(B.C.) (Criminal) (As of Right) (By Leave) No. 28026
(B.C.) (Criminal) (By Leave) No. 28148
(Ont.)(Criminal)(By Leave) No. 28189

SUPREME COURT OF CANADA
(On Appeal from the Ontario and British Columbia Courts of Appeal)

B E T W E E N:

DAVID MALMO-LEVINE

Appellant

- and -

HER MAJESTY THE QUEEN, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, CANADIAN CIVIL LIBERTIES ASSOCIATION, ATTORNEY GENERAL FOR ONTARIO

Respondents

-- and between --

VICTOR EUGENE CAINE

Appellant

- and -

HER MAJESTY THE QUEEN, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, CANADIAN CIVIL LIBERTIES ASSOCIATION, ATTORNEY GENERAL FOR ONTARIO

Respondents

-- and between --

CHRISTOPHER JAMES CLAY

Appellant

- and -

HER MAJESTY THE QUEEN, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, CANADIAN CIVIL LIBERTIES ASSOCIATION, ATTORNEY GENERAL FOR ONTARIO

Respondents

TRANSCRIPTION OF CASSETTES

Friday, December 13, 2002
09:01 hours

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Motion to Adduce New Evidence

--- Upon commencing at 09:01 hours

CHIEF JUSTICE McLACHLIN:

David Malmo-Levine versus Her Majesty the Queen, British Columbia Civil Liberties Association, Canadian Civil Liberties Association, and Attorney General for Ontario.

Victor Eugene Caine versus Her Majesty the Queen, British Columbia Civil Liberties Association, Canadian Civil Liberties Association, and Attorney General for Ontario.

And Christopher James Clay versus Her Majesty the Queen, British Columbia Civil Liberties Association, Canadian Civil Liberties Association, and Attorney General for Ontario.

Alan Young and Paul Burstein, for the Appellant, Christopher James Clay.

David Malmo-Levine, appearing in person.

John W. Conroy, Q.C., for the Appellant, Victor Eugene Caine.

Joseph J. Arvay, Q.C. and Matthew Pollard, for the Intervener, British Columbia Civil Liberties Association.

Andrew K. Lokan and Andrew Lewis, for the Intervener, Canadian Civil Liberties Association.

S. David Frankel, Q.C., Kevin Wilson and W. Paul Riley, for the Respondent, Her Majesty the Queen.

Milan Rupic, for the Intervener, Attorney General for Ontario.

The counsel are aware that the Court has concern over whether this

appeal should proceed at this time, in view of a recent announcement by the Minister of Justice and Attorney General for Canada, regarding his intention to introduce legislation in Parliament that would decriminalize, in some way, marijuana offences in the next few months.

Accordingly, the Court has invited the parties to speak to the question of whether this appeal should proceed at this time, as a preliminary matter.

I would, therefore, invite the parties to indicate their views on this matter.

Mr. Young.

ARGUMENT OF THE APPELLANT, Christopher James Clay, Alan Young

MR. ALAN YOUNG: Good morning.

As you know, we have some concerns about the state of the record, in terms of fresh evidence, but my understanding is that the federal Crown is prepared to withdraw, on the basis that it really doesn't change the record.

In terms of the announcement, it's very difficult to know how that affects anything. The political and judicial sides of government are separate; however, our position would be that it's simply one of many promises that have been made in the past and that really not too much weight should be put on it. It really doesn't affect the constitutional principles.

This government may or may not decriminalize and they may or may not decriminalize, on the basis of, what we call, the harm principle. They may do so on an economic efficiency argument, which is not something that we can raise before this Court.

So, though we are somewhat bewildered by the recent events in the media – even this morning watching, there is so much on this particular issue – we believe that it would probably be in the best interest to proceed as best that we can

today.

Thank you.

MR. JUSTICE IACOBUCCI: Why would – if – if there's one of two alternatives, you say, economic efficiency or harm, we all – we all know, do we not, that harm plays a central role in this argument today and does – does that not mean that, if the Court goes on to reserve the matter and does – and something comes out on – that – that amplifies or elaborates on the harm principle, what – what does the Court do with that?

MR. ALAN YOUNG: I think that we need to focus on the record and not the perceptions of the Minister as a partner.

We have voluminous records, some 40 volumes. We apologize for that. That's really where we make the ascert – the assertment(sic) of whether there is harm. When the government goes forward, if they are to say that there's no harm that helps our case, but, in our opinion, if they say that it's not an issue of evaluating harm, it doesn't matter because we really focus on the record and the evidence, and not the opinion of the Minister.

It does complicate matters. That much I have to concede. I'm just not sure that, if the matter was to be adjourned, what type of information, and when we would get that information, from the Department of Justice.

Minister Cauchon has indicated an intention within four months, and it may or may not happen within the four months, and it's unclear how the government would tender this evidence before this Court, whether or not we would have an opportunity to explore the reasons behind the announcement.

We may be just left with the bare bones of the legislation without knowing whether it's it's efficiency or harm that's being discussed, and we're no further ahead.

So, as I said, we – we do understand the complication here, but I believe – and I hope that I'm not speaking for everybody here that we are all prepared to proceed – but perhaps other people should speak for themselves.

Thank you.

CHIEF JUSTICE McLACHLIN: Thank you, Mr. Young.

Mr. Malmo-Levin.

ARGUMENT OF THE APPELLANT, David Malmo-Levine, Appearing in Person

MR. DAVID MALMO-LEVINE: Good morning.

I'm of the opinion that the fresh evidence doesn't really add anything to the discussion that we are about to have. It doesn't affect the principles that we are discussing in any way. I don't believe that it adds anything really new to the record.

Regarding the announcement, I was born in 1971. This government started promising legalization back in 1970, before the LeDain Commission was finished its work. It has promised decriminalization or legalization about eight times since then. I don't believe that we can really afford this latest announcement much weight.

So, in my submission, I think that we should proceed today.

CHIEF JUSTICE McLACHLIN: Thank you, Mr. Malmo-Levine.

Mr. Conroy.

ARGUMENT OF THE APPELLANT, Victor Eugene Caine, John W. Conroy, Q.C.

MR. JOHN W. CONROY: I agree with what Mr. Young and what Mr. Malmo-Levine have said.

And I would simply add that I think that the government could benefit from hearing from this Court on these issues before they introduce any legislation.

MR. JUSTICE BINNIE: Is there not some concern that the Appellants, if this appeal is dismissed, wind up with records and that, if, in fact, the law is changed in the next few months, their position, as individuals, has benefited?

MR. JOHN W. CONROY: Well, again, we've heard so many promises in the past that we just don't give them much credence anymore.

I mean, we concede that maybe a bill will be introduced within the next few months. It will then go to committee, they'll have all kinds of consultations and it'll be another year or two before we get to this issue. I just don't see something happening very quickly.

Sure, it's a concern and the biggest concern is having taken this amount of time to get all of this material and all of this evidence before this Court so that we can finally get this point clarified by the Court.

All of a sudden, once again, just before we're about to – to do something, there's another announcement. We may have to come back –

MR. JUSTICE MAJOR: – (off mike – inaudible) –

– when has this happened before?

– (voice over voice – off mike) –

MR. JOHN W. CONROY: Well, we – we – they've come up to the brink of saying:

We're about to decriminalize – or we're about to –

MR. JUSTICE MAJOR: Not – not on the eve of a hearing dealing with the same subject matter.

MR. JOHN W. CONROY: No, that's true. We've never been able to get leave to get here before. This is the first time that leave has been granted on

this issue.

MR. JUSTICE MAJOR: They wanted to get – (off mike – inaudible) –

MR. JOHN W. CONROY: There were a couple of other applications, in the past.

Look, you know, it's going to be ridiculous if they pass some sort of legislation, with the rumours and the gossip – these traffic-type things. We may have to come back and challenge that, which is an enormous, further cost. I agree.

But to delay it further and not ask this Court to at least deal with some of the critical issues that are there, in our submission, is – is going to just lead to a further waste of time.

MR. JUSTICE MAJOR: To follow up on Justice Binnie's question, what about the case of the individuals carrying a criminal record, which, after this appeal is concluded, they're out of the system?

The legislation changes so they become – (interruption in recording) – one of a traffic violation or something else, that – that the criminal record is – (interruption in recording) – almost take judicial notice of the number of convictions for simple possession and the difficulties that it causes people, in crossing the border or being bonded.

And the consequences seem to be very dramatic and disproportionate from what you read about the severity of the crime is – (interruption in recording) –

Do they not have an interest in seeing whether the Minister's promise, as of this morning, is carried out?

MR. JOHN W. CONROY: I – I – I agree, my Lord – sorry – Justice

– Justice Major.

They do, but I think that their remedy is going to have to be to lobby politically to ensure that any legislation contains, within it, an amnesty for people who were previously convicted.

Mr. Caine, my client, is perhaps the only one, in this situation, who was convicted solely of simple possession and the danger for him is that, if we adjourn, that, if they do introduce legislation that contains an amnesty, then his entire appeal is rendered moot or academic.

He's anxious to proceed and, having invested this amount of time and energy in this issue, he wants to get a decision from this Court. He's very cynical about what the politicians may or may not do. He has wanted to have this issue determined for a long period of time.

Obviously, he received an absolute discharge at – at – after his conviction so the extent of his record is as – is as low as it could be, in terms of stigma because more than a year has passed since he received his absolute discharge, but he still wants to see this law addressed by this Court – the division of powers issue – addressed by this Court so that we can have some determination for the future so that the politicians can be guided by what the *Constitution* requires them to do.

CHIEF JUSTICE McLACHLIN: Thank you, Mr. Conroy.

Mr. Frankel.

ARGUMENT OF THE RESPONDENTS, Her Majesty the Queen, S. David Frankel

MR. S. DAVID FRANKEL: This may be the only point on which the parties are all *ad idem* because the Respondent is also of the view that these appeals should proceed.

With respect to the – the record, as the Court may have seen, from my letter to the Registry, the – the fresh evidence application is – is simply an update.

I think that we are all agreed that the harm, associated with marijuana and the evidence of harm, is, notwithstanding the passage of some five, six – five or six years, the same as it was when these trials took place, and is reflected in the findings of Mr. Justice McCart and – and Judge Howard, in the two cases where expert evidence was called.

Rather than, as is sometimes done and, in fact, was – has been done here by the Intervener, the British Columbia Civil Liberties Association, collecting up a number of articles, recent studies, in some cases, post-dating the trials and putting them in a book of authorities and filing them, the Crown has brought forward a summary of that – of those by Dr. Collant(ph), but it doesn't change anything of – of significance.

It is simply to apprise the Court of the fact that the harm – the known harms associated with marijuana and the suspected – or the concerns that relate to marijuana are about the same today as they were when the trials took place.

And – and, indeed, if – if – if I may, on that point, because obviously we're all attuned to what's going on outside of the Court, the report yesterday, that was released by the Commons Committee, the Senate Report having come forward some time ago, but the Commons Committee Report, as it deals with marijuana, on page 129, insofar as the – the Court knows that the Commons Committee has recommended decriminalization, the Commons Committee, on still – on page 129, still expresses concerns, with respect to "the harmful effects of marijuana", having heard hundreds of witnesses and reviewed hundreds of documents.

And, if that – that still exists, their view is that there should be another enforcement model –

– (voice over voice – off mike) –

CHIEF JUSTICE McLACHLIN: Well, this illustrates the problem perhaps because we have – if the matter is in – before Parliament, we can expect continued debate about this. We can expect continued, new evidence coming forward.

I know that, technically, we will be stuck with a record that's before us, but it does put the Court in an awkward position to have the two processes going side by side.

MR. S. DAVID FRANKEL: Well, if – if – if – if I may, Chief Justice, the – the comment earlier about a promise by the Minis – by the Minister of Justice, there has been no, in my submissions – submission, promise by the Minister of Justice.

The – the Minister of Justice has indicated that he – that the government may move forward –

– (voice over voice – off mike) –

MR. JUSTICE MAJOR: – (off mike – inaudible) –

– fall on the recollection of what I heard him say on television, that he's going to move quickly –

MR. S. DAVID FRANKEL: Well –

CHIEF JUSTICE McLACHLIN: There's some good evidence –

MR. S. DAVID FRANKEL: – I take –

MR. JUSTICE MAJOR: – there's a judicial notice, I think, on the side of the – I think, of the national –

MR. S. DAVID FRANKEL: – if – if – if – if the Court's prepared to take judicial notice of television, then I expect that it is also prepared to take judicial notice of the Internet.

Because, last night, I – I was – I was on a – on a – on an aircraft when the papers came out, on Tuesday morning, with the references to what the Minister had said in the scrum, I believe, the day before, and I'm pleased to say that all the statements in quotation marks, on the stories as they appeared on the *National Post*, the *Globe and Mail*, and the *Ottawa Citizen* website, are exactly the same.

And they indicate that the – the Minister says that, in – in a scrum, if we talk about the question of criminal – criminalizing(sic) marijuana, we may move ahead quickly, as a government.

And then the next question is:

Well, if you may move ahead quickly, how quickly may you move ahead?

And that's where the – that's when the Minister said:

You know, come back and see me or -- or – in – in – in four months.

MR. JUSTICE MAJOR: But the biggest –

MR. S. DAVID FRANKEL: I also, if – if – if I may, because I too was watching television yesterday, the Minister, both in a – a scrum, following question period, and on CPAC last night, when members of – when he followed members of the Commons Committee, indicated that he is going to look at the recommendations and consider the various options.

So, in my respectful submission, it – it cannot be said that there is any *fait accompli*, but, in any event, I would –

MR. JUSTICE MAJOR: Well, agree with me, Mr. Frankel, that he expressed, just on the surface, optimism and agreement with the report, saying –

MR. S. DAVID FRANKEL: Well, you see –

MR. JUSTICE MAJOR: – that he supported it?

MR. S. DAVID FRANKEL: – the Minister, as I understand it – and I have to admit that, not living in Ottawa, I probably am not as attuned to all of the statements made in scrums by various Ministers, but –

MR. JUSTICE MAJOR: Just watch the CBC –

MR. S. DAVID FRANKEL: – I'm not –

MR. JUSTICE MAJOR: – and you'll be as informed as the rest of us.

MR. S. DAVID FRANKEL: The – the – the problem is that I usually don't get home from the office in time to watch *The National.*

The – the – the Minister, as I understand it, personally – and – and it's reflected in – in the newspaper stories and – and – and he's repeated it, has a personal view.

He's indicated that the government may move forward, but, in my submission, the – the Minister has never said that the Minister's personal view is government policy.

And – and, indeed, there – as I recall, last night on CPAC, he indicated that the government would be looking at coming forward with a policy, but we don't know, at this remove(sic), what shape that policy will take.

But I say that, even if there was legislation before the House today, based on a decriminalization model, that would, in no way, render the important issues, raised in this case, academic.

As you will have seen from the material, some of those opposite take the position that the *Charter* precludes any prohibition, with respect to marijuana, whether it's a decriminalization model or the current model that has been in place for any number of

years.

There are also issues raised, in this cases, or these cases, on a division of powers basis, that go to the very ability of the Parliament of Canada to enact legislation dealing with marijuana at all.

So what this Court concludes, if it hears these appeals, will very much have a bearing on any possible changes in – in the legislation.

And – and I agree with my learned friend, Mr. – Mr. – Mr. Conroy, that the same challenges – many of the same challenges, that are brought forward here, could be brought forward if the legislation changes.

No one, at the moment, not the Minister, the Senate Committee or the recent Commons Committee, has said that marijuana is a totally benign substance.

The fact that the recommendation yesterday is for decriminalization, some form of control, this speaks a view of the Committee that there are harms associated with marijuana, but, other than the traditional role model, it may be a better route to go for various reasons.

But it does – no one is here saying that marijuana is a benign and an – a –

– (voice over voice – off mike) –

MR. JUSTICE IACOBUCCI: Well that –

MR. S. DAVID FRANKEL: – (off mike – inaudible) –

MR. JUSTICE IACOBUCCI: – that's not the point.

MR. S. DAVID FRANKEL: The point – the point that is being made here, both – both for the federalism issue and the *Charter* issue, is that harm is at the basis of those arguments. That's part of – a big part of the argument. There's no denying that, Mr.

Frankel.

And the concern, that has been raised, reflects that – that this question of harm will be part of further debate, further discussion and – and, indeed, further opinion down the road.

And it's not just one Minister. It's the Minister who is before this Court in his hat that he wears as Attorney General of the country, and – so it's not just that he's made that statement, as the Minister of Justice, this policy hat, as you know better than anyone in this room –

MR. S. DAVID FRANKEL: But I would –

MR. JUSTICE IACOBUCCI: – but – but –

MR. S. DAVID FRANKEL: – but I would put you in that position –

MR. JUSTICE IACOBUCCI: Well, I would –

MR. S. DAVID FRANKEL: – actually –

MR. JUSTICE IACOBUCCI: – but, in any event, he is a party before this Court and we're going to be hearing submissions on the – the question of harm that all of us, who are now going to be attuned to thinking about:

Well, is it that much harm? Or how much harm is it? Or is there something else going on here?

None of us is – is – the suggestion is not to hear – not to hear these cases, but what's the best time to give the fullest consideration to these issues, in terms of serving the administration of justice properly and the – and the – and the accused, who are in this courtroom and are in – in other courtrooms?

So it seems to me that it's not a – it's not just a question of admitting

that it's benign – of – of someone saying that it's benign. It's the question of:

What is the nature of this harm for purposes of – of resolving these appeals?

MR. S. DAVID FRANKEL: Well, in – in response to that, given the various studies and reports that I – that – that we – that we've all seen and that we've all looked at, the – the evidence that was called in the – in the two trials below, Dr. Collant's(ph) report, the Senate Report, the – the House of Commons Report, the reality is that research continues.

And that no one – no one is – I'm not here saying, as Mr. Justice LaForest said, in *RJR-MacDonald*, that marijuana kills, as – as he said with respect to tobacco.

Those opposite me are not saying that marijuana is a totally harmful(sic) substance and that no one should have any concerns about it.

Those positions ex – exist and, unless someone comes up with the silver bullet on either side, in my submission, the ground, on which this ap – these appeals are to be argued, is – is likely to be the same today, as it is tomorrow, as it is to be four months from now, as – as it is to be two years from now.

MR. JUSTICE BINNIE: But that's only part of the issues. That – that one of the questions here is the very contradiction between positions being taken outside the Court and positions taken inside the Court.

Because your view is that the harm principle should be set aside and the question is whether there's a rationale basis for the prohibition.

And the Committee says:

"The consequences of conviction for the possession of a small amount

of cannabis for personal use are disproportionate to the potential harm associated with that behaviour."

Is it the position of the Attorney General before the Court that the consequences for conviction for possession of a small amount of cannabis for personal use are disproportionate and, therefore, arguably, irrational to the potential harm associated with that behaviour?

MR. S. DAVID FRANKEL: Our position, as set out in the factum, is that – is that the consequences themselves are irrelevant, that the sole test is whether there is a rational basis upon which to legislate.

MR. JUSTICE BINNIE: And what is being said, in the report, which the Minister appears to have accepted – but perhaps he hasn't – is that there is a disproportionality at – lying at the heart of the very argument that you're making.

– (voice over voice – off mike) –

MR. S. DAVID FRANKEL: I – I – I don't agree with that –

MR. JUSTICE BINNIE: Well, then he also –

MR. S. DAVID FRANKEL: – (off mike – inaudible) –

MR. JUSTICE BINNIE: – or, in the report, says that:

"The licit or illicit status of substances has little impact on their use."

So, in terms of the rationality of the prohibition, is it – is it the Minister's position here that the law has little or no impact on the possession of marijuana?

Or is it that the law serves a rational purpose?

MR. S. DAVID FRANKEL: Our position is that the law serves a rational, deterrent purpose. It may be that the conclusion will, ultimately, be reached by

Parliament that that purpose can, as well – or perhaps better – be served by another enforcement model.

Because I ask the Court to bear in mind that no one to this point – I – I shouldn't say that –

MR. JUSTICE BINNIE: This – this report –

MR. S. DAVID FRANKEL: – that the Senate Committee –

MR. JUSTICE BINNIE: – the report doesn't draw a distinction between decriminalizing and regulatory offences.

It says:

"The licit or illicit status of substances has little impact on their use."

MR. S. DAVID FRANKEL: Well, that – that –

MR. JUSTICE BINNIE: And, given the consequences –

MR. S. DAVID FRANKEL: – that – that – that is the view of this Committee –

MR. JUSTICE BINNIE: Right –

MR. S. DAVID FRANKEL: – and –

MR. JUSTICE BINNIE: – which the Minister is carrying forward –

MR. S. DAVID FRANKEL: – and the Minister – the Minister has said – since we are spending so much time talking about the statements of – of the Minister – I –

MR. JUSTICE BINNIE: Well, he's before the Court. He's your client.

Well, that – that could lead to an interesting debate because I act for the

Attorney General of Canada. The party before this Court is Her Majesty the Queen, represented by the Attorney General.

But, leaving – leaving – leaving that aside –

MR. JUSTICE BINNIE: I hope that you've got better arguments than that.

MR. S. DAVID FRANKEL: – the –

– (laughter) –

MR. S. DAVID FRANKEL: – sometimes you take what you can come up with.

MR. JUSTICE IACOBUCCI: I think that the Queen would be interested in that theory too.

– (laughter) –

MR. S. DAVID FRANKEL: I – I would have to be invited for tea.

– (laughter) –

MR. JUSTICE IACOBUCCI: Uh-huh.

MR. S. DAVID FRANKEL: The Minister has – said yesterday quite clearly that he is going to study the report and that there will be a process following it.

The report having been released yesterday, the Min – the Minister not having taken a position, with respect to every finding in the report, I'm certainly not in a position to convey to this Court what the Minister's views are.

And I think that it would be unfair to the Minister to expect him, on such short notice, to comment on every finding and recommendation in a – in a report that was – that was just released yesterday.

Now –

– (voice over voice – off mike) –

MADAM JUSTICE ARBOUR: But isn't that the whole point about the timeliness of this particular hearing?

If there is – as there appears to be – some indication that the Minister may be reconsidering some of the foundations of the position that he is taking before this Court, the question that was raised was whether it is timely to proceed –

MR. S. DAVID FRANKEL: Well –

MADAM JUSTICE ARBOUR: – proceed with this appeal now.

MR. S. DAVID FRANKEL: The position, that is being advanced by the Crown in this appeal, as set out in the factum, has not changed with respect to the authority of Parliament, with respect to marijuana and the appropriate *Charter* and division of powers principles to be applied to the exercise of that power. Nothing has changed in that regard.

And, as I said before, even with the decriminalization model, some of those very same issues remain alive.

The only recommendation, in terms of – you know, because mention has been made about these particular Appellants – the only recommendation in the latest report, with respect to convictions that have already been registered, is in the separate report by the – by Libby Davies, the New Democratic Party member of the Committee, who recommends that, if – if the change is made, that there be an amnesty granted to all of those who have been convicted for possession of marijuana.

But I ask the Court to bear in mind – and I believe that Mr. Conroy alluded to this – that his client is the only one in that position.

Mr. Malmo-Levine was convicted of possession, for the purpose of

trafficking.

Mr. Clay was convicted of possession, trafficking and possession, for the purpose of trafficking.

Nothing, in what has gone on outside this Court in the last week or so, really has any bearing on the trafficking aspects of the matter.

– (voice over voice – off mike) –

MR. JUSTICE MAJOR: – (off mike – inaudible) –

MR. S. DAVID FRANKEL: No one is suggesting decriminalization of trafficking –

MR. JUSTICE MAJOR: – although wouldn't it follow that, if the offence is minimized, trafficking in a substance that – it would be like a traffic ticket? It wouldn't bear the same consequences, as it does today, when the drug is considered harmful – (interruption in recording) –

If you're trafficking in something that's almost innocuous, surely, the penalty can't be the same as trafficking in something that serious. It's going – it must have a spill-over effect.

MR. S. DAVID FRANKEL: Well, as I – as I pointed out in the factum, Mr. Justice Major, there are numerous, regulatory offences, in the *Hazardous Products Act*, and so on and so forth, that are prosecutable as summary conviction offences, where there – there is – there is – there is some concern, with respect to – to harm.

And, as I – I'm – I'm repeating myself, but no one here is suggesting that marijuana is not a substance has some harm associated with it.

If these appeals were to be adjourned, there may or may not be new legislation. Even if there is new legislation, I think it fair to say that research into

the effects of marijuana will continue. It has been going on for – for decades and, at the moment, the situation, as we all seem to understand it, is the same as it was when these trials took place.

So, if the Court is concerned about new evidence coming forward, that concern will never abate.

– (voice over voice – off mike) –

MR. JUSTICE LeBEL: Well –

MR. S. DAVID FRANKEL: – it will always –

MR. JUSTICE LeBEL: – well, Mr. –

MR. S. DAVID FRANKEL: – be there –

MR. JUSTICE LeBEL: – Mr. Frankel, it's not only a matter of new evid – evidence. It's a matter of understanding and knowing – getting to know where the government of Canada really stands on those issues.

MR. S. DAVID FRANKEL: Well, the government – the government of Canada takes the position that the current law is constitutional in all respects, but, outside of these cases, is – as it does in many areas on a daily basis, is considering whether some aspects of this law should be reformed because perhaps there is a better model by which to address the concerns that exist, and continue to exist, with respect to – to marijuana.

So – and I'm repeating myself, but our position has – has not changed, and nothing said by the Minister affects those positions.

And – and, indeed, I – I would say that, given that –

MR. JUSTICE LeBEL: It may –

MR. S. DAVID FRANKEL: – there's a –

MR. JUSTICE LeBEL: – it may at least, at first blush, have some relationship with the assessment of the harm and then perhaps, at some point, on the s.7 analysis and even – even some – with some respects of the division of powers issue.

MR. S. DAVID FRANKEL: Well, I –

MR. JUSTICE LeBEL: I think – I think that you're putting us in a rather difficult pos – pos – position. We have a record which is in the process of changing, a position of the government of Canada, we don't know – we do not know entirely.

And you're asking us, in effect, to close our – our eyes and decide this case on the basis of a record, which may be incomplete, and which – which may not reflect the position of the government of the day.

MR. S. DAVID FRANKEL: Well, as I've said, the – the record reflects the position of the government of the day. The record and the findings of the trial judge, with respect to harm, has not been impaired or altered in any significant respect, by recent –

And, by "recent", I – one – one of the articles – there are three articles that are referenced in Dr. Collant's(ph) reporter(sic), from the November 23rd edition of the British Medical Journal. So, I mean, we are up to date in – in – in that respect.

The – the Commons Committee, that heard many, many more witnesses than were called in the trials in these matters, is still of the opinion that there are harms associated with marijuana.

There has been no suggestion of a total removal of a prohibition because there – because the government is – is of the view that marijuana should not be regulated in some way. It is a question of the appropriate vehicle to use. There are a number of policy options.

One policy option is presently before the Court, but, if another policy option is – is chosen, the same, basically, issues still have to be determined.

And, assuming for a moment that this case is adjourned, is there a timeline? Or is the Court waiting six months? Is the Court waiting eight months?

If the government should enact new legislation, on the basis of – of the concerns that exist today – and, as I say, the same arguments, division of powers and *Charter* arguments, can be raised, but further medical research is being done, are these in every – and – and challenges to the new legislation to be put off forever?

One of the difficulties, that's raised in cases like this, is that they are based on science, and the science is ever evolving.

CHIEF JUSTICE McLACHLIN: Well, I think that we have that point.

As – as to the timeline, with respect to the Minister's announcement, he has indicated that he will be making decisions within four months, as I understand his announcement.

– (voice over voice – off mike) –

MR. S. DAVID FRANKEL: Well –

CHIEF JUSTICE McLACHLIN: – and, assuming that that's the case, you may put a different gloss on that, but that certainly seems to be the expectation that's out there, given what he said.

MR. S. DAVID FRANKEL: If I – if I –

CHIEF JUSTICE McLACHLIN: In six months time, it may be that we'll – we'll know where they're going or where they are – or maybe even four or five months – and would that not be more prudent than rushing ahead with the

appeals at this time?

MR. JUSTICE IACOBUCCI: You see, one other scenario would be that we would hear these and then, of course, we have new material that comes out and we have a re-hearing of the matter. That – that's not a very efficient way of doing it.

MR. S. DAVID FRANKEL: It – it's not –

MR. JUSTICE IACOBUCCI: It's sort of – it's sort of, you know, justice by installments.

And – and the other aspect of this that is – is familiar to me, and that is in the RJ-Mac – the *RJR-MacDonald* tobacco case.

There was a real concern by – expressed by members of the Court when the government had a view of another way of dealing with this problem, but it was not prepared and it had its own reasons for not sharing that with the Court, in terms of another way of handling the question of – of tobacco ad – advertising and – and treatment of that product, for the purposes of that case.

And we weren't able to get it at the other means, that was being discussed, because it was – it was con – confidential.

But it does impair the ability of the Court to deal with *Charter* and constitutional arguments if the fullest, if you like, access to all of the data and all of the arguments are not before it.

And this is – it – it seems that, with this intention to go ahead, that that might be repeated in this case.

MR. S. DAVID FRANKEL: Well, if I – if I – if I could come back to something that the Chief Justice said, I – I prefer – I would prefer that the Court focus on what the Minister said, and not what the headline writers interpreted him as

saying.

Because what he said, after he said that the government may move ahead, and he was asked, in a – in a scrum – and I've never been in a scrum, I – certainly not a scrum like I've seen on television in Ottawa – he was asked about a date, and he said, and this is the quote in the newspapers:

> "I don't like to give you a date, but, let's say, the beginning of next year. Give me the four first months of next year."

And, within the four first months – as I read that, within the four first months – the first four months – excuse me – of next year, the government may come – may have developed a policy.

That – that's – that is all that he has said and that – that is reflected in his – in his more – more recent comments, in a – in a scrum yesterday and as I – as I heard him on CPAC last night.

If we were back in four months or six months or ten months, there may well be new evidence. There may not be. That is always going to be the situation.

And, indeed, the same situation can arise when this Court is asked to deal with s.1, of the *Charter*. The – the s.1 evidence may – may change over time, but I'm not aware of this Court ever declining to adjudicate, on a s.1 argument, because more research and more study might bring more information to bear.

There is a record before this Court. The parties, it would appear, are content to go forward on the record. The record reflects the situation, as it appears on the ground today.

And I would urge you to proceed because it's important that these issues be resolved, not only with respect to this – this legislation, but with respect

to anything that the government might consider doing in the future.

MR. JUSTICE BINNIE: Can I just ask this – this point that I raised earlier? And I'm not sure that the Bench is altogether clear.

But, if the case were to go forward today, would you be prepared to agree with the Appellants, on behalf of the Attorney General, that:

> "– the consequences of conviction for possession of a small amount of cannabis for personal use are disproportionate to the potential harm associated with that behaviour"?

I'm reading from the House of Commons Report. Is that now common ground?

MR. S. DAVID FRANKEL: No.

I have – I have no ability, at this time, to answer that question.

MR. JUSTICE BINNIE: And our problem.

We've got a report, we've got a government which is moving, we have a – a statement – a committee statement that goes to the heart of the rationality of the possession charge in issue.

And you don't know and we don't know where the Attorney General is on that point. It is very difficult to defend, as – as rational, something which the person, contending for its rationality, says is disproportional.

MR. S. DAVID FRANKEL: Well, the person contending has – has not said that.

MR. JUSTICE BINNIE: That's the Attorney General. The Attorney General has associated himself with the report, to some extent. As you say, it is not clear. He hasn't gone through the report and said:

I agree with this. I agree with that. I disagree with the next thing.

But he has put his own weight and, apparently, the weight of the government behind these – (off mike – inaudible) – both on a factual and on a policy level, and the Court is caught in the – in the turning of the tide.

MR. S. DAVID FRANKEL: Well, again, Mr. Justice Binnie, I – I think that the Minister has been clear between his personal view and the government's view, which is yet to be formulated.

MR. JUSTICE BINNIE: That's our – that's our problem.

CHIEF JUSTICE McLACHLIN: I think that we've probably canvassed this matter as thoroughly as we can, at this time.

The Court will retire.

RECESS

CHIEF JUSTICE McLACHLIN: In these appeals, the Court is being asked to determine the constitutionality of the provisions of the *Narcotic Control Act*, prohibiting the possession of marijuana.

According to the written submissions to the Court, a central question is whether harm to society or to any person, by use of marijuana, is sufficient to permit criminalization.

The Minister of Justice and the Attorney General for Canada, who is the Respondent in all of the appeals before us, has announced his intention to introduce legislation in Parliament that would decriminalize, in some way, the present marijuana offences, and has made comments on the gravity of the existing offences.

The process announced by the Minister will inevitably involve a

discussion of what harm comes from the conduct covered by these offences and its proportionality to conviction and its consequences.

We may, therefore, expect that the underlying basis, for criminalization of marijuana possession and use, will be taken up in Parliament and will be widely discussed in the months to come.

That examination and discussion may well prove to be of relevance to the case and – and of interest to the parties, and it may provide guidance to the Court in deciding the present appeals.

Accordingly, in considering all of these circumstances, particularly the interest of a full and fair hearing on the issue, the Court will adjourn these appeals to the Spring term.

In adjourning these appeals, the Court expresses no view on the issues before us.

The Court stands adjourned.

--- Court was adjourned at 10:04 hours.

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