PART 1

STATEMENT OF FACTS

A. The Adjudicative Facts

1. The adjudicative facts were summarized by the Court below as follows:

> During late afternoon of June 13, 1993, two RCMP officers were patrolling a parking lot at a beach in White Rock, they observed the appellant Victor Eugene Caine and a male passenger sitting in a van owned by Mr. Caine. The observed Mr. Caine, who was seated in the drivers sit, starts the engine and begins to back up. As one officer approached the van, he smelt a strong odor of recently smoked marihuana.
>
> Mr. Caine produced for the officer a partially smoked cigarette of marihuana, which weighed 0.5 grams. He possessed the marihuana cigarette for his own use and not for any other purpose.
>
> **Reasons for Judgment below, Appellants Record in Malmo-Levine, Vol. II pp.244-245, para's 6 & 7; See Exhibit 2 in the proceedings at trial, Appellants Record, p.5-5b**

B. The Legislative Facts

2. The legislative facts are set out in detail in the "Joint Statement of Legislative Facts" submitted jointly by the appellants Caine, Malmo-Levine and Clay. In addition, where not inconsistent, this Appellant accepts the findings of fact in the Courts below with respect to the Legislative facts as follows:

a.	Legislative history:	- Trial -paras 31-35 - Appeal -paras 71-96
b.	Current rates of use of marihuana:	- Trial -paras 36-38 - Appeal -para. 17
c.	Health risks posed to the user of marihuana:	- Trial -paras 39-48 - Appeal -paras 18-25
d.	Risk of harm to others or to society as a whole:	- Trial -paras 49-53 - Appeal -paras 26,27&142
e.	Effect of prohibition on rates of use:	- Trial -paras 55-62 - Appeal -paras 91-96
f.	How the law prohibiting the possession of marihuana itself causes harm:	- Trial -para 63 - Appeal -para. 28
g.	Summary of "harm":	- Appeal-para. 29

PART II

STATEMENT OF POINTS IN ISSUE

QUESTION 1: Does prohibiting possession of Cannabis (marihuana) for personal use under s. 3(1) of the *Narcotic Control Act*, R.S.C. 1985, c. N-1, by reason of the inclusion of this substance in s. 3 of the Schedule to the Act (now s. 1, schedule II, *Controlled Drugs and Substances Act*, S.C. 1996, c. 19), infringe s. 7 of the *Canadian Charter of Rights and Freedoms*?

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

QUESTION 3: Is the prohibition on the possession of Cannabis (marihuana) for personal use under s. 3 (1) of the *Narcotic Control Act*, by reason of the inclusion of this substance in s. 3 of the Schedule to the Act (now s. 1, schedule II, *Controlled Drugs and Substances Act*, S.C. 1996, c. 19), within the legislative competence of the Parliament of Canada as being a law enacted for the peace, order and good government of Canada pursuant to s. 91 of the *Constitution Act*, 1867; as being enacted pursuant to the Criminal law power in s. 91(27) thereof; or otherwise?

PART III

ARGUMENT

QUESTION 1: S. 7 OF THE CHARTER

(a) The Butler Test in the context of cannabis (marihuana) prohibition.

3. While Parliament undoubtedly has a broad discretion to determine what conduct should be proscribed as criminal and subject to punishment, this Court stated in ***Labatt Breweries of Canada v. A.G.*** *(Canada):*

> "Parliament may not deprive an individual of the right to liberty or security of the 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 added]
>
> ***Labatt Breweries of Canada v. A.G. (Canada)*** **[1980] 1 SCR 914 at p. 932-3;52 CCC (2d) 433 at p.456-7.App.Book of Authorities(ABA)Tab20**

4. Labatt Breweries, therefore, affirms that the conduct must involve a potential impact on others or society as a whole in that it must relate to a "public" issue and not a "private" one. That there must be some "compelling interest", some harm or the risk thereof to society was affirmed recently in ***R. v. Butler,*** where this Court found that the purpose of the obscenity provisions was the "avoidance of harm to society" and that "legal moralism" was no longer a valid purpose for legislation. Sopinka, J. stated at p. 498:

> "The objective of maintaining conventional standards of propriety, independently of any harm to society, is no longer justified in light of the values of individual liberty which underlie the *Charter*".
>
> ***R. v. Butler*** **[1992] 1 S.C.R. 452 (S.C.C.) per Sopinka J. at p.498.ABA Tab10**

5. In considering the "minimal impairment" test under section 1 of the *Charter*, Sopinka, J. found that there was a "rational connection" between the prohibition of extreme pornography and the prevention of harm to society and expressed the test under s.1 as follows:

> "[The impugned provision] is designed to catch materials 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 about it that it is sufficient in this regard for Parliament to have a reasonable basis for concluding that harm would result and this requirement does not demand actual proof of harm."
>
> ***R. v. Butler*** **(supra) per Sopinka, J. at p. 505.ABA Tab 10**

6. Even more recently, in ***R. v. Cuerrier***, McLachlin, J. (as she then was) with Gonthier, J. concurring, stated at paragraph 50 that "criminal liability is generally imposed only for conduct which causes injury to others or puts them at risk of injury" and later at paragraph 69 that:

"The courts should not broaden the criminal law to catch conduct that society generally views as non-criminal. If that is to be done, Parliament must do it. Furthermore, the criminal law must be clear. I agree with the fundamental principle affirmed in the English cases that it is imperative that there be a clear line between criminal and non-criminal conduct. Absent this, the criminal law loses its deterrent effect and becomes unjust."

R. v. Cuerrier **[1998] 2 S.C.R. 371 (S.C.C.) at paras 47-50 and 69-70.ABA Tab 13**

7. Cory, J. (writing for Major, Bastarache and Binnie, J.J.) held, affirming Butler (supra) that there was no prerequisite that any harm must actually have resulted but a "significant risk" of harm was required.

R. v. Cuerrier **(supra) at para. 95.ABATab13**

8. If follows that according to the jurisprudence to date, Parliament can criminalize conduct if it has a "reasoned apprehension of a risk of harm" to others or to society as a whole and there is some authority that the risk in question must be "significant" but there is no clear statement from the Court as to what level of risk must exist before Parliament can act or, more importantly, what limits exist on the Criminal law, (or the Peace, Order and Good Government (POGG)), powers, and where the line is to be drawn between "public" and "private" matters.

9. It is submitted that the test enunciated by the majority of the Court below and concurred in by the Ontario Court of Appeal in ***R. v. Clay***, arose out of *R. v. Jones* where Wilson, J. indicated that a trivial or insubstantial effect on one's religion by legislative or administrative action did not amount to a breach of freedom of religion. This test was then applied by McLachlin, J. (as she then was) in *Cunningham* when she said: "The Charter does not protect against insignificant or "trivial" limitations of rights".

R. v. Jones **[1986] 2 SCR 284 (S.C.C) per Wilson J. (in dissent) at p. 313-315.ABA Tab19**
Cunningham v. Canada **[1993] 2 S.C.R. 143 (S.C.C.) at p. 151.ABATab14**

10. It is respectfully submitted that this principle of "triviality" relates to the impact on one's *Charter* rights and not the impact of the conduct in issue. In other words, the British Columbia Court of Appeal turned this principle on its head. In *Jones* and *Cunningham*, the reference was to the trivial or insignificant impact of the law on *Charter* rights. In the case at Bar, the *Charter* rights in issue are "liberty and security of the person" and the threat of imprisonment for the

possession of marijuana clearly threatens liberty and security of the person in more than a trivial or insignificant way.

11. It is submitted that, it is the conduct here which - leaving aside the medical necessity and the sacramental or religious use of cannabis - the "recreational", "preventative medicine", "performance enhancement" use - otherwise known as the "fun" or "social" use of cannabis. Cannabis laws are not trivial - they are harmful - and it is the negative side effects of laws - not drugs - that are being discussed in *Cunningham*. It is “trivial” in the sense of being of no concern to most people and having no direct or indirect significant consequences to others or to the public. Consequently, the question arises as to whether Parliament is authorized to threaten liberty for conduct which is personal to the user, and presents a trivial or insignificant reasoned apprehension of a risk of harm to society as a whole, that is both, remote and speculative.

12. It is respectfully submitted that the Court below has taken the threshold test of “triviality” that applies to the availability of sanctions for autonomous acts and has used it as a threshold standard for harm caused by the autonomous acts themselves. While the *Charter* does not protect persons from trivial or insignificant limitations of rights, the question here is whether it protects persons involved in trivial conduct or at least conduct that does not pose a reasoned apprehension of a risk of harm to the public that is significant, serious or substantial, from Government threats to their liberty and security of their person.

b) The Harm Principle

13. The Court below, with the subsequent concurrence of the Ontario Court of Appeal in *Clay*, accepted that the operative “principle of fundamental justice” in these circumstances was the “harm principle”. That principle was best articulated by the Victorian philosopher and economist, John Stuart Mill, in his essay “On Liberty” as follows:

> “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 is warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral is not a sufficient warrant. He cannot rightfully be compelled to do or 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 any one for which he is amenable to society, is that which concerns others. In the part, which merely concerns him, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign."
>
> **J.S. Mill, On Liberty, John W. Parker and Son, West Strand, London, 1859, pp. 21-22.ABA Tab 41**

14. While reference has been made by members of this Court to the writings of John Stuart Mill in the context of interpreting the meaning of "liberty" in section 7 of the *Charter*, namely in ***R. v. Jones*** and ***B. R. v. Children's Aid Society***, however there is no clear statement by the Court accepting this principle as a 'principle of fundamental justice' under section 7 of the *Charter*.

> ***R. v. Jones*** **[1986] 2 S.C.R. 284 (SCC) per Wilson J. (in dissent) at p. 318 - 319;ABA Tab19**
> ***B.R. v. Children's Aid Society*** **[1995] 1 S.C.R. 315 at pp. 364 – 365 and 430 – 431. ABA Tab 9**

15. In the Court below, the Court reviewed the common law, leading treatises on the criminal law, the work of the Law Reform Commission, Canadian Federalism cases and leading *Charter* cases and concluded that this principle was indeed a principle of fundamental justice.

> **Reasons for Judgment below - Appellants Record in Malmo-Levine Vol II p. 241 at pp. 299-316 (paras 104-130)**

16. The writings of John Stuart Mill make it clear that it does not apply to vulnerable groups, although that is not to say that prohibition is necessarily the best protection for them either. Further, the Law Reform Commission of Canada

in 1976 in a report entitled “Our Criminal Law” echoed that limitation and added that the harm threatened must be “serious both in nature and degree”.

Reasons for Judgment below - Appellants Record in Malmo-Levine Vol II p. 241 at pp. 305-307 and 316-317 (paras 115-116 and 131-133)

17. This requirement of a “significant” harm and not just any risk of harm is also referred to in *A History of the Criminal Law in England* by Sir James Fitzjames Stephen at p. 78 (vol. 2): (“…some definite, gross, undeniable injury to someone…”); in J. Smith and B. Hogan’s *Criminal Law*, 8th Edition (London: Butterworths, 1996) at p. 17, (where “crime” is defined as “generally acts which have a particularly harmful effect on the public and do more than interfere with merely private rights”); in *Legal Duties and Other Essay in Jurisprudence* by Sir C.K. Allen (Oxford: Clarendon Press, 1931) at pp. 233-4, (where “crime” is said to consist of “…wrong doing which directly and in serious degree threatens the security or well-being of society…”); in *The Moral Limits of the Criminal Law* by Joel Feinberg (Oxford: Oxford University Press, 1984) Vol. 1 at p. 11, (“…it is legitimate for the State to prohibit conduct that causes serious private harm, or the unreasonable risk of such harm…”); by the Canadian Committee on Corrections (1969) in the “Ouimet Report” entitled *Toward Unity: Criminal Justice and Corrections* at p. 12, (“no conduct shall be defined as criminal unless it represents a serious threat to society…”) and again in that Committee’s adoption of three criteria as “properly indicating the scope of the criminal law”, namely:

1) No act shall be criminally proscribed unless its incidence, actual or potential, is substantially damaging to society;
2) No act should be criminally prohibited where its incidence may adequately be controlled by social forces other than the criminal process;
3) No law should give rise to social or personal damage greater than that it was designed to prevent.

Reasons for Judgment below - Appellants Record in Malmo-Levine Vol II p. 241 at pp. 301-307 (paras 107-116) and p. 339 (para 173)

c) The Balancing of Interests

18. It is respectfully submitted that it is essential, in order to properly conduct the balancing of "interests" between the interests of the state and those of the individual under s. 7 of the *Charter,* to determine what level of potential risk of harm must exist before Parliament can resort to penal sanctions in an effort to prohibit conduct. This would set the constitutional standard or test within the context of the "harm principle" as a principle of fundamental justice within the meaning of that term in s. 7 of the *Canadian Charter of Rights and Freedoms*.

19. It is respectfully submitted that it is for this Court to set the constitutional standard and not Parliament so that Parliament's power to threaten liberty and the security of the person is not unfettered but subject to constitutional limits that allow for a balancing process that takes into account the interest of the state and the interest of the individual. If the interests of the State are low because the conduct in question does not present a risk of significant harm to others or to society as a whole but the threat to the liberty of the individual is high by way of imprisonment, then the balance should come down in favour of the individual. On the other hand, if the risk of harm to others or to society as a whole is significant and the interest of the individual are low or trivial then any balancing would likely come down in favour of the State.

20. It is for the Court however as the custodians of the liberties of the subject and as guardians of the Constitution to ensure that Parliament operates within the constitutional standards set by the Court and not simply at the whim of the majority based on speculative and remote perceptions of a risk of harm from the conduct of a significant minority. It is submitted that the setting of such a constitutional standard goes to the essence of our constitutional democracy and defines the rights and interests of the state and the individual and the principles and tests to be applied in the balancing process under s. 7 of the *Charter* in a criminal or penal law context.

d) The Onus of Proof

21. The Appellant accepts the principle that he who asserts a violation of his rights must prove the violation and agrees that there is ample authority that the

onus of proof specifically under section 7 of the *Charter* is on the party alleging a breach of that section. Indeed, this Court has recently reaffirmed that burden of proof and contrasted it with the burden on the Crown under section 1 of the *Charter* in the recent decision of ***R. v. Mills***, particularly where the Court said:

> "However, there are several important differences between the balancing exercises under ss. 1 and 7. The most important difference is that the issue under s. 7 is the delineation of the boundaries of the rights in question whereas under s. 1 the question is whether the violation of these boundaries may be justified. The different role played by ss. 1 and 7 also has important implications regarding which party bears the burden of proof. If interests are balanced under s. 7 then it is the rights claimant who bears the burden of proving that the balance struck by the impugned legislation violates s. 7. If interests are balanced under s. 1 then it is the state that bears the burden of justifying the infringement of the *Charter* rights."
>
> ***R. v. Mills*** **[1999] 3 S.C.R. 668 (S.C.C.) at para. 65-57.ABA Tab 25**

22. Nevertheless, Lamer, J. (as he then was) speaking for the majority of the Court, in ***Smith v. The Queen*** stated at p. 144:

> "This court has already had occasion to address s. 1. In Hunter et al. v. Southam Inc. (1984), 14 C.C.C. (3d) 97, 11 D.L.R. (4th) 641, [1984] 2 D.C.R. 145; R. v. Big M. Drug Mart Ltd. (1985), 18 C.C.C. (3d) 385, 18 D.L.R. (4th) 321, [1985] 1 S.C.R. 295; Re B.C. Motor Vehicle Act, supra; and R. v. Oakes (1986), 24 C.C.C. (3d) 321, 26 D.L.R. (4th) 200, [1986] 1 S.C.R. 103, this court indicated that **once there has been a prima facie violation** of the Charter the burden rests upon the authorities to salvage the legislative provision in question. In Oakes, this court set out the criteria which must be met in order to discharge this burden." [emphasis added]
>
> ***Smith v. The Queen*** **[1987] 1 S.C.R. 1045 (S.C.C.) per Lamer, J. at p. 21, (internet version) para 71.ABA Tab 34**

23. Further, this Court has also recognized that in certain circumstances, it is appropriate to shift the burden back to the Crown. In ***R. v. Bartle***, this Court stated:

> "However, just because the applicant bears the ultimate burden of persuasion under s.24 (2) does not mean that he or she will bear the burden on <u>every</u> issue relevant to the inquiry. As a practical matter, the onus on any issue will tend to shift back and forth between the applicant

> and the Crown, depending on what the particular contested issue is, which party is seeking to rely on it and, of course, the nature of the Charter right which has been violated."
>
> ***R. v. Bartle*** **[1994], 92 C.C.C. (3d) 289 (S.C.C.) at p.314.ABA Tab 6**

24. It is submitted that once the Appellant established a potential threat to his liberty and the security of his person by the fact that he was charged with a criminal offence, and then established the operative principle of fundamental justice was the "harm principle", and that a prima facie imbalance existed between the individual's interests and the State's interests in the application of that principle, then because of the very nature of the "harm principle" and the circumstances of the case, the onus should have shifted to the Crown respondent to provide evidence of the significant harm that it relies upon to justify the use of criminal sanctions. It is the State or Government, after all that is threatening the individual's liberty. Under the "harm principle" the State only derives a legitimate interest in so doing if the conduct in question poses at least a risk of significant harm to others or to society as a whole, or at least, that there is a reasonable basis for concluding that there is a risk of harm to society, following ***Butler*** (supra). If the Government asserts such harm then surely it should bear the onus of establishing it. The Appellant should not be required to prove a negative, at least when the basis for the threat to liberty is clearly within the knowledge and control of the State that passed the law in the first place and that relies upon it to control the human behavior of its citizens. It is submitted that he who asserts a right to pass legislation prohibiting certain conduct under threat of criminal sanction should bear the burden of proving that they have a reasonable basis for such penal legislation.

> ***Smith v. The Queen*** **1 S.C.R. 1045 (S.C.C.) per Lamer, J. at p. 18, para 56 and p. 21, para 71.ABA Tab 34**

e) The Ambit and Scope of "Liberty and the Security of the Person"

25. While an Appellant need only prove a deprivation of one of the rights in s. 7 and the threat of imprisonment clearly engages the "liberty" interest, it does not follow that the Court should, therefore, immediately proceed to determine the

operative principles of fundamental justice without further examining the ambit and scope of the "liberty and the security of the person" interests arising in the circumstances.

Reasons for Judgment below - Appellants Record in Malmo-Levine Vol II p. 241 at p. 263-265 (paras 38-44) and p.278 (para 69)

26. This Court has interpreted the concepts of "liberty and the security of the person" as contained in section 7 of the Charter broadly and has made it clear that they include more than the absence of physical restraint and that they have substantive content. In ***R. v. Morgentaler***, this Court said that the right to individual liberty guaranteed under section 7 of the Charter is inextricably tied to the concept of human dignity, and after giving a number of examples of where human dignity finds expression, concluded:

> "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."

R. v. Morgentaler **[1988] 1 S.C.R. 30 (S.C.C.) per Wilson, J. at p. 163-166 and 173-174.ABA Tab 27**

27. Similarly, in ***B. (R.) v. Children's Aid Society of Metropolitan Toronto***, this Court confirmed that "liberty" does not mean unconstrained freedom but, in any organized society, is subject to numerous constraints for the common good. Further, that "liberty" does not mean mere freedom from physical restraints. The Court said:

> "In a fair 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.

B. R. v. Children's Aid Society of Metropolitan Toronto **(supra) per LaForest, J. at pp. 368 – 369.ABA Tab 9**

28. Finally, in Rodriguez, the late Sopinka J. in discussing the right to "security of the person" stated as follows:

> "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 p. 588.ABA Tab 32**

29. It is submitted that while the Courts, in the absence of a threat of imprisonment, must consider more closely whether the conduct in question engages a "liberty or the security of the person" interest, it does not follow that where there is a threat of imprisonment by virtue of a penal sanction, that the Court should not go on to determine whether or not the conduct in question involves a matter of personal autonomy and the making of a decision that is of fundamental personal importance involving a private and personal matter to the individual. It is submitted that it is necessary to do so in order to fairly carry out the balancing process.

> **Reasons for Judgment below - Appellants Record in Malmo-Levine Vol II p. 241 at pp. 263-265 (paras 38-44) and pp. 278-279 (paras 69-70)**

30. It is submitted that a decision whether or not to possess and consume Cannabis (marijuana), even if potentially harmful to the user, is analogous to the decision by an individual as to what food to eat or not eat and whether or not to eat fatty foods, and as such is a decision of fundamental personal importance involving a choice made by the individual involving that individual's personal autonomy. It is not that possession of Cannabis (marijuana) is a matter of fundamental importance but rather the choice or decision on the part of the individual to possess it in order to consume it, always subject to the "harm principle".

f) Additional principles of fundamental justice

31. It is respectfully submitted that the prohibition against the possession of marijuana also violates certain other principles of fundamental justice and that the Court below erred in law in failing to consider or apply them. It is submitted that if the legislation violates several principles of fundamental justice, it is

important to consider each of the principles violated and to take them into account in the balancing process. It is submitted that the additional principles in issue here are the following:

1) The principle of restraint – a corollary to the harm principle;
2) The principle precluding irrationality and arbitrariness in the Legislative scheme; and,
3) The principle of overbreadth within the statutory regime.

32. It is submitted that the "**principle of restraint**", recognized in government literature and to the effect that the criminal law must be used with restraint and should only be employed to protect against "seriously harmful" conduct or contact which is "substantially harmful to society", is a "principle of fundamental justice" and a corollary to the "harm principle". On the evidence in this case, there is no demonstrable significant health problem in relation to cannabis (marijuana) in the Province of British Columbia or any other Provinces, let alone nationally.

> ***Report of the Canadian Committee on Corrections*** **(Ouimet Report), 1969 at p. 12;ABA Tab 42**
> **Law Reform Commission of Canada, *Our Criminal Law,* 1976 at pp. 19-20;ABA 39**
> **Government of Canada, *The Criminal Law in Canadian Society,* 1982 at p. 45.ABA Tab 40**
> **Reasons for judgment below at trial – Appellants Record Vol. VII p. 1122 and pp. 1140-1141**

33. With respect to the **principle precluding irrationality and arbitrariness in the Legislative scheme**, in ***R. v. Arkell***, this Court, in reviewing the constitutionality of the classification scheme for distinguishing first degree murder from second degree murder, concluded that the scheme was not in violation of section 7 of the *Charter* because it was neither "arbitrary nor irrational". The Ontario Court (General Division) in ***R. v. M.(C.)*** applied this principle to strike down section 159 of the *Criminal Code* (the prohibition against acts of anal intercourse) which decision was upheld by the Ontario Court of Appeal. In a cannabis (marijuana) context, the same test was applied by the Quebec Court of Appeal in ***R. v. Hamon***. It is submitted that the rule of law, which is the animating principle of the *Charter* and a constituent element of the preamble to the *Charter* is essentially a protection against irrational and arbitrary state

conduct. It is submitted that in the circumstances, it is irrational and arbitrary for Parliament to adopt a non-criminal approach to the use of tobacco leaving it to local, regional and provincial authorities to regulate its impact on others and society as a whole while in the case of cannabis (marijuana), it adopts a criminal or penal law approach, threatening liberty where there is no evidence of significant harm to others either directly or indirectly and the evidence of a risk of harm to society as a whole is remote and speculative. It is submitted that in the context of the risk of harm to others this is arbitrary and irrational.

R. v. M. (C.) **(1992), 75 C.C.C. (3d) 556 (Ont. Ct. Gen. Div.);ABA Tab 23**
R. v. M. (C.) **(1995), 30 C.R.R. (2d) 112 (Ont. C.A.);ABA Tab 24**
R. v. Arkell **(1990), 59 C.C.C. (3d) 65 (S.C.C.);ABA Tab 5**
R. v. Hamon **(1993). 85 C.C.C. (3d) 490 (Que.C.A.);ABA Tab 15**

34. With respect to the **principle of overbreadth**, the failure to draw a meaningful and operative distinction between private acts and the business of encouraging, promoting and profiting from an activity for commercial purposes is inconsistent with the modern legislative approach to consensual crime and does not serve a valid legislative objective. By widening the net this broadly to prohibit the simple possession of cannabis (marihuana) for personal use, the legislation goes well beyond the stated governmental objective of combating the social evils of the black market drug trade and serves to promote a form of "legal moralism" which has been frowned upon by this Court in the *Butler* decision. This Court firmly established that overbreadth within a statutory regime violates fundamental principles of justice in ***R. v. Nova Scotia Pharmaceutical Society*** and two years later applied this principle to invalidate section 179(1)(b) of the *Criminal Code* in *Heywood*.

R. v. Butler (supra) **at pp.479.492 - 499;ABA Tab 10**
R. v. Heywood **(1994) 94 C.C.C.(3d) 481(SCC); ABA Tab 17**
R. v. Nova Scotia Pharmaceutical Society**, [1992] S.C.R. 606 (S.C.C.).ABA Tab 28**

35. It is submitted that this view is consistent with the approach that Parliament has taken to all other consensual or "victimless" crimes where it has

drawn a clear distinction between participating in an undesirable activity on the one hand and participating in the business of facilitating that activity on the other hand. For example, the obscenity provisions (s.163) of the *Criminal Code* do not apply to possession of, or "consuming", obscene materials. It is the act of making, printing, publishing, distributing or circulating or possession of such material for such purposes that are proscribed. Similarly, acts of prostitution are not themselves prohibited, but only the acts of solicitation by communicating in a public place or impeding traffic in pursuit of customers that are prescribed by s.213 of the Criminal Code. Also, one cannot be convicted of being a keeper of a bawdy house or gaming house unless the location has been used on a frequent or habitual basis from which the inference can be drawn that the keeper is in the business of providing the service. (See ss.197-210 of the Criminal Code). Further, gaming activity is not prohibited if one is wagering or taking bets on a personal level and is not "in the business of betting". (See s.204 (1)(a) and (b) of the Criminal Code).

36. In addition, it is submitted that if it is asserted that it is necessary to have an offence of "simple possession" in order to curtail distribution or commercial activity in relation to cannabis (marihuana), that then the legislation prohibiting "simple possession", if in existence for that purpose, is overbroad in that it fails to make any meaningful distinction between personal and private acts of consumption and public acts of distribution which form part and parcel of the illicit drug trade. This expansive approach overshoots the mark insofar as the criminalizing of such conduct is unnecessary for the achievement of the stated purpose of curbing and combating the illicit drug trade. Possession for such purposes is already clearly proscribed by a separate Section – s.4 (2) of the Controlled Drugs and Substances Act.

Conclusion with respect to s.7 of the *Charter*

37. In view of the forgoing, it is respectfully submitted that there is no "public wrong" in a healthy adult possessing for his or her own use a substance that will

not harm him or her, unless it is used regularly and for a long time, and when even then, the harms are well within our degrees of tolerance in society and do not significantly impact upon others or society as a whole. It is submitted that there is no "public evil" in this conduct and no reasonable basis for concluding that the conduct of "possession" in and of itself presents any harm or risk thereof to the rights of others or society as a whole. It is respectfully submitted that the states interest is limited to conduct that involves "possession" and additional conduct, such as driving while ones ability to do so is impaired, that together might present a reasonable basis for concluding that there is a significant risk of harm to others or to society as a whole, or, in protecting vulnerable groups. It is submitted that any such exceptions to the breach of s. 7 of the *Charter* by this legislation should be considered under s. 1.

38. It is respectfully submitted that prohibiting possession of cannabis (marihuana) for personal use under the former *Narcotic Control Act* and now the *Controlled Drugs and Substances Act,* infringes s. 7 of the *Canadian Charter of Rights and Freedoms* in that it involves the federal government threatening to deprive the appellant of his right to liberty and the security of his person, including his right to personal autonomy to live his life and to make decisions that are of fundamental personal importance to him, otherwise than in accordance with the principles of fundamental justice applicable to the circumstances of the case namely, the harm principle, the principle of restraint, the principle precluding irrationality and arbitrariness in the legislative scheme, and the principle of overbreadth in the legislative scheme.

QUESTION 2: S. 1 OF THE CHARTER

39. There is some authority from this Court that if the answer to question 1 is in the affirmative then the law violates the constitutional right to liberty and/or the security of the person in a manner that is not in accordance with the principles of fundamental justice, and then that law can never be justified under s. 1 except perhaps in times of war or national emergencies.

Reference Re: s.94(2) of the Motor Vehicle Act **[1985] 2 SCR 486 (SCC) at p. 518.ABA Tab 30**
R. v. Heywood **(1994) 94 C.C.C.(3d) 481per Cory J. at p. 523.ABA Tab 17.**

40. Further, in circumstances where the violation of the principles of fundamental justice is as a result of overbreath, this Court has held that it would be even more difficult to see how the limit could be justified because overbroad legislation which infringes s. 7 of the Charter would appear to be incapable of passing the minimal impairment branch of the s. 1 analysis. This was the position taken by the appellant and respondent at trial and consequently no submission were made with respect to s. 1 at trial nor on appeal and neither was s. 1 addressed by either the trial Court or the British Columbia Court of Appeal.

R. v. Heywood **(supra) at p. 523.ABA Tab 17.**

41. However, by s. 22 of the *Narcotic Control Act,* now s. 60 of the *Controlled Drugs and Substances Act*, the federal cabinet can amend the schedule to the Act by adding or deleting any substance deemed necessary by the Cabinet "in the public interest." It has been held that the "public interest" is not a factor relevant to the s. 7 inquiry but is relevant to the s. 1 analysis. It has also been held that the term "in the public interest" is vague and imprecise. If so this provision is also unconstitutional as violating s. 7 of the *Charter* because it permits a 'standard less sweep' allowing the Governor in Council to pursue personal predilections in directing the inclusion of any item in the schedule. As soon as an item is included it immediately becomes subject to the *Act* and possession becomes an offence that may result in imprisonment upon conviction.

Reference Re: s. 94(2) of **the** ***Motor Vehicle Act*** **(B.C.), supra per Lamer J. at p. 517-518.ABA Tab 30**
R. v. Morales **(1993), 77 CCC (3d) 91 at p. 99-105 (SCC)ABA Tab 26**
R. v. Heywood **(supra) at p. 514-516.ABA Tab 17.**

42. In this regard, see also the reasons of Lamer J., writing for the majority of the Court, in ***R. v. Swain*** **[1991] 1 S.C.R. 933 (SCC) at p. 976-978,(ABA Tab 36)**said as follows:

> "It is not appropriate for the state to thwart the exercise of the accused's right by attempting to bring societal interests into the principles of fundamental justice and to thereby limit an accused's s. 7 rights. Societal

> interests are to be dealt with under s. 1 of the *Charter*, where the Crown has the burden of proving that the impugned law is demonstrably justified in a free and democratic society. In other words, it is my view that any balancing of societal interests against the individual right guaranteed by Section 7 should take place within the confines of s. 1 of the *Charter*

43. It is recognized however, that there is a substantial differences of opinion in the Supreme Court of Canada on this issue, and that the balancing under s. 7 in past cases has resembled the test applied under s. 1.

> ***R. v. Lyons*** **[1987] 2 S.C.R. 309 at pp. 326-329;ABA Tab 21**
> ***R. v. Beare*** **[1988] 2 S.C.R. 387 at pp. 401-407 and 415;ABA Tab 7.**
> ***R. v. Jones*** **[1986] 2 S.C.R. 284 per LaForest J generally;ABA Tab18.**
> ***Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research)*****, [1990] 1 S.C.R. 425 per LaForest J at p. 536-540 and L'Heureux-Dube J at p. 586-589.ABA Tab 37.**

44. If a s. 1 analysis is to be undertaken it is respectfully submitted that the pronouncements of this Court in ***R.J.R. MacDonald Inc. v. Canada*** **(Attorney General) [1995] 3 SCR 199** with respect to the appropriate test for a s. 1 analysis is particularly instructive in relation to the issues before this Court in this case. In this regard the Appellant refers in particular to the judgment of McLachlin J (as she then was) at paragraphs 126-129.

> 126. I agree with La Forest, J. that "[the appropriate 'test'...in a s.1 analysis is that found in s.1 itself" (para.62). The ultimate issue is whether the infringement is reasonable and "demonstrably justified in a free and democratic society." The jurisprudence laying down the dual considerations of importance of objective and proportionality between the good which may be achieved by the law and the infringement of rights it works, may be seen as articulating the factors which must be considered in determining whether a law that violates constitutional rights is nevertheless "reasonable" and "demonstrably justified". If the objective of a law which limits constitutional rights lacks sufficient importance, the infringement cannot be reasonable or justified. Similarly, if the good which may be achieved by the law pales beside the seriousness of the infringement of rights which it works, that law cannot be considered reasonable or justified. While sharing La Forest J.'s view that an over technical approach to s. 1 is to be eschewed, I find no conflict between the words of s. 1 and the jurisprudence founded upon *R. v. Oakes*, [1986]1 S.C.R. 103. The latter complements the former;

127. This said, there is merit in reminding ourselves of the words chosen by those who framed and agreed upon s. 1 of the *Charter*. First, to be saved under s. 1 the party defending the law (here the Attorney General of Canada) must show that the law which violates the right or freedom guaranteed by the *Charter* is "reasonable". In other words, the infringing measure must be justifiable by the processes of reason and rationality. The question is not whether the measure is popular or accords with the current public opinion polls. The question is rather whether it can be justified by application of the processes of reason. In the legal context, reason imports the notion of inference from evidence or established truths. This is not to deny intuition its role, or to require proof to the standards required by science in every case, but it is to insist on a rational, reasoned defensibility;

128. Second, to meet its burden under s. 1 of the *Charter*, the state must show that the violative law is "demonstrably justified". The choice of the word "demonstrably" is critical. The process is not one of mere intuition, nor is it one of deference to Parliament's choice. It is a process of demonstration. This reinforces the notion inherent in the word "reasonable" of rational inference from evidence or established truths;

129. The bottom line is this. While remaining sensitive to the social and political context of the impugned law and allowing for difficulties of proof inherent in that context, the courts must nevertheless insist that before the state can override constitutional rights, there be a reasoned demonstration of the good which the law may achieve in relation to the seriousness of the infringement. It is the task of the courts to maintain this bottom line if the rights conferred by our constitution are to have force and meaning. The task is not easily discharged, and may require the courts to confront the tide of popular public opinion. But that has always been the price of maintaining constitutional rights. No matter how important Parliament's goal may seem, if the state has not demonstrated that the means by which it seeks to achieve its goal are reasonable and proportionate to the infringement of rights, then the law must perforce fail.

45. It is therefore respectfully submitted that following the test set out by the Court in ***R. v. Oakes*** and more recently in **R.J.R. MacDonald** (supra):

(1) That the objective of the legislation, insofar as it relates to the simple possession and use of Cannabis by one individual without any demonstrable harm to another individual or other individuals or society as a whole, is not "of sufficient importance to warrant overriding a constitutionally protected right or freedom" and in any event is overbroad;

(2) That the three-fold proportionality test has not been satisfied:

(a) The legislation is not rationally connected to the achievement of the objective in question in that it is arbitrary, unfair and based on irrational considerations. (In this regard see paragraph 34, supra and paras 102-109 of exhibit 3 in the Appellants Record in Malmo-Levine pp. 135-141);

(b) The legislation does not impair as little as possible the right or freedom in question. In this regard it is submitted that the penalties provided for simple possession and use of Cannabis, particularly when compared to the use and possession of tobacco, alcohol (or perhaps a more appropriate comparison would be herbs and coffee beans) and the lack of criminal penalties for the possession of such drugs, indicates that the legislation here overreaches substantially in this regard and in failing to provide reasonable access for medical or other therapeutic uses or purposes. (In this regard see also para 13 (supra) and the quotation from J.S. Mill)

(c) The legislation is not proportionate between its effects which are responsible for limiting the *Charter* right or freedom and its objective, if found or identified as having a sufficient importance. Once again, it is submitted that a comparison between Parliament's treatment of the simple possession and use of alcohol, tobacco and caffeine and the lack of penalties for such matters, illustrate the disproportionality between the possession, use and the lack of consequences for same in relation to those drugs and the substantial consequences for possession and use of Cannabis in the absence of any demonstrable consequences to others or society as a whole. It is respectfully submitted that the penalties available, including a criminal record and all of its consequences, for possession of Cannabis, are grossly disproportionate to the prohibited conduct, particularly when the evidence is overwhelming as to the lack of harm to others and to society as a whole. It has been established that there is no significant harm with respect to 95% of the users and that the harm to the remaining 5% chronic users is mitigatable by either alternative methods of ingestion besides smoking or by the development of properly manufactured high potency organic cigarettes or ‘joints’ or resin together with education with respect to safe smoking habits, as are the risks to the vulnerable groups by appropriate consumer protection methods such as packaging and labelling, warnings and education.

46. It is therefore respectfully submitted that the violation of s. 7 of the *Charter* by prohibiting possession of cannabis (marihuana) for personal use cannot be

justified under s. 1 of the *Charter* as a reasonable limit prescribed by law that is demonstrably justified in a free and democratic society.

QUESTION 3: THE DIVISION OF POWERS ISSUE

47. The Constitutional underpinnings for the *Narcotic Control Act* (and now the CDSA) are not completely clear. The decision of this Court in ***R. v. Hauser*** (in finding that the federal government had authority to prosecute matters under the *Narcotic Control Act* as opposed to the provincial Attorney's General), incidentally concluded that the Parliament of Canada, pursuant to its power to make laws in relation to the "**peace, order and good government** of Canada", is competent to make laws for the control of narcotics.

> ***R. v. Hauser*** **[1979] 1 S.C.R. 984 per Pigeon, J. at p. 996-1000;see also Dickson J. (in dissent) at p. 1054-1061.ABA Tab 16**

48. However, this view was called into question by the Court in ***Schneider v. The Queen*** (in considering the validity of the *British Columbia Heroin Treatment Act*. In this regard see in particular the judgment of Dickson, J. (as he then was) for the majority and the concurring judgment of Laskin C.J.C. on this point.

> ***Schneider v. The Queen*****, [1982] 2 S.C.R. 112 per Laskin C.J.C. at SCR 115;per Dickson J at 130-32.ABA Tab 33.**

"Peace, Order and Good Government"

49. With respect to the applicability of the Federal governments constitutional power under the "**peace, order and good government**" clause, it is submitted that it is clear that this residual power only has application in three situations:

A. In the case of the existence of a national emergency;
B. With respect to a subject matter which did not exist at the time of confederation and which is clearly not in a class of matters of a merely local or private nature; and
C. Where the subject matter "goes beyond local or provincial concerns and must from its inherent nature be the concern of the Dominion as a whole.

***Labatt Breweries of Canada Ltd. v. Attorney General of Canada et al.*, [1980] 1 S.C.R. 914 at p.465-466, 52 C.C.C. (2d) 433 at p. 456-7.ABA Tab 20**

50. It is respectfully submitted that the prohibition against simple possession of cannabis (marihuana) contained in the *Narcotic Control Act* or the *Controlled Drugs and Substances* Act does not come within any of the above-noted three situations. First, there is no evidence of a national emergency at present nor has there been any evidence of one in this regard since cannabis (marihuana) was included in the Schedule in 1923, a period of approximately 78 years. Second, while the overall subject matter of the *Act* did not exist at the time of confederation, cannabis (marihuana) did and, at least insofar as it applies to the offence of simple possession of cannabis, it is submitted that such possession clearly falls into the class of matters of a merely local or private nature, namely the health concern of the user. Consequently the "newness" doctrine is not applicable. Third, there is no evidence that the subject matter the simple possession of marihuana for personal use is beyond the competence of the Provinces and is a national concern which can only be effectively dealt with under the Federal power. Fourth, the more recent pronouncements of the Supreme Court of Canada call into question reliance upon the "**peace, order and good government**" clause as the constitutional foundation for the *Narcotic Control Act* and, it is submitted, that on the record in this case the prohibition against the possession of cannabis (marihuana) for one's own use cannot be supported on the basis of the residual "**peace, order and good government**" power.

Evidence of Dr. H. Kalant for the Respondent – Appellant Record Vol. V at p. 861; Vol. VI sy p. 892,1003,1010-1013,1024-1026,1056-1058; Vol. VII at p.1077-1078,1085-1088, 1092-1093, 1097, 1099-1104

"Criminal Law"

51. Prior to the *Charter*, the test for determining whether or not a matter fell within "**criminal law**" was reviewed by Estey, J. for the majority of this Court in ***Labatt Breweries of Canada Ltd. v. Attorney General of Canada et al.***, (supra) as set out at paragraph 4 of this Argument.

52. In the context of the Charter and the relationship between s. 7 and s. 1 thereof, this test appears to have been continued. In this regard, see the words of Dickson J. (as he then was) in ***R. v. Big M Drug Mart Ltd.*** (1985), 18 C.C.C. (3d) 385 at pp. 417-418:

> "Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction, which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the Charter is to protect, within reason, from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others, no one is to be forced to Act in a way contrary to his beliefs or his conscience."

53. More recently, this Court in **RJR-Mac Donald Inc. v. Canada (Attorney *General)*, [1995] 3 S.C.R. 199**, extensively reviewed it's previous decisions and those of the Privy Council relating to the "**criminal law**" power in the context of tobacco consumption and, more specifically, advertising of tobacco products.

> **See the judgment of La Forest, J. on this issue at pp. 240-258 and 261-267. ABA Tab 31**

54. It is submitted that the scope of Parliament's legislative authority under its "**criminal law**" power is affected by changes in social, political and/or scientific perspectives. Where developments in the state of information available to Parliament indicate that an activity which was previously considered to be injurious to the public interest can no longer be so considered, Parliament may no longer justify a prohibition of this activity under its "**criminal law**" power. It is submitted that such changes appear to have occurred certainly since **R. v. *Hamon* (1983),8 C.C.C.(3d) 490(Que.C.A.) and *R. v. Cholette*, unreported, March 23rd,1993,Victoria Registry #64964(BCSC) ABA Tabs 5 and 11.**

See Joint Statement of Legislative Facts para 43-64

55. It is submitted that a change in the social and political climate or a change in scientific understanding can render a Federal law ultra vires, notwithstanding the fact that the law, when enacted, was felt to be unquestionably intra vires. In the ***Margarine Reference,*** [1949], this Court held that the prohibition on the consumption and sale of margarine had lost its criminal law underpinnings as a result of changing scientific data. Rand, J. noted that the "ordinary, though not exclusive ends" of valid criminal legislation is the protection of "public peace, order, security, health and morality". In light of the fact that updated scientific evidence completely undercut former claims that margarine was injurious to public health, this Court invalidated the margarine prohibition as it no longer served the valid ends of criminal legislation but rather served only the objective of protecting the dairy industry.

> ***The Reference as to the Validity of Section 5(a) of Dairy Industry Act (Margarine Reference),*** **[1949] S.C.R. 1 at p. 50; affd [1951] A.C. 179. ABA Tab 22.**

56. The ***Margarine Reference*** principle has been applied in other contexts in which moral, political and scientific shifts in perspective have cast doubt on the vires of Federal law. In particular, this principle has been raised in the area of Temperance law and Sunday observance law – two areas in which the law had been structured around the "local option" concept. A number of cases in these areas have held that the enactment of permissive Provincial legislation reflected a change in moral outlook in public policy, such that the Federal prohibition could no longer be upheld as intra vires the government of Canada. While no permissive Provincial legislation has been enacted in relation to cannabis (marihuana) to indicate a barometer for a changed perspective, nevertheless, the circumstances do indicate a change in perspective underscored by the fact that virtually every government commission into the subject matter has concluded that the original justification for the prohibition has been lost and by the fact that numerous western, liberal democracies have moved in the direction of decriminalization.

R. v. Varley **(1935), 65 C.C.C. 192 at 199-200;ABA Tab 38.**
R. v. Clay**, unreported, August 14th, 1997, Ontario Court (General Division), File Number 3887F per McCart, J. at p.8-12;ABA Tab 12.**
R. v. Jones **(1936), Chitty's Abridgment of Canadian Criminal Case Law (Toronto Canada Law Book 1925-1939)p. 326-327.ABA Tab 18.**
R v. Shopper's Bazar Ltd. **(1973), 15 C.C.C. (2d) 497.ABA Tab 35**

57. It is submitted that the legislative history in relation to the prohibition against the possession of cannabis (marihuana) is also telling in this regard.

See Joint Statement of Legistlative facts paras 30-37

58. In ***R. v. Clay*** *(supra),* at trial, his Lordship Justice McCart failed to distinguish between harm to the user and harm to others or to society as a whole and failed to distinguish between possession for personal use and possession for distribution and consequently finds the legislation to be valid under the "**peace, order and good government**" clause as addressing a concern which is national in scope. Those findings are contrary to the evidence before the Court in this case relating to the simple possession and use of marihuana for personal use only.

59. It is therefore submitted, that in addition to the principles and factors that arise under the *Charter*, the prohibition against the possession of cannabis (marihuana) cannot be sustained as a valid exercise of either the "**peace, order and good government**" power or the Federal "**criminal law**" power.

60. In these proceedings to date the Respondent Federal government has asserted three bases to ground such jurisdiction under either of those powers, namely public health concerns, compliance of international obligations and public safety.

(i) Public Health Concerns

(a) There is no evidence that the possession of cannabis (marihuana) for personal use has any impact by way of harm of any kind whatsoever on other persons, whether in close proximity or otherwise to the possessor/user, nor any evidence of any harm of any significance to society as a whole. The evidence from the Respondents expert witness Dr H. Kalant was that the consumption of cannabis (marihuana) is not significantly harmful to the health of 95% of the

individual adult otherwise healthy consumers in Canada who are apparently low, occasional or moderate users. The evidence of Dr.S.Peck, the B.C. Deputy Provincial Health officer indicated no significant public health concerns across the country. While there is reason for concern with respect to traditional vulnerable groups such as immature youths, pregnant women and the mentally ill, the only group whose long term health appears to be affected by use is the chronic user who smokes at least one marihuana cigarette per day by taking deep lung samples, smoking the cigarette down to its end when it is loosely packed and without a filter. Further, it is the process of smoking or pyrolisis which causes this harm (eventual chronic bronchitis - not cancer) and not the active ingredients in cannabis (marihuana);

(b) This group is estimated to comprise approximately .21 percent or 1/5 of 1% of the total Canadian population over 15 years of age or approximately 30,000 persons across Canada. Whatever "harm" that this small group might have on society as a whole by way of health costs, etc., it is likely negligible or at least very small and certainly cannot be said to threaten the Dominion as a whole or to constitute a public health problem warranting either Federal "**criminal law**" involvement or resort to the "**peace, order and good government"** clause. Further, the nature of the health concerns arising from this small group are such as are traditionally dealt with between a doctor and patient or a local hospital and health counselors, which are matters that fall clearly within the historical, Provincial jurisdiction over health as a local or private matter in the Province.

See Joint Statement of Legislative Facts paras 8-10

(ii) International Obligations

(a) The Crown also asserts that the legislation can also be justified in order to ensure compliance with Canada's international obligations. Canada (and the Netherlands) is apparently 1 of 85 countries, which have ratified the United Nations Convention against Illicit Trafficking in Narcotic Drugs and Psychotropic Substances (1988). Article 3 (2) of the Convention provides that the Convention is subject to each countries constitutional principle and the basic concepts of its

legal system. While it generally calls for each party to adopt measures to establish a criminal offence under its domestic law for possession and other offences, Article 3(4)(c) and (d) permits the parties to resort to alternatives to conviction or punishment for cases of a minor nature. These alternatives include treatment, education, aftercare, rehabilitation or social reintegration.

(b) These provisions, in the most recent Treaty, as well as its predecessors, not only allow Canada to treat simple possession for personal use by alternative approaches to penal law and by methods traditionally reserved in our Federal system to the Provincial legislatures, but also expressly states that the treaty or Convention is subject to the traditional basic concepts of our legal system, which would include the division of powers between the Federal and Provincial governments and our constitutional principles which include not only that division of powers, but also the provisions of the *Canadian Charter of Rights and Freedoms*. The Applicant submits that these factors provide a complete answer to the Crown's claim to base the *Narcotic Control Act* (or the CDSA) prohibition against simple possession on this international treaty basis.

> **The Convention against Illicit Trafficking in Narcotic Drugs and Psychotropic Substances (1988) signed by Canada December 20th, 1988, ratified July 5th, 1990 and in force for Canada November 11th, 1990.ABA Tab 43.**
>
> **See also the Convention on Psychotropic Substances (1971) and in particular Article 2, paragraphs 1-7 and Article 22, paragraph 1-5 – see tab 23 of the Crown's Brandeis Brief(Ex.5)**
>
> **See also the Single Convention on Narcotic Drugs (1961), Article 38,paragraph1see tab 20 of the Crown's Brandeis Brief(Ex.5)**
>
> **See the Protocol Amending the Single Convention on Narcotic Drugs, 1961, Article 14 amending Article 36, paragraphs 1 and 2 of the Single Convention – see tab 21 of the Crown's Brandeis Brief(Ex.5)**
>
> ***R. v. Clay*, unreported, August 14th, 1997, Ontario Court (General Division), File Number 3887F per McCart, J. at p.18.ABA Tab 12.**

(iii) Public Safety

(a) With respect to “public safety” the Respondent’s basis for this assertion is in relation to the admitted acute effects of the consumption of cannabis (marihuana) which does cause alteration of mental functions and, depending upon individual circumstances, including the amount of use, potency, familiarity of the product, might clearly result in the individual user’s ability to drive a motor vehicle or to fly an airplane or operate complex machinery, being impaired.

(b) While research continues into the acute effects of marihuana consumption and its impact in this regard, recent studies indicate that the impact on users is far less significant than users of alcohol and the extent to which marihuana use may contribute to accidents is still not clear. Nevertheless, the applicant concedes that consumption of marihuana in its acute stage can impair one’s psycho-motor functions but says that this concern is dealt with by the Parliament of Canada under its “**criminal law**” powers and specifically s.253 of the *Criminal Code of Canada* which makes it an offence to operate a plane, train or car when ones ability to do so is impaired by alcohol or a drug.

(c) Interestingly, Parliament has seen fit to restrict the application of s.253(b) to consumers of alcohol. While there was some evidence before the Court of methods being developed to ascertain levels of THC concentrations in the person’s blood, it appears that no similar device to the breathalyzer machine for alcohol detection has been invented and there are other practical problems at present with such methods of detection. Apparently a demand for a sample of saliva would indicate whether or not there has been recent use, but this in turn would require follow-up with a blood sample to determine actual levels of use;

(d) It is submitted that s.253 (a) covers the situation in that it is expressly directed towards impairment of psychomotor skills used in driving or flying or operating other equipment. The police have the power to not only observe the driving of the suspect or hear information from others about it, but can also observe the suspect and require the suspect to perform various roadside tests designed to determine whether or not one’s psycho-motor co-ordination or skills are in fact impaired. The evidence does not suggest that a properly trained

officer would be unable to detect such lack of co-ordination if the person's abilities were impaired by the drug.

Mercer and Jeffrey: "Alcohol, Drugs and Impairment in Fatal Traffic Accidents in British Columbia" (1995), Crown's Brandies Brief, Exhibit 5, tab 16.
Robbe, *Influence of Marihuana on Driving* (1994), Institue of Human Pharmacology, University of Limberg, Maastricht (Exhibit 40). See also the excerpt at Tab 17 of Crown's Brandeis Brief (Exhibit 5)
Huestis, "Drug Monographs: Marihuana" (1994), Committees on Driving under the Influence of Drugs (Tab 18 from the Crown's Brandeis Brief(Ex.5)
Zimmer and Morgan, *Marihuana Myths, Marihuana Facts: a Review of the Scientific Evidence*, Lindesmith Centre, New York and San Francisco (1997), Exhibit 39, Chapter 17.ABA Tab 44.
Evidence of Dr. H. Kalant for the Respondents – Appellants Record Vol VI at pp. 969-979 and 1002-1004

(e) It is conceded by the applicant that this is a legitimate exercise of the Federal Parliament's "**criminal law**" power in that it does not simply prohibit possession and use of cannabis (marihuana), but such use in conjunction with driving, operating or having care and control of a car, airplane or other equipment while under the influence. This clearly involves the use of the substance in circumstances where the additional activity of driving, etc. presents a clear and substantial risk to others through one's use and ultimately to society as a whole. This is the traditional basis for the use of the "**criminal law**" power as involving conduct, which can harm others or present a significant risk of serious harm to in society in a significant way.

(f) It is submitted, however, that the prohibition against the simple possession under the *Narcotic Control Act* or the *Controlled Drugs and Substances Act* alone cannot be justified on public safety grounds, absent the additional conduct of driving, flying or operating other equipment. To do so would be to use means that are broader than necessary to accomplish the objective and the provision would be overbroad and consequently in violation of the principles of fundamental justice. In other words, the liberty and security of the person of an individual would be

infringed in a manner that is unnecessarily broad, going beyond what is needed to accomplish the governmental objective.

***R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606 (SCC)**
R. v. Heywood, (supra) generally (SCC)ABA Tabs 28 and 17

PART IV

NATURE OF ORDER SOUGHT

1. The relief sought is that the appeal be allowed, the conviction set aside and that the appropriate declaration be made pursuant to s.24(1) and s.52 of the ***Canadian Charter of Rights and Freedoms*** declaring that the inclusion of cannabis sativa, its preparations, derivatives and similar synthetic preparations, including all of those substances set out in the Schedule under s.3(1) to (6) to the ***Narcotic Control Act***, R.S.C. 1985, Chap.N-1 as amended to date, and/or the analogous provisions of the ***Controlled Drugs and Substances Act*** insofar as they relate to the personal possession and use contrary to ss.3(1) and (2) of the ***Narcotic Control Act*** or s. 4 of the ***Controlled Drugs and Substances Act*** are in violation of the appellant'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 s.7 of the ***Canadian Charter of Rights and Freedoms*.**

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

_____
JOHN W. CONROY, Q.C.
COUNSEL FOR APPELLANT

NOTICE TO THE RESPONDENT: Pursuant to subsection 44(1) of the rules of the Supreme Court of Canada, this appeal will be inscribed by the Registrar for hearing after the respondent's factum has been filed or on the expiration of the time period set out in paragraph 38(3)(b) of the said Rules, s the case may be.