>
> 4. Dr. B. Beyerstein
> Dr. Beyerstein has a B.A. in Psychology, and a Ph.D. in Experimental and Biological Psychology. Among other activities, he teaches psychopharmacology at the undergraduate and graduate level. He was qualified as an expert in the fields of (a) psychoactive drugs, their effects on the brain, consciousness and behaviour, and (b) on policy ssues surrounding drug regulation.
>
> 5. Dr. John Morgan
> Dr. Morgan is a medical doctor with the Department of Pharmacology at the City University, New York Medical School. He was qualified to give expert evidence on (a) the effects of alcohol and pshchotropic drugs, including marihauana, on human beings.
>
> 6. Dr. Harold Kalant
> Dr. Kalant has a medical doctor degree and a B.Sc. in Medicine, and a PhD. in Pathological Chemistry, which was followed by a post-doctoral Fellowship in Biochemistry. He was qualified as an expert in the fields of (a) health, and (b) psychopharmacology. I found Dr. Kalant be a particularly knowledgeable, articulate, careful, fair, and dispassionate witness.

The Crown has raised some concerns about the reliability of two of the applicant's witnesses, Dr. Morgan and Dr. Beyerstein. Both witnesses acknowledge being active promoters of the movement to change the laws relating to cannabis. That fact does not, in itself, constitute a reason for giving no weight to their evidence. Even Dr. Kalant, has a position on the legalization issue, although he was careful to avoid taking sides during his testimony.

> ... It is concluded, from a cost-benefit analysis based on pharmacologic, toxicologic, sociologic, and historical facts, that radical steps to repeal the prohibitions on presently illicit drugs would be likely, on balance, to make matters worse rather than better.
>
> Kalant and Goldstein, "*Drug Policy: Striking the Right Balance*", (1990) 246 Science 1513 at 1513 (for the reference to marihuana specifically, see p. 1517)

I am prepared to assume that each of the witnesses at this hearing developed their respective policy positions as a result of their understanding of the scientific facts about marihuana, rather than the reverse. In the absence of evidence to the contrary, I have proceeded on the basis that their testimony about marihuana *per se* was delivered without taint by their respective political philosophies.

Having said this, I do acknowledge that the court should approach, with caution, the evidence of any expert witness who demonstrates a tendency to drift from "evidence" to "argument". Dr. Beyerstein was particularly prone to this. On several occasions he referred to "our" Brandeis Brief, and he was, at times, inclined to depart from his role as a "witness" and to assume the role of an "advocate". In assessing his evidence, I have proceeded with great caution.

IV. (1) LEGISLATIVE HISTORY

The *Opium and Drug Act* of 1911, (S.C. 1911, c.17) was Canada's first legislation prohibiting the possession of narcotics. It contained a Schedule of prohibited drugs (cocaine, morphine, opium, and eucaine) which did not include Cannabis. Under the *Act*, the power to add new drugs to the Schedule was given to the Cabinet. In 1923, a consolidated and amended *Opium and Narcotic Drug Act* was enacted. At the same time, cannabis sativa was added to the Schedule of prohibited drugs under that Act. This was done by order-in-council. There was no discussion or debate in the House of Commons at the time of its inclusion, beyond the Health Minister's simple assertion to the House: "There is a new drug in the schedule.". Canada, *House of Commons Debates*, Session 1923, at 2124 (Exhibit 38); Boyd, N. "The Origins of Canadian Narcotics Legislation: The Process of Criminalization in Historical Context", 8 *Dalhousie Law Journal* 102 at 129 (Defence Brandeis Brief,

Exhibit 18, Tab 2); MacFarlane, Bruce .A., *Drug Offences in Canada* (1986, 2nd ed.), Aurora: Canada Law Book Inc., at 24 (Crown's Brandeis Brief, Exhibit 5, Tab 19).

At the time that Cannabis became a prohibited drug, there was little information available about the substance. It appears that the writings of Emily Murphy, an Edmonton, Alberta Magistrate, were of considerable influence. Commencing in 1920, she published a series of sensationalist articles in McLean's Magazine on the supposed effects of marihuana use. These articles were later expanded into a book called *The Black Candle*, (Toronto, Thomas Allen) which was published in 1922. The allegations being made were derived primarily from correspondence with U.S. police officials. They consisted of reckless assertions of fact which were, quite simpy, untrue. In writing about "Marihuana: A new Menace", at pp.332-3 of her book, she quotes Charles A. Jones, the Chief of Police for the City of Los Angeles:

> He says, "...The addict loses all sense of moral responsibility. Addicts to this drug, while under its influence, are immune to pain, and could be severely injured without having any realization to their condition. While in this condition they becoming 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..."

She closes the chapter, "Marihuana: A New Menace", by stating:

> It has been pointed out that there are three ways out from the regency of this addiction. First, insanity. Second, death. Third, abandonment. This is assuredly a direful trinity and one with which the public should be cognizant...
>
> Quoted by Boyd, N.T during his Testimony (Transcript, 28 November 1995, p.33); and by MacFarlane, Bruce A., *Drug Offences in Canada*, (supra) at 24; and by McCart J. in Regina v. Clay, (supra) at 7-8.

There was no evidentiary or factual support for any of the allegations contained in the above quotations. Indeed, there was little, if any, scientific information available

about marihuana in 1922. Still, commentaries of this sort helped to create a climate of irrational fear which, no doubt, provided some impetus to the movement to prohibit the use of marihuana.

In fact, there appears to have been no evidence of any significant social or health problem associated with marihuana back in 1923, or in the years subsequent to its criminalization. In his decision in *Clay* (*supra*, p.7), McCart J. has noted that there were no recorded convictions for possession of marihuana until 1937 and the annual conviction rate over the next 20 years fluctuated somewhere between 0 and 12. After referring to similar statistics, Bruce A. MacFarlane notes, in his text, *Drug Offences in Canada*, (*supra*) at p.25:

> Indeed, in 1955 (22 years after its inclusion on the schedule), the Special Senate Committee on the Traffic in Narcotic Drugs in Canada reported that:
>
> > Marijuana is not a drug commonly used for addiction in Canada...No problem exists in Canada at present in regard to this particular drug. A few isolated seizures have been made but these have been visitors to this country.
> >
> > *Proceedings of the Special Senate Committee on the Traffic in Narcotic Drugs in Canada* (1955, The Senate of Canada; The Honourable Tom Reid, Chairman), at p.XII.

The testimony of Dr. Kalant is to the same effect:

> ... the law which was passed in 1923 was not, in fact, in response to what was perceived as a large -- statistically a large problem of use of cannabis in Canada. The evidence, such as it is, doesn't suggest there was widespread use, and secondly, any information about its consequences was not being gathered in a systematic way, so the -- whatever the reasons were for passing the law, I don't think we can say they rested on a public health basis. (Transcript, 31 January 1997 at 29; See also Transcript, 5 September 1997 at 118)

In 1961, the *Opium Act* was restructured and renamed the *Narcotic Control Act*, S.C. 1960-61, c.35. The final edition of this *Act* (R.S.C. 1985, Chap. N-1), is the statute under which the applicant is charged.

A penalty of seven years imprisonment for simple possession existed from 1923 until 1969, at which time simple possession of marihuana was hybridized, thereby enabling the authorities to prosecute by summary conviction instead of solely by indictment. The penalty for conviction (upon summary conviction) dropped from a possible 7 years to a maximum of 6 months upon a first conviction. This amendment occurred at a time when marihuana was becoming increasingly more popular as a recreational drug. This had led to a significant increase in recorded convictions. The practical effect of the amendment was to reduce the number of prison sentences that were being imposed.

IV. (2) MARIHUANA: CURRENT RATES OF USE

As noted above, cannabis sativa or marihuana was rarely consumed in Canada until the 1960's. Use increased dramatically commencing in 1966, peaked around 1979, and decreased until about 1990 when a further increase, particularly among youths, was noted. Use appears to have decreased again. User rates today remain substantially lower than those recorded in the late 1960's and early 1970's. Use among 12-17 year olds in 1992 was 8% compared to 24% in 1979. Use among 18-25 year old was 23% in 1992 compared to 46.9% in 1979. Most adolescents cease to use marihuana after a few years.

It is now estimated that some 4 to 5 million people have tried marihuana. Statistical surveys suggest that, as at 1990, 23.2% of Canadians 15 years and older had used marihuana at some time in their lives. In 1993, 4.2% of Canadians 15 years of age and older used marihuana in the past year. This was a decline from 1989 when the figure was 6.5%. This 4.2% figure represents approximately 1 million Canadians age 15 or older.

Although the statistical surveys do not give us a very clear picture as to the frequency of use by the 4.2% of the population in issue, Dr. Kalant did confirm that one might fairly estimate that some 95% of the 1 million users would be low/occasional/moderate users. Approximately 5% of the total user group would be chronic users. A chronic user is generally considered to be a person who uses 1 or more marihuana joints (cigarettes) per day. Counsel for the applicant has argued that 5% of the 4.2% of Canadians (15 years of age or older) who use marihuana represents approximately 30,000 chronic users. I have some difficulty with the math here. If it is agreed that 1 million Canadians use marihuana (representing 4.2% of the population 15 years and older), 5% of that group of 1 million users comes, by my calculations, to 50,000 chronic users.

> Exhibit 15, National Alcohol and Other Drugs Survey, Part Two, Health and Welfare Canada, 1990;
>
> Exhibit 16, "Licit and Illicit Drugs", Canadian Profile, Chap. 4, Canadian Centre for Substance Abuse and Addiction Research Foundation, 1995;
>
> Exhibit 46, Eric Single, Ann McLennan and Patricia McNeil, "Alcohol and other Drug Use in Canada", Research publication for the Studies Unit, Health Promotion Directorate, Health Canada and the Canadian Centre on Substance Abuse Horizons 1994;
>
> Exhibit 47, Eric Single, Joan Brewster, Patricia McNeil, Jeffrey Hatcher and Katherine Trainer, Alcohol and Drug Use Results from the 1993 General Social Survey, Report prepared for the Studies Unit, Health Promotion Directorate, Health Canada, January, 1995;
>
> Exhibit 14, "Substance Use and Abuse", The Adolescent Health Survey, Province of British Columbia, Chapter 10

IV. (3) DOES MARIHUANA POSE A HEALTH RISK FOR THE USER?

On the question of whether individual marihuana users face any health risks, the distinction between "low/occasional/moderate users" and "chronic users" is of considerable importance. Quite simply, the risk of harm from the use of

marihuana depends upon which group one is talking about. All of the witnesses from whom I have heard, including Dr. Kalant, appear to agree that there is no evidence to sugest that low/occasional/moderate users assume any significant health risks from smoking marihuana, so long as they are healthy adults and do not fall into one of the vulnerable groups, namely immature youths, pregnant women and the mentally ill. On the other hand, for the chronic user, there is a significant health risk, although, this is primarily from the process of smoking, rather than from the chemical make-up of the drug.

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

1. the occasional to moderate use of marihuana by a healthy adult is not ordinarily harmful to health, even if used over a long period of time;

2. there is no conclusive evidence demonstrating any irreversible organic or mental damage to the user, except in relation to the lungs and then only to those of a chronic, heavy user such as a person who smokes at least 1 and probably 3-5 marihuana joints per day;

3. there is no evidence demonstrating irreversible, organic or mental damage from the use of marihuana by an ordinary healthy adult who uses occasionally or moderately;

4. marihuana use does cause alteration of mental function and as such should not be used in conjunction with driving, flying or operating complex machinery;

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

6. marihuana is not addictive;

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

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

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

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

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

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

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

These findings are, in my view, supported by the testimony of the experts who have appeared before me, including the Crown's expert, Dr. Kalant. They are also consistent with the findings of McCart J. in *Regina v. Clay*, (*supra*) at 11-12. They are also consistent with the findings of the Ledain Commission of Inquiry into the Non-Medical Use of Drugs (1972/1973). This Commission was appointed by the Federal Government of Canada in 1969. After almost four years of public hearings and research, the majority of the commissioners concluded that simple possession of marihuana should not be a criminal offence. The Commission's findings with respect to cannabis, as summarized in the applicant's written submissions, are as follows:

> i. cannabis is not a "narcotic";
>
> ii. few acute physiological effects have been detected from current use in Canada;
>
> iii. few users (less than 1%) of cannabis move on to use harder and more dangerous drugs;
>
> iv. 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. the short term physical effects of cannabis are relatively insignificant and there is no evidence of serious long term physical effects.
>
> LeDain, G., *Cannabis: A Report of the Commission of Inquiry into the Non-Medical Use of Drugs*, Ottawa, Information Canada, 1972,, in particular, Chapter 6 "Conclusions and Recommendations", pp.265-310 and summary of recommendations at pp.301-302, 310, Exhibit 18, Defence Brandeis Brief, Tab 19;
>
> LeDain, G., *Final Report of the Commission of Inquiry into the Non-Medical Use of Drugs*, Ottawa, Information Canada, 1973, Exhibit 18, Defence Brandeis Brief, Tab 20.

Notwithstanding the above conclusions, one cannot say that marihuana is a completely harmless drug for all individual users. The LeDain Commission isolated four areas of concern, which are summarized in the decision of McCart J. in the *Clay* decision (*supra*) at p. 13:

> ...the probably harmful effect of cannabis on the maturing process in adolescence; the implications for safe driving arising from impairment of cognitive functions and psycho motor abilities...the possibility, suggested by reports in other countries and clinical observations on this continent, that the long term heavy use of cannabis may result in a significant amount of mental deterioration and disorder; and the role played by cannabis in the development and spread of multi-drug use by stimulating a desire for drug experience and lowering inhibitions about drug experimentations.
>
> LeDain, G., *Cannabis: A Report of the Commission of Inquiry into the Non-Medical Use of Drugs*, Ottawa, Information Canada, 1972, (supra);
>
> LeDain, G., *Final Report of the Commission of Inquiry into the Non-Medical Use of Drugs*, Ottawa, Information Canada, 1973, (supra).

In September 1994, some 22 years after the LeDain Report, the Hall Report (Australia) was delivered. (Hall, Solowij, and Lemon, *National Drug Strategy, The health and psychological consequences of cannabis use,* (1994), Canberra, Australia, Australian Government Publishing Service, Crown's Brandeis Brief, Tab 3.) The Hall Report contains a number of conclusions regarding the "adverse" effects of cannabis which are set out in the Executive Summary at pp. ix-xi.

As to the "Acute effects", that is, the adverse effects that might occur while actually under the influence, the Hall Report notes:

- anxiety, dysphoria, panic and paranoia, especially in naive users;

- cognitive impairment, especially of attention and memory, for the duration of the intoxication;

- psychomotor impairment, and probably an increased risk of accident if an intoxicated person attempts to drive a motor vehicle or operate machinery;

- an increased risk of experiencing psychotic symptoms among those who are vulnerable because of personal or family history of psychosis;

- an increased risk of low birth weight babies if cannabis is used during pregnancy.

The first two findings noted above refer to effects that are actually quite rare, and are transient in nature. Taken as a whole, the findings suggest is that: (1) naive users should be careful and if they choose to smoke should do so with experienced users and in an appropriate setting; (2) no one should be studying, writing an exam, or engaging in other complex mental activities while in a state of intoxication induced by cannabis (or alcohol, for that matter); (3) pregnant women should not smoke cannabis (of course, they should not be smoking tobacco or drinking alcohol either); (4) the mentally ill or those with a family history of mental illness should not use cannabis; and (5) as with alcohol, no one should drive, fly or operate complex machinery while under the influence of marihuana.

As to the "Chronic effects", that is, the adverse effects that might occur from the chronic use of cannabis (daily use over many years), the Hall Report notes that there is still considerable "uncertainty".

The "major *probable* adverse effects" from chronic use appear to be:

- respiratory diseases associated with smoking as the method of administration, such as chronic bronchitis, and the occurrence of

histophathalogical changes that may be precursors to the development of malignancy;

- development of a cannabis dependence syndrome, characterized by an inability to abstain from or to control cannabis use;

- subtle forms of cognitive impairment, most particularly of attention and memory, which persist while the user remains chronically intoxicated, and may or may not be reversible after prolonged abstinence from cannabis.

The "major *possible* adverse effects" from chronic use (that is, effects which remain to be confirmed by further research) are:

- an increased risk of developing cancers of the aerodigestive tract, i.e. oral cavity, pharynx, and oesophagus;

- an increased risk of leukaemia among offspring exposed while in utero; [*since disproven*]

- a decline in occupational performance marked by underachievement in adults in occupations requiring high level cognitive skills, and impaired educational attainment in adolescents;

- birth defects occurring among children of women who used cannabis during pregnancies. [*since disproven*]

Both Dr. Kalant and Dr. Connolly agreed that research since the publication of the Hall Report (1994) has failed to reveal any foundation for the above-noted concerns regarding(1) leukaemia among off-spring, and (2) birth defects among children of women who used marihuana during pregnancy. These concerns would no longer be considered as "risks" in the scientific community.

Finally, the Hall Report identifies three traditional "high risk groups":

(1) Adolescents with a history of poor school performance whose educational achievements may be further limited by cognitive impairments if chronically intoxicated, or who start using cannabis at an early age (there being a concern that such youths are at higher risk of becoming chronic users of cannabis as well as other drugs);

(2) Women of childbearing age, because of the concern with the effects of smoking cannabis while pregnant; and

(3) Persons with pre-existing diseases such as cardiovascular diseases, respiratory diseases, schizophrenia or other drug dependencies, all of whom may face a risk of precipitating or exacerbating the symptoms of their deceases.

One last report should be mentioned. Dr. Kalant chaired the Joint Addiction Research Foundation-World Health Organization (ARF/WHO) meeting which produced the *Report of an ARF/WHO Scientific Meeting on Adverse Health and Behavioral Consequences of Cannabis Use* (Exhibit 5, Crown's Brandeis Brief, Tab 1, Fehr and Kalant, 1981, Toronto: ARF Books). He subsequently chaired a further committee of scientific experts on marihuana, which was convened by the World Health Organization in 1993 for the purpose of producing an up-dated report on the health consequences of marihuana use. In early 1998, this second report was released, with a caution that it was not a "formal publication" of WHO. (*Cannabis: a health perspective and research agenda*, Division of Mental Health and Prevention of Substance Abuse, World Health Organization (1997), Exhibit 53) A summary of this committee's findings is found at pages 30-31 of the report. These findings, although organized differently, are similar to those found in the Hall Report (*supra*) except that leukaemia and birth defects among children born to women who smoked while pregnant are not noted as risks arising from chronic use.

There was general agreement among the witnesses who appeared before me (save perhaps for Dr. Morgan) that the conclusions contained in the Hall Report were sound (except for the references to leukemia and birth defects), based on the scientific information available at this time. It should be noted that, apart from the "acute effects", which are rare and transient, none of the above reports raise any significant concerns about the well-being of a healthy adult who is a low/occasional/moderate user of marihuana.

IV. (4) IS THERE A RISK OF HARM TO OTHERS OR TO SOCIETY AS A WHOLE?

An individual who is in a state of intoxication induced by marihuana poses a risk to the health and safety of others should he or she drive, fly or operate complex machinery. The applicant agrees that the state has a legitimate interest in protecting members of society from such conduct. Section 253(a) of the *Criminal Code*, R.S.C. 1985, Chap. C-46 already achieves this purpose. It is a criminal offence to operate a "vehicle, vessel, aircraft or railway equipment" while one's ability to do so is impaired by a drug. There is really no evidence to suggest that driving while under the influenc of marihuana is an actual problem in our society. On the other hand, determining whether a driver is in fact impaired by marihuana may be difficult. Absent a confession, there are significant difficulties in proving such a charge in court. This may account for the lack of statistics on this issue.

Apart from the above problem, there is no evidence to suggest that harm of any kind will befall individual members of society as a result of any actions by individual marihuana users.

The final question is whether the use of marihuana poses any risk or imposes any burden upon society as a whole. The current widespread use of marihuana does not appear to have had any significant impact on the health care system of this province and, more importantly, it has not been perceived by our health care officials as a significant health concern, either provincially or nationally. (Testimony of Dr. S. Peck, Deputy Provincial Health Officer for the Province of British Columbia, Transcript 8 March 1996, pages 3-78. Dr. Peck confirmed that the Annual Reports from the Provincial Health Officer from 1992, 1994, and 1995 make no reference to marihuana use or marihuana health problems as causing any kind of significant health problem in this Province. He noted a lack of any evidence showing that marihuana use is causing a burden of any kind on the health care system. (Exhibit 11, *Annual Report from the Provincial Health Officer*, 1992; Exhibit 12,

Annual Report from the Provincial Health Officer, 1994; Exhibit 13, *Annual Report from the Provincial Health Officer*, 1995).

The evidence establishes that any health care concerns (including financial concerns) associated with marihuana use in this country are minor compared to the social, criminal and financial costs associated with the use of alcohol or tobacc.

Even when marihuana use was at its highest in the 1970's and 1980's, there was very little impact on the health care system from the recreational use of this drug. This was confirmed by Dr. Connolly, who was a front-line health care provider during this period of time, working with youth and street persons with drug abuse problems.

IV. (5) MARIHUANA: DOES PROHIBITION AFFECT THE RATES OF USE?

In recent years, convictions for cannabis possession have fluctuated between 29,119 (1989) and 35,587 (1984). On average, 2,128 individuals/year have been incarcerated for possession of cannabis. Between 1977-1985, 93% of all cannabis convictions were for simple possession and the majority of all narcotics convictions were for cannabis-related offences. (Note: disposition statistics for marihuana possession charges have not been published by the government since 1985).

It has been estimated that by the 1990's over 600,000 Canadians will have criminal records for cannabis related offences.

As to the relationship between the existence of penal sanctions and the prevalence of marihuana consumption, it should be noted that, since 1969, the potential penalty for conviction of simple possession of marihuana on summary

conviction has remained the same. Also, a jail sentence has been a much less likely prospect. Writing in 1982, Professor Boyd noted, "Since 1967 the percentage of individuals jailed for possession of marihuana has dropped from 46% to 4.3%." (Exhibit 18, Defence Brandeis Brief, Tab 1: "The Question of Marihuana Control: Is "De Minimis" Appropriate, Your Honour?", 24 *Criminal Law Quarterly* 212 at 223)

Thus, in Canada, it would appear that the variations in consumption rates noted above (in particular, the decline in consumption since 1969) have occurred with no apparent statistical relationship to any increase or decrease in the severity of the law or its application.

This phenomenon is not unique to Canada. In the Netherlands, where marihuana use has been *de facto* decriminalized since 1976 (the law is not enforced if the amount in question is 30 grams or less), there was some increase in usage following implementation of this policy. Unfortunately, statistics for consumption rates prior to the adoption of the non-enforcement policy were not kept; hence, it is difficult to draw any confident conclusions from the Netherlands experience. It is of some note, however, that the consumption rates in the Netherlands, under the non-enforcement policy, remain well below those of the United States of America which maintains the most punitive approach towards marihuana.

Since 1987 in South Australia and 1992 in the Australian Capital Territory, an "expiation" scheme has been in place in cases of simple possession of small amounts of cannabis. Under these schemes, the offender may pay a small fine, thereby avoiding a criminal conviction and record. Studies by the South Australian Office of Crime statistics found that these schemes did not result in any significant increase in the number or type of persons caught using marihuana. Again, in those American states (11) which have reduced the possession of marihuana from a

criminal offence to a regulatory offence (enforced by way of a ticket and fine), consumption rates do not appear to have been significantly affected. These rates are not out of line with the rates of use in comparable states where possession of marihuana is punishable by imprisonment. At times they are actually lower, suggesting that marihuan consumption rates tend to rise and fall independent of the law.

> Boyd, N. "The Question of Marihuana Control: Is "De Minimis" Appropriate, Your Honour?", (982) 24 Criminal Law Quarterly 212, Defence Brandeis Brief, Exhibit 18, Tab 1;
>
> Bryan, M.C., "Cannabis Canada + a decade of indecision", Federal Legal Publications, Inc. (1980), Defence Brandeis Brief, Exhibit 18, Tab 3;
>
> Erickson and Fischer, "Canadian Cannabis Policy: The Impact of Criminalization, the Current Reality and future Policy Options", Toronto, Addiction Research Foundation1995, Defence Brandeis Brief, Exhibit 18, Tab 4;
>
> Zimmer and Morgan, "Exposing Marijuana Myths: A Review of the Scientific Evidence", 1995, p.2, 14, Defence Brandeis Brief, Exhibit 18, Tab 11;
>
> Boyd, N. High Society: Legal and Illegal Drugs in Canada, Toronto, Key Porter Books, 1991, see 78, 79, 81-82, 99, Defence Brandeis Brief, Exhibit 18, Tab 16;
>
> LeDain, G. Cannabis: A Report of the Commission of Inquiry into the Non-Medical Use of Drugs, Ottawa, Information Can. 1972 (particularly Chapter 6 "Conclusions and Recommendations, pp.265-310 and summary of recommendations at pp.301-302, 310), Defence Brandeis Brief, Exhibit 18, Tab 19;
>
> LeDain G. Final Report of the Comm.. of Inquiry into the Non-Medical Use of Drugs, Ottawa, Information Can., 1973, Defence Brandeis Brief, Exhibit 18, Tab 20.
>
> Testimony of Professor N. Boyd: 28 November 1995, pp. 38-39, 44-49, 78-80, 13 March 1996, pp.39-41
>
> Testimony of Dr. Kalant, 30 January 1997, pp. 70-71, 74-75; 31 January 1997, pp. 20-21.

I remain dubious as to whether one can draw any significant conclusions about what might occur, upon legalization, to rates of marihuana use in Canada from experiences in countries that are culturally, economically and geographically distinct. It should also be noted that the applicant is seeking a declaration that the possession of marihuana be fully legalized. We should be cautious about assuming that the consequences of legalization would be the same as the consequences of non-enforcement or conversion to a regulatory offence.

Our experience with prohibition (alcohol) is informative. Dr. Kalant and Professor Boyd both confirmed that alcohol consumption decreased during the prohibition era and increased afterwards. Goldstein and Kalant, "*Drug Policy: Striking the Right Balance*", (*supra*) at 1515:

> As would be expected, the ease of obtaining a drug affects its consumption. Contrary to the prevalent view that prohibition failed, there is substantial evidence that it reduced alcohol consumption substantially, albeit at the price of bootlegging, gangsterism, violence, and disrespect for the law among some segments of society...
>
> Conversely, lowering of the legal drinking age in a number of states and provinces led to an immediate increase in alcohol-related driving accidents contributed by those under 21. Thus, although drinking by those under 21 had, no doubt, gone on previously, it increased sharply when the law permitted it.

Again, I am mindful of the fact that alcohol and marhuana are qualitatively different drugs with their own unique "cultures" in terms of how, when and why they are consumed. Thus, one cannot assume that marihuana consumption will necessarily increase to a substantial degree upon legalization, just because alcohol consumption did.

It is a fair and comon sense conclusion that marihuana consumption would increase upon legalization, thereby leading to an increase in the absolute number of chronic users and vulnerable persons adversly affectd by the drug.

However, it is impossible to conclude, from the evidence before me, whether this increase would be substantial, moderate, or negligible. Still, there is at least a "risk" that the consumption rates may rise to the point where the costs associated with attending to the chronic users and other vulnerable persons become a significant burden upon our health care and social welfare systems.

IV. (6) DOES THE LAW PROHIBITING THE POSSESSION OF MARIHUANA CAUSE HARM?

There is a consensus that there are, indeed, social and economic costs attached to the prohibition against marihuana. In summary, they are as follows:

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

2. disrespect for the law by upwards of one million persons who are prepared to engage in this activity, notwithstanding the legal prohibition;

3. distrust, by users, of health and educational authorities who, in the past, have promoted false and exaggerated allegations about marihuana; the risk is that marihuana users, especially the young, will no longer listen, even to the truth;

4. lack of open communication between young persons and their elders about their use of the drug or any problems they are experiencing with it, given that it is illegal;

5. the risk that our young people will be associating with actual criminals and hard drug users who are the primary suppliers of the drug;

6. the the lack of governmental control over the quality of the drug on the market, given that it is available only on the blackmarket;

7. the creation of a lawless sub-culture whose only reason for being is to grow, import and distribute a drug which is not available through lawful means;

8. the enourmous financial costs associated with enforcement of the law; and

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

V. SECTIONS 91 AND 92, *Constitution Act*, 1867: IS THE LEGISLATION *ULTRA VIRES* THE FEDERAL PARLIAMENT?

The applicant has questioned whether the prohibition against the possession of cannabis (marihuana) is *intra vires* the federal Parliament?

This issue has already been answered in the affirmative by the Supreme Court of Canada. In *R. v. Hauser* [1979] 1 S.C.R. 984, 46 C.C.C. (2d) 481, the majority of the Court characterized the *Narcotic Control Act*, R.S.C. 1970, C-34, as legislation enacted under the federal Peace, Order and Good Government power under S.91 of the *British North America Act*, 1867.

In support of this conclusion, Pigeon J., speaking for the majority, observed that, in 1867, drug abuse had not been a problem in Canada (at 997), that the *Narcotic Control Act* was designed to deal with a genuinely new problem which did not exist at the time of Confederation (at 1000), and that the subject matter of the Act clearly could **not** be characterized as a "Matter of a merely local or private Nature" under S.92(16) of the *B.N.A. Act*, (at 1000). In the same vein, Spence J., expressed the view that federal legislation was necessary to properly deal with the subject matter of the legislation, given that the trade in both legal and illegal drugs "constantly crosses national and provincial boundaries". (at 1004)

The evil at which the legislation was aimed was the abuse of and addiction to narcotic drugs. Pigeon J., for the majority, found support for this in the language set out in the preamble of the 1961 *Single Convention on Narcotic Control 1961*, a treaty to which Canada became a party on March 30, 1961. That preamble contains the following statements:

> ...
> *Recognising* that addiction to narcotic drugs constitutes a serious evil

> for the individual and is fraught with social and economic danger to mankind.
> ...
>
> *Considering* that effective measures against abuse of narcotic drugs requires co-ordinate and universal action,
>
> *Hauser*, (*supra*) at 999

The applicant has urged that I re-assess the *Hauser* decision., in view of the *obiter* comments by Laskin, C.J.C. in *Schneider v. The Queen*, [1982] 2 S.C.R. 112 (at 115), 68 C.C.C. (2d) 449 at (453-4) to the effect that *Narcotic Control Act* is more properly characterized as legislation enacted under the federal Criminal Law power:

> I would myself have viewed the *Narcotic Control Act* as an exercise of the federal criminal law power (as did Dickson J. dissenting on another point in Hauser); and had I sat in Hauser, I would have supported the reasons of Spence J. who, in Hauser, saw the *Narcotic Control Act* as referable to both the criminal law power and to the trade and commerce power;
>
> ... There is, in my view, good ground to reconsider that basis of decision, resting as it did on a bare majority judgment.

Notwithstanding the above comments of Laskin, C.J.C., I am bound by the decision in *R. v Hauser*. That decision was not over-ruled by the court in *Schneider v. The Queen*. To the contrary, Dickson J., speaking for himself and 6 others in Schneider, clearly accepted the decision in *Hauser* (*supra*) as the final authority on the relationship between the peace order and good government power and the competence of the federal parliament to make laws for the control of narcotics. If the decision in *Hauser* is to be reconsidered, this must be done by the Supreme Court of Canada.

In fact, the applicant's ultimate position is that neither the Peace, Order and Good Government power nor the Criminal Law power entitle the federal government to enact legislation of a penal nature prohibiting the possession of

cannabis (marihuana) for personal use, notwithstanding the comments of Pigeon J. in *Hauser* (*supra*) or the comments of Laskin C.J.C. in *Schneider*, (*supra*). This submission is predicated upon a proposition put forth by the applicant to this effect:

> Before any conduct can be prohibited under the criminal law or by way of any legislation penal in character (and carrying with it the threat of imprisonment), it must be demonstrated that the conduct involves a demonstrable harm or risk of harm to another individual or individuals or to society as a whole.

Given the absence of any evidence that the individual user of cannabis poses any risk of harm to others or to society as a whole, it is submitted that the simple possession and use of marihuana by individuals cannot be the subject of criminal or legislation that is otherwise penal in character.

In view of my conclusion that I am bound by the decision in *R. v. Hauser*, (*supra*), I do not propose to consider the argument on the above 'principle' at this point in my judgment. It appears again in the applicant's submissions on S.7 of the *Charter* where, in my view, it more properly belongs. Absent any consideration of the *Charter*, any analysis under S.91 and 92 of *Constitution Act* must contain a conclusion that the subject matter in question lies within the competence of either the federal or provincial government. Yet, it is the applicant's position that neither level of government can prohibit individuals from possessing and using marihuana in the absence of any evidence demonstrating that such use carries with it a risk of harm to others or to society as a whole. Such a conclusion can only be reached through a consideration of the *Charter*. It cannot be reached through a traditional analysis of the division of powers under S.91 and S.92 of the *Constitution Act*.

Finally, the applicant submits that the prohibition against the possession of marihuana (as opposed to the *Narcotic Control Act* as a whole) cannot be justified under the "Peace, Order and Good Government" power, in that there has

never been any evidence that the ***use of marihuana*** presents a problem or "emergency" of national dimensions within the meaning of *Labatt Breweries of Canada Ltd. v. Attorney General of Canada et al.*, Breweries of Canada Ltd. v. Attorney General of Canada et al., [1980] 1 S.C.R. 914, 52 C.C.C. (2d) 433 at 465-466. The applicant further asserts that the possession of marihuana, to the extent that it is a health concern, clearly is a matter of a "merely local or private nature", there being no evidence that the health issues relevant to the use of marihuana are a matter of 'national' concern transcending the power of each province to adequately address in its own way. This argument presumes that marihuana must, in its own right, satisfy the "Peace Order and Good Government" tests set out in the authorities before it can be the subject of prohibitory legislation under the federal residual power. I do not think that this presumption is sound. Once the general character and purpose of the *Narcotic Control Act* has been determined and once this purpose has been determined to be a matter which properly falls under the federal domain, it is not necessary that each and every drug listed in the Schedule to the *Narcotic Control Act* meet the character and purpose test. The field has been validly occupied by the federal parliament. The field is broad. It is not limited to only those drugs which give rise to health concerns that have a national dimension to them.

The *Schneider* decision (*supra*) does not support the applicant's argument on this issue. In Schneider, the court was concerned with the validity of the *Heroin Treatment Act* (B.C.). All members of the court agreed that the pith and substance of this legislation was the "treatment" of heroin addicts and that the "treatment" of addicts is a health matter that is of a "local and private" nature. Accordingly, the legislation was *intra vires* the provincial legislature. The "treatment" of addicts was seen as a health issue that was distinct and severable from the health concerns addressed by the federal Parliament in the *Narcotic Control Act*, those

being, "the ***possession***, trafficking, importing and exporting, and cultivation of narcotics". (Dickson J. at 466; emphasis added) Speaking about this distinction, Dickson J. noted:

> It [heroin dependency] is not something that "goes beyond local or provincial concern or interests and must from its inherent nature be the concern of the Dominion as a whole... Nor can it be said, on the record, that heroin addiction has reached a state of emergency as will ground federal competence under residual power.
>
> I do not think the subject of narcotics is so global and indivisible that the legislative domain cannot be divided, illegal trade in narcotics coming within the jurisdiction of the Parliament of Canada and the treatment of addicts under provincial jurisdiction. *Schneider v. The Queen*, (*supra*) S.C.R at 131-32, C.C.C. at 466-7

Estey J., in separate reasons, reached a similar conclusion. He confirmed the existence of a provincial jurisdiction in relation to those aspects of health that are "local in nature", as well as a federal jurisdiction in relation to health which exists where "the dimension of the problem is national rather than local". *Schneider v. The Queen*, (supra) at C.C.C. at 474-475. As to the "treatment" issue, he stated:

> But I do not read that authority [*R. v Hauser*] as determining that narcotics addiction treatment as distinct from regulation of trafficking and ***use*** of narcotics is necessarily assigned to the peace, order and good government powers of Parliament without more... *Schneider*, (*supra*) C.C.C. at 475 (emphasis added)
>
> ... health would appear to be a divisible field according to the nature of the measure taken. *Schneider*, (*supra*) C.C.C. at 476.

The above comments of the members of the court in *Schneider* re-affirm the conclusion that the *Narcotic Control Act* is a valid exercise of federal legislative power over ***possession and use***, as well as trafficking and cultivation of drugs. Moreover, while the field of health may well be divisible "according to the nature of the measure taken" (Estey J., *Schneider*, (*supra*) C.C.C. at 476., one cannot read into the judgement in *Schneider* the proposition that jurisdiction over

the field is divisible according to the nature of the particular drug (such as cannabis) in issue.

In conclusion, the applicant's request that I re-consider the issue of whether the prohibition against the possession of cannabis (marihuana) is a valid exercise of federal legislative power under S. 91 of the *Constitution Act*, 1867 is dismissed. I should point out that the NOTICE OF CONSTITUTIONAL CHALLENGE does not raise the issue of whether this legislation is *ultra vires* the federal Parliament. It would not be appropriate for me to deal with such a challenge in these circumstances.

VI. SECTION 7 OF THE CHARTER OF RIGHTS

I will begin with some general comments regarding the role of the court in *Charter* cases of the kind before me. Firstly, the court is not concerned with the question of whether a particular piece of legislation represents a wise or effective or cost-effective policy choice by our elected law-makers. The only question before the court is whether that legislation conforms to the *Charter of Rights*. *Rodriguez v. A.G. Canada and A.G. B.C.*, [1993] 3 S.C.R. 519, Sopinka J. at 589-590

Secondly, the courts are prepared to show 'judicial deference' to the legislative process in cases involving complex medical and social science issues. This point was made most recently in the *RJR MacDonald Inc. v. Canada (A.G.)* (1995), 127 D.L.R. (4th) 1 (S.C.C.), a case in which the 'effects of cigarette advertising' was an issue. La Forest states, at 51-52:

> Courts are specialists in the protection of liberty and the interpretation of legislation and are, accordingly, well placed to subject criminal justice legislation to careful scrutiny. However, courts are not specialists in the realm of policy-making, nor should they be. This is a role properly assigned to the elected representatives of the people, who have at their disposal the necessary institutional resources to

> enable them to compile and assess social science evidence, to mediate between competing social interests and to reach out and protect vulnerable groups. In according a greater degree of deference to social legislation than to legislation in the criminal justice context, this court has recognized these important institutional differences between legislatures and the judiciary.

In the United States, the courts have shown similar deference to their legislatures in the realm of social policy as it relates to prohibitions against the possession of marihuana. In *U.S. v. Kiffer* the court highlighted the serious difficulties involved in judicial intervention in the highly charged political context in which narcotics legislation exists:

> Any Court asked to undertake review of the multifarious political, economic and social considerations that usually underlie legislative prohibitory policy should do so with caution and restraint. In this case, the challenged legislation incorporates conclusions or assumptions concerning an array of medical, psychological and moral issues of considerable controversy in contemporary America. Indeed, as a recent perceptive study suggests, "Marijuana, in fact, has become the symbol of a host of major conflicts in our society, each of which exacerbates any attempt at a rational solution to the problem". J. Kaplan, Marijuana - The New Prohibition 3 (1970). This should serve as a reminder that in most instances the resolution of such sensitive issues is best left to the other branches of the government.
>
> *United States v. Kiffer*, 477 F.2d 349 at 352 (1973); See also: People v. Shepard, 409 N.E. 2d. 840 at 842-3; *U.S. v. Green*, 89 2 F. 2d 453 at 455-456 (1989); *Wolkind v. Selph*, 495 F. Supp 507 (1980); *State v. Peek*, 422 N.W. 2d 160; I, 458 N.F. 2d 499 (Ill. 1983)

Turning to the case before me, I do not think it can be doubted that there are numerous difficulties in evaluating the health hazard to humans of any drug, including marijuana. Accordingly, I must be guided by the cautions expressed in the above passages.

> For a concise summary of these difficulties, see the Hall Report of 1994 (*supra*) at page 1. See also "Cannabis: a health perspective and research agenda", WHO 1997 (*supra*) at pages 2-5 (Ch.2: Cannabis and health: some issues about inference) and at pages 31-33 (Ch. 15: Recommendations for future research).

Notwithstanding the above, and this brings me to my third point, the Supreme Court of Canada has recognized that courts have a ***duty*** to, and indeed, are ***empowered*** to measure the content of legislation against the guarantees of the Constitution when asked, notwithstanding that the ultimate effect of the application is to challenge the wisdom of the government's policy. *Operation Dismantle v. The Queen, et al.*, [1985] 1 S.C.R. 441.

Finally, as to the reviewability of S.3 of the Schedule to the *Narcotic Control Act*, this provision is the product of a federal Cabinet decision, under the authority of S.22(1) of the *Act*, to add marihuana to the Schedule of prohibited drugs by way of Order-in-Council. Such decisions of the federal Cabinet are reviewable by the courts under the *Charter. Operation Dismantle,* (*supra*).

VI. LIBERTY AND SECURITY OF THE PERSON

Section 7 of the Charter reads as follows:

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

The applicant has identified three interests which he asserts are protected by S.7. Each interest is allegedly threatened by the legal prohibition against possession of marihuana. They are:

1. the right to human dignity and personal autonomy;

2. the right to privacy; and

3. the right to physical liberty (freedom from the threat of imprisonment).

VI. (1) HUMAN DIGNITY AND PERSONAL AUTONOMY

The concepts of liberty and security of the person, as contained in S.7 of the *Charter* have been interpreted broadly by the Supreme Court of Canada. It is clear that these concepts include much more than the absence of physical constraints. They have substantive content. A key aspect of that content is the notion of 'human dignity'. Human dignity is a protected value in any free and democratic society. Human dignity is illusory in the absence personal autonomy, that is, the right to make decisions affecting one's own life. The importance of personal autonomy and human dignity as values in our society has been recognized in several decisions of our Supreme Court. Speaking about the meaning of liberty, Wilson J., in *R. v. Morgentaler,* [1988] 1 S.C.R. 30, states:

> The *Charter* and the right to individual liberty guaranteed under it are inextricably tied to the concept of human dignity. (at 164)
>
> .....
>
> The idea of human dignity finds expression in almost every right and freedom guaranteed in the ***Charter***. Individuals are afforded the right to choose their own religion and their own philosophy of life, the right to choose with whom they will associate and how they will express themselves, the right to choose where they will live and what occupation they will pursue. ***These are all examples of the basic theory underlying the Charter, namely that the state will respect choices made by individuals and, to the greatest extent possible, will avoid subordinating these choices to any one conception of the good life.*** (at 166) [Emphasis added]

Similarly, La Forest, J. (speaking for the majority of the Court on this issue) in *B.(R.) v. Childrens' Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 (at 368-369) states:

> On the one hand, liberty does not mean unconstrained freedom; see Re *B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 (*per* Wilson J., at p.524); *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713 (*per* Dickson D.J., at pp. 785-86). Freedom of the individual to do what he or she wishes must, in any organised society, be subjected to numerous constraints for the common good. The state undoubtedly has the right to impose many types of restraints on individual behaviour, and not all limitations will attract *Charter* scrutiny. On the other hand, liberty does not mean mere freedom from physical

> restraint. ***In a free and democratic society, the individual must be left room for personal autonomy to live his or her own life and to make decisions that are of fundamental personal importance.*** In *R. v. Morgentaler*, [1988] 1 S.C.R. 30, Wilson J. noted that the liberty interest was rooted in the fundamental concepts of human dignity, personal autonomy, privacy and choice in decisions going to the individual's fundamental being. She stated at p. 166:
>
> > ***Thus, an aspect of the respect for human dignity on which the Charter is founded is the right to make fundamental personal decisions without interference from the state.*** This right is a critical component of the right to liberty. Liberty, as was noted in Singh, is a phrase capable of a broad range of meaning. In my view, this right, properly construed, grants the individual a degree of autonomy in making decisions of fundamental personal importance. [Emphasis added]

The right of personal autonomy, that is, the 'liberty' to live one's own life and to make decisions that are of fundamental personal importance, includes the right to make decisions pertinent to one's own health, and to determine what one can and cannot do to one's own body, notwithstanding that the such decisions may be foolhardy and potentially harmful to one's self. The right to make autonomous decisions with respect to one's bodily integrity is deeply rooted in our common law traditions, and is most apparent in the field of medical ethics. In *Malette v. Shulman et al.* (1990), 72 O.R. (2d) 417, a case involving 'informed consent', the Ontario Court of Appeal made the following observations:

> ***The state's interest in preserving the life or health of a competent patient must generally give way to the patient's stronger interest in directing the course of her own life.*** As indicated earlier, there is no law prohibiting a patient from declining necessary treatment or prohibiting a doctor from honouring the patient's decision. To the extent that the law reflects the state's interest, it supports the right of individuals to make their own decision. (at 429) [Emphasis added]

The right to make decisions about one's own health, and the right of control over one's bodily integrity appear now to be entrenched in the S.7 *Charter* provisions dealing with 'liberty' and 'security of the person'. In the course of

protecting an individual (who has not been declared incompetent) from compelled psychiatric treatment, the Ontario Court of Appeal concluded as follows:

> On the first branch of the analysis, it is manifest that the impugned provisions of the Act [i.e. *Mental Health Act*] operate so as to deprive the appellants of their right to "security of the person" as guaranteed by s.7. The common law right to bodily integrity and personal autonomy is so entrenched in the traditions of our law as to be ranked as fundamental and deserving of the highest order of protection. This right forms an essential part of an individual's security of the person and must be included in the liberty interests protected by s.7. ***Indeed, in my view, the common law right to determine what shall be done with one's own body and the constitutional right to security of the person, both of which are founded on the belief in the dignity and autonomy of each individual, can be treated as co-extensive.*** [Emphasis added]
>
> *Fleming v. Reid* (1991) 4 O.R. (3d) 74, 88 (Ont. C.A.); See also *R. v. Taylor* (1992), 77 C.C.C. (3d) 551 (Ont. C.A.)

Finally, the Supreme Court of Canada has confirmed that the S.7 *Charter* right to "security of the person" encompasses the right to make autonomous decisions as they relate to one's bodily integrity:

> There is no question, then, that personal autonomy, at least with respect to the right to make choices concerning one's own body, control over one's physical and psychological integrity, and basic human dignity are encompassed within security of the person, at least to the extent of freedom from criminal prohibitions which interfere with these.
>
> *Rodriguez v. B.C.(A.G.)*, [1993] 3 S.C.R. 519 (S.C.C.) *per* Sopinka J. at 588. See also: *R. v. Morgentaler*, [1988] 1 S.C.R. 30; 37 C.C.C. (3d) 449 (S.C.C.) at CCC 556; *Reference re: ss. 193 and 195.1(1)(c) of the Criminal Code*, [1990] 1 S.C.R. 1123

How do the above principles regarding the right to human dignity and personal autonomy apply to the constitutional challenge before me? In fact, a number of courts have considered the question of whether the prohibition against marihuana offends S.7 of the *Charter*. The most relevant decision, for my purposes, is that of the Honourable Mr. Justice Curtis of the Supreme Court of British Columbia

in *R. v. Malmo-Levine and Roswell*, Vancouver Registry No. CC970509, February 18,1998. His conclusions are as follows (at 5-6):

> *The starting point for an analysis of this issue is to determine what it is that is intended to be constitutionally protected by the words life, liberty and security of the person in s. 7 of the Charter. Constitutional protection is the highest level of protection our law allows, and when found to exist will be enforced in priority to all other interests. I interpret the word liberty in s. 7 to refer to the position of a person within Canadian society. Any society, by its very essence, has rules. No one within a society can be free to do absolutely anything which suits them and no member of Canadian society has ever had such freedom. Justice LaForest, speaking for the majority of the Supreme Court of Canada in the case of B.R. v. Children's Aid Society said at page 30:*
>
> > *On the one hand, liberty does not mean unconstrained freedom; see Re B.C. Motor Vehicle Act, [1985] 2 S.C.R. 486 (per Wilson J., at p.524); R. v. Edwards Books and Art Ltd., [1986] 2 S.C.R. 713 (per Dickson D.J., at pp. 785-86). Freedom of the individual to do what he or she wishes must, in any organised society, be subjected to numerous constraints for the common good. The state undoubtedly has the right to impose many types of restraints on individual behaviour, and not all limitations will attract Charter scrutiny. On the other hand, liberty does not mean mere freedom from physical restraint. In a free and democratic society, the individual must be left room for personal autonomy to live his or her own life and to make decisions that are of fundamental personal importance."*
>
> *In the case of R. v. Morgentaler, Justice Wilson speaking of liberty and s. 7 of the Charter refers at page 166 to:*
>
> > *"The right to make fundamental personal decisions without interference from the state."*
>
> *and goes on to say:*
>
> > *"In my view, this right, properly construed, grants the individual a degree of autonomy in making decisions of fundamental, personal importance."*
>
> ***Interpreting the Charter in light of the common law and legal traditions of Canada, I find no basis for holding that freedom to use marihuana constitutes a matter of fundamental, personal importance, such that it is included within the meaning of the word liberty in s. 7 of the Charter.*** *There being no right to use marihuana created by the right to life, liberty and security of the person, the question of the principles of fundamental justice need not*

> *be considered. The Narcotics Control Act does not infringe Mr. Malmo-Levine's or Mr. Rowell's rights under s. 7.* [Emphasis added]

In reaching the above conclusion, Curtis J. relied upon a number of earlier decisions, all of which have concluded that the provisions of the *Narcotic Control Act* dealing with the possession of marihuana use do not infringe of any of the rights guaranteed by S.7 of the *Charter*.

> *R. v. Hamon* (1993) 85 C.C.C. (3d) 490 (Que. C.A.);
>
> *R. v. Hunter*, B.C.S.C., Victoria Registry No. 88807, April 14, 1997 (Tyrwhitt-Drake, J.);
>
> *R. v. Cholette*, B.C.S.C., Victoria Registry No. 64964, March 23, 1993 (Dorgan, J.);
>
> *R. v. Clay*, Ontario Court (General Division), Registry No.38887F, August 14, 1997 (McCart J.)
>
> *R. v. Parker*, Ontario Ct. of Justice (Prov. Div.),Toronto Registry, October 7, 1997 (Sheppard J.)

In *Hamon* (*supra*), the Quebec Court of Appeal does not really resolve the question of whether the prohibition against the personal possession of marihuana is an infringement of either (1) "the freedom from being detained against one's will, or (2) "a person's right to make fundamental personal decisions without interference from the state" (see p.492). The court was satisfied that the evidence demonstrated that abusive use of marihuana has detrimental effects on the user and society. On this basis, the court found that the prohibition against marihuana is not arbitrary or irrational (or xenophobic, vague or racist). This is, of course, an issue that relates to an analysis of the principles of fundamental justice. In effect, the court appears to have concluded that, if there is a deprivation of liberty, such deprivation is in accordance with the principles of fundamental justice.

In *Hunter*, (*supra*), the court again does not address the issue of whether there has been a deprivation of liberty. Rather, the conclusion is that "the

statutes contain reasonable prohibitions against certain conduct, and these are not unduly broad in their application" (at p.6). Once again, these are findings that relate to an analysis of the principles of fundamental justice. They support the conclusion that, if there is a deprivation of liberty, such deprivation is in accordance with the principles of fundamental justice.

In *Cholette* (*supra*), the court does conclude that "the accused's right to life, liberty and security cannot include the right to possession and/or cultivation of marihuana just because he and others in applying their subjective view of the existing law consider the law inappropriate". Referring to the decision of the Supreme Court of Canada in Morgentaler (supra), the court describes the 'liberty' interestof the accused in these terms:

> I shall paraphrase: One must be able to make one's own decisions and to accept the consequences. That is essential to one's self-respect as a human being.
>
> In this case Mr. Cholette is free to make his own decisions; he must accept the consequences for the decisions he makes. He has the freedom from state intervention until he does something which Parliament has decided is illegal and then he faces the consequences of state interference and/or sanction. (at p.5)

The constitutional principles underlying the above conclusions are a little unclear to me. Nonetheless, the finding that the right to possess marihuana is not a right protected by S.7 is consistent with and approved of by the court in *Melmo-Levine and Rowsell* (*supra*).

In *Clay* (*supra*), the court again proceeded on the basis that "the applicants, who are facing criminal charges with most serious consequences, have their liberty and security in grave peril". In other words, there was a deprivation (or threatened deprivation) of liberty by virtue of a possible prison sentence. The court then devoted its attention to the question of whether this deprivation of liberty was

in accordance with the principles of fundamental justice. The court concluded that (1) the legislation was not arbitrary; (2) the legislation was not overly broad; (3) the right to possess marihuana could not be considered "fundamental; and (4) the evidence demonstrated that the consumption of marihuana does cause harm, albeit not as much as first believed. (at 21-23)

In *Parker* (*supra*), the accused established that he was an epileptic and that the use of marihuana was medically necessary for the treatment of his symptoms. The court concluded that the prohibition against the personal possession of marihuana impaired the accused's liberty and the security of his person by virtue of the threat of imprisonment upon conviction and by virtue of the fact that he was being denied access to the medical benefits associated with the use of marihuana. In coming to this conclusion, the court did not disturb or question other decisions (such as *Clay, supra*) which, in the context of recreational as opposed to medical use, had held that the right to possess marihuana is not "of fundamental importance". (at p. 18) The court concluded that the legislation was overbroad and accordingly, the deprivation of liberty suffered by the accused offended the 'principles of fundamental justice. At page 20:

> It does not accord with 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.

In *Parker*, Sheppard J. declined to strike down the legislation. Instead, he created a 'constitutional exemption' for those persons possessing or cultivating marihuana for their personal medically approved use. Such persons are protected from prosecution under the legislation. By implication, the validity of the legislation in relation to recreational users of marihuana is upheld in *Parker*.

With respect to the decisions of our Supreme Court in *Cholette* (*supra*) and *Melmo-Levine and Rowsell*, (*supra*), the applicant submits that these decisions do not properly characterize or address the issue. According to the applicant, the right to possess and use marihuana is protected by S.7 of the *Charter*, not because the right to use marihuana is a matter of fundamental personal importance, but because the decision to consume marihuana, notwithstanding that it might be harmful to one's health, is nothing more nor less than an exercise of the fundamental right of autonomy over one's own health and bodily integrity. The *Narcotic Control Act* prohibition against the possession of marihuana for personal use deprives the individual of this fundamental right of autonomy.

In my view, whatever thoughts I had on the above position of the applicant "went up in smoke", so to speak, with the arrival of the February 1998 decision of our Supreme Court in *Melmo-Levine and Rowsell*, (*supra*). Notwithstanding the applicant's position, noted above, Mr. Justice Curtis was clearly satisfied that the issue was more properly characterized as a question of whether S.7 of the *Charter* guarantees the right to use marihuana. I am bound by this decision of Curtis J. The fact that the charge before him was possession of marihuana for the purpose of trafficking, rather than simple possession, is of no significance. It is clear from the decision that he was ruling on the question of simple possession, independent of any considerations about the trafficking aspect of the charge.

The background to the *Melmo-Levine and Rowsell* decision is of some importance. The constitutional challenge before the court included a S.7 *Charter* challenge identical to the one before me. In fact, with the consent of the Crown, argument proceeded on the basis that all of the findings of fact (legislative facts) sought by the applicant before me had been proven. The written submissions of the applicant before me were then presented to Mr. Justice Curtis. In effect, Mr. Justice

Curtis has ruled on precisely the same factual and legal issues as are before me, the only difference being that the applicant's argument on the facts was, for the purpose of argument, assumed to have been proven.

In view of the decision in *Melmo-Levine and Rowsell*, (supra), I conclude that there has been no infringement of the applicant's liberty or security of person as these concepts relate to his right to make decisions regarding his own health and bodily integrity.

VI. (2) The Right to Privacy (Personal Autonomy)

In his written submissions, the applicant has asserted that "the principle of fundamental justice incorporates a right to privacy". He states,

> "Loosely-defined as "the right to be left alone", it is submitted that this right to privacy includes the right to indulge in the consumption of intoxicants in the privacy of one's home and it is submitted that the state should not interfere with this privacy right in the absence of compelling circumstances." (parag. 122)

In my view, the concepts of 'liberty' and 'principles of fundamental justice are distinct. Analytically, it is important to keep them so, otherwise a logical analysis under S.7 of the *Charter* becomes difficult. The cases relied upon by the applicant characterize 'privacy' as a right, not as a principle of fundamental justice. In *R. v. O'Connor* (1995), 103 C.C.C. (3d) 1 (S.C.C.) at p.53, the court acknowledged "the great value of privacy in our society" as well as the court's sympathy for the proposition that S.7 of the *Charter* includes a right to privacy. The court went on to note that "respect for individual privacy is an essential component of what it means to be free". *O'Connor*, (*supra*) at 54-55. See also the decision of the Supreme Court of Alaska in *Ravin v. State*, 537 P.2d 494 at 509-510 and 511

(1975), wherein the court considered the State's prohibition against possession of marihuana in light of the American constitutional guarantee of a right to privacy.

As defined by the applicant and by the court in Ravin v. State, (supra), the right to privacy is, to me, indistinguishable from the notion of liberty and security of the person advanced by the applicant (see above). Conceptually, this notion of 'privacy' appears to be nothing more than 'liberty and security of the person' under a different name. It is unclear to me how the applicant's notion of a right to privacy is necessary to or capable of advancing his argument. The conclusions reached above regarding the general use of marihuana as not being of fundamental importance would encompass the narrower right to use marihuana in the privacy of one's own home.

VI. (3) THE RIGHT TO PHYSICAL LIBERTY: FREEDOM FROM THE THREAT OF IMPRISONMENT

It is conceded that, by virtue of the potential for imprisonment following commission of the offence in this case, the applicant's liberty interest under S.7 is engaged.

> *Reference re SS. 193 and 195.1(1)(c) of the Criminal Code (Man.)* [1990] 1 S.C.R. 425 (S.C.C.) at 1140; *Singh v. Minister of Employment and Immigration,* [1985] 1 S.C.R. 177 at 207

The decision in *Melmo-Levine and Rowsell*, (*supra*) deals only with the question of whether 'liberty and security of the person' and the associated concepts of human dignity and personal autonomy include the right to possess maihuana. The conclusion was, No. The decision does not deal with the submission that there is a deprivation of the applicant's physical liberty through the threat of imprisonment for the use of marihuana. The Crown concedes that there is such a deprivation of liberty

and that there must be an assessment of the 'principles of fundamental justice' to determine whether the deprivation is in accordance with those principles.

VII. THE PRINCIPLES OF FUNDAMENTAL JUSTICE

The principles of fundamental justice are found "in the basic tenets and principles, not only of our judicial process, but also of the other components of our legal system".

> Reference re Section 94(2) of the Motor Vehicle Act, [1985] 2 S.C.R. 486 at 503, 512; *Rodriguez v. British Columbia* (Attorney General), [1993] 3 S.C.R. 519 at 590-591 per Sopinka J.

The principles of fundamental justice are principles which are well-established, precise and articulable concepts. They must be "legal principles":

> ***A mere common law rule does not suffice to constitute a principle of fundamental justice, rather, as the term implies, principles upon which there is some consensus that they are vital or fundamental to our societal notion of justice are required.*** Principles of fundamental justice must not, however, be so broad as to be no more than vague generalizations about what our society considers to be ethical or moral. ***They must be capable of being identified with some precision and applied to situations in a manner which yields an understandable result. They must also, in my view, be legal principles.*** [Emphasis added.]
>
> Rodriguez v. B.C., (supra), at 590-591.

In considering the issue of fundamental justice, one must necessarily engage in a balancing process. The object of that process is to come to "a determination of the balance to be struck between individual rights and the interests of society" such as are engaged by the legislation in issue. *Chiarelli v Canada (Minister of Employment and Immigration,* (1992) 72 C.C.C. (3d) 214 (S.C.C.) at 220. The balancing process will involve a consideration of a number of issues, including the scope of the legislation, the rationale behind it, the nature of the societal and state interests that are being advanced, the applicable principles and

policies that have animated legislative and judicial practice in the field, and the interests of the accused, in particular, the nature of the liberty he has lost.

Chiarelli (*supra*); Re Kindler and Minister of Justice, (1991) 67 C.C.C. (3d) 1; *Rodriguez* (*supra*), *R. v. Heywood* (1994) 94 C.C.C. (3d) 481 at 514 (S.C.C.); *R. v. Lyons* [1987] 2 S.C.R. 309; *Singh v. Ministry of Employment and Immigration*, [1985] 1 S.C.R. 177

The observations of Cory J. in *Heywood* (*supra*) on the concept of overbreadth are instructive. He refers to 'overbreadth' as "no more than an analytical tool" for examining the means chosen by the state and how those means relate to the purpose of the state, as expressed through its legislation. At 156, he states:

> Reviewing legislation for overbreadth as a principle of fundamental justice is simply an example of the balancing of the State interest against that of the individual.

Thus, any analysis of legislation under S.7 involves an assessment of state interests and individual interests to determine whether the balance between them does or does not offend the principles of fundamental justice. This is of particular importance to the applicant in the present case. The assessment of his interests necessarily requires that weight be given to the ultimate consequence for him, which is a loss of his liberty if convicted. However, the assessment also requires an assessment of the nature of the conduct which he is prohibited from engaging in. Here, the applicant might like to argue that the focus should be on the state's interference with the applicant's right to autonomy and his right to make decisions about his bodily integrity. That, in my view, is too abstract an approach for a S.7 analysis. The specific conduct in issue is clearly the use of marihuana and I do not think the applicant can avoid that fact. When particularized, his complaint is that the legislation constitutes an unjustified interference with his right to possess and use marihuana.

Of course, Curtis J. has already determined, in the *Melmo-Levine and Rowsell* decision (*supra*), that the right to possession and use of marihuana is ***not a matter of fundamental, personal importance***. Hence it is not conduct which is protected by S.7 of the Charter. This conclusion, which is binding on me, has significant consequences when it comes to a consideration of the principles of fundamental justice. It means that, in the balancing of state and individual interests, one cannot attach any weight to the applicant's interest, that interest being the right to possess and use marihuana without threat of imprisonment by the state. Moreover, it would appear, from the authorities, that considerations about overbreadth, and arbitrariness, and even the 'harm' principle proposed by the applicant are not principles that exist independent of the balancing process. Rather, they are aspects of that process, and as such, they too are affected by the fact that no weight can be given to the applicant's interests. In short, given the finding in *Melmo-Levine and Rowsell* (*supra*) that the right to possess marihuana is "not a matter of fundamental importance" and that it is not a protected interest under S.7 of the *Charter*, it is simply not possible to come to the conclusion that the interest of the applicant in possessing marihuana outweighs the interest of the state in prohibiting the same for the purpose of solving the health problems, if any, associated with its use.

In conclusion, the applicant clearly faces the threat of imprisonment if he possess marihuana contrary to the existing law. This amounts to a deprivation of 'liberty' under S. 7 of the *Charter*. However, this deprivation of liberty does not offend the principles of justice.

VIII. THE 'HARM' PRINCIPAL

In his written argument, the applicant asserts the following:

> It is submitted that, similarly, in a criminal or penal law context, it is a principle of fundamental justice that conduct by an individual that does not involve ***demonstrable harm to another individual or other individuals or to society as a whole***, shall not be prohibited under threat of imprisonment or other substantial penalty affecting liberty or the security of one's person, whether under the criminal law or any laws analogous thereto carrying penal consequences. (para. 85)

This above proposition is worthy of some consideration, given that it directlt engages the legislative facts in issue.

To support the above proposition, the applicant relies upon the philosophical writings of John Stuart Mill (1806-1873) who, in the introduction to his essay, "*On Liberty*", said:

> The object of this essay is to assert one very simple principle, as entitled to govern absolutely the dealing of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion. ***That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.*** He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil in case he do otherwise. To justify that, the conduct from which it is desired to deter him, must be calculated to produce evil to someone else. ***The only part of the conduct of anyone, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute.*** Over himself, over his own body and mind, the individual is sovereign. (at 21; See also 13-14, 149-50 and 187) [Emphasis added]
>
> "*On Liberty*" by John Stuart Mill, John W. Parker and Son, West Strand, London, 1859 at p.21.
>
> See also the majority decision in: LeDain, G. *Cannabis: A Report of the Commission of Inquiry into the Non-Medical Use of Drugs*, 1972 *(supra*) at 275-282

Reference to the writings of John Stuart Mill was made by Wilson J., in dissent, in *R. v. Jones*, [1986] 2 S.C.R. 284 at 318 and her reference was in turn quoted with approval by La Forest J. writing for the majority in *B(R) v. Children's Aid Society of Metropolitan Toronto*, (*supra*) at 364-365, as well as by Cory, Iacobucci and Major, J.J., dissenting in part, at 430-431. However, these references should not be taken in isolation from other comments made by Wilson J. regarding the right of the individual to make ***fundamental*** personal decisions and decisions of ***fundamental*** personal importance. *Morgentaler*, (*supra*) at 166. See also the comments of LaForest J. regarding the liberty interest being rooted in fundamental concepts of "...choice in decisions going to the individual's ***fundamental being***. *B.(R.) v. Children's Aid,* (*supra*).

The applicant has asserted an alternative principle in his written argument:

> ...it is submitted that it is now a well-settled "principle of fundamental justice" that the criminal law must be used with restraint and should only be employed to protect against "seriously harmful" conduct or conduct which is "substantially harmful to society. (parag. 98)

In this respect, the applicant relies upon the following comments in the 1969 *Report of the Canadian Committee on Corrections* (Ouimet Report) at p. 12:

> The Committee adopts the following criteria as properly indicating the scope of criminal law:
>
> > No act should be criminally proscribed unless its incidence, actual or potential, is substantially damaging to society.

Also cited is a 1982 Government of Canada policy statement, "The Criminal Law in Canadian Society":

> ...since society has many other means for controlling or responding to conduct, criminal law should be used only when the harm caused or threatened is serious, and when the other, less coercive or less intrusive means do not work or are inappropriate.

> Government of Canada, *The Criminal Law in Canadian Society*, 1982 at p. 45

In my view, the proposals that the criminal law be used only to protect against conduct that involves demonstrable harm to another individual or other individuals or to society as a whole or against conduct that is seriously harmful or substantially harmful to society are not 'principles of fundamental justice'. The case authorities are to the contrary. See *R. v. Butler* (1992), 70 C.C.C. (3d) 129 at 165 per Sopinka, J. (S.C.C.)

> ...The impugned provision...is designed to catch material that creates a risk of harm to society. It might be suggested that proof of actual harm should be required. It is apparent from what I have said above that it is sufficient in this regard for Parliament to have a reasonable basis for concluding that harm will result and this requirement does not demand actual proof of harm.

In fact, our Supreme Court has consistently granted Parliament "a broad discretion in proscribing conduct as criminal and in determining proper punishment". *R. v. Hinchey* (1996), 111 C.C.C. (3d) 353 at 369-70. The principles applicable to Parliament's law-making powers in the criminal sphere make clear that Parliament has a broad scope of authority to "criminalize" conduct in order to address any social, political or economic interests. *Labatt Breweries of Canada v. A.G. Canada,* (*supra*) at 457. And at 456-7:

> Parliament may not deprive an individual of the right to liberty or security of person in the absence of a compelling interest in curtailing these rights for the common good ***because it is necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.*** [Emphasis addd]

If there was any doubt of how this principle might be applied in the present context, it was resolved when the Supreme Court of Canada indicated, in *R.J.R. MacDonald Inc. v. Canada*, (*supra*) that Parliament may legislate under the criminal law power to protect Canadians from harmful drugs. In this case, LaForest

notes, at p.473, that the evil targeted by the legislation was "the detrimental effects caused by tobacco consumption". He later notes:

> The harm tobacco consumption causes each year to individual Canadians, and to the community as a whole, is tragic.

He subsequently held that the legislation in question, which was designed to prohibit tobacco manufacturers from inducing Canadians to consume tobacco, was valid legislation under the Criminal Law power (at 475). LaForest clearly suggests that, had Parliament chosen to prohibit the possession and use of tobacco as well, in order to protect individual Canadians from their own bad habits, this too would have been valid legislation under the Criminal Law power. He is, however, mindful of the impracticalities involved in attempting to prohibit the use of an addictive drug which is currently being used by one third of the population. (at 477)

The correct position is, in my view, that which is set out in *Butler*, (*supra*) at 165. To paraphrase in terms that are applicable to the case before me: Parliament may enact penal legislation prohibiting use of a drug, when it has a reasonable basis for concluding that there is a risk of harm to the health of the user, or a risk of harm to society as a whole.

The evidence before me demonstrates that there is a reasonable basis for believing that the following health risks exist with use marihuana.

> There is a general risk of harm to the users of marihuana from the acute effects of the drug, but these adverse effects are rare and transient. Persons experiencing the acute effects of the drug will be less adept at driving, flying and other activities involving complex machinery. In this regard they represent a risk of harm to others in society. At current rates of use, accidents caused by users under the influence of marihuana cannot be said to be significant.
>
> There is also a risk that any individual who chooses to become a casual user, may end up being a chronic user of marihuana, or a member of one of the vulnerable persons identified in the materials. It is not possible to identify these persons in advance.

> As to the chronic users of marihuana, there are health risks for such persons. The health problems are serious ones but they arise primarily from the act of smoking rather than from the active ingredients in marihuana. Approximately 5% of all marihuana users are chronc users. At current rates of use, this comes to approximately 50,000 persons. There is a risk that, upon legalization, rates of use will increase, and with that the absolute number of chronic users will increase.
>
> In addition, there are health risks for those vulnerable persons identified in the materials. There is no information before me to suggest how many people might fall into this group. Given that it includes young adolescents who may be more prone to becoming chronic users, I would not estimate this group to be miniscule.
>
> All of the risks noted above carry with them a cost to society, both to the health care and welfare systems. At current rates of use, these costs are negligible compared to the costs associated with alcohol and drugs. There is a risk that, with legalization, user rates will increase and so will these costs.

In view of these facts, I am satisfied that there is a reasonable basis for Parliament to have concluded that the possesion and use of marihuana poses a risk to the health of users and to society as a whole. The risk is not large. It need not be in order for Parliament to be entitled to act. It is for Parliament to determine what level of risk is acceptable and what level of risk requires action.

In conclusion, the legal prohibition against the possession of marihuana does not offend against any principle of fundamental justice that is related to the "harm" principle asserted by the applicant.

In view of the above findings, it cannot be said that the legislation is arbitray, irrational or overbroad, even if one were to assume that the right to use marihuana was a protected right under the *Charter*.

IX. CONCLUSION

The *Narcotic Control Act* provisions prohibiting the possession of marihuana for personal use are not contrary to Section 7 of the *Charter of Rights*.

The application for a declaration that such provisions are null and void is denied.

BY THE COURT

F. E. Howard, P.C.J.