IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL FOR THE PROVINCE OF BRITISH COLUMBIA)

S.C.C №28148

BETWEEN:

VICTOR EUGENE CAINE

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

(ON APPEAL FROM THE COURT OF APPEAL FOR THE PROVINCE OF ONTARIO)

S.C.C №28189

BETWEEN:

CHRISTOPHER CLAY

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

(ON APPEAL FROM THE COURT OF APPEAL FOR THE PROVINCE OF BRITISH COLUMBIA)

S.C.C №28026

BETWEEN:

DAVID MALMO-LEVINE

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

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FACTUM OF THE INTERVENOR ~THE ATTORNEY GENERAL FOR ONTARIO~

PART I

STATEMENT OF FACTS

1. The Intervenor Attorney General for Ontario takes no position on the facts that are summarized in the facta of the parties.

PART II
POINTS IN ISSUE

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2. The Intervenor's submissions are limited to one legal issue:

A) THE "HARM PRINCIPLE": Whether the principles of fundamental justice in the realm of criminal law include a "harm principle".

This issue arises in the context of the related constitutional questions itemized as № 1, as

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stated by the Chief Justice in the within appeals.

3. In accordance with the normal role of intervenors in criminal cases, the Intervenor takes no position as to whether the appeals should be allowed or dismissed. The Intervenor also takes no position as to how the concrete constitutional questions should

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be answered.

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PART III
BRIEF OF ARGUMENT

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A. THE SECTION 7 ISSUE: WHETHER THE PRINCIPLES OF FUNDAMENTAL JUSTICE INCLUDE A "HARM PRINCIPLE"

i) OVERVIEW OF THE INTERVENOR'S POSITION

4. The Intervenor accepts the Respondent's contention that the ambit of section 7 of the *Charter of Rights and Freedoms* does not include a "harm principle". Generally speaking, it is Parliament's responsibility to decide what constitutes a "criminal offence", and the judiciary has no role to play under the *Charter* in evaluating the wisdom of legislation. This Honourable Court has repeatedly demonstrated a steadfast reluctance to adopt such a role in the guise of *Charter* review.

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5. However, it appears to the Intervenor that the fundamental issue in this ground of appeal is whether it is constitutionally permissible for someone to be convicted of a criminal offence, and liable to imprisonment, *where the offence can be shown to lack a rational connection to a valid purpose under Parliament's criminal law power.* In such a case, it would be the Intervenor's position that the offence cannot be supported under the criminal law power (although that would say nothing about whether it might be supportable under another head of power). Under division of powers jurisprudence, a criminal offence must, by definition, rationally address conduct which is harmful (or likely to entail harm or risk of harm) or blameworthy. In the context of criminal law, "harm" is not a purely utilitarian measure. "Harm" is a broad term that embraces many kinds of injury or undesirable effect to a wide variety of important public interests.

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6. In practical terms, whether a criminal offence is reviewed by way of a *vires* analysis under division of powers doctrine, or by way of the mooted "harm principle" within the orbit of section 7, *the result will necessarily be the same*. The "harm principle" (at least as it has been formulated by Braidwood J.A. and Rosenberg J.A. in the within cases in the courts below), does no more than reiterate the threshold test for Parliament's

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exercise of criminal jurisdiction. Consequently, it would be inelegant and uneconomical to adopt a "harm principle" as a new doctrine under section 7 in the realm of criminal law. Any issue respecting the validity of legislation under a *vires* analysis ought logically to precede any engagement with section 7. In his book *Constitutional Law of Canada*, Peter Hogg makes careful note of the significance of section 32(1)(a) of the *Charter* in this context. The section states that the *Charter* applies to the federal Parliament "in respect of all matters within the authority of Parliament", and, consequently,

> . . .the *Charter* does not apply to a law that is *ultra vires* on federal grounds; such law is invalid, of course, but only for breach of the power-distributing provisions of the Constitution; it cannot also be invalid for breach of the *Charter*. [from ch. 15.2]

Reference: Peter Hogg, *Constitutional Law of Canada*, ch. 15.2, "Priority between Federal and Charter Grounds", Carswell (loose leaf ed.)

~A PRELIMINARY NOTE ON *REGINA V. HAUSER*

7. The Intervenor pauses to note that the submissions within only address "the harm principle" in the context of the criminal law notwithstanding that the legislation in question in the present cases is the *Narcotic Control Act*. Whether or not the *Act* is supportable under the criminal law power, or whether it stands, *sui generis*, as an anomaly under P.O.G.G., it is apparent that, for purposes of constitutional review, the *Act* must be treated in substance as criminal legislation: For example, see *Regina v. Grant*, [1993] 3 S.C.R. 223 at 240-42. In this light, the Intervenor sees no need to ask this Honourable Court to revisit *Regina v. Hauser*, [1979] 1 S.C.R. 984. The Intervenor appreciates that some commentary on *Hauser* suggests that it was wrongly decided; for example, see Peter Hogg's *Constitutional Law of Canada*, at ch. 17.3(d). However, as a practical matter, *Hauser* does not appear to have had any unsettling or significant effect on P.O.G.G. jurisprudence, and it has not otherwise interfered with the *Act* being treated wholly in accordance with the criminal law. *If it were otherwise, the correctness of* Hauser *would be a live and important issue.*

Reference: *Regina v. Hauser*, [1979] 1 S.C.R. 984

Regina v. Grant, [1993] 3 S.C.R. 223 at 240-42

Peter Hogg, *Constitutional Law of Canada*, ch. 17.3(d), in "The 'National Concern' Branch", Carswell (loose leaf ed.)

8. In any event, the Intervenor notes that this Honourable Court has on a previous occasion declined a request to reconsider *Hauser*: See *Regina v. Aziz*, [1981] 1 S.C.R. 188. More generally, this Court has stated that *stare decisis* is an especially important principle in division of powers cases: See *Regina v. Big M Drug Mart*, [1985] 1 S.C.R. 295 *per* Dickson J. at 334-35. Finally, the issue of whether *Hauser* was correctly decided may be a nice issue, but it can have no bearing on the disposition of the appeals in the within cases; in that regard, see the comments of Rosenberg J.A. in his Reasons for Judgment in *Clay* in the court below, at para. 40 to 45.

Reference: *Regina v. Aziz*, [1981] 1 S.C.R. 188
Regina v. Big M Drug Mart, [1985] 1 S.C.R. 295 *per* Dickson J. at 334-35
Reasons for Judgment of the Court of Appeal for Ontario in *Regina v. Clay*, *per* Rosenberg J.A., at para. 40 to 45, *Appellant's Record*

ii) THE FUNDAMENTAL ISSUE IN THIS CASE IS ADDRESSED BY DIVISION OF POWERS DOCTRINE

9. The division of powers in the *Constitution Act, 1867* requires the judiciary in cases of constitutional challenge to evaluate whether federal legislation has been enacted within the proper limits of the criminal law power or, otherwise, is a colourable intrusion on provincial powers. In the development of the jurisprudence governing the "division of powers", it has been necessary for the courts to give definition to the domain of criminal law. Apart from the formal requirements of prohibition and penal sanction, the cases have recognized two essential features of this jurisdiction, as summarized in the following paragraphs.

Reference: *RJR-MacDonald Inc. v. A.G. Canada*, [1995] 3 S.C.R. 199 at para. 28 & 29
Labatt Breweries v. A.G. Canada, [1980] 1 S.C.R. 914 at 932-34

a) THE ESSENTIAL SUBJECT MATTER OF CRIMINAL LAW IS HARMFUL OR BLAMEWORTHY CONDUCT

10. Parliament may enact legislation under the criminal head of power to address conduct that is harmful --or which entails harm or risk of harm-- to persons, society, property, commerce, nature, morality, the State, or the administration of justice itself. In

this context, we see that "harm" is a compendious term that embraces the manifold "evils" that may beset diverse interests that deserve the protection of criminal law. All modern Canadian jurisprudence on the nature of the criminal law is rooted in a famous passage in Rand's J. judgment in the *Margarine Reference*, [1949] S.C.R. 1 at 49 & 50, wherein he defined criminal law for the purposes of division of powers analysis:

> 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 to safeguard the interest threatened.
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> . . . .
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> Is the prohibition. . .enacted with a view to a public purpose which can support it as being in relation to criminal law? Public peace, order, security, health, morality: these are the ordinary though not exclusive ends served by the law. . . [emphasis added]

In other words, in order to pass muster under a *vires* analysis, a criminal offence must rationally address a valid legislative purpose under the criminal law. In such an inquiry it is necessary for the courts to determine whether the offence in question is criminal *in substance*, not merely in form. As is apparent in Rand's language in the above quoted passage ("we can properly look for some evil"), such an inquiry must involve an assessment as to whether the offence in question rationally addresses conduct which is inherently harmful, or likely to entail harm or risk of harm, or which is fundamentally blameworthy. As Cory J. sstated in *Knox Contracting Ltd. v The Queen*, [1990] 2 S.C.R. 338 at 348, without such an assessment the criminal law head of power would become so wide in its scope that it would

> permit Parliament to "colourably invade areas of exclusively provincial legislative competence": [citation omitted].

In substance, this inquiry into *vires* is equivalent to the mooted "harm principle" as formulated in the present cases in the courts below. In *RJR-MacDonald Inc., supra,* at para. 29, 30 & 32, LaForest J. commented on this aspect of Rand's J. judgment in the *Margarine Reference*:

> The question, as Rand J. framed it, is *whether the prohibition with penal consequences is directed at an "evil" or injurious effect upon the public.*
>
> . . .I note, in passing the well-established principle that a court is entitled, in a pith and substance analysis, to refer to extrinsic materials, such as related legislation, Parliamentary debates and evidence of the "mischief" at which the legislation is directed: [citations omitted]
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> . . . .
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> The scope of the federal power to create criminal legislation with respect to health matters is broad, and is circumscribed only by the requirements that the legislation must contain a prohibition accompanied by a penal sanction and *must be directed at a legitimate* public health *evil*. . . [emphasis added]

These passages appear to confirm that a criminal offence must rationally address a valid legislative purpose under the criminal law. More particularly, an offence must rationally address conduct which is inherently harmful, or likely to entail harm or risk of harm, or which is fundamentally blameworthy.

Reference: *Reference re Validity of section 5(a) of the Dairy Industry Act (Margarine Reference)*, [1949] S.C.R. 1 at 49 & 50

Knox Contracting Ltd. v The Queen, [1990] 2 S.C.R. 338 at 348

RJR-MacDonald Inc., supra, at para. 28 to 32

11. The purpose of the criminal law casts light on the scope of federal criminal law power and, more particularly, illuminates the broad meaning of "harm" as that term is used in division of powers cases bearing on criminal law. In *Regina v. Greenwood* (1991), 67 C.C.C. (3d) 435 (Ont. C.A.), at 445, Doherty J.A. endeavours to summarize the fundamental purpose of criminal law, as follows:

> The criminal law is essentially a means whereby society seeks to prevent, and failing that, punish blameworthy conduct which strikes at the fundamental values of the community. The criminal law is, however, a weapon of last resort, intended for use only in cases where the conduct is so inconsistent with the shared morality of society so as to warrant public condemnation and punishment: *The Criminal Law in Canadian Society* (Government of Canada, 1982), *Libman v. R.*, [1985] 2 S.C.R. 178. . .at 212. . .

In *Greenwood, supra*, at 445 Doherty J.A. further notes that this purpose assists the statutory interpretation of criminal offences:

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> There must be at least a rough equivalence between what judges say is criminal and what the community regards as morally blameworthy. Judicial interpretation of statutory language so as to declare conduct criminal which members of the community view as innocent or morally neutral does a disservice to the overall operation of the criminal law: [citations omitted].

Both of these passages in *Greenwood* were subsequently quoted with approval by L'Heureux-Dubé J. in *Regina v. Hinchey*, [1996] 3 S.C.R. 1128, at para. 35 & 36. The idea that the criminal law is meant to addresses "blameworthy conduct" has also been applied repeatedly under section 7 of the *Charter* in cases which concern the *mens rea* - the fault requirement- of various offences. For example, in *Regina v. Martineau*, [1990] 2 S.C.R. 633, this Court struck down the constructive murder provisions in the *Criminal Code* on the basis that the moral blameworthiness -or "stigma"- that attaches to murder required a degree of *mens rea* that was proportionate. In *Regina v. Ruzic*, [2001] 1 S.C.R. 687, this Court struck down the defence of duress as enacted in section 17 of the *Code* on the basis that it was unduly narrow; in effect, the defence was unavailable to certain categories of persons who had acted involuntarily and who, therefore, lacked a meaningful degree of fault. The principle which animates these cases in the context of the *Charter*, was stated broadly by Lamer J. in *Reference re s. 94(2) of the Motor Vehicle Act*, *supra*, at 492:

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> A law that has the potential to convict a person who has not really done anything wrong offends the principles of fundamental justice and, if imprisonment is available as a penalty, such a law then violates a person's right to liberty under s. 7 of the *Charter of Rights and Freedoms*. . .

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Reference: *Regina v. Greenwood* (1991), 67 C.C.C. (3d) 435 (Ont. C.A.) at 445

Regina v. Hinchey, [1996] 3 S.C.R. 1128 at para. 35 & 36

Reference re s. 94(2) of the Motor Vehicle Act, [1985] 2 S.C.R. 486 at 492

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Regina v. Martineau, [1990] 2 S.C.R. 633

Regina v. Ruzic, [2001] 1 S.C.R. 687

12. However, it bears noting that the judiciary has not engaged in a robust assessment of the *actus reus* of criminal offences under section 7 in a manner that is analogous to the cases involving *mens rea*. This is because the decision to criminalize specific types of conduct belongs wholly to Parliament. In *Regina v. Hydro-Quebec*, [1997] 3 S.C.R. 213 at 290, LaForest J. put it as follows:

> . . .it is entirely within the discretion of Parliament to determine what evil it wishes by penal prohibition to suppress and what threatened interest it thereby wishes to safeguard. . .

In *Hinchey*, *supra*, at para. 28, L'Heureux-Dubé J. made the same point:

> Parliament generally must be left to its role of asserting the public good through the criminal law. . . Parliament. . .retains the power to designate the specific acts which it considers harmful to the State.

For the purposes of the within appeals, the key point here is that the jurisprudence *unambiguously* indicates that the only brake on Parliament's supremacy in the creation of criminal offences (apart from review based on the infringement of enumerated *Charter* rights) are the rules governing *vires* under division of powers doctrine.

Reference: *Regina v. Hydro-Quebec*, [1997] 3 S.C.R. 213 at 290
Hinchey, supra, at para. 28 & 30

b) THE DOMAIN OF CRIMINAL LAW IS FLUID AND MAY BE RESPONSIVE TO NEW CIRCUMSTANCES

13. The definition of "criminal law" in Canadian jurisprudence is specifically meant to be adaptable to new mischiefs that had previously not been understood as belonging to the domain of the criminal law power. That is, the criminal law is not limited to the state of the jurisprudence as it existed at confederation or as it may appear fossilized or "frozen" in judgments or text books. Criminal law is fluid and may be made responsive to changes in social convention, learning, morality and science. Parliament is fully entitled to legislate with respect to subject matter that -historically- had not been the subject matter of criminal jurisdiction, so long as the "evil" relates to a public interest that is entitled to the protection of the criminal law. For example, in *RJR-MacDonald Inc.*

we see that Parliament is entitled to engage its criminal jurisdiction to address the serious harm caused by the consumption of tobacco, notwithstanding the fact that previously it had never been a traditional concern of the criminal law. In large part, advances in medical science, as well as social consensus, have given Parliament a rational basis to govern tobacco consumption by way of criminal jurisdiction.

Reference: *Regina v. Zelensky*, [1978] 2 S.C.R. 940 at 951
RJR-MacDonald Inc., supra, at para. 28 to 30, 46 to 48

14. But the question arises: Can Parliament's criminal jurisdiction be forced to recede over a particular subject matter as a result of changing social conditions or scientific evidence? The answer appears to be yes: The *Margarine Reference* is a rare example of a criminal prohibition, once valid, becoming unsupportable on the criminal law head of power in the light of evidence which undermined the prohibition's original criminal law rationale. The majority opinions in the case accepted that Parliament had been entitled, in the first place, to prohibit the sale and possession of margarine in order to protect public health, but that rationale was not immune to challenge. Ultimately, advances in science demonstrated that margarine was not "harmful" and, consequently, the prohibition was no longer rationally connected to a legitimate criminal law purpose. Apart from the original danger to public health posed by margarine (as it had been perceived by Parliament), there was no other fundamental public interest -such as morality or public order- that was engaged by the prohibition. The majority of justices in the *Margarine Reference* rejected the argument made by the federal Crown that the original criminal law purpose that was behind Parliament's prohibition in 1886 -valid at the outset- necessarily trumped new evidence to the contrary. It may be noted that Kellock J. at page 55 of the judgment carefully summarized the position of the federal Crown that the statute's original purpose still animated the legislation:

> Mr. Varcoe [the federal Crown] argues that the existing legislation is still to be considered as legislation in the interests of public health on the basis that when the original prohibitions with respect to oleomargarine. . . were imposed that was the ground upon which Parliament expressly proceeded. He says the original Act was in no sense a temporary Act and the dropping of the preamble is immaterial.

The Intervenor's reading of the *Margarine Reference* is based on *Zelensky*, *supra*, at 951-52, wherein Laskin C.J.C., on behalf of the majority, treated the issue explicitly:

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> *New appreciations thrown up by new social conditions or reassessments of old appreciations which new or altered social conditions induce make it appropriate for this Court to re-examine courses of decisions on the scope of legislative power* when fresh issues are presented to it, always remembering, of course, that it is entrusted with a very delicate role in maintaining the integrity of the constitutional limits imposed by the [*Constitution Act, 1867*]... Certainly, as has been often said, time does not validate a statute which is unconstitutional, but I point out that *there is an instance in our law where time has invalidated a statute which was generally regarded as constitutional.* That was the result of the Margarine Reference. . .holding that federal legislation prohibiting the manufacture, possession and sale of margarine (first enacted in 1886 when there was concern about the nutritional quality of the product and its danger to health), *could not be sustained as an exercise,* inter alia, *of the federal criminal law power because in the intervening years, changes in methods of manufacture and of ingredients had removed any danger to health...* [emphasis added]

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Two years earlier, Laskin C.J.C. had made this same point about the *Margarine Reference* in *Reference re Anti-Inflation Act*, [1976] 2 S.C.R. 373 at 427. In light of the foregoing, it appears that, in a case where a criminal offence were shown to lack a rational connection to any valid criminal law purpose, such an offence could not be supportable on the criminal law head of power.

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Reference: *Margarine Reference, supra*
Zelensky, *supra*, at 951-52
Reference re Anti-Inflation Act, [1976] 2 S.C.R. 373 at 427

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iii) IN THE ALTERNATIVE: THE PRINCIPLES OF FUNDAMENTAL JUSTICE IN THE REALM OF CRIMINAL LAW MAY INCLUDE A "HARM PRINCIPLE"

15. However, if the Intervenor is incorrect that the mechanism of *vires* analysis fully addresses the fundamental issue in the within ground of appeal, the following submissions are made in the alternative: To the extent that *dicta* in the relevant jurisprudence provides sufficient support for a "harm principle" as a component of the principles of fundamental

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justice in the realm of criminal law, such a principle should be crafted in a manner that is similar to that proposed by Braidwood J.A. and Rosenberg J.A. in the within cases in the courts below. Their formulation of the principle may be paraphrsed thus: A criminal offence which is punishable by imprisonment must address conduct which may be harmful or likely to entail harm or risk of harm. In this context "harm" is defined as follows:

> [W]hether the prohibited activities hold a "reasoned apprehension of harm" to other individuals or society. . .The degree of harm must be neither insignificant nor trivial.

The principle shortcoming of this test as framed is that, on its surface, it seems wholly utilitarian. As stated in *Greenwood*, *supra*, the foundations of the criminal law have always been based on the community's "fundamental values" and "shared morality", and a necessary purpose of the criminal law has always been to protect such interests, at least to the extent that Parliament sees fit. As we have seen, the governing criminal jurisprudence incorporates all of that into the term "harm". In other respects, the test as framed by Braidwood J.A. and Rosenberg J.A. goes no further than is necessary to determine whether the offence in question is a valid exercise of the criminal law power. In our system of government the courts do not have any general supervisory jurisdiction to second guess the wisdom of legislation. Rosenberg J.A. was attentive to this concern in *Clay* when he said, with respect to the test proposed by Prowse J.A., in dissent in *Malmo-Levine*, that it would lead the judiciary into "an unjustifiable intrusion into the legislative sphere."

Reference: *Reasons for Judgment* of the Court of Appeal for British Columbia in *Regina v. Malmo-Levine*, *per* Braidwood J.A., at para. 138, *Appellant's Record*

Reasons for Judgment of the Court of Appeal for Ontario, in *Regina v. Clay*, *per* Rosenberg J.A., at para. 27 & 28, *Appellant's Record*

Hinchey, *supra*, at para. 28 to 37

Greenwood, *supra*, at 445

iv) THE OPERATION OF THE "HARM PRINCIPLE"

16. In a constitutional challenge based on the harm principle, the task for the court should be to determine whether the applicant has demonstrated that the there is no rational

basis to conclude that the prohibited conduct is harmful, or likely to entail harm or risk of harm, with the harm or risk of harm being neither insignificant nor trivial, or, otherwise, fundamentally blameworthy. (The Intervenor again pauses to repeat that "harm" in this context is a compendious term that embraces the manifold "evils" that are the subject matter of the criminal law.) In his Reasons for Judgment in *Clay* at para. 27 & 28, Rosenberg J.A. described the test in the following terms:

> Braidwood J.A. described the harm principle at para. 138 as "whether the prohibited activities hold a 'reasoned apprehension of harm' to other individuals or society". He also held that the degree of harm must be neither insignificant nor trivial. . .
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> . . . .
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> . . .the principle, as derived by Braidwood J.A., appears to be consistent with. . .the language from *Regina v. Butler*, [1992], 1 S.C.R. 452. In that case, Sopinka J., in applying s. 1 to the alleged violation of freedom of expression from the obscenity prohibition in the Criminal Code, held at page 504 that a rational connection between the impugned measure and the objective of the legislation was made out if Parliament had a "reasoned apprehension of harm". Later he held at page 505, in applying the minimal impairment test, that it was sufficient that the prohibited material "creates a risk of harm to society" and "that is sufficient in this regard for Parliament to have a reasonable basis for concluding that harm will result and this requirement does not demand actual proof of harm".

As a practical matter, this is a strict test which can succeed only in the clearest of cases. The Intervenor adopts the words of the Respondent in his factum at para. 78(d) that an applicant would, in essence, be required to demonstrate that "the legislature had acted in an irrational or arbitrary manner".

Reference: *Reasons for Judgment* of the Court of Appeal for British Columbia in *Regina v. Malmo-Levine, per* Braidwood J.A., at para. 134 to 140, *Appellant's Record*

Reasons for Judgment of the Court of Appeal for Ontario in *Regina v. Clay, per* Rosenberg J.A., at para. 27 & 28, *Appellant's Record*

Regina v. Butler, [1992] 1 S.C.R. 452 *per* Sopinka J. at 501-09

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PART IV
ORDER REQUESTED

17. The Intervenor takes no position as to how the constitutional questions should be answered. The Intervenor also takes no position as to whether the appeals should be allowed or dismissed.

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ALL OF WHICH IS RESPECTFULLY SUBMITTED

Milan Rupic
of counsel for the Intervenor

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PART V

AUTHORITIES

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TEXTS

Peter Hogg, *Constitutional Law of Canada*, Carswell (loose leaf ed.) 4