Court File No.28189

IN THE SUPREME COURT OF CANADA
(On Appeal from the Court of Appeal for Ontario)

B E T W E E N:

HER MAJESTY THE QUEEN

Respondent

- and -

CHRISTOPHER CLAY

Appellant

APPELLANT CLAY'S FACTUM

PART I - STATEMENT OF FACTS

I. PROCEDURAL HISTORY OF THE CASE

1. After hearing more than two weeks of expert and other evidence concerning the constitutionality of the criminal prohibition on the use of marijuana, and after having reserved his decision for several months, on August 14, 1997, the McCart J., of the Ontario Court (General Division), dismissed the Appellant's constitutional challenge and convicted him of the offences of trafficking cannabis, possession of cannabis and possession of cannabis for the purpose of trafficking, contrary to the *Narcotic Control Act*. The Appellant was sentenced to a $750.00 fine and a period of probation.

- Reasons for Judgment at trial, Appellant's Record, Volume XVI, p.3347.

2. By way of Notice of Appeal, dated September 5, 1997, the Appellant appealed to the Ontario Court of Appeal. On October 6th, 1999 the Appellant presented his appeal to the Court below based on three grounds. In an endorsement received July 31, 2000, the Court of Appeal for Ontario dismissed the Appellant's appeal against conviction and his constitutional challenge to the criminal prohibition on the personal and private possession of marijuana.

- Notice of Appeal and Application for Leave to Appeal to Court of Appeal, Appellant's Record, Volume I, p.20.

3. On March 15, 2001, the Appellant was granted leave to appeal to this Honourable Court. On October 19, 2001, the Right Honourable Chief Justice of Canada stated the constitutional questions in this matter and the two companion cases of *R. v. Malmo-Levine* and *R. v. Caine*. Pursuant to the Order of Lebel, J., dated October 3, 2001, the three Appellants were granted permission to file one Joint Statement of Legislative Facts (of no more than 40 pages in length) and individual factums no more than 30 pages in length.

II. SUMMARY OF THE EVIDENCE

(A) THE APPELLANT'S BACKGROUND AND THE CIRCUMSTANCES OF "THE OFFENCE"

4. The Appellant, was 26 years of age at the time of his arrest. He had been working as an insurance agent before deciding to study photography at Ryerson University in Toronto. Prior to his attendance at Ryerson, the Appellant's experience with marijuana was brief and fleeting. While at Ryerson, the Appellant began to study and compile research materials relating to the use of marijuana. He began to experiment with the recreational use of marijuana. His views on the subject began to change significantly and he soon became committed to effecting political change with respect to what he believed was the criminalization of a harmless activity. The Appellant began distributing his research materials on marijuana during the weekends at a local flea -market and other venues. The information which he distributed consisted of studies relating to (a) the medicinal value of marijuana with respect to AIDS, multiple sclerosis, and other diseases; (b) the industrial value of hemp products; and (c) the recreational use of marijuana.

- C. Clay, Examination-in-chief, Appellant's Record, Volume II, p.448 to p.450.

5. In 1994, Mr. Clay opened a retail outlet in London, "The Great Canadian Hemporium". The store sold pipes, industrial hemp products and marijuana logos. The Appellant disseminated free literature from the store. Indeed, the store was equipped with a full library for those interested in researching issues concerning marijuana. The Appellant had financed his store through a government-sponsored youth venture loan granted specifically for this purpose. At some point after the Appellant had set up the store, a government employee came to visit and admitted that, although the store was controversial, it appeared to be a viable business operation and so the loan was approved.

- C. Clay, Examination-in-chief, Appellant's Record, Volume II, p.450.

6. The Appellant grew increasingly frustrated by the lack of any meaningful response from the politicians to his efforts to reform the law. Eventually he decided to try raising the issue in the courts by "pushing the envelope a bit further" and, thus, decided to begin selling some small seedling plants at his store. It was on Wednesday, May 17, 1995 that the Appellant first obtained these plant cuttings. On that same day, an undercover police officer, Randal Bornais, entered the store and purchased a small cutting for $30.00 directly from the Appellant. Later that same day, officers with the London Police Force executed a search warrant at The Great Canadian Hemporium. They seized 16 plant cuttings from glass display cases in the store. The next day, the officers executed a search warrant at the Appellant's home in London and discovered a small quantity of marijuana.

- C. Clay, Examination-in-chief, Appellant's Record, Volume II, p. 455.

(B) THE LEGISLATIVE FACTS

7. The expert evidence presented at trial upon which the Appellant relied to support his constitutional challenges in the courts below is summarized in the Joint Statement of Legislative Facts filed under separate cover.

(C) THE BOTANICAL EVIDENCE: WHETHER THE SEEDLING PLANTS SEIZED FROM THE APPELLANT CONTAINED A PSYCHOACTIVE COMPOUND TO JUSTIFY THEM BEING CLASSIFIED AS A "NARCOTIC"

1) The analysis of the plant material in the Appellant's case

8. As proof that the substance sold, cultivated and possessed by the Appellant was a proscribed narcotic under the *Narcotic Control Act*, the Crown tendered Certificates of Analyst purporting that the substance was "cannabis (marijuana)". The Crown called the analyst who had signed these Certificates, Mr. McLerie, to testify at trial. Mr. McLerie testified that the government's testing only requires that 2 of the 4 targeted cannabinoids (of which, THC was one) be found in the plant (or other

substance) before it will be classified as "marijuana". In other words, ***THC need not be found*** before the plants which are being examined can be certified as a narcotic. Yet, ***THC is the only***

psychoactive chemical present in cannabis. McLerie admitted that, if called upon, he would certify articles of hemp clothing as "cannabis"

- D. McLerie, Cross- Examination, Appellant's Record, Volume I, p.145.

9. Mr. McLerie further testified that none of the tests which the government currently uses to certify plants as "cannabis" actually determines the quantity of THC present in the plant. The significance of this lacuna in the testing becomes critical in view of the fact that the government has begun licencing people to cultivate cannabis plants which have less than 0.3% THC for the purposes of industrial hemp production. Cannabis plants with no more than 0.3% THC cannot produce any psychoactive effects and, thus, can not properly be classified as a "narcotic" by the *Narcotic Control Act*. It was the Appellant's position at trial that the Crown was obliged to prove that the seedling plants which he was alleged to have sold and possessed contained any THC, let alone enough THC to warrant classifying them as the narcotic "cannabis (marijuana)" (as opposed to not certifying them as "a narcotic" because they were nothing more than the non-psychoactive form of cannabis; namely hemp).

- D. McLerie, Cross-Examination, Appellant's Record, Volume I, p.135.

2) Not all cannabis plant material is psychoactive

10. The species, *Cannabis sativa,* can be sub-divided into two strains or sub-species: fibre cannabis (commonly referred to as hemp) and intoxicating cannabis (commonly referred to as marijuana). Parliament has recently (approximately 1995) begun licencing the cultivation of the former. Whether or not a cannabis plant will turn out to be one strain or the other depends upon the nature of the cannabinoids present in the plant. There are dozens of different cannabinoids present in a cannabis plant. Scientists have managed to isolate and synthesize some of these compounds. In the late 1960's, Professor Raphael Mechoulam identified Delta 9, tetrahydrocannabinol (THC) as being the psychoactive compound responsible for the intoxicating effect of some cannabis plants. Plants which contain sufficient THC will generate intoxication, and plants with low levels of THC, and high levels of other cannabinoids (particularly cannabidiol) will not generate intoxication. Instead, those plants will produce a fibre which has numerous industrial and agricultural applications.

- E. Small, Cross-examination, Appellant's Record, Volume I, p.195 to p.207.

11. In terms of industrial use, hemp may be used for the production of paper goods, textile, foods, cleaning solution, fuel, construction materials and many others. It is being used by major manufactures, such as European car producers and the Body Shop. The Government of Canada issues licenses for people to grow cannabis for industrial purposes on the condition that the seeds employed will not produce a plant with a THC concentration in excess of 0.3%. This is the standard that the Europe Union has adopted with respect to licensed hemp cultivation. This dividing line or cutoff of 0.3 per cent THC is intended to separate "hemp" from "intoxicant" cannabis. The dividing line originated in a series of 1973 publications in which Dr. E. Small, research scientist and plant taxonomist for Agriculture Canada, proposed the level. Since then, many jurisdictions have adopted this dividing line to facilitate the licensed cultivation of non-intoxicating, fibre cannabis.

- G. Leson Affidavit, Appellant's Record, Volume XVI, p.3332;
- G. Scheifle, Examination in-chief, Appellant's Record, Volume I, p.313 to p.314;
- E. Small, Examination-in-chief and Cross-examination, Appellant's Record, Volume I, p.162, p.228 to p.230, p. 253 to p. 254;
- D. McLerie, Cross-examination, Appellant's Record, Volume I, p.141;
- B. Rowsell, Cross-examination, Appellant's Record, Volume V, p.1015.

3) The studies conducted by Dr. Ernest Small on non-psychoactive cannabis plants

12. Dr. Small has studied hundreds of strains of cannabis, obtained from different sources around the world. In the course of his studies, it became evident to him that there were two general categories, not clearly discriminable, but nevertheless different. Plants that originated in northern areas tended to exhibit a syndrome of characteristics that contrasted with an opposing syndrome of characteristics in plants from relatively southern areas. The northern plants tended to have relatively low amounts of THC. They tended to have appearance attributes typical of fibre plants (they tended to be tall, they often had hollow stems, and they tended to mature quite early). By contrast, southern plants tended to be high in THC. They often did not have the attributes of fibre plants (they were often relatively short, highly branched, and normally didn't come into flower early in the climate). They were frequently killed by frost just when they were coming into flower. In assessing the situation, Small decided that 0.3 per cent THC represented a rough boundary between the two.

- E. Small, Examination in-chief, Appellant's Record, Volume I. p.163 to p.164.

13. Although a trained eye could probably distinguish between an intoxicating and non-intoxicating cannabis plant based upon morphological distinction, the non-trained expert would not be able draw this distinction based upon the appearance of the plant alone. Therefore, it is necessary to conduct chemical analysis to determine if the plant has sufficient THC to be classified as an intoxicating plant. This also poses some problems because the levels of THC vary quite a bit in different parts of the plant and the levels of THC also vary depending on the season, the maturity of the plants in question, and the time of day. For example, it would have been difficult, if not impossible, to determine the intoxicating potential of the seedlings sold by the Appellant as the THC was still in a developmental stage. However, it is possible to conclusively determine if a seedling will be a fibre or intoxicant plant based on the ratio between the existing THC and the existing CBD (cannabidiol). This ratio remains fixed throughout the lifespan of the plant. From this ratio, it is possible to extrapolate and determine if the seedling will eventually produce in excess of .3% THC.

- E. Small, Examination in-chief and Cross-examination, Appellant's Record, Volume I, p.164, p.165, p.167, p.234 top.236, p.245 to p.248.

4) The pharmacological perspective on the 0.3% THC standard

14. Dr. Kalant testified that, based upon the finding of one study which he had reviewed, he felt it is possible for an individual to become intoxicated by smoking cannabis with concentrations of less than 0.3% THC. Based upon this one study, he concluded that an individual could become intoxicated after taking 25 puffs of cannabis with a 0.3% THC concentration or after taking 75 puffs of cannabis with a 0.1% THC concentration. Dr. Kalant did concede, however, that with low levels of THC it would require a very "determined" smoker who would endure the "nearly impossible" and "disagreeable" necessity of having to smoke so much of the substance in order to achieve the intoxicating effect.

- H. Kalant, Examination-in-chief and Cross-examination, Appellant's Record, Volume VI, p.122 to p.1229 and p.1317 to p.1319.

15. Dr. Small testified that in devising the 0.3% cut-off level he was engaged in an "artistic, subjective and arbitrary" exercise. In his view, while the 0.3 per cent criterion is a useful criterion, it is not an absolute criterion. He was not aware of whether there have been studies conducted that have tried to prove or disprove the accuracy or viability of his "arbitrary" 0.3 per

cent THC threshold. However, at the time he arrived at that standard for differentiating, his conclusions had been supported by Dr. Turner of the University of Mississippi, an expert considered by Dr. Small to be one the "leading personalities" in the field. In addition, despite having his 0.3% standard adopted by both the European Union and Canada, Small has made no efforts to communicate his concerns to these legislatures regarding the alleged arbitrariness of this cut-off level.

- E. Small, Cross-examination, Appellant's Record, Volume I, p.203 to p.222, and p.229;
- B. Rowsell, Re-examination, Appellant's Record, Volume V, p. 1025 to p.1026.

16. Dr. Morgan, on the other hand, testified that in terms of the studies with human populations, 0.3 per cent THC marijuana will produce no psychoactivity. In reality, he said, anything less than 0.5 per cent will not produce psychoactivity. While people could still smoke such low-THC marijuana, they could never achieve an intoxicating effect. In Dr. Morgan's view, the plant substance must have this threshold level of THC, otherwise a smoker will not be able to "puff it often enough to absorb enough marijuana to give a high enough blood level to have an effect".

- J. Morgan, Examination in-chief, Appellant's Record, Volume V, p.1079 to p.1084.

PART II - POINTS IN ISSUE

10. The Appellant respectfully submits that his appeal raises the following issues:

A. Is it a violation of the principles of fundamental justice to criminalize an activity that amounts to an exercise of personal autonomy and which and is done in the privacy of the home where there is no reasonable basis for believing that the criminalized activity causes substantial harm to society?

B. In the face of evidence (including the finding of a Royal Commission) that the harm associated with the consumption of cannabis is minimal, is the criminalization of the private consumption (and cultivation necessarily incidental to that private consumption) a valid exercise of the criminal law power contained

in s.91(27) of the *Constitution Act*, *1867* and or does it fall within the residual power of "Peace, Order and Good Government?"

C. Should the Schedule of the *Narcotic Control Act* be interpreted and or be construed to criminally prohibit the possession of plants (or other substances) which have no psychoactive effects and are used exclusively as an industrial product or, alternatively, should the Crown bear the burden of proving that the seized substance has a threshold level of THC in order to distinguish the substance from a purely industrial product?

The Appellant respectfully submits that: the answer to Issue A is "Yes"; the answer to Issue B is "No"; and the answer to Issue C is "No, the Crown should bear the burden of proving a threshold level of THC."

PART III - ARGUMENT

A. THE CRIMINAL PROHIBITION VIOLATES SECTION 7 IN A MANNER THAT DOES NOT ACCORD WITH PRINCIPLES OF FUNDAMENTAL JUSTICE?

1) Judgments in the courts below

11. As it did in the courts below, the section 7 challenge to the criminal prohibition on cannabis turns on whether that criminal prohibition accords with the "principles of fundamental justice". Both appellate courts recognized that the threat of criminal penalty (*i.e.,* incarceration and crimnial record) engages s.7's liberty interest and thus satisfied the first "stage" of the analysis.

- Reasons for Judgment on appeal in *Clay*, Appellant's Record, Volume XVI, p.3437 to p.3438;
- *Rodriguez v. B.C.(A.-G.)*, [1993] 3 S.C.R. 519;
- *R. v. Parker* (2000), 146 C.C.C. (3d) 193 (Ont. C.A.).

12. In considering whether the deprivation of liberty occasioned by the criminal prohibition of cannabis accords with the "principles of fundamental justice" the Ontario Court of Appeal was prepared to accept that the "principles of fundamental justice" included a "harm principle" in the terms suggested by Justice Braidwood of the B.C. Court of Appeal in *Regina v. Malmo-Levine*:

> The harm principle is a concise legal principle and there is a consensus among reasonable people that it is vital to our system of justice. The proper way to

> characterize this principle in the context of the Charter is to determine whether the prohibited activities hold a reasoned apprehension of harm to other individuals or society where the degree of harm is neither insignificant not trivial. However, like the majority of the British Columbia Court of Appeal, the Court below held that the "harm principle" meant that Parliament need only have "a reasonable apprehension of harm" before a criminal prohibition will satisfy the minimum constitutional requirements of s.7.
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> - Reasons for Judgment on appeal in *Clay,* Appellant's Record, Volume XVI, p.3440 to p.3441.

17. The Ontario Court of Appeal, relying on the reasoning of the majority decision in *Malmo-Levine* and in *Caine,* held that because "the evidence established that there is a reasoned apprehension of harm that is neither insignificant or trivial", the criminal prohibition was in accordance with the principle of fundamental justice at issue; namely, the harm principle.

- Reasons for Judgment on appeal in *Clay,* Appellant's Record, Volume XVI, p.3441.

2) The Balancing Required for Determining Whether a Criminal Prohibition Accords with the Principles of Fundamental Justice

18. As with most of the "principles of fundamental justice" which determine the constitutionality of a legislative deprivation of liberty, and especially with respect to the "harm principle", the second stage of the s. 7 analysis involves a balancing of the societal interests purportedly advanced by the legislation against the individual s. 7 interests at stake. It is a balancing approach which is reminiscent of that required by s. 1 of the *Charter* as described by La Forest J., writing for a majority of this Court, in *Godbout v. Longueuil (City of), infra*:

> From the foregoing discussion, it is clear that deciding whether the infringement of a s. 7 right is fundamentally just may, in certain cases, require that the right at issue be weighed against the interests pursued by the state in causing that infringement. This balancing process will necessarily be contextual, insofar as the particular right asserted, the extent of the infringement, and the state interests implicated in each particular case will depend largely on the facts.
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> - *Rodriguez v. B.C.(A.-G.), supra*;
> - *Godbout v. Longueuil (City of)*, [1997] 3 S.C.R. 844, para. 78 ;

- Reasons for Judgment on appeal in *Malmo-Levine*, Appellant's Record in *Malmo-Levine*, Volume II, p.273 *et seq.* (per Prowse J.A. dissenting).

19. In balancing the societal interests against the individual interests at the second stage of the s. 7 analysis of the constitutional challenge to the criminal prohibition on cannabis, it is submitted that the courts below committed three fundamental errors:

(i) After deciding that section 7's "liberty" and "security of the person" interests did not independently guarantee the right to consume cannabis, the courts ignored the context in which the individual's liberty interest is jeapordized by the criminal prohibition; namely, a personal decision to intoxicate themselves in private using cannabis instead of other more harmful, lawful intoxicants. While not constitutionally enshrined, the personal and private nature of the activity demands more than a "not insignificant" amount of harm before it can be criminalized.

(ii) The courts erred in failing to consider that because the evidence (including that presented by the Crown) established that only a very small minority of cannabis consumers were at risk of harm the deprivation of liberty of the vast majority of cannabis consumers did "little or nothing to enhance the state' interest[s]", especially in view of the general inefficacy of the prohibition as a deterrent: see *Rodriguez, supra* at 595-5.

(iii) The Courts erred in failing to shift the burden on to the state to justify the necessity of an ***absolute criminal*** prohibition given "the origins of the marihuana prohibition in Canada are not based in good public policy", given the recent trends towards decriminalization around the world and given the recommendations of its own commission's conclusion that the relatively minor harm associated with cannabis use did not warrant a criminal sanction.

When applied correctly, the balancing tilts in favour of finding that the deprivation of liberty caused by the criminal prohibition on cannabis does not accord with the principles of fundamental justice.

(i) The personal and private nature of the activity for which the criminal prohibtion deprives liberty requires a more compelling state interest to justify the deprivation

20. In deciding whether a criminal prohibition violates a *Charter* right, this Court has repeatedly held that it is important to contextualize the right in question. For example, while legislation restricting a type of speech will deprive individuals of their s. 2(b) *Charter* right, when balancing the rights of the individual against the competing rights of the state, it is

important to consider the nature of the expressive activity affected by the legislative provision. As this Court recently observed in *R. v. Sharpe, infra*:

> In summary, prohibiting the possession of child pornography restricts the rights protected by s. 2(b) and the s. 7 liberty guarantee. While the prurient nature of most of the materials defined as "child pornography" may attenuate its constitutional worth, it does not negate it, since the guarantee of free expression extends even to offensive speech.

In other words, for the purpose of the balancing required by a constitutional challenge to a criminal prohibition, *Charter* rights are not to be defined in one-dimensional terms, but rather along a sliding scale defined contextually by the nature of the activity in question.

- *R. v. Sharpe*, [2001] 1 S.C.R. 45, para.27;
- *R. v. Keegstra*, [1990] 3 S.C.R. 697, paras. 83 and 90;
- *Cunnigham v. Canada*, [1993] 2 S.C.R. 143 at 151-2.

21. The closer that the criminally proscribed activity lies to the heart of the interests protected by the *Charter* right at issue, the heavier it will weigh in the balance against the alleged social harm purporting to justify the criminal prohibition. Put differently, as the activity in issue moves along the spectrum closer to the "core" of a *Charter* right the weightier the societal interest must be to justify the criminal prohibition. In terms of the "harm principle", this means that the more constitutional value there is to the proscribed activity, the more serious the harm must be to justify using the criminal law to prohibit it. This approach is reflected in the majority judgment of this Court in *Sharpe*:

> Yet problems remain. The interpretation of the legislation above reveals that the law may catch some material that ***particularly engages the value of self-fulfillment and poses little or no risk of harm to children***. This material may be grouped in two classes. The first class consists of self-created, privately held expressive materials. Private journals, diaries, writings, drawings and other works of the imagination, created by oneself exclusively for oneself, may all trigger the s. 163.1(4) offence. The law, in its prohibition on the possession of such materials, reaches into a realm of exceedingly private expression, where s. 2(b) values may be particularly implicated and state intervention may be markedly more intrusive. Further, the risk of harm arising from the private creation and

> possesion of such materials, while not eliminated altogether, is low. [Emphasis added.]

While upholding the law in every other respect, this Court held that the risk of harm was not sufficient to justify criminalizing certain conduct which lay closer to the core of the *Charter* right in question.

- *R. v. Sharpe, supra* at paras. 74-77.

22. Assuming, *in arguendo*, that the personal and private consumption of cannabis does not independently engage the "liberty" and "security of person" interests enshrined in s. 7 of the *Charter*, it is submitted that the nature of this activity, unlike almost any other criminally proscribed activity, does engage the very values which those s. 7 interests are intended to protect; namely, privacy and autonomous decision-making with respect to bodily or psychological integrity. In *Sharpe*, this Court confirmed that the s. 7 liberty guarantee includes a right to privacy:

> The private nature of the proscribed material may heighten the seriousness of a limit on free expression. Privacy, while not expressly protected by s. 8 of the *Charter*, is an important value underlying the s. 8 guarantee: see *Hunter v. Southam Inc.,* [1984] 2 S.C.R. 145; *R. v. Mills*, [1999] 3 S.C.R. 668. Indeed, as freedom from state intrusions and conformist social pressures is integral to individual flourishing and diversity, this Court has observed that "privacy is at the heart of liberty in a modern state": *R. v. Dyment*, [1988] 2 S.C.R. 417 at p.427. Privacy may also enhance freedom of expression claims under s. 2(b) of the *Charter*, for example, in the case of hate literature: *Keegstra, surpa* at pp. 772-73; *Taylor*, *supra*, at pp.936-37. The enhancement in the case of hate literature occurs in part because private material may do less harm than public, and in part because freedoms of conscience, thought and belief are particularly engaged in the private setting: *Taylor, supra*....

The "security of the person" interests protected by s. 7 have been interpreted to include 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.

- *R. v. Sharpe, supra* at para. 26;
- *Fleming v. Reid* (1991), 4 O.R.(3d) 74 at 88 (Ont. C.A.);
- *Rodriguez v. B.C.(A.G.), supra*;
- *Reference re: ss.193 and 195.1(1)(C) of Criminal Code,* [1990] 1 S.C.R. 1123.

23 It is therefore submitted that in order to properly determine whether the criminal prohibition on cannabis accords with the "principles of fundamental justice" (*i.e.*, the harm principle), a court must take account of the constitutional values engaged by the personal and private consumption of cannabis. Unlike other criminal activity, cannabis is rarely (if ever) consumed in a manner which affects innocent non-consuming members of the public. This is especially true when a person consumes cannabis in the privacy of his/her own home. As set out in Paragraph 18 of the Joint Statement of Legislative Facts, cannabis is predominantly consumed as part of socializing with friends and partners during evenings and weekends. Cannabis is consumed in order to achieve the following: relaxation, euphoria, recreation, creativity, insight, pleasure and escape. People who have decided that they want to intoxicate themselves at home may choose to consume cannabis instead of other lawful intoxicants, such as alcohol or tobacco, in order to avoid the much more harmful effects of those lawful intoxicants. While the privacy and autonomy interests associated with the personal and private consumption of marijuana may not themselves stand in the way of a criminal prohibition, they do require a more serious and significant level of harm to justify the deprivation of liberty occasioned by the criminal prohibition on cannabis.

- *B.(R.) v. Children's Aid,* [1995] 1 S.C.R. 315 at 340 and 368-9.

24 In 1975, the Supreme Court of Alaska engaged in this exercise of balancing the right to privacy against "legitimate societal needs" and reached the following conclusion concerning the criminal prohibition of cannabis:

> We glean from these cases the general proposition that the authority of the state to exert control over the individual extends only to activities of the individual which affect others or the public at large as it relates to matters of public health or safety, or to provide for the general welfare. We believe this tenet to be basic to a free

society. The state cannot impose its own notions of morality, propriety, or fashion on individuals when the public has no legitimate interest in the affairs of those individuals. The right of the individual to do as he pleases is not absolute, of course: it can be made to yield when it beings [begins] to infringe on the rights and welfare of others.

Further, the authority of the state to control the activities of its citizens is not limited to activities which have a present and immediate impact on the public health or welfare. It is conceivable, for example, that a drug could so seriously develop in its user a withdrawal or amotivational syndrome, that widespread use of the drug could significantly debilitate the fabric of our society. Faced with a substantial possibility of such a result, the state could take measures to combat the possibility. The state is under no obligation to allow otherwise "private" activity which will result in umbers of people becoming public charges or otherwise burdening the public welfare. But we do not find that such a situation exists today regarding marijuana. It appears that effects of marijuana on the individual are not serious enough to justify widespread concern, at least as compared with the far more dangerous effects of alcohol, barbiturates and amphetamines. Moreover, the current patterns of use in the United States are not such as would warrant concern that in the future consumption patterns are likely to change....

However, given the relative insignificance of marijuana consumption as a health problem in our society at present, we do not believe that the potential harm generated by drivers under the influence of marijuana, standing alone, creates a close and substantial relationship between the public welfare and control of ingestion of marijuana or possession of it in the home for personal use. Thus we conclude that no adequate justification for the state's intrusion into the citizen's right to privacy by its prohibition of possession of marijuana by an adult for personal consumption in the home has been shown. The privacy of the individual's home cannot be breached absent a persuasive showing of a close and substantial relationship of the intrusion to a legitimate government interest. Here, mere scientific doubts will not suffice. The state must demonstrate a need based

> on proof that the public health or welfare will in fact suffer if the controls are not applied."
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> - *Ravin v. State*, 537 P.2d 494 at 509-510 and 511 (1975, Alaska S.C.)

25 In *R. v. Butler, infra*, faced with a constitutional challenge to the criminal prohibition on obscene material, this Honourable Court noted the significance of the fact that the criminal prohibition on the "consumption" of obscene material did ***not*** extend to personal and private consumption. Accordingly, as Prowse J.A. found in her dissenting opinion in the B.C. Court of Appeal judgment in *Malmo-Levine* and *Caine*, the "reasonable apprehension of harm" threshold articulated by this Court in *Butler* does not support the Crown's contention that this is an adequate level of harm to justify the criminal prohibtion on personal and private cannabis consumption. In any event, on the evidence adduced in the courts below with respect to the consumption of cannabis, there can be little doubt that the potential harm associated with the personal and private consumption of cannabis is less that the potential harm associated with the personal and private consumption of criminally obscene material. In *Butler*, there was no dispute that the nature of the harm which was apprehended was both real and substantial (as opposed to "not insignificant" or "not trivial") ***because it would be suffered by innocent non-consuming members of society in a significant way***; the evidentiary debate *Butler* was with respect to whether that harm had been conclusively proven. While a reasonable apprehension of a "not insignificant" or "not trivial" harm may suffice to justify a regulatory prohibition on the personal and private consumption of a substance, it is not constitutionally adequate for justifying the use of incarceration and the imposition of a criminal record to deter such consumption. The "reasonable apprehension of a not insignificant harm" was ***not*** the right threshold by which to measure the constitutional sufficiency of the harm associated with the personal and private use of cannabis.

- *R. v. Butler*, [1992] 1 S.C.R. 452.

(ii) The criminal prohibition on cannabis does little to enhance the state's objective as it is grossly overbroad and it is ineffective

26 In *Rodriguez*, for the majority of this Court, Sopinka J. wrote:

> Where the deprivation of the right in question does little or nothing to enhance the state's interest (whatever it may be), it seems to me that a breach of

> fundamental justice will be made out, as the individual's rights will have been deprived for no valid purpose.

This approach reflects the "overbreadth" principle which this Court has also recognized as a "principle of fundamental justice". In *R. v. Nova Scotia Pharmaceutical Society, infra*, this Court firmly established that overbreadth within a punitive statutory regime will not accord with s. 7's principles of fundamental justice. Two years later, the Court in *R. v. Heywood, infra*, applied this principle and invalidated s. 179(1)(b) of the *Criminal Code* (*i.e.*, sex offender loitering in the vicinity of playground, etc.). In *Heywood*, the Court characterized the overbreadth analysis as follows:

> Overbreadth analysis looks at the means chose by the state in relation to its purpose. In considering whether a legislative provision is overbroad, a court must ask the question: Are those means necessary to achieve the state objective? If the state, in pursuing a legitimate objective, uses means which are broader than is necessary to accomplish that objective, the principles of fundamental justice will be violated because the individual's rights will have been limited for no reason. The effect of overbreadth is than in some applications the law is arbitrary or disproportionate....

It is submitted that to accord with s. 7's "principles of fundamental justice" and, in particular, the overbreadth principle, the harm caused by a legislative provision cannot be disproportionate to the harm prevented by it; that is, a "not insignificant" level of prevented harm cannot justify a legislative provision which seriously harms the interests s. 7 of the *Charter* was intended to protect.

- *Rodriguez v. B.C.(A.-G.), supra* at para. 147;
- *R. v. Nova Scotia Pharmaceutical Society,* [1992] 2 S.C.R. 606;
- *R. v. Heywood,* [1994] 3 S.C.R. 761 at paras. 49 and 50;
- *Godbout v. Longueuil (City of)*, *supra* at para. 80.

27 As the Crown's own expert, Dr. Kalant, acknowledged, the vast majority of cannabis users are moderate users who do not present ***any*** risk of harm to themselves or others. Indeed, both the trial Judge in *Clay* (and the Ontario Court of Appeal) recognized this fact:

> However, to be fair, there is also general agreement among the experts who testified that moderate use of marijuana causes ***no physical or psychological***

> ***harm***. Field studies in Greece, Costa Rica and Jamaica generally supported the idea that marijuana was a relatively safe drug – not totally free from potential harm, but unlikely to create serious harm for most individual users or society. [Emphasis added.]

However, the criminal prohibition on cannabis does not distinguish between those few whose consumption presents a potential risk of ***some*** harm (assuming that harm is sufficiently serious to justify criminal sanctions) and those for whom moderate consumption presents little or no risk of any harm. Yet, the criminal prohibition attaches criminal sanctions to ***all*** users, regardless of whether it is their first, second or tenth time using cannabis. Even though the Crown's expert estimates that there are only about 30,000 chronic users in Canada for whom there is some risk of harm, the criminal prohibition has adversely impacted upon no less than 600,000 Canadians. Crudely put, the criminal prohibition needlessly causes harm to 20 people for every one person who might benefit from the putative deterrent effects of the law. From another perspective, the gross overbreadth of the criminal prohibition on cannabis means that the overwhelming majority of convicted offenders have "not really done anything wrong" and that we are convicting them to prevent harm to the small percentage of chronic users: see *B.C. Motor Vehicle Reference, infra*.

- Reasons for Judgment at trial in *Clay*, Appellant's Record, Volume XVI, p.3365 to p.3366;
- *B.C. Motor Vehicle Reference,* [1985] 2 S.C.R. 486;
- *R. v. Nguyen,* [1990] 2 S.C.R. 906;
- Joint Statement of Legislative Facts, Paragraphs 17 and 22 to 27.

28 It is submitted further that where a criminal prohibition is focussed on an activity for which there is little or no risk of harm to anyone other than those who voluntarily chose to engage in that activity, the balance tilts further away from the constitutional validity of the legislative provision. In order to justify criminalizing an activity based on the potential harm it may cause to a voluntary participant, the state must produce sound empirical evidence to show that the criminalization of that activity prevents more harm than it causes. As Abella J.A. observed in a similar context in *R. v. M.(C.), infra*:

> The issue then comes down to this: is sending young persons to jail a reasonable way for the state to protect them from any risks associated with consensual anal intercourse?

> If the prevention of harm by discouraging the risk is the objective, it is difficult to imagine a more intrusive way to protect an individual from harm than criminal prosecution. Far from minimally impairing the right to equality, the loss of liberty for a consensual form of sexual expression is, it seems to me, the most restrictive means possible for achieving the objective. The risk associated with unprotected sexual conduct is a health risk. It strikes me as decidedly inappropriate to deal with minimizing health risks at any age by using the punitive force of the *Criminal Code*, but especially so for young people...
>
> Health risks ought to be dealt with by the health care system...
>
> It is not enough for a government to assert an objective for limiting guaranteed rights under s. 1; there must, in my view, also be an underlying evidentiary basis to support the assertion. Since there is no empirical evidence that adolescents are more at risk of HIV transmission than any other group, or that criminalizing their sexual behaviour protects them from this risk, there is, accordingly, no evidentiary foundation to support the government's first articulated objective.
>
> When governments define the ambits of morality, as they do when they enunciate laws, they are obliged to do so in accordance with constitutional guarantees, not with unwarranted assumptions. Sending young people to jail for their own protection when they exercise sexual choices not exercised by the majority, represents, in my view, even if benignly intended, precisely such unwarranted assumptions.
>
> - *R. v. M.(C.)* (1995), 30 C.R.R. (2d) 112, 121-123 (Ont. C.A.)

29 The uncontradicted evidence adduced in the courts below shows that it is the criminal prohibition on cannabis which causes significant harm to society: see Paragraphs 22 to 27 of the Appellants' Joint Statement of Legislative Facts. As the Ontario Court of Appeal observed in *Clay*:

> In considering whether Parliament has struck a fair balance, the deleterious effects of the marihuana prohibition should not be underestimated. In addition to the possibility of imprisonment, the evidence at trial also demonstrated the broader adverse impact. As Braidwood J.A. noted at paragraphs 146-47 in Malmo-Levine,

> the continued criminalization of marihuana has led to a "palpable disrespect for the law among the million or so Canadians who continue to use the substance despite the risk of imprisonment". The marihuana law has fostered disrespect and distrust for narcotic laws generally. The marihuana prohibition has also resulted in the stigmatization of many thousands of Canadians who have been given a criminal record or a record of a finding of guilt by reason of their being charged with possession of marihuana. That charge and the resultant court proceedings are often their only interaction with the criminal justice system.
>
> - Reasons for Judgment on appeal in *Clay*, Appellant's Record, Volume XVI, p.3441.

30 It is further submitted that the Ontario Court of Appeal erred in failing to also weigh the criminal prohibition's ineffectiveness in actually preventing the harm it was purportedly designed to prevent. Once again, the uncontradicted evidence adduced in the courts below is that the criminal prohibition does little or nothing to deter people – whether they be moderate or chronic users – from consuming cannabis. As summarized at Paragraph 28 of the Joint Statement of Legislative Facts:

> In spite of the criminal prohibition and the adverse social effects associated with a charge of marijuana possession, 92% of those who were charged with cannabis offences continue to use cannabis, in much the same way as they had been using it before becoming entangled with the criminal justice system. Studies have shown that the intervention by the criminal justice system simply "engineered them into a desire to avoid being caught again and gave them ideas about how to be more careful". Actual sanctions and the threat of punishment were ineffective deterrents: those who were most likely to continue using marijuana actually perceived a greater risk of re-arrest and a more severe punishment upon a subsequent conviction. The continued upward trend in cannabis use among Canadians, notwithstanding the continuation of the criminal prohibition, demonstrates that the prohibition has been completely ineffective as a general deterrent. In study of a group of older, regular cannabis users (averaging 13 years of use), the group reported no difficulty in obtaining a regular source of supply and expressed little or no concern over the possibility of arrest and prosecution.

> Conversely, the failure of the criminal prohibition as a specific or general deterrent has translated into an opportunity for some jurisdictions to liberalize the prohibition without increasing the rate of consumption that increasing rates of marijuana consumption are not triggered by legal reform which has moved in the direction of decriminalizing.

As for the potential denunciatory effect of the criminal prohibition on cannabis, a 1995 opinion poll conducted by Health Canada revealed that 69% of Canadians were in favour of softening the criminal prohibition. The results of that poll are consistent with every other public opinion poll conducted over the past 20 years in Canada.

- *Godbout v. Longueuil (City of)*, *supra* at para. 81;
- Joint Statement of Legislative Facts, Paragraphs 28 and 29

31 In deciding how to cast the balance between the ineffectiveness of a criminal prohibition and the level of harm which the criminal prohibition on cannabis seeks to avoid, this Court's recent decision in *RJR - MacDonald Inc.* is instructive. Despite this Court's finding that "the detrimental health effects of tobacco consumption are both dramatic and substantial", the Court accepted that the government was justified in ***not*** criminalizing tobacco consumption. In recognizing that a criminal prohibition on tobacco "would likely lead many smokers to resort to alternative, and illegal, sources of supply", the Court noted the comments of Health Minister, Jake Epp, on why the government had decided against a criminal prohibition on tobacco consumption: "***Prohibiting the sale of a social drug like tobacco is not feasible****...."* The nature and extent of the harms potentially caused by cannabis consumption pale by comparison to the harms caused by tobacco consumption. If the much more serious harm caused by tobacco consumption does not compel a criminal prohibition given the inefficacy of such a measure, then it can hardly be constitutionally justified to use a criminal prohibition to prevent the ***much*** lesser harm associated with cannabis consumption when it is equally ineffective at deterring consumption.

- *RJR - MacDonald Inc. v. Canada (Attorney General), supra* at paras. 32 and 34.

32 If properly considered by a court, the ineffectiveness and the overbreadth of the criminal prohibition on cannabis greatly undermines its constitutional validity. In 1994, the Constitutional Court of Germany considered whether the consumption of cannabis is injurious to

the consumer and to the public. In emphasizing the need to have a power to dismiss minor charges which are not associated with social harm, the Court reached the following conclusions with respect to the relative lack of harm occasioned by the consumption of cannabis as compared to the societal interest in the criminal prohibition:

> There is far-reaching agreement that cannabis products do not lead to physical dependence... and — apart from the chronic consumption of large doses — do not lead to the development of tolerance... The direct damage to health resulting from moderate use is also considered to be slight... On the other hand, the possibility of psychological dependence is hardly contested... for a minority of cannabis consumers in the case of chronic consumption of large doses; at the same time, however, the addiction potential of cannabis products is categorized as very slight... This is consistent with the large number of unobtrusive occasional consumers, and of users who restrict themselves to the consumption of hashish. It has also been reported that long-term consumption of cannabis products can lead to behaviour disorders, lethargy, apathy, anxiety, derealization , and depression... and that this can disrupt personality development, specifically of young people. On the other hand, there is disagreement as to whether the use of cannabis products can cause the so-called amotivational syndrome, a condition characterized by apathy, passivity and euphoria. The point at issue is whether it is consumption of cannabis products which causes the amotivational syndrome... or whether such consumption is the result of a pre-existing attitude to life... There is general agreement, however, that the amotivational syndrome is only associated with long-term use of large doses of cannabis products.
>
> The majority of authorities now reject the view that cannabis has a "pacesetting" function for hard drugs, in so far as an actual physical characteristic of cannabis products is meant... This is in accordance with the results of the 1990 survey... according to which only 2.5% of hashish users also use other drugs which are subject to the provisions of the Narcotics Act. This does not preclude cannabis consumption, in an undetermined number of cases, having a "transfer effect" with respect to hard drugs. It is generally supposed, however, that this has less to do with habituation than with fact that the drugs market forms a single unit—the cannabis user generally buys his hashish from dealers who also traffic in "hard" drugs... Finally, there is no disagreement as to the fact that acute cannabis intoxication can have a negative effect on driving ability.
>
> In view of all this, and in spite of the major overall significance which the total number of small-scale consumers has for the illicit drugs market, taken individually each small-scale consumer makes only a minor contribution to bringing about the dangers which prohibition of involvement with cannabis

> products is meant to avert. This may be otherwise, however, if the nature and manner of consumption is likely to encourage young people to use the drug.
>
> ***If acquisition or possession of cannabis products is restricted to small quantities for occasional personal use, then the concrete danger of the drug being transferred to third parties is in general not very significant. Accordingly, the public interest served by punishment is as a rule minor. In its effects on individual offenders, the imposition of penalties within the criminal law on occasional users of small quantities of cannabis products and on those who are merely trying out the drug may lead to results which are unreasonable and, from the point of view of prevention, actually negative. It may, for example, lead to persons being driven into the drugs scene or to their developing a feeling of solidarity with it.*** [Emphasis added.]
>
> - Hans-Jorg Albrecht Affidavit, Appellant's Record in *Clay*, Volume VII, p.1577 *et seq.*

(iii) The irrational origins of the criminal prohibition and the conclusions of the LeDain Commission demand positive proof from the state that the criminal prohibition on cannabis is necessary

33 The history of the current prohibition on marijuana is unlike that of any other criminal offence, and certainly unlike that of any of the offences which have so far been the subject of substantive s. 7 *Charter* challenges. By way of contrast, in a recent case assessing the constitutionality of the incest provisions as they apply to the sexual conduct of consenting adults, the Nova Scotia Court of Appeal dismissed the challenge while observing that:

> The analysis of these arguments must be undertaken with the recognition that the appellants have the burden of proving on the balance of probabilities that their fundamental rights are violated by the law in question. In that respect, I note that the appellants have not presented any evidence that indicates that incest between consenting adults is permitted by the law of any other civilized nation, nor have they filed any articles or learned publications, law reform commission papers or other material that supports their position that "recreational" sexual activity with blood relations should be legalized and constitutionally protected.

Similarly, in upholding the constitutionality of the obscenity provisions and the prohibition on assisted suicide, this Court was influenced by the fact that virtually every other civilized nation had similar criminal prohibitions.

- *Rodriguez v. B.C.(A.G.), supra*;
- *R. v. Butler, supra*;
- *R. v. F.(R.P.)* (1996), 105 C.C.C. (3d) 435 at 441 (N.S.C.A.).

34 The fact that other jurisdictions prohibit an activity will normally bolster the presumption that such an activity causes social harm. However, the contrary is true with respect to cannabis; that is, the international trend towards cannabis decriminalization ***undermines*** any such presumption of harm. Put differently, unlike any other existing criminal prohibition, the prohibition on the consumption of cannabis cannot be said to be based on a presumption of harm given that other civilized nations have decriminalized this activity. In addition, unlike the incest prohibition and the prohibition on assisted suicide (see *Rodriguez, supra)*, it has not been a criminal offence since time immemorial to consume *cannabis*.

35 Further, and in the alternative, it is submitted that the checkered history of the criminal prohibition on marijuana requires more than "a reasonable apprehension" of some harm in order to satisfy the "harm principle". The legislative history of the criminal prohibition on cannabis stands in stark contrast to the legislative history of the Canadian government's recent criminal prohibition on tobacco ***advertising*** (tobacco ***consumption*** still being legal):

> In Canada, the decision to criminalize tobacco advertising was made incrementally, as part of a 25-year public policy process, and only after Parliament had determined that there was compelling evidence concerning the health effects of tobacco consumption and that the variety of non-criminal measures then in place were not sufficiently effective in reducing consumption.
>
> - *RJR - MacDonald Inc. v. Canada (Attorney General), supra* at para. 48.

36 The "harm" relied upon by the courts below to satisfy the "harm principle" with respect to the criminal prohibition on cannabis were the same harms identified by the LeDain Commission in 1972. The LeDain Commission was struck specifically to consider the wisdom of maintaining, *inter alia*, the criminal prohibition on cannabis. Notwithstanding its findings with respect to those four potential "harms", the LeDain Commission concluded that the ***criminal*** prohibition on marijuana should be removed as it was disproportionate to those

potential harms. The significance of the findings of a commission of inquiry have been firmly recognized by this Court in a number of cases, including *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, *infra*:

> Commissions of inquiry have a long history in Canada. This court has already noted (*Starr v. Houlden, supra*, at pp. 503-5 C.C.C.) the significant role that they have played in our country, and the diverse functions which they serve. As *ad hoc* bodies, commissions of inquiry are free of many of the institutional impediments which at times constrain the operation of the various branches of government...
>
> . . . .
>
> One of the primary functions of public inquiries is fact-finding. They are often convened, in the wake of public shock, horror, disillusionment, or scepticism, in order to uncover "the truth". Inquiries are, like the judiciary, independent; unlike the judiciary, they are often endowed with wide-ranging investigative powers. In following their mandates, commissions of inquiry are, ideally, free from partisan loyalties and better able than Parliament of the legislatures to take a long-term view of the problem presented....

In the face of the findings by the LeDain Commission that the potential harm does ***not*** justify the criminal prohibition of cannabis, it is submitted that the state must be required to produce subsequently obtained evidence which positively establishes a measurable degree of harm worthy of a criminal prohibition. Otherwise, it can hardly be said that Parliament's apprehension of harm is "reasonable". A belief based on wilful blindness can never be reasonable. Although written in the context of the balancing required under s. 1 of the *Charter*, the words of McLachlin J. (as she then was) for the majority of this Court in *RJR - MacDonald Inc. v. Canada (Attorney General)*, *infra* are apposite:

> 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.

As the records in the courts below demonstrate, Parliament has repeatedly refused to even study the issue since the LeDain Commission reported that the criminal prohibition on marijuana was unjustified given the lack of serious or substantial harm associated with the consumption of cannabis. For that reason, the state is constitutionally estopped from continuing to rely upon the criminal prohibition unless and until it can justify it.

- Reasons for Judgment of Court of Appeal, Appellant's Record, Volume XVI, p.3432;
- *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97 at paras. 60 and 62;
- *RJR - MacDonald Inc. v. Canada (Attorney General), supra* at paras. 48 and 129;
- Affidavit of Senator Sharon Carstairs, sworn April 30, 1997, Appellant's Record, Volume XVI, p.3214.

B. THE CRIMINAL PROHIBITION OF MARIJUANA IS NOT A VALID EXERCISE OF THE FEDERAL LEGISLATIVE POWER

37 It is respectfully submitted that the *Narcotics Control Act,* as it relates to the prohibition of cannabis, is *ultra vires* the Parliament of Canada regardless of whether the proper constitutional characterization of the Act is an exercise of the criminal law power or as an exercise of the federal government's residual legislative power under P.O.G.G. It is respectfully submitted that a shifting scientific perspective of the proscribed activity can and should affect the characterization of the pith and substance of a law for the purpose of a division of power analysis. This argument was uniquely raised in this case and was not the subject matter of consideration in either *Caine* or *Malmo-Levine*. It is submitted that the Courts below erred in upholding this law as a valid exercise of the federal criminal power in light of the extensive record demonstrating a fundamental shift in the scientific and moral perspectives of the activity at issue. The Court below also held that it was not free to reconsider the decision of this Honourable Court in *R. v. Hauser, infra* that the *Narcotic Control Act,* in general, was a valid exercise of the P.O.G.G. power.

- *R. v. Hauser*, [1979] 1 S.C.R. 984;
- Reasons for Judgment on appeal in *Clay*, Appellant's Record, Volume XVI, p.3443.

38 The constitutional underpinning for the *Narcotic Control Act* has been the subject of debate and disagreement. At first blush, one would assume that Parliament's authority in this regard devolves from its criminal law power under s. 91(27) of the *Constitution Act, 1867*. However, in *Hauser,* this Court concluded that Parliament had the authority to create laws for the control of narcotic pursuant to its residual power to make laws in relation to the "peace, order and good government of Canada" (P.O.G.G.). This conclusion was merely incidental to the Court's primary holding that the federal government had authority to prosecute matters under the *Narcotics Control Act*.

39 With respect to the P.O.G.G. clause, it is now well-settled that this residual head of legislative power was intended to apply to only three situations:

(i) the existence of a national emergency;

(ii) with respect to subject-matter which did not exist at the time of Confederation and is clearly not in a class of matters of a merely local or private nature;

(iii) 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".

It is respectfully submitted that the cannabis prohibition contained in the *Narcotics Control Act* is not encompassed by any of these three situations. First, there is no evidence of a national emergency (especially one which has been sustained for the past 65 years). Second, although the subject-matter of the Act did not exist at the time of Confederation, the subject-matter does impinge upon matters of a merely local or private nature (*i.e.,* health concerns) and as such the "newness" doctrine is not applicable. Third, there is no evidence that the subject-matter is beyond the competence of the provinces or that it is a national concern which can only be effectively dealt with under federal power.

- *Labatt Breweries of Canada v. A.G. of Can.,* [1980] 1 S.C.R. 914.

40 The characterization of the entire *Narcotic Control Act* as falling within P.O.G.G. has been called into question in more recent years. In a case which post-dates *Hauser*, Chief Laskin noted the following:

> ..in my view, the majority judgement in the *Hause*r case ought not to have placed the *Narcotic Control Act* under the residuary power. Unless we revert to a long abandoned view of the peace, order and good government power as embracing the entire catalogue of federal legislative powers, I would myself have viewed the *Narcotic Control Act* as an exercise of the federal criminal law power; 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.
>
> It is of some relevance to note that this court, speaking through, Martland J., in *R v. Aziz*, [1981] 1 S.C.R. 188 was cautious in its endorsement of *Hauser* as being the *Narcotic Control Act* entirely on the peace, order and good government clause. There is, in my view, good ground to reconsider that basis of decision, resting as it did on a bare majority judgement.

If the P.O.G.G. power cannot serve as a constitutional foundation for the entire *Narcotics Control Act*, *a fortiori*, it cannot serve to justify a federally enacted prohibition on cannabis.

- *Schneider v. The Queen*, [1982] 2 S.C.R. 112.

41 With respect to the criminal law power under s. 91(27) of the *Constitution Act, 1867,* the following summary of the scope of this power has been repeatedly adopted by this Court:

> The traditional root of discussions in this field is found in Russell v. The Queen (1882), 7 App. Cas. 829 (P.C.), where Sir Montague E. Smith said at p. 839:
>
> > "Laws...designed for the promotion of public order, safety or morals and which subject those who contravene them to criminal procedure and punishment, belong to the subject of public wrongs rather than to that of civil rights...and have direct relation to the criminal law.
>
> That there are limits to the extent of the criminal authority is obvious and these limits were pointed out by this Court in The Reference as to the Validity of Section 5(a) of the Dairy Industry Act (Margarine Reference), [1949] S.C.R. 1, aff'd [1951] A.C. 179, where Rand J. looked to the object of the statute to find whether or not it related to the traditional field of criminal law, namely public peace, order, security, health and morality. In that case, the Court found that the object of the statute was economic:...
>
> The test is one of substance, not form, and excludes from criminal jurisdiction legislative activity not having the prescribed characteristics of criminal law:

> "A crime is an act which the law, with appropriate penal sanctions, forbids; but as prohibitions are not enacted in a vacuum, we can properly look for some evil or injurious or undesirable effect upon the public against which the law is directed. That effect may be in relation to social, economic or political interests; and the legislature has had in mind to suppress the evil or the safeguard the interest threatened." [Reference re Validity of Section 5(a) of Dairy Industry Act, Canadian Federation of Agriculture v. AG Que. et al. (the Margarine case), [1949] S.C.R. 1 at 49, [1949] 1 D.L.R. 433 at 472-3, aff'd [1951] 4 D.L.R. 689 (P.C.) (Rand J.).]

- *Labatt Breweries of Canada v. A.G. of Can., supra*;
- *RJR - MacDonald Inc. v. Canada (Attorney General), supra*.

42 While this Court has recently held in *RJR - MacDonald Inc.* that "public health" is a matter which may properly be the subject of the federal criminal law power, it is submitted that the Court's decision in that case was never intended to apply to ***all*** health issues, that is, regardless of the seriousness or scope of the alleged problem. As Estey J. observed in *Schneider v. The Queen*:

> ... "health" is not a matter which is subject to specific constitutional assignment but instead is an amorphous topic which can be addressed by valid federal or provincial legislation, depending in the circumstances of each case on the nature or scope of the health problem in question.

Interpreting the scope of the federal criminal law power to include any health issue "would allow Parliament to invade areas of provincial legislative competence colourably simply by legislating in the proper form". It is therefore submitted that, at a minimum, the federal criminal law power is limited to broad concerns for "***all*** the inhabitants of the Dominion" or for the "general health" of the nation.

- *Schneider v. The Queen, supra*;
- *RJR - MacDonald Inc. v. Canada (Attorney General), supra* at para. 28;
- *Standard Sausage Co. v. Lee* (1933), 60 C.C.C. 265 at 269-71 (B.C.C.A.);
- *In the Matter of a Reference as to the Validity of Section 5(a) of the Dairy Industry Act*, [1949] S.C.R. 1 ["the *Margarine Reference*"].

43 It is submitted that, as the courts below recognized, the legislative origins of the criminal prohibition on cannabis had nothing to do with legitimate claims that cannabis was injurious to public health. In the words of Rosenberg J.A. in the Court below, "the supposed evidence of [the] harm was based on racism and irrational, unproven and unfounded fears. This stands in stark contrast to the genesis of the tobacco legislation which this Court recently held to be a valid exercise of the federal criminal law power in *RJR - MacDonald Inc.*:

> An appropriate starting point in an examination of these extrinsic materials is the speech given by Jake Epp, the Minister of National Health and Welfare, on November 23, 1987, before second reading of Bill C-51, which was later given Royal Assent to the Act. He stated (Canada, House of Commons Debates, vol. ix, 2nd Sess., 33rd Parl., Vol. IX, 1987 (November 23, 1987), at p. 11042):
>
> . . . .
>
> > This is not a moral crusade. It is not a case of some overzealous individuals attempting to force their life-style on others. It is responsible government action in reaction to overwhelming evidence that tobacco, despite its widespread use by a third of the adult population, is actually responsible for 100 deaths a day in Canada.

By contrast, the Minister of Health has never promoted the criminal prohibition on cannabis as a means of protecting the health of Canadians. For good reason. Prior to the mid-1960's, there were virtually no convictions for cannabis possession. While there is ***some*** recent evidence to suggest that there are some potential harms from smoking cannabis, those harms concern only 1/5 of 1% of the Canadian population, not the 33% jeopardized by tobacco consumption. Moreover, unlike the harms caused by tobacco consumption, there are only 154 ***hospitalizations*** (not deaths) ***each year*** (not each day) in Canada which are ***associated with*** (not caused by) cannabis consumption. As Dr. Peck noted in his testimony at trial in *Caine*, local health officials across the country have ***not*** raised any health concerns relating to the consumption of cannabis.

- *RJR - MacDonald Inc. v. Canada (Attorney General), supra* at para. 30.

44 It is submitted further that a change in the social and political climate or a change in the scientific understanding of an activity can render a federal law *ultra vires*, notwithstanding the fact that the law may have once been *intra vires*. In the *Margarine Reference*, this Honourable Court held that the prohibition on the consumption and sale of margarine had ***lost*** its criminal

law underpinning as a result of changing scientific data. 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. It is submitted that a prohibition which has lost its criminal law underpinning will have equally and obviously lost its justification as an exercise of the P.O.G.G. power.

- *Margarine Reference*, *supra*.

45. 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 and public policy, such that federal prohibition could no longer be upheld as *intra vires* the Government of Canada. In the case of the cannabis prohibition the relevant change in perspective is evidenced by (1) the fact that virtually every foreign government commission (as well as our own LeDain Commission) has concluded that the original justification for the prohibition on marijuana has been lost; and (2) the fact that other legislators in western, liberal democracies have moved in the direction of decriminalization.

- *R. v. Varley* (1935), 65 C.C.C. 192 at 199-200 (Ont. Co. Ct);
- *R. v. Jones* (1936), 67 C.C.C. 228 at 238-239 (N.B.C.A.);
- *R. v. Shoppers' Bazaar Ltd*. (1973), 15 C.C.C. (2d) 497 (Ont. Prov. Ct.);
- *Starr v. Houlden,* [1990] 1 S.C.R. 1366.

46. It is respectfully submitted that the cannabis prohibition cannot be sustained as a valid exercise of the federal criminal law power. Without a sound scientific basis for concluding that the consumption of cannabis is seriously harmful to a significant number of consumers and/or to society at large, and that this harm threatens the Dominion as a whole, it is submitted that the control or regulation of cannabis must be characterized as a provincial concern, either as a matter of property and civil rights (s.92(13)) or as a matter that is of a local or private nature (s.92(16)), such as the regulation of alcohol consumption.

47. In the absence of any sound scientific evidence that cannabis consumption causes any serious harm, modern day defenders of the criminal prohibition often argue that Canada's

criminal prohibition law is justified because of Canada's international legal obligations. Indeed, defenders of the criminal prohibition say that the ***genesis*** of the "current" Canadian cannabis prohibition is the 1961 "Single Convention". It is that international treaty, the prohibition's proponents say, which reflects global recognition of the serious harm associated with the consumption of cannabis. The unsupported opinions of many governments, as reflected in treaties such as the Single Convention, can not and should not serve as a substitute for the evidence of harm required to justify invoking the criminal law to regulate an activity. Simply put, a group of blind men walking do not see their path any clearer just because they walk in lock step together. Indeed, the ***1961*** Single Convention pre-dated the conclusions of at least six government commissions in four different countries (*i.e.,* the U.S., England, Canada and Australia), all of which found that cannabis consumption was not sufficiently harmful to justify the use of the criminal sanction. Furthermore, since 1961, many Western European countries have "decriminalized" cannabis consumption notwithstanding that they were parties to the Single Convention. Their decriminalization efforts have been justified by the fact that Article 36 of the Convention requires only that the parties to the Convention make cannabis consumption a "punishable offense", but not necessarily a ***criminal*** offence. In other words, regulatory offences concerning the personal possession of cannabis (such as those which the provinces have the power to create) would, as they have in other jurisdictions, satisfy Canada's international obligations.

> - N. Dorn and A. Jamieson, *"Room for Manoeuver*: Overview of comparative legal research into national drug laws of France, Germany, Italy, Spain, the Netherlands and Sweden and their relation to three international drugs conventions" (London: DrugScope, 2000);
> - *R. v. Parker, supra* at 242 and 248.

C. THE APPROPRIATE CONSTITUTIONAL REMEDIES

48. It is respectfully submitted that the appropriate remedy for the constitutional violations outlined above is an order declaring that the offence of possession of cannabis is of no force and effect or, in the alternative, a declaration that the offence requires the Crown to prove some measure of harm associated with the defendant's use of cannabis. The alternative suggestion is neither novel nor unworkable. A harm requirement was "read in" to the obscenity offences in

order to avoid convicting people involved in conduct which was not necessarily harmful by definition.

- *R. v. Butler, supra*;
- *R. v. Hawkins* (1993), 86 C.C.C.(3d) 246 (Ont. C.A.); rev'd on other grds, [1995] 4 S.C.R. 55.

49. In the further alternative, it is submitted that the minimum constitutional remedy ought to be an order declaring that, upon being found guilty of a cannabis possession offence, no one may be convicted or imprisoned unless there are exceptional circumstances. The vast majority of cases involving possession of cannabis result in the imposition of non-custodial terms (though in the past – the last time statistics were made available by the state – an average of 2,000 individuals per year were still being sentenced to a term of imprisonment). It is submitted that, in light of the marginal or insignificant harms associated with possession of cannabis, the common practice of imposing non-custodial terms should receive constitutional recognition in order to avoid violating the principle of ensuring proportionality between punishment and blameworthiness. This Honourable Court has recognized that one cannot rely upon the good faith of public officials to ensure that sentencing practices are proportionate to blameworthiness, and the Court has also recognized that in assessing the constitutionality of the operation of a statutory provision the court is allowed to take into account hypothetical scenarios in which the law can potentially violate the Constitution. The current legal regime allows for a period of incarceration of up to 7 years for possession of cannabis. One can easily conceive of numerous hypothetical scenarios in which a law-abiding, productive individual whose actions have resulted in little or no harm to society will be exposed to the ultimate sanction for conduct which is relatively harmless.

- *R. v. Smith*, [1987] 1 S.C.R. 1045;
- *R. v. Goltz*, [1991] 3 S.C.R. 485;
- *R. v. M.(C.A.)*, [1996] 1 S.C.R. 500.

50. Finally, it is submitted that the plenary power given to a court to award a remedy which is "appropriate and just in the circumstances" should be employed to order a stay of proceedings in all criminal prosecutions of possession of cannabis until such time as Parliament can present sound scientific evidence which provides a "reasoned" basis for concluding that it is necessary to criminalize conduct relating to the personal consumption, possession and cultivation of cannabis.

In light of fact that both the 1972 LeDain Commission Report and the 1996 Senate Committee on Legal and Constitutional Affairs recommended further studies to determine if cannabis is sufficiently harmful to warrant criminalization, it is submitted that this Honourable Court can, and should, order Parliament to study, and reach a firm conclusion as to whether or not there is a justifiable basis for continuing to use the "blunt instrument" of the criminal law to address the speculative concerns relating to cannabis.

D. WHAT MUST THE CROWN PROVE TO ESTABLISH THAT THE SUBSTANCE IS A PROHIBITED "NARCOTIC"?

51. It is respectfully submitted that the Crown failed to prove that the Appellant was in possession of, trafficked in, or cultivated a ***narcotic***. It is submitted that the certificates of analyst which purported to identify the plant substance as *"cannabis (marijuana)*" did not sufficiently identify a prohibited narcotic. It is respectfully submitted that there are two strains of cannabis: a fibre non-intoxicating strain (hemp) and an intoxicating strain (marijuana). The primary distinction between these strains relates to the level of the psychoactive cannabinoid found in cannabis (*i.e.*, delta-9 tetrahydrocannabinol (delta-9 THC)). According to the Government of Canada (and other governments around the world) the fibre strain will not produce intoxicating effects below a level of 0.3% THC. That is why the Court below erred in holding that this Honourable Court's decision in *R. v. Perka, infra*, was dispositive of the issue. In *Perka,* the issue was whether Parliament's reference to "cannabis" could be interpreted to exclude an ***intoxicating*** strain of cannabis known by another taxonomic name to the botanical community. As Dickson J. observed:

> It would simply be unreasonable to assume this by using the phrase "*cannabis sativa L.*" Parliament meant to prohibit only some intoxicating marijuana and exempt the rest. Such an interpretation would be at odds with the general scheme of the Narcotic Control Act as well as the common understanding of society at large.

It is respectfully submitted that it is equally unreasonable to conclude that the *Narcotic Control Act* was intended to apply to ***non-intoxicating*** substances. As this Honourable Court recently held in *Re N.(F.), infra,* a purposive approach to statutory interpretation requires a court to avoid formalistic definitions in favour of "plausible" definitions that comport with the main legislative

concern. In the case of a "narcotic" proscribed by the Act, that legislative concern is for the substance's psychoactive properties. It was, therefore, incumbent on the Crown to prove beyond reasonable doubt that the plant substances in this case were intoxicating substances; namely "*cannabis (marihuana)*".

- *R. v. Perka*, [1984] 2 S.C.R. 232;
- *Re N (F.),* [2000] 1 S.C.R. 880.

52. In the last two decades the scientific understanding of the pharmacological and botanical differences between "intoxicating cannabis" and "industrial/fibre cannabis" has lead to a clear line of demarcation between the psychoactive version and the industrial version of the cannabis plant. It is respectfully submitted that requiring the Crown to prove that any alleged "narcotic" has psychoactive potential is consistent with the following:

(a) **Principles of strict construction**

- *D.P.P. v. Goodchild*, [1978] 2 All E.R. 161, 164-5 (H.L);
- *R. v. Hasselwander*, [1993] 2 S.C.R. 398.

(b) **Ordinary meaning of "marihuana"**

- *House of Commons Debate,* February 24, 1983, p.772

(c) **The contextual and purposive approach to legislation**

- *R. v. Sharpe, supra* at para. 33;
- *R. v. Snider* (1968), 65 W.W.R. 292, 297-8 (Alta. C.A.).

(d) **The purpose underlying Canadian and international drug policy**

- *R. v. McBurney* (1974), 15 C.C.C. (2d) 361 at pg. 373 (B.C.S.C.);
- *R. v. S.* (1974), 17 C.C.C. (2d) 181 at pg.191 (Man. Prov. Ct.);
- *R. v. Carver*, [1978] 2 W.L.R. 872 at pg. 876 (C.A.);
- *Williams v. The Queen* (1979), 53 A.L.J.R. 101 at pg. 106 (H.C. Aust).

(e) **The dictates of International Treaties and Conventions**

- *U.N. Single Convention on Narcotic Drugs, 1961*, Article 28 (Control of Cannabis):

> 2. This Convention shall not apply to the cultivation of the cannabis plant exclusively for industrial purposes (fibre and seed) or horticultural purposes.

- *U.N. Convention Against Illicit Traffick in Narcotics Drugs and Psychotropic Substances,* 1988, Article 14:

> 2. Each party shall take appropriate measures to prevent illicit cultivation of and to eradicate plants containing **narcotic or psychotropic substances**, such as opium poppy, coca bush and cannabis plants, cultivated illicitly in its territory. The measures adopted shall respect fundamental human rights and shall take due account of traditional illicit users, where there is historical evidence of such use as well as the protection of the environment. (emphasis added)

30. It is respectfully submitted that strict construction, the purposive approach and the need to interpret legislation to avoid constitutional invalidity all point towards a definition of "cannabis" in the *Narcotic Controls Act* that is limited to the intoxicating variety. Any other interpretation would result in draconian penalties being applied to conduct which presents no greater risk of harm than the cultivation of roses (*e.g.*, a person is always at risk of being pricked by a rose bush). In the words of Madame Justice Wilson in a situation where this Honourable Court saw fit to read down the scope of a criminal offence to avoid an overly broad application.

> ... I think such a limitation is required in order to avoid a weakening of th authority of criminal law by its application to trifles. While it may be true that the only acceptable definition we can give of a crime is "an act prohibited by the legislature with penal consequences", when the legislature employs language as broad as it has here I think it is open to the court to refine it in light of what it perceives to be the degree of public condemnation any impugned conduct would be likely to attract.
>
> - *R. v. Skoke- Graham,* [1985] 1 S.C.R. 106.

PART IV

ORDER REQUESTED

53. The Appellant Clay respectfully requests that the appeal be allowed and that the offence of "simple possession" as it relates to the personal and private possession of cannabis be declared of no force or effect. In the alternative, the Appellant requests that the offence of simple possession of cannabis be interpreted so as to required proof of some harm associated with the defendant's use of cannabis. In the further alternative, the Appellant requests that the legislative provision authorizing an incarceratory sentence for the offence be declared of no force or effect.

In the further alternative, the Appellant requests that the phrases "marihuana" and "cannabis (marihuana)" in the *Narcotic Control Act* be interpreted to require proof of some measure of the intoxicating psychoactive cannabinoid (*i.e.*, THC).

DATED at Toronto this 29th day of November, 2001.

ALL OF WHICH IS RESPECTFULLY SUBMITTED BY:

PAUL BURSTEIN
Of Counsel for the Appellant Clay

ALAN YOUNG
Of Counsel for the Appellant Clay

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, as the case may be.

PART V

TABLE OF AUTHORITIES

Referred to at page(s)

Case Law

Texts and other writings

International Treaties