IN THE SUPREME COURT OF CANADA

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

No. 28026

BETWEEN:

DAVID MALMO-LEVINE

APPELLANT

AND:

HER MAJESTY THE QUEEN

RESPONDENT

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

No. 28148

BETWEEN:

VICTOR EUGENE CAINE

APPELLANT

AND:

HER MAJESTY THE QUEEN

RESPONDENT

(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

No. 28189

BETWEEN:

CHRISTOPHER CLAY

APPELLANT

AND:

HER MAJESTY THE QUEEN

RESPONDENT

RESPONDENT'S FACTUM

DAVID MALMO-LEVINE
c/o Conroy & Company
Barristers & Solicitors
2459 Pauline Street
Abbotsford, B.C. V2S 3S1
(Tel. No. (604) 852-5110,
Fax No. (604) 859-3361)

Appearing in Person

GOWLING LAFLEUR HENDERSON LLP
Barristers & Solicitors
P.O. Box 366, Station D
Suite 2600 – 160 Elgin Street
Ottawa, Ontario K1P 1C3
(Tel. No. (613) 232-1781,
Fax. No. (613) 563-9869)

Ottawa Agent

CONROY & COMPANY
Barristers & Solicitors
2459 Pauline Street
Abbotsford, B.C. V2S 3S1
(Per: John W. Conroy, Q.C.
(Tel. No. (604) 852-5110,
Fax No. (604) 859-3361))

Counsel for the Appellant Caine

GOWLING LAFLEUR HENDERSON LLP
Barristers & Solicitors
P.O. Box 366 Station D
2600 – 160 Elgin Street
Ottawa, Ontario K1P 1C3
(Tel. No. (613) 232-1781,
Fax. No. (613) 563-9869)

Ottawa Agent

PAUL BURSTEIN & ASSOCIATE
Barristers & Solicitors
127 John Street
Toronto, Ontario M5V 2E2
(Per: Paul Burstein
(Tel. No. (416) 204-1825,
Fax No. (416) 204-1849))

Counsel for the Appellant Clay

SHORE, DAVIS
Barristers & Solicitors
800 – 200 Elgin Street
Ottawa, Ontario K2P 1L5
(Per: Leonard M. Shore, Q.C.
(Tel. No. (613) 233-7747,
(Fax No. (613) 233-2374))

Ottawa Agent

ATTORNEY GENERAL OF CANADA
Department of Justice
900 – 840 Howe Street
Vancouver, B.C. V6Z 2S9
(Per: S. David Frankel, Q.C.
(Tel. No. (604) 666-0211,
Fax No. (604) 666-1599))

Counsel for the Respondent

MORRIS A. ROSENBERG
Deputy Attorney General of Canada
284 Wellington Street
Ottawa, Ontario K1A 0H8
(Per: Robert J. Frater
(Tel. No. (613) 957-4763,
Fax No. (613) 941-7865))

Solicitor for the Respondent

MINISTRY OF THE ATTORNEY GENERAL
Crown Law Office - Criminal
720 Bay Street - 10th Floor
Toronto, Ontario M5G 2K1
(Per: Milan Rupic
(Tel. No. (416) 326-4595,
Fax No. (416) 326-4656))

Counsel for the Intervener,
Attorney General of Ontario

BURKE ROBERTSON
Barristers & Solicitors
70 Gloucester Street
Ottawa, Ontario K2P 0A2
(Per Robert E. Houston, Q.C.
(Tel. No. (613) 566-2058,
Fax No. (613) 235-4430))

Ottawa Agent

PALIARE ROLAND
Barristers & Solicitors
501 – 250 University Avenue
Toronto, Ontario M5H 3E5
(Per: Andrew K. Lokan
(Tel. No. (416) 646-4324,
Fax No. (416) 6464323))

Counsel for the Intervener,
Canadian Civil Liberties Association

GOWLING LAFLEUR HENDERSON LLP
Barristers & Solicitors
P.O. Box 366 Station D
2600 – 160 Elgin Street
Ottawa, Ontario K1P 1C3
(Per: Henry S. Brown, Q.C.
(Tel. No. (613) 786-0139,
(Fax No. (613) 563-9869))

Ottawa Agent

ARVAY FINLAY
Barristers & Solicitors
4000 – 888 Fort Street
Victoria, B.C. V8W 1H8
(Per: Joseph J. Arvay, Q.C.
(Tel. No. (250) 388-6868,
Fax No. (250) 388-4456))

Counsel for the Intervener,
British Columbia Civil Liberties Association

BURKE ROBERTSON
Barristers & Solicitors
70 Gloucester Street
Ottawa, Ontario K2P 0A2
(Per Robert E. Houston, Q.C.
(Tel. No. (613) 566-2058,
Fax No. (613) 235-4430))

Ottawa Agent

INDEX

IN THE SUPREME COURT OF CANADA

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

BETWEEN:

DAVID MALMO-LEVINE

APPELLANT

AND:

HER MAJESTY THE QUEEN

RESPONDENT

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

BETWEEN:

VICTOR EUGENE CAINE

APPELLANT

AND:

HER MAJESTY THE QUEEN

RESPONDENT

(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

CHRISTOPHER CLAY

APPELLANT

AND:

HER MAJESTY THE QUEEN

RESPONDENT

RESPONDENT'S FACTUM

PART I

STATEMENT OF FACTS

INTRODUCTION

1. The Appellants were separately convicted under the provisions of the now repealed ***Narcotic Control Act***, R.S.C. 1985, c. N-1, of various marihuana offences. They challenge those convictions on constitutional grounds. All submit that prohibiting possession of marihuana for recreational use violates s. 7 of the ***Charter of Rights and Freedoms***. The Appellants Caine and Clay also take the position that this prohibition is ***ultra vires*** the Parliament of Canada on a division of powers basis. The Appellant Malmo-Levine argues that the offence of possession of

marihuana for the purpose of trafficking is discriminatory, and infringes his rights under s. 15(1) of the ***Charter***.

2. Non-constitutional issues are also raised. Malmo-Levine argues that he is entitled to a new trial because the trial Judge dismissed his constitutional challenge without giving him an opportunity to call evidence. Clay takes the position that, as a matter of statutory interpretation, only intoxicating marihuana is a "narcotic", and that the Crown failed to prove this with respect to the drugs that are the subject matter of the charges against him.

3. In light of the common issues, the Respondent has elected to file a single factum. She does not accept the Appellants' Joint Statement of Legislative Facts as an accurate recitation of the facts pertinent to the disposition of these matters. To some extent, it is a rehearsal of conflicting evidence adduced in the ***Caine*** and ***Clay*** trials, rather than a statement of the nearly identical finding of facts on which the trial judges in those matters based their respective judgments. As well, certain portions are irrelevant, while others are argument.

(Note: In paragraph 2 of their respective factums, Caine and Malmo-Levine state that they accept the findings of the trial courts only to the extent that they are "not inconsistent" with the facts in the Joint Statement.)

4. Both Courts of Appeal accepted and based their decisions on the findings made in the trial courts. Accordingly, those facts govern the resolution of these appeals.

See: ***R. v. Van Der Peet***, [1996] 2 S.C.R. 507 @ paras. 81, 82; ***Housen v. Nikolaisen*** (2002), 211 D.L.R. (4th) 577, 2002 SCC 33 @ para. 25

(Note: As discussed below, little evidence was called at the ***Malmo-Levine*** trial. Rather, the trial Judge elected to deal with the constitutional issue on the basis of the facts defence counsel averred could be established to support that challenge. These were the same facts relied on by the defence in the ***Caine*** trial. In dealing with both the ***Caine*** and ***Malmo-Levine*** appeals together the Court of Appeal for British Columbia proceeded on the basis of the findings in ***Caine***.)

5. The Respondent's position is that the impugned legislation is constitutional, and that all appeals should be dismissed.

(Note: All three trials concluded after the coming into force of the ***Controlled Drugs and Substances Act***, S.C. 1996, c.8, on May 17, 1997 (SI/97-47, ***Canada Gazette*** Part II, Vol. 131, p. 1502). By reason of s. 62 of this enactment, the Appellants were sentenced in accordance with its provisions.)

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

6. ***Constitution Act, 1867*:**

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

. . .

27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

91. Il sera loisible à la Reine, de l'avis et du consentement du Sénat et de la Chambre des Communes, de faire des lois pour la paix, l'ordre et le bon gouvernement du Canada, relativement à toutes les matières ne tombant pas dans les catégories de sujets par la présente loi exclusivement assignés aux législatures des provinces; mais, pour plus de garantie, sans toutefois restreindre la généralité des termes ci-haut employés dans le présent article, il est par la présente déclaré que (nonobstant toute disposition contraire énoncée dans la présente loi) l'autorité législative exclusive du parlement du Canada s'étend à toutes les matières tombant dans les catégories de sujets ci-dessous énumérés, savoir:

. . .

27. La loi criminelle, sauf la constitution des tribunaux de juridiction criminelle, mais y compris la procédure en matière criminelle.

7. ***Charter of Rights and Freedoms*:**

1. The ***Canadian Charter of Rights and Freedoms*** guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

1. ***La Charte canadienne des droits et libertés*** garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

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

7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

15. (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

8. *Narcotic Control Act*:

2. In this Act,

"marihuana" means ***Cannabis sativa L.***

"narcotic" means any substance included in the schedule or anything that contains any substance included in the schedule.

2. Les définitions qui suivent s'appliquent à la présente loi.

« chanvre indien » ou « marihuana » Le ***Cannabis sativa L.***

« stupéfiant » Substance énumérée à l'annexe, ou toute préparation en contenant.

3.(1) Except as authorized by this Act or the regulations, no person shall have a narcotic in his possession.

(2) Every person who contravenes subsection (1) is guilty of an offence and liable

3. (1) Sauf exception prévue par la présente loi ou ses règlements, il est interdit d'avoir un stupéfiant en sa possession.

(2) Quiconque enfreint le paragraphe (1) commet une infraction et encourt, sur déclaration de culpabilité:

(a) on summary conviction for a first offence, to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding six months or to both and, for a subsequent offence, to a fine not exceeding two thousand dollars or to imprisonment for a term not exceeding one year or to both; or

b) on conviction on indictment, to imprisonment for a term not exceeding seven years.

a) par procédure sommaire, pour une première infraction, une amende maximale de mille dollars et un emprisonnement maximal de six mois, ou l'une de ces peines, et, en cas de récidive, une amende maximale de deux mille dollars et un emprisonnement maximal d'un an, ou l'une de ces peines;

b) par mise en accusation, un emprisonnement maximal de sept ans.

4.(1) No person shall traffic in a narcotic or any substance represented or held out by the person to be a narcotic.

(2) No person shall have in his possession any narcotic for the purpose of trafficking.

(3) Every person who contravenes subsection (1) or (2) is guilty of an indictable offence and liable to imprisonment for life.

4.(1) Le trafic de stupéfiant est interdit, y compris dans le cas de toute substance que le trafiquant prétend ou estime être tel.

(2) La possession de stupéfiant en vue d'en faire le trafic est interdite.

(3) Quiconque enfreint le paragraphe (1) ou (2) commet un acte criminel et encourt l'emprisonnement à perpétuité.

Schedule

3. ***Cannabis sativa***, its preparations, derivatives and similar synthetic preparations, including:

(1) Cannabis resin,
(2) Cannabis (marihuana),
(3) Cannabidiol,
(4) Cannabinol,
(4.1) Nabilone,
(5) Pyrahexyl,
(6) Tetrahydrocannabinol.

but not including:

(7) non-viable Cannabis seed.

Annexe

3. Chanvre indien (***Cannabis sativa***), ses préparations, dérivés et préparations synthétiques semblables, notamment:

(1) Résine de cannabis,
(2) Cannabis (marihuana),
(3) Cannabidiol,
(4) Cannabinol,
(4.1) Nabilone,
(5) Pyrahexyl,
(6) Tétrahydrocannabinol.

mais non compris:

(7) Graine de cannabis stérile.

(Note: The respective chemical formulas for items (4)-(5) have been omitted.)

9. ***Controlled Drugs and Substances Act:***

2.(1) In this Act,	2.(1) Les définitions qui suivent s'appliquent à la présente loi.
"controlled substance" means a substance included in Schedule I, II, III, IV or V;	« substance désignée » Substance inscrite à l'une ou l'autre des annexes I, II, III, IV ou V.
Schedule II	Annexe II
1. Cannabis, its preparations, derivatives and similar synthetic preparations, including:	1. Chanvre indien (Cannabis), ainsi que ses préparations et dérivés et les préparations synthétiques semblables, notamment:
(1) Cannabis resin	(1) résine de cannabis
(2) Cannabis (marihuana)	(2) cannabis (marihuana)
(3) Cannabidiol	(3) cannabidiol
(4) Cannabinol	(4) cannabinol
(5) Nabilone	(5) nabilone
(6) Pyrahexyl	(6) pyrahexyl
(7) Tetrahydrocannabinol	(7) tétrahydrocannabinol
but not including	mais non compris:
(8) Non-viable Cannabis seed, with the exception of its derivatives	(8) graines de cannabis stériles - à l'exception des dérivés de ces graines
(9) Mature Cannabis stalks that do not include leaves, flowers, seeds or branches; and fiber derived from such stalks	(9) tige de cannabis mature - à l'exception des branches, des feuilles, des fleurs et des graines - ainsi que les fibres obtenues de cette tige

(Note: The respective chemical formulas for items (4)-(7) have been omitted.)

MALMO-LEVINE

Circumstances of the Offence

10. Malmo-Levine was charged with possession of marihuana for the purpose of trafficking. The underlying facts are summarized in the reasons of the Court of Appeal:

> [3] The appellant David Malmo-Levine described himself to the Court as a "marihuana / freedom activist." Beginning in October 1996, he helped operate an organization in East Vancouver known as the "Harm Reduction Club" which was a co-operative, non-profit association of its members. The stated object of the club was to educate its users and the general public about marihuana and provide unadulterated marihuana to its users at club cost. The club had approximately 1800 members.

[4] The Club educates its members on a wide variety of "safe smoking habits" to minimize any harm from the use of marihuana. Members are required to sign a pledge not to operate motor vehicles or heavy equipment while under the influence of the substance.

[5] On 4 December 1996, police entered the premises of the Club and seized 316 grams of marihuana, much of it in the form of "joints." Mr. Malmo-Levine was charged with possession of marihuana for the purpose of trafficking contrary to section 4 of the *NCA*.

Indictment, Malmo-Levine Rec., Vol. 1, p. 1; Statement of Adjudicative Facts, Malmo-Levine Rec., Vol. 1, pp. 58-62; Reasons for Judgment (Braidwood J.A.), Malmo-Levine Rec., Vol. 2, pp. 243, 244

Proceedings at Trial (Curtis J.)
([1998] B.C.J. No. 1025 (QL) (S.C.))

11. Malmo-Levine was jointly charged with Chad Rowsell. Both filed notices, pursuant to s. 8 of the ***Constitutional Questions Act***, R.S.B.C. 1996, Chap. 68, challenging the provisions of the ***Narcotic Control Act***, as they apply to marihuana. They alleged violations of ss 2(a), 2(b), 2(c), 2(d), 7, 8, and 12 of the ***Charter***.

Notice of Constitutional Question (December 9, 1997), Amended Notice of Constitutional Question (January 24, 1998), Supplementary Notice of Constitutional Question January 27, 1998), Malmo-Levine Rec., Vol. 1, pp. 2-14

12. Malmo-Levine and Rowsell sought to call evidence to support their application. After hearing briefly from one witness (Malmo-Levine's mother) the trial Judge asked their counsel to state what facts they expected to prove.

Testimony of C.L. Malmo, Malmo-Levine Rec., Vol. 1, pp. 19, 20; Ruling (Curtis J.), Malmo-Levine Rec., Vol. 2, pp. 229, 230

13. A statement of the proposed evidence was put before the trial Judge. This was done primarily by filing the written submissions, including the assertions of fact, prepared by defence counsel in the then on-going ***Caine*** trial in the Provincial Court of British Columbia. This contained, ***inter alia***, a summary based on the ***viva voce*** evidence of the six experts called in that case (five for the defence, one for the Crown).

Statement of Adjudicative Facts (Exhibit 1), Addendum to Legislative Facts (Exhibit 2), Defence Submission in Support of ***Voir Dire*** (Exhibit 3), Statement of Facts (Exhibit 4), List of Witnesses and Summary of Evidence (Exhibit 5), Malmo-Levine Rec., Vol. 1, pp. 58-193

14. After hearing submissions, Curtis J. held that even accepting the facts counsel claimed could be proven the constitutional challenge could not succeed. Accordingly, he declined to embark upon an evidentiary hearing, and dismissed the substantive motion. With respect to s. 7 of the ***Charter***, he stated:

> Interpreting the ***Charter*** in light of the common law and legal traditions of Canada, I find no basis for holding that freedom to use marihuana constitutes a matter of fundamental, personal importance, such that it is included within the meaning of the word liberty in s. 7 of the ***Charter***. There being no right to use marihuana created by the right to life, liberty and security of the person, the question of the principles of fundamental justice need not be considered. The ***Narcotic Control Act*** does not infringe Mr. Malmo-Levine's or Mr. Rowsell's rights under s. 7.
>
> Ruling (Curtis J.), Malmo-Levine Rec., Vol. 2, p. 233

15. Malmo-Levine was convicted, and sentenced to one year (conditional). Rowsell was acquitted.

CAINE

Circumstances of the Offence

16. Caine was charged with simple possession of marihuana (by way of summary conviction). The facts relating to the offence were agreed to, and are summarized in the reasons of the Court of Appeal:

> [6] The facts in the ***Caine*** appeal are not in dispute. During the late afternoon of 13 June 1993, two R.C.M.P. officers were patrolling a parking lot at a beach in White Rock. They observed the appellant Victor Eugene Caine and a male passenger sitting in a van owned by Mr. Caine. The officers observed Mr. Caine, who was seated in the driver's seat, start the engine and begin to back up. As one officer approached the van, he smelled a strong odour of recently smoked marihuana.
>
> [7] Mr. Caine produced for the officer a partially smoked cigarette of marihuana which weighed 0.5 grams. He possessed the marihuana cigarette for his own use and not for any other purpose.
>
> Information, Caine Rec., Vol. 1. p. 1; Agreed Statement of Facts, Caine Rec., Vol. 1, pp. 5-5(b); Reasons for Judgment (Braidwood J.A.), Malmo-Levine Rec., Vol. 2, pp. 244, 245

Proceedings at Trial (Howard P.C.J.)

([1998] B.C.J. No. 885 (QL) (Prov.Ct.))

17. Prior to the commencement of the trial Caine gave notice, pursuant to the ***Constitutional Question Act*** (B.C.), challenging the offence of possession of marihuana and related substances in the ***Narcotic Control Act***, under s. 7 of the ***Charter***. He later filed an Amended Notice.

Following the coming into force of the ***Controlled Drugs and Substances Act***, he filed a Further Amended Notice, with respect to the continued prohibition of possession of cannabis related substances.

Notice of Constitutional Challenge (January 7, 1994), Amended Notice of Constitutional Challenge (September 29, 1995), Further Amended Notice of Constitutional Challenge September 30, 1997), Caine Rec., Vol. 1, pp. 2-4(b)

Evidence Relating to the Constitutional Challenge

18. Both parties filed what were styled as "Brandeis Briefs". Caine called five expert witnesses: Professor Neil Boyd (a criminologist), Dr. Shaun H. Peck (a medical doctor, and Deputy Provincial Health Officer for British Columbia), Dr. Allan K. Connolly (a psychiatrist), Dr. Barry Beyerstein (a psychologist), and Dr. John P. Morgan (a medical doctor and pharmacologist). The Crown called one witness in reply, Dr. Harold Kalant (a medical doctor, with expertise in psychopharmacology).

Reasons for Judgment (Howard P.C.J.), Caine Rec., Vol. 7, pp. 1129, 1131

(Note: (a) The trial Judge noted that Dr. Beyerstein had a tendency in his testimony "to depart from his role as 'witness' and to assume the role of an 'advocate'." On the other hand, she found Dr. Kalant to be "a particularly knowledgeable, articulate, careful, fair, and dispassionate witness": Caine Rec., Vol. 7, p. 1131; (b) At the ***Clay*** trial Professor Boyd and Dr. Morgan testified as defence witnesses. The Crown called Dr. Kalant: see paras. 46, 47 below.)

Findings of Fact

19. With respect to the health risks of marihuana, the trial Judge found:

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

1. the occasional to moderate use of marihuana by a healthy adult is not ordinarily harmful to health, even if used over a long period of time;
2. there is no conclusive evidence demonstrating any irreversible organic or mental damage to the user, except in relation to the lungs and then only to those of a chronic, heavy user such as a person who smokes at least 1 and probably 3-5 marihuana joints per day;
3. there is no evidence demonstrating irreversible organic or mental damage from the use of marihuana by an ordinary healthy adult who uses occasionally or moderately;
4. marihuana use does cause alteration of mental function and as such should not be used in conjunction with driving, flying or operating complex machinery;

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

6. marihuana is not addictive;

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

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

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

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

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

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

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

Reasons for Judgment (Howard P.C.J.), Caine Rec., Vol. 7, pp. 1135, 1136

(Note: The trial Judge noted her findings were "consistent with the findings of McCart J. in ***Regina v. Clay***": Caine Rec., Vol. 7, p. 1136 (see paras. 48, 49 below).)

Ruling on the *Charter* Challenge

20. In rejecting Caine's submission that prohibiting the recreational use of marihuana violates what he contends is the "harm principle" of fundamental justice, Howard P.C.J. stated:

> The evidence before me demonstrates that there is a reasonable basis for believing that the following health risks exist with use [sic] marihuana.
>
> There is a general risk of harm to the users of marihuana from the acute effects of the drug, but these adverse effects are rare and transient. Persons experiencing the acute effects of the drug will be less adept at driving, flying and other activities involving complex machinery. In this regard they represent a risk of harm to others in society. At current rates of use, accidents caused by users under the influence of marihuana cannot be said to be significant.
>
> There is also a risk that any individual who chooses to become a casual user, may end up being a chronic user of marihuana, or a member of one of the

> vulnerable persons [sic] identified in the materials. It is not possible to identify these persons in advance.
>
> As to the chronic users of marihuana, there are health risks for such persons. The health problems are serious ones but they arise primarily from the act of smoking rather than from the active ingredients in marihuana. Approximately 5% of all marihuana users are chronc [sic] users. At current rates of use, this comes to approximately 50,000 persons. There is a risk that, upon legalization, rates of use will increase, and with that the absolute number of chronic users will increase.
>
> In addition, there are health risks for those vulnerable persons identified in the materials. There is no information before me to suggest how many people might fall into this group. Given that it includes young adolescents who may be more prone to becoming chronic users, I would not estimate this group to be miniscule.
>
> All of the risks noted above carry with them a cost to society, both to the health care and welfare systems. At current rates of use, these costs are negligible compared to the costs associated with alcohol and drugs. There is a risk that, with legalization, user rates will increase and so will these costs.
>
> In view of these facts, I am satisfied that there is a reasonable basis for Parliament to have concluded that the possesion [sic] and use of marihuana poses a risk to the health of users and to society as a whole. The risk is not large. It need not be in order for Parliament to be entitled to act. It is for Parliament to determine what level of risk is acceptable and what level of risk requires action.
>
> In conclusion, the legal prohibition against the possession of marihuana does not offend against any principle of fundamental justice that is related to the "harm" principle asserted by the applicant.
>
> Reasons for Judgment (Howard P.C.J.), Caine Rec., Vol. 7, pp. 1163, 1164

21. With respect to "vulnerable persons", the trial Judge had earlier noted that all witnesses, with the possible exception of Dr. Morgan, were in general agreement with many of the conclusions in the 1994 Australian ***Hall Report***, which identified the following "high risk groups":

> (1) Adolescents with a history of poor school performance whose educational achievements may be further limited by cognitive impairments if chronically intoxicated, or who start using cannabis at an early age (there being a concern that such youths are at higher risk of becoming chronic users of cannabis as well as other drugs);
>
> (2) Women of childbearing age, because of the concern with the effects of smoking cannabis while pregnant; and
>
> (3) Persons with pre-existing diseases such as cardiovascular diseases, respiratory

diseases, schizophrenia or other drug dependencies, all of whom may face a risk of precipitating or exacerbating the symptoms of their deceases [sic].

Reasons for Judgment (Howard P.C.J.), Caine Rec., Vol. 7, p. 1139

(Note: The full title of this report is, ***The health and psychological consequences of cannabis use***, prepared for the Australian National Task Force on Cannabis, by Hall, Solowji, and Lemon (Tab 5 of the Crown's Brandeis Brief, reproduced on the CD filed as part of the Caine Record.))

22. In holding that the law does not violate constitutionally protected dignity and autonomy, Howard P.C.J. felt bound by the judgment of Curtis J. in ***Malmo-Levine***:

> In my view, whatever thoughts I had on the above position of the applicant "went up in smoke", so to speak, with the arrival of the February 1998 decision of our Supreme Court in ***Melmo-Levine*** [sic] ***and Rowsell***, (***supra***). Notwithstanding the applicant's position, noted above, Mr. Justice Curtis was clearly satisfied that the issue was more properly characterized as a question of whether S. 7 of the ***Charter*** guarantees the right to use marihuana. I am bound by this decision of Curtis J. The fact that the charge before him was possession of marihuana for the purpose of trafficking, rather than simple possession, is of no significance. It is clear from the decision that he was ruling on the question of simple possession, independent of any considerations about the trafficking aspect of the charge.
>
> The background to the ***Melmo-Levine*** [sic] ***and Rowsell*** decision is of some importance. The constitutional challenge before the court included a S. 7 ***Charter*** challenge identical to the one before me. In fact, with the consent of the Crown, argument proceeded on the basis that all of the findings of fact (legislative facts) sought by the applicant before me had been proven. The written submissions of the applicant before me were then presented to Mr. Justice Curtis. In effect, Mr. Justice Curtis has ruled on precisely the same factual and legal issues as are before me, the only difference being that the applicant's argument on the facts was, for the purpose of argument, assumed to have been proven.
>
> In view of the decision in ***Melmo-Levine*** [sic] ***and Rowsell***, (***supra***), I conclude that there has been no infringement of the applicant's liberty or security of person as these concepts relate to his right to make decisions regarding his own health and bodily integrity.
>
> Reasons for Judgment (Howard P.C.J.), Caine Rec., Vol. 7, p. 1156

Ruling on Division of Powers Challenge

23. This attack was dismissed on the basis of ***R. v. Hauser***, [1979] 1 S.C.R. 984. In this connection, the trial Judge stated, ***inter alia***:

> Finally, the applicant submits that the prohibition against the possession of marihuana (as opposed to the ***Narcotic Control Act*** as a whole) cannot be justified under the "Peace, Order and Good Government" power, in that there has never been any evidence that the use of marihuana presents a problem or "emergency" of

national dimensions within the meaning of ***Labatt Breweries of Canada Ltd. v. Attorney General of Canada et al., Breweries of Canada Ltd. v. Attorney General of Canada et al.***, [1980] 1 S.C.R. 914, 52 C.C.C. (24) 433 at 465-466. The applicant further asserts that the possession of marihuana, to the extent that it is a health concern, clearly is a matter of a "merely local or private nature", there being no evidence that the health issues relevant to the use of marihuana are a matter of "national" concern transcending the power of each province to adequately address in its own way. This argument presumes that marihuana must, in its own right, satisfy the "Peace Order and Good Government" tests set out in the authorities before it can be the subject of prohibitory legislation under the federal residual power. I do not think that this presumption is sound. Once the general character and purpose of the ***Narcotic Control Act*** has been determined and once this purpose has been determined to be a matter which properly falls under the federal domain, it is not necessary that each and every drug listed in the Schedule to the ***Narcotic Control Act*** meet the character and purpose test. The field has been validly occupied by the federal parliament. The field is broad. It is not limited to only those drugs which give rise to health concerns that have a national dimension to them.

Reasons for Judgment (Howard P.C.J.), Caine Rec., Vol. 7, pp. 1146, 1147

24. Caine was convicted, and granted an absolute discharge.

Summary Conviction Appeal (Thackray J.)

25. A summary conviction appeal was dismissed without reasons.

Formal Order (Thackray J.), Caine Rec., Vol. 7, p. 1165

COURT OF APPEAL DECISION IN MALMO-LEVINE AND CAINE
((2000), 145 C.C.C. (3d) 225, 34 C.R. (5th) 91, 138 B.C.A.C. 218, 226 W.A.C. 218)

26. Although Malmo-Levine's appeal was from conviction on a charge of possession for the purpose of trafficking, the Court of Appeal restricted its consideration to whether the prohibition on marihuana possession is constitutional. As it noted, if the offence of possession "passes constitutional muster", then there would be no need to consider the trafficking provisions.

Reasons for Judgment (Braidwood J.A.), Malmo-Levine Rec., Vol. 7, p. 261, para. 34

27. Mr. Justice Braidwood (Madam Justice Rowles concurring) upheld the prohibition, and dismissed both appeals. Madam Justice Prowse, in dissent, found a violation of s. 7, and directed the parties to file further written submissions on the issue of s. 1 justification. However, because of the disposition by the majority no further submissions were made.

Formal Order (B.C.C.A.), Malmo-Levine Rec., Vol. 2, pp. 238-240; Formal Order (B.C.C.A.), Caine Rec., Vol. 7, pp. 1166-1168

28. The Court dealt with both matters on the facts found by Howard P.C.J. in ***Caine***. At the hearing it declined to receive additional material from the parties.

> Reasons for Judgment (Braidwood J.A.), Malmo-Levine Rec., Vol. 7, p. 278, para. 68, p. 334, para. 165

29. Although all members of the Court accepted the Appellants' contention that the "harm principle" is a principle of fundamental justice under s. 7 of the ***Charter***, they disagreed with respect to its boundaries. The majority held that it is open to Parliament to impose penal sanctions when the prohibited activity creates "a reasoned apprehension of harm" that is neither "insignificant" nor "trivial". The dissent would require the potential harm to be "serious" or "substantial".

Majority Reasons

30. Braidwood J.A. dealt first with the "harm principle", and then went on to consider whether the impugned provision of the ***Narcotic Control Act*** "strikes the right balance between the individual and the state." In summarizing his findings, he stated:

> [158] In conclusion, the deprivation of the appellants' liberty caused by the presence of penal provisions in the *NCA* is in accordance with the harm principle. I agree that the evidence shows that the risk posed by marihuana is not large. Yet, it need not be large in order for Parliament to act. It is for Parliament to determine what level of risk is acceptable and what level of risk requires action. The ***Charter*** only demands that a "reasoned apprehension of harm" that is not significant [sic] or trivial. The appellants have not convinced me that such harm is absent in this case.
>
> [159] Therefore, I find that the legal prohibition against the possession of marihuana does not offend the operative principle of fundamental justice in this case.
>
> [160] Determining whether the *NCA* strikes the "right balance" between the rights of the individual and the interests of the State is more difficult. In the end, I have decided that such matters are best left to Parliament. The LeDain Commission recommended the decriminalization of marihuana possession nearly thirty years ago based on similar arguments raised by the appellants in this case. Parliament has chosen not to act since then, although there are moves afoot to make exceptions for the medical use of marihuana in wake of recent decisions. Nevertheless, I do not feel it is the role of this Court to strike down the prohibition on the non-medical use of marihuana possession at this time.
>
> [161] As discussed earlier, the conviction in ***R. v. Malmo-Levine*** also related to possession of marihuana for the purpose of trafficking. It therefore follows, in the totality of the analysis set forth above, that if the s. 7 challenge to the provisions relating to the simple possession of marihuana fails, then so too would a challenge relating to the possession of marihuana for the purpose of trafficking.

Reasons for Judgment (Braidwood J.A.), Malmo-Levine Rec., Vol. 2, pp. 331, 332

31. With respect to Curtis J.'s decision declining to hold an evidentiary hearing in ***Malmo-Levine***, Braidwood J.A. held this to be an error of no consequence:

> [162] Finally, it should be noted that the learned trial judge in ***Malmo-Levine*** refused to hear evidence that had been tendered by Mr. Malmo-Levine for the reason that it would be irrelevant. He convicted the appellant on the evidence tendered by the Crown. I am of the opinion that the learned trial judge should have admitted the evidence. However, the result would not have been different if the evidence had been admitted.
>
> Reasons for Judgment (Braidwood J.A.), Malmo-Levine Rec., Vol. 2. , p. 332

Dissenting Reasons

32. Prowse J.A. summarized her reasons as follows:

> [187] In the result, because the test I would apply is different from that applied by Mr. Justice Braidwood, I conclude that the balancing of interests under the third stage of the s. 7 analysis must be resolved in favour of the individual. In my view, the evidence does not establish that simple possession of marijuana presents a reasoned risk of serious, substantial or significant harm to either the individual or society or others. As a consequence of this finding, I conclude that the appellants have established that they have been deprived of their right to life, liberty and security of the person in a manner which is not in accordance with the principles of fundamental justice insofar as s. 3(1) of the ***NCA*** is concerned. I would not be prepared to make this finding with respect to the count of possession of marijuana for the purpose of trafficking under s. 4 of the ***NCA*** for several reasons: first, the trial judges did not address this issue; second, very little argument was addressed to this issue during the course of submissions; third, this issue would be moot if the Crown were able to justify s. 3(1) of the ***NCA*** under s. 1 of the ***Charter***; and, finally, these are dissenting reasons.
>
> Reasons for Judgment (Prowse J.A.), Malmo-Levine Rec., Vol. 2. , pp. 346, 347

(Note: The Court did not deal with Caine's division of powers ground. Neither did it address Malmo-Levine's equality rights argument, raised for the first time on appeal without giving the notice required under the ***Constitutional Question Act*** (B.C.).)

CLAY

Circumstances of the Offences

33. Clay was charged, by indictment, with several marihuana offences. The underlying facts were not disputed, and are summarized in the reasons of the Court of Appeal:

> [2] The appellant owned a store called "The Great Canadian Hemporium". In addition to selling items such as hemp products, marihuana logos and pipes, the

appellant sold small marihuana plant seedlings from his store. The appellant is an active advocate for the decriminalization of marihuana. The appellant does not require marihuana for any personal medical reason although he did sell marihuana cuttings from his store to persons who did.

[3] An undercover police officer bought a small marihuana cutting at the store. The police also seized marihuana cuttings [16 plants] and a small amount of marihuana [6.8 grams] when they executed search warrants at the appellant's store and home. As a result, the police charged the appellant under the former ***Narcotic Control Act*** with possession of cannabis sativa, trafficking in cannabis sativa, possession of cannabis sativa for the purpose of trafficking and the unlawful cultivation of marihuana.

Indictments, Clay Rec., Vol. 1, pp. 1, 5, 6, 14; Admissions of Facts, Clay Rec., Vol. 7, pp. 1428-1430; Evidence of Constable R.G. Bornais, Clay Rec., Vol. 1, pp. 58-62, 80-86; Evidence of Detective T.J. Gaffney, Clay Rec., Vol. 1, pp. 89, 90; Reasons for Judgment (Rosenberg J.A.), Clay Rec., Vol. 16, p. 3432

(Note: Clay was convicted on charges of trafficking, possession for the purpose of trafficking, and possession. He was acquitted of cultivation. Gordon James Prentice, a co-accused on the trafficking and possession for the purpose of trafficking charges, was acquitted at trial.)

Proceedings at Trial (McCart J.)
((1997), 9 C.R. (5th) 349 (Ont.Ct.(G.D.))

34. Prior to trial Clay gave written notice challenging the constitutional validity of the inclusion of marihuana in the Schedule to the ***Narcotic Control Act*** under s. 7 of the ***Charter***, and on the basis it is beyond the authority of Parliament.

Notice of Application and Notice of Constitutional Issue (April 1997), Clay, Rec., Vol. 1, pp. 8-12

Analysis of the Marihuana

35. The Crown called David D. McLerie, a "designated analyst" under the ***Narcotic Control Act***, employed by Health Canada. He testified regarding the tests he performed before signing Certificates of Analyst stating that the substances relating to the charges contain a "narcotic" within the meaning of the ***Act***, namely, "cannabis (marihuana)". He followed a protocol approved by Health Canada, and also by the United Nations.

Evidence of D.D. McLerie, Clay, Rec., Vol. 1, p. 114, 115, 129; Certificates of Analyst (Exhibit 12), Clay Rec., Vol. 7, pp. 1449-1455

36. The first step is to screen the sample, by visual and microscopic examination, looking for physical characteristics of the cannabis plant.

Evidence of D.D. McLerie, Clay Rec., Vol. 1, pp. 115, 116, 130, 132

37. Next is the Duquenois test. The sample is soaked in a petroleum ether solution, and a colouring agent is added to a portion of the liquid. Marihuana will turn the liquid a certain colour. A positive result is required to be able to certify a substance as marihuana.

Evidence of D.D. McLerie, Clay Rec., Vol. 1, pp. 116, 133, 134, 142, 144

38. The final test, thin layer chromatography, is used to determine whether specific compounds, known as cannabinoids, are present. Although marihuana contains many cannabinoids Health Canada tests for only four, *viz.*, cannabinol (C.B.N.), cannabidiol (C.B.D.), cannabichromene (C.B.C.), and delta 9 tetrahydrocannabinol (T.H.C.). T.H.C. is the psychoactive substance in marihuana. Two cannabinoids must be present before a certificate will be issued. Although analysts prefer that one is T.H.C., this is not a requirement.

Evidence of D.D. McLerie, Clay Rec., Vol. 1, pp. 116, 118, 134-136, 144, 145, 147

39. The above procedure will not determine the percentage of any of the cannabinoids present in a sample. Additional, more time-consuming testing, known as quantitation, can do this.

Evidence of D.D. McLerie, Clay Rec., Vol. 1, pp. 117, 136, 137

Botanical Classification of Cannabis

40. The Crown called Dr. Ernest Small, a research scientist with Agriculture Canada, and an expert in plant taxonomy specializing in cannabis.

Evidence of E. Small, Clay Rec., Vol. 1, pp. 152, 153; ***C.V.***, Clay Rec., Vol. 7, pp. 1472-1475

41. Dr. Small stated that, from a botanical classification perspective, there is only one species of cannabis plant, ***cannabis sativa*** (i.e., it is monotypic). He would designate plants with relatively higher amounts of T.H.C. as a subspecies, ***cannabis indica***.

Evidence of E. Small, Clay Rec., Vol. 1, pp. 157-160, 203

(Note: From a photograph, Dr. Small identified the cutting sold by Clay as a cannabis plant: Clay Rec., Vol. 1, p. 171; Photograph (Exhibit 2), Clay Rec., Vol. 7, p. 1431.)

42. He explained that "hemp" is not a scientific term, but a "common or vernacular name" used to refer to cannabis plants primarily useful for harvesting the fibres in their stalks. It was not until the late 1960s that T.H.C. was isolated, and understood as the psychoactive substance in cannabis. Based on two papers he published in 1973, there has been some recognition

throughout the world, including by Health Canada, of 0.3% T.H.C. (by weight) as a "dividing line or cutoff", between non-intoxicating and intoxicating marihuana. However, there is no botanically accepted classification (i.e., species) of cannabis based on T.H.C. content.

Evidence of E. Small, Clay Rec., Vol. 1, pp. 162, 167, 168, 207, 211-216, 219, 222, 223

(Note: At the time of trial (i.e., in 1997) Health Canada licensed the growing of cannabis for research purposes only. However, if upon testing the T.H.C. level is found to exceed 0.3%, then the material must be destroyed: Clay Rec., Vol. 1, pp. 228, 229; Vol. 2, pp. 308-311.)

43. Dr. Small chose this percentage following an experiment conducted in Ottawa in which he grew hundreds of strains of cannabis from around the world. Plants from areas above 30 degrees north latitude tended to have relatively lower amounts of T.H.C. than those from southern regions. The 0.3% figure is "kind of a rough boundary between the two."

Evidence of E. Small, Clay Rec., Vol. 1, pp. 163, 164, 202

44. Even with extensive expertise, such as possessed by Dr. Small, it is impossible to identify a particular plant as having high or low T.H.C. solely by a visual examination of its physical (morphological) characteristics. However, applying very refined mathematical techniques to analyze data that includes non-visually apparent physical characteristics, it is possible to differentiate between intoxicating and non-intoxicating plants with a high degree of accuracy. This is not a practical method for making this determination, as it requires sophisticated computers, standardized growing conditions, and the taking of samples over an entire growing season.

Evidence of E. Small, Clay Rec., Vol. 1, pp. 171, 176, 230, 232-234, 236, 248

45. The percentage of T.H.C. varies between different parts of a plant, and is not consistent throughout the growth cycle. However, the ratio between T.H.C. and C.B.D. in a given plant appears to remain constant. It is, accordingly, possible, through chemical analysis, to determine whether a seedling will mature into a plant with relatively high or low T.H.C.

Evidence of E. Small, Clay Rec., Vol. 1, pp. 164, 245-248

Defence Expert Witnesses on Constitutional Challenge

46. In support of his constitutional challenge Clay called the following persons to give opinion and other evidence:

(a) Professor Patricia G. Erickson, a criminologist at the University of Toronto: Clay Rec., Vol. 2, pp. 463ff, *C.V.*, Clay Rec., Vol. 8, pp. 1647;

(b) Dr. Diane M. Riley, a psychologist, and policy analyst with the Harm Reduction Network, University of Toronto: Clay Rec., Vol. 3, pp. 564ff, *C.V.*, Clay Rec., Vol. 8, pp. 1781;

(c) Professor Marie-Andrée Bertrand, a recently retired professor of criminology, and a member of the LeDain Commission into the Non-Medical Use of Drugs (1969-1973): Clay Rec., Vol. 3, pp. 649ff, *C.V.*, Clay Rec., Vol. 7, p. 1557;

(d) Eugene L. Oscapella, a member of the Ontario Bar, with expertise in federal drug law, and drug policy: Clay Rec., Vol. 3, pp. 700ff, *C.V.*, Clay Rec., Vol. 7, p. 1569;

(e) Dr. Heinz E. Lehmann, professor of psychiatry, McGill University, and a member of the LeDain Commission: Clay Rec., Vol. 4, pp. 746ff; *C.V.*, Clay Rec., Vol. 12, p. 2578;

(f) Dr. Eric W. Single, a professor of sociology at the University of Toronto: Clay Rec., Vol. 4, pp. 773ff, *C.V.*, Clay Rec., Vol. 11, 2327;

(g) Professor Neil Boyd, School of Criminology, Simon Fraser University: Clay Rec., Vol. 4, pp. 822ff, *C.V.*, Clay Rec., Vol. 9, p. 1838;

(h) Dr. Lester Grinspoon, associate professor of psychiatry, Harvard Medical School: Clay Rec., Vol. 4, pp. 866ff, *C.V.*, Clay Rec., Vol. 11, p. 2426;

(i) Bruce Rowsell, Director, Bureau of Drug Surveillance, Health Protection Branch, Ottawa: Clay Rec., Vol. 5, pp. 1001ff; and

(j) Dr. John P. Morgan, professor, City University of New York Medical School: Clay Rec., Vol. 5, pp. 1047ff, *C.V.*, Clay Rec., Vol. 12, p. 2591.

Crown Expert Witness on Constitutional Challenge

47. Dr. Harold Kalant was the only witness called by the Crown regarding the use and effects of marihuana. He is Professor Emeritus (Pharmacology), at the University of Toronto, and Director Emeritus (Biobehavioural Research), of the Addiction Research Foundation of Ontario.

Clay Record, Vol. 6, pp. 1218ff; *C.V.*, Clay Rec., Vol. 16, p. 3287

(Note: It is the Respondent's position that the evidence given by Clay and a number of other defence witnesses is not relevant to the issues on appeal; i.e., his parents (Robin and Louise Clay), persons who use marihuana for medical reasons (Brenda Rochford and Lynn Harichy), someone who lost employment as an elementary school teacher after pleading guilty to charges of possessing and cultivating 70 marihuana plants (Jeffrey J. Shurie), someone who volunteers to assist persons with A.I.D.S., and testified as to the relief they obtain from smoking marihuana (Neev Tapiero). Of marginal relevance at best is the evidence of Gordon Scheifele, who has grown low T.H.C. marihuana under Health Canada licences, and expressed his views with respect to the industrial / commercial viability of hemp. He is neither a taxonomist nor a pharmacologist.)

Findings of Fact

48. With respect to the effects of marihuana, McCart J. stated:

I heard from a most impressive number of experts, among whom there was a general consensus about effects of the marijuana consumption. From an analysis of their evidence I am able to reach the following conclusions:

1. Consumption of marijuana is relatively harmless compared to the so-called hard drugs and including tobacco and alcohol;
2. There is no hard evidence demonstrating any irreversible organic or mental damage from the consumption of marijuana;
3. That cannabis does cause alteration of mental functions and as such, it would not be prudent to drive a car while intoxicated;
4. There is no hard evidence that cannabis consumption induces psychoses;
5. Cannabis is not an addictive substance;
6. Marijuana is not criminogenic in that there is no evidence of a causal relationship between cannabis use and criminality;
7. That the consumption of marijuana probably does not lead to "hard drug" use for the vast majority of marijuana consumers, although there appears to be a statistical relationship between the use of marijuana and a variety of other psychoactive drugs;
8. Marijuana does not make people more aggressive or violent;
9. There have been no recorded deaths from the consumption of marijuana;
10. There is no evidence that marijuana causes amotivational syndrome;
11. Less that [sic] 1% of marijuana consumers are daily users;
12. Consumption in so-called "de-criminalized states" does not increase out of proportion to states where there is no de-criminalization;
13. Health related costs of cannabis use are negligible when compared to the costs attributable to tobacco and alcohol consumption.

Reasons for Judgment (McCart J.), Clay Rec., Vol. 16, pp. 3363-3365

49. Turning to the detrimental effects of the drug, the trial Judge continued:

Harmful Effects of Marijuana and the Need for More Research

Having said all of this, there was also general consensus among the experts who testified that the consumption of marijuana is not completely harmless. While marijuana may not cause schizophrenia, it may trigger it. Bronchial pulmonary damage is at risk of occurring with heavy use. However, to be fair, there is also general agreement among the experts who testified that the moderate use of marijuana causes no physical or psychological harm. Field studies in Greece, Costa Rico 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.

The LeDain Commission found at least four major grounds for social concern: the probably harmful effect of cannabis on the maturing process in adolescence; the implications for safe driving arising from impairment of cognitive functions and psycho motor abilities, from the additive interaction of cannabis and alcohol and from the difficulties of recognizing or detecting cannabis intoxication; the possibility, suggested by reports in other countries and clinical observations on this continent, that the long term, heavy use of cannabis may result in a significant amount of mental deterioration and disorder; and, the role played by cannabis in the development and spread of multi-drug use by stimulating a desire for drug experience and lowering inhibitions about drug experimentation. This report went on to state that it did not yet know enough about cannabis to speak with assurance as to what constitutes moderate as opposed to excessive use.

The Report of the National Task Force on Cannabis, Canberra, Australia, was delivered on September 30, 1994. This Task Force concluded in general, that the findings on the health and psychological effects of cannabis suggest that cannabis use is not as dangerous as its opponents might believe, but that its' [sic] use is not completely without risk, as some of its opponents [sic] would argue. As it is most commonly used, occasionally, cannabis presents only minor or subtle risks to the health of the individual. The potential for problems increase [sic] with regular heavy use. While the research findings on some potential risks remain equivocal, there is clearly sufficient evidence to conclude that cannabis use should be discouraged particularly among youth.

Sometime prior to the Canberra Report, the Royal Commission into the non-medical use of drugs in South Australia was released. This Commission concluded that marijuana is not an addictive drug and "is comparatively harmless in moderate doses, although there are effects on skills such as those required for driving, and its' [sic] effects may be greater if it is taken in combination with other drugs. It is almost certainly harmful, to some extent, in high doses. The summary of the scientific and medical evidence does not entirely resolve the policy questions, since further value judgments have to be made."

Finally, I would refer to a commentary by Dr. Harold Kalant on three reports which appeared in 1982 respecting the potential health damaging consequences of chronic cannabis use. The one report is that of an expert group appointed by the Advisory Council on the misuse of drugs in the United Kingdom. The second is that resulting from a scientific meeting sponsored jointly by the Addiction Research Foundation of Ontario and the World Health Organization. The third is that of a committee set up by the Institute of Medicine, National Academy of Sciences, of the United States of America. There was general agreement by the three groups after a review of essentially the same body of evidence. In brief, the verdict in each case has been that the available evidence is not nearly complete enough to permit an identification of the full range and frequency of occurrence of adverse effects from cannabis use, but that the practice can certainly not be considered harmless and innocent.

> I can only conclude from a review of these reports and the other *viva voce* evidence which I heard that the jury is still out respecting the actual and potential harm from the consumption of marijuana. It is clear that further research should be carried out. While it is generally agreed that marijuana used in moderation is not a stepping stone to hard drugs, in that it does not usually lead to consumption of the so-called hard drugs, nevertheless approximately 1 in 7 or 8 marijuana users do graduate to cocaine and/or heroin.
>
> Reasons for Judgment (McCart J.), Clay Rec., Vol. 16, pp. 3365-3369

0.3% T.H.C. Issue

50. The trial Judge did not resolve the conflict in the evidence as to whether marihuana with a T.H.C. level of less than 0.3% (by weight) can have any intoxicating effect.

51. Dr. Morgan expressed the view that even 1.0% T.H.C. marihuana can have no effect:

> … .3 per cent marihuana has no psycho-activity, at least in terms of the studies that humans have conducted. In reality, let me say with what I know is well documented in the literature. .5 and less has no psycho-activity. Humans can smoke it 'til the cows come home, they won't get high.
>
> In fact, there is significant evidence, I'll soften a little bit, to say that marihuana less then one percent has no psycho-activity, and I say that because the medical literature documents that, and that humans given one percent marihuana versus placebo marihuana, that's marihuana that has no T.H.C. in it, usually cannot distinguish one per cent from zero per cent T.H.C., now I say that with some hesitation because actually I believe that in some instances, one per cent marihuana will produce an effect.
>
> But let's say anything less than one per cent marihuana is ineffective and certainly .3 per cent is wholly ineffective.
>
> Evidence of J.P. Morgan, Clay Rec., Vol. 5, p. 1079

(Note: Dr. Morgan, who described himself as "a conscientious objecter [sic] in the war on drugs", advocates the decriminalization of all drugs for personal use, including heroin and cocaine: Clay Rec., Vol. 6, p. 1195.)

52. Dr. Kalant, who was present when Dr. Morgan testified, did not agree that the proportion of T.H.C. is in and of itself determinative of whether a given quantity of marihuana will have an intoxicating effect. Although a more potent drug will produce greater effects, the dose is what is significant. With marihuana, this is the T.H.C. percentage times the volume of smoke inhaled.

> Evidence of H. Kalant, Clay Rec., Vol. 6, pp. 1222, 1223, 1300

53. When asked, in cross-examination, whether Health Canada would be "seriously mistaken" if it were of the view that 0.3% T.H.C. was unlikely to produce toxic effects, Dr. Kalant responded:

> Yes, I would say so, and I would point out that some of the other statements that I heard made in court here are equally mistaken, for example the claim that I believe was made by both Dr. Grinspoon and Dr. Morgan, if I'm not mistake [sic], that anything below one per cent is extremely unlikely to have any psycho-active effect flies in the face of all the experience of the LeDain Commission and of Health and Welfare.
>
> As the LeDain Commission pointed out in the early '70s, the typical street marihuana was .5 per cent and people were quite happy smoking it and getting the effect, and I did ask Health and Welfare analytical labs to give me a list of the analytical results for all the samples which they had looked at year by year from 1971 on, and there was a, for the first two or three years, .5 per cent was the mean value. .6 per cent at the beginning was the highest value they found, and both the mean and the highest value gradually increased over time.

Evidence of H. Kalant, Clay Rec., Vol. 6, p. 1300

54. He agreed, however, that the lower the potency, the less likely it is that someone will be willing to smoke marihuana to achieve the desired effect. With regard to his calculation that it would take 75 puffs of 0.1% T.H.C. to produce an effective dose, he stated:

> That's right, yeah, and this is why the probability of that happening gets less and less, the lower the potency. In other words, there is a limit to first of all the cigarette would not last that long, you would have to use several cigarettes to achieve it.
>
> Secondly, the intake of 75 puffs might very well become disagreeable, the amount of smoke and the effort of taking it in might become more than a person is willing to do, so that the lower the potency, the less probable that anyone is going to do it for psycho-active effect.
>
> My calculation was meant to show simply that .3 per cent is feasible within the limits of the experimental conditions which they used.

Evidence of H. Kalant, Clay Rec., Vol. 6, pp. 1317, 1318

55. Mr. Rowsell testified that Health Canada's 0.3% licence guideline is based on European Union regulations, and was adopted to permit studies to be done on growing marihuana for industrial use. When Canadian regulations are developed this may not be the level permitted. The guideline is not based on an acceptance that marihuana of this potency constitutes "no real potential harm"

Evidence of B. Rowsell, Clay Rec., Vol. 5, pp. 1015, 1016, 1024-1030

(Note: On March 12, 1998 (i.e., after the trial) the ***Industrial Hemp Regulations***, SOR/98-156, ***Canada Gazette*** Part II, Vol. 132, p. 947, came into force. These permit the licensing of commercial / industrial activities in relation to "industrial hemp", defined, in s. 1, to include cannabis plants "which do not contain more than 0.3% THC w/w.")

Ruling on Proof of "Narcotic"

56. In holding that the marihuana in issue is a "narcotic", McCart J. stated:

> Aside from the constitutional issues, the accused Clay submitted that the Crown failed to prove beyond a reasonable doubt that the accused was in possession of, trafficked in or cultivated a "narcotic". He submitted that the certificate of analysis which identified the plant substance as cannabis (marijuana) did not sufficiently identify a prohibited narcotic. He submitted that the failure of the certificate of analysis to specify the level of THC found in the plant substance renders the certificate deficient in properly identifying a prohibited narcotic. I have carefully considered both the written and oral submissions of counsel and I am of the view that ***Perka et al v. The Queen*** (1984), 14 C.C.C. (3d) 385 is a complete answer to the defence submissions.
>
> Reasons for Judgment (McCart J.), Clay Rec., Vol. 16, pp. 3354, 3355

Ruling on *Charter* Challenge

57. In rejecting a submission founded on the "harm principle", McCart J. stated:

> With apparent reliance on the decision of the Supreme Court in ***Reference Re: s. 94(2) of the Motor Vehicle Act*** (1985), 23 C.C.C. (3d) 289, it is the applicants' position that the illegal conduct causes actual harm before Parliament is entitled to legislate against that conduct. I could find no authority for that proposition and in any event I believe I have amply demonstrated that the consumption of marijuana does cause harm, albeit and perhaps not as much harm as was first believed. ...
>
> Reasons for Judgment (McCart J.), Clay Rec., Vol. 16, p. 3380

58. With respect to "arbitrariness", he said:

> I believe it is the applicant's submission that it is a violation of the principles of fundamental justice to create an arbitrary and legislative classification in which marijuana is subject to the same legislative regime as the harder drugs is answered by the passage of the ***Controlled Drugs and Substances Act***. In this ***Act,*** marijuana is listed in a separate schedule from the so-called hard drugs and the penalties for simple possession of small amounts of marijuana have been significantly reduced. Given the actual and potential harm which results from the consumption of marijuana, there can hardly be any argument that its prohibition is arbitrary or irrational.
>
> Reasons for Judgment (McCart J.), Clay Rec., Vol. 16, p. 3381

59. Turning to "overbreadth", he held:

> The applicants submit that the prohibition on the use and distribution of marijuana is overbroad in that (a) no meaningful exemptions are provided for legitimate medical use and (b) the legislation fails to make any meaningful distinction between personal and private acts of consumption or distribution and acts which form part and parcel of the illicit drug trade. I have already dealt with (a), finding that the applicants have no standing in that neither of them have need to consume marijuana for therapeutic purposes. With respect to (b) I believe the simple answer is that, in certain circumstances, the consumption of marijuana is harmful in a variety of respects. Furthermore, as many of the studies have indicated, further research is necessary to determine the long-range effects of marijuana consumption.
>
> Reasons for Judgment (McCart J.), Clay Rec., Vol. 16, pp. 3381, 3382

60. Lastly, in finding that the law does not infringe personal privacy and autonomy, the trial Judge, after quoting from the reasons of Lamer C.J. in ***B.(R.) v. Children's Aid Society***, [1995] 1 S.C.R. 315, continued:

> In my view, the critical words in the above quotations are "fundamental personal importance", "fundamental concepts of human dignity", "personal autonomy", "privacy and choice in decisions going to the individual's fundamental being". The therapeutic value of marijuana aside, it was generally agreed among the experts that, in the words of Dr. Morgan, marijuana is primarily used for occasional recreation. One might legitimately ask whether this form of recreation qualifies as of "fundamental personal importance" such as to attract ***Charter*** attention. In this regard, I quote from the ***Alaska*** decision [***Ravin v. State***, 537 P. 2d 494 (Alaska S.C., 1975)] at p. 502:
>
> > "Few would believe they have been deprived of something of critical importance if deprived of marijuana."
>
> Again, in the ***Bell*** decision [***N.O.R.M.L. v. Bell***, 488 F. Supp. 123 (Dist. Columbia, 1988)] at p. 133:
>
> > "Private possession of marijuana ... cannot be deemed fundamental."
>
> Finally, in ***Cunningham v. Canada***, ***supra***, I quote from the judgment of McLachlin J. at p. 498 where she says:
>
> > "The ***Charter*** does not protect against insignificant or 'trivial' limitations of rights."
>
> Reasons for Judgment (McCart J.), Clay Rec., Vol. 16, pp. 3383, 3384

Ruling on Division of Powers Challenge

61. In the course of addressing the ***Charter*** issues, McCart J. stated:

> On the basis of my findings, there can be no doubt that the ***Narcotic Control Act*** addresses a concern which is national in scope and in my view it falls within the

competence of the Parliament of Canada as affecting the peace, order and good government of Canada.

Reasons for Judgment (McCart J.), Clay Rec., Vol. 16, p. 3384

62. Clay was convicted. In respect of each charge, he was ordered to pay a fine ($400.00 in total), and placed on probation for three years.

Court of Appeal Decision
((2000), 146 C.C.C. (3d) 276, 37 C.R. (5th) 170, 188 D.L.R. (4th) 468, 135 O.A.C. 66, 49 O.R. (3d) 577)

63. In dismissing the appeal, Mr. Justice Rosenberg (Mr. Justice Catzman and Madam Justice Charron concurring), accepted that the evidence supported the findings of the trial Judge.

Reasons for Judgment (Rosenberg J.A.), Clay Rec., Vol. 16, p. 3434, para. 10, p. 441, para. 34

(Note: The Court heard this matter together with ***R. v. Parker*** (2000), 146 C.C.C. (3d) 193 (Ont.C.A.), which raised issues concerning the medical use of marihuana. Judgments in both were released at the same time.)

64. Before addressing Clay's main argument, based on the "harm principle", Rosenberg J.A. dealt with his alternative submission that the right to use intoxicants, including marihuana, in the privacy of one's home is a fundamental aspect of personal autonomy and human dignity:

> [14] The Supreme Court of Canada has also confirmed that s. 7 protects a right to personal autonomy as an aspect of security of the person. As Sopinka J. wrote in ***Rodriguez v. British Columbia (Attorney General)***, [1993] 3 S.C.R. 519 at p. 588:
>
> > 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. [emphasis by Rosenberg J.A.]
>
> [15] In my view, the decision to use marihuana for recreational purposes similarly does not fall within this aspect of security of the person. I do not agree that such a decision is basic to human dignity. This case is not at all like ***Rodriguez*** where, at p. 588, Sopinka J. described the impact of the ***Criminal Code*** prohibition on assisted suicide on the appellant's ability to make personal decisions in these terms: ...
>
> [16] Other cases engaging this aspect of security of the person have included ***R. v. Morgentaler***, [1988] 1 S.C.R. 30, where delays in the therapeutic abortion procedure put the pregnant woman's life and health at risk, and ***Fleming v. Reid*** (1991), 4 O.R. (3d) 74 (C.A.), where a psychiatric patient was medicated contrary to instructions he had given when he was still competent. I have also held in ***R. v. Parker*** that the accused's right was infringed where he was denied access to marihuana that he

> required to control epileptic seizures that threatened his life and health. Again, the affront to autonomy and human dignity in these cases is far removed from the claim made by the appellant in this case.
>
> [17] At this stage in the development of the ***Charter***, it is not possible to delineate the aspects of personal autonomy that will receive protection under s. 7. The result for any given fact situation must be informed by the situations where a deprivation of liberty or security of the person has been found in the past.
>
> [18] I agree with the trial judge that the recreational use of marihuana, even in the privacy of one's home, does not qualify as a matter of fundamental personal importance so as to engage the liberty and security interests under s. 7 of the ***Charter***.
>
> Reasons for Judgment (Rosenberg J.A.), Clay Rec., Vol. 16, pp. 3437, 3448

65. Expressing some reservations with respect to adopting the "harm principle" as a standard for judicial scrutiny of legislation, he stated:

> [24] In ***Rodriguez v. British Columbia (Attorney General)*** at p. 590, Sopinka J. cautioned that the court must be careful that the principles of fundamental justice do not become principles in "eye of the beholder only". As he said at pp. 590-91:
>
> > Principles of fundamental justice must not, however, be so broad as to be no more than vague generalizations about what our society considers to be ethical or moral. They must be capable of being identified with some precision and applied to situations in a manner which yields an understandable result.
>
> [25] The harm principle as a principle of fundamental justice evokes many of these concerns when it is taken out of the context from which it is derived. While it is a good basis for legislative policy, a helpful guide for the exercise of discretion by prosecutions [sic] and an important principle for judges in exercising discretion in sentencing, it is a difficult principle to translate into a means of measuring the constitutionality of legislation. For example, how much harm is sufficient to warrant legislative action? And, can the harm principle be applied outside the ***mens rea*** area in a manner that yields an understandable result?
>
> Reasons for Judgment (Rosenberg J.A.), Clay Rec., Vol. 16, p. 3439

66. However, having regard to the reasons of Braidwood J.A. in ***Malmo-Levine***; ***Caine***, ***supra***, Rosenberg J.A. continued:

> [28] I am prepared to accept for the purpose of this appeal that a harm principle is a principle of fundamental justice in the terms suggested by Braidwood J.A. I do not agree with the higher test propounded by Prowse J.A. which, in my view, could lead to an unjustifiable intrusion into the legislative sphere. Moreover, the principle, as derived by Braidwood J.A., appears to be consistent with the argument made by the appellant in this court, which in turn was based on some of the language from ***R. 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 p. 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 p. 505, in applying the minimal impairment test, that it was sufficient that the prohibited material "creates a risk of harm to society" and "that it is sufficient in this regard for Parliament to have a reasonable basis for concluding that harm will result and this requirement does not demand actual proof of harm".
>
> Reasons for Judgment (Rosenberg J.A.), Clay Rec., Vol. 16, p. 3440

67. On the basis of the facts found by the trial Judge, Rosenberg J.A. concluded, "that there is a reasoned apprehension of harm that is neither insignificant nor trivial."

Reasons for Judgment (Rosenberg J.A.), Clay Rec., Vol. 16, p. 3441, para. 34

68. With reference to his reasons in ***Parker, supra***, Rosenberg J.A. noted that, except for medical use, there is no international consensus favouring the legalization of marihuana. He viewed as inapt a submission that Parliament's failure to prohibit alcohol and tobacco precluded it from acting with respect to marihuana.

Reasons for Judgment (Rosenberg J.A.), Clay Rec., Vol. 16, p. 3441, paras. 35, 36

69. An argument that the legislation is overly broad because by reason of the definition sections in the ***Narcotic Control Act*** both intoxicating and non-intoxicating marihuana are prohibited was dismissed:

> [39] The appellant also submits that the prohibition is over broad because it applies to all forms of cannabis, not merely those with a sufficient level of Tetrahydrocannabinol (THC) to produce the psychoactive effect. It does not appear that this issue was raised before the trial judge as a constitutional matter. In any event, there is a rational basis for Parliament prohibiting all cannabis in order to effectively control the harm from psychoactive cannabis. This is because there is not a clear distinction between "narcotic" and "non-narcotic" cannabis and, therefore, it is difficult to distinguish between the two. For example, while some scientists consider cannabis with 0.3% THC "narcotic", there is evidence that even cannabis with less than this amount of THC is psychoactive.
>
> Reasons for Judgment (Rosenberg J.A.), Clay Rec., Vol. 16, p. 3442

70. With respect to Parliament's jurisdiction to regulate the use of marihuana, Rosenberg J.A. rejected Clay's arguments that (a) ***Hauser, supra***, was wrongly decided, (b) subsequent decisions of this Court have called into question reliance on the federal "residual power" (i.e., peace, order, and good government) as support for the ***Narcotic Control Act***, and (c) the

legislation is also not supportable as criminal law (i.e., s. 91(27)). In connection with the latter, he stated:

> [45] In my view, the findings by the trial judge concerning the harm from marihuana use and the other objectives of the ***Narcotic Control Act***, including Canada's international obligations and controlling the domestic and international trade in illicit drugs, are sufficient to dispose of this argument. Moreover, in view of the binding effect of the decision in ***Hauser***, this argument is not available to the appellant. Finally, acceptance of the reservations expressed by Dickson J. in ***Hauser*** and Laskin C.J.C. in ***Schneider*** about the use of the federal residual power would merely result in the ***Act*** being justified as an exercise of the federal criminal law power.
>
> Reasons for Judgment (Rosenberg J.A.), Clay Rec., Vol. 16, pp. 3442-3444, paras. 40-45

71. The final point raised was that the Crown failed to prove that the marihuana Clay possessed and sold was a prohibited drug, because there was no evidence it contained the psychoactive cannabinoid T.H.C. It was contended that, as a matter of statutory interpretation, only marihuana with more than 0.3% T.H.C. falls within the definition of a "narcotic". Citing ***R. v. Perka***, [1984] 2 S.C.R. 232, Rosenberg J.A. found no ambiguity in the definition provisions, and that the prohibition applies to all marihuana.

Reasons for Judgment (Rosenberg J.A.), Clay Rec., Vol. 16, pp. 3444-3446, paras. 46-51

72. Rosenberg J.A. declined to grant constitutional remedies, which he had done in ***Parker, supra*** (at paras. 195-209). In that decision the prohibition on possession of marihuana in the ***Controlled Drugs and Substances Act*** was found to violate s. 7 of the ***Charter***, because the legislative scheme did not adequately address therapeutic use of the drug. However, the declaration of invalidity was suspended for 12 months to provide Parliament with an "opportunity to fill the void." Parker, who had established a medical need for marihuana, was granted a constitutional exemption from the law during the period of suspension. In addition, the judicial stay of the charges against him granted at trial was affirmed. However, as Clay had not asserted a personal medical need for marihuana, and his challenge based on recreational use had failed, Rosenberg J.A. concluded it was appropriate to permit his convictions to stand.

Reasons for Judgment (Rosenberg J.A.), Clay Rec., Vol. 16, pp. 3446-3449, paras. 52-61

(Note: Subsequent to ***Parker,*** the federal government addressed the medical marihuana issue in the ***Marihuana Medical Access Regulations***, SOR/2001-227, ***Canada Gazette*** Part II, Vol. 135, p. 1330.)

PART II

ISSUES / CONSTITUTIONAL QUESTIONS

73. The Chief Justice has stated the following constitutional questions:

Malmo-Levine

1. Does prohibiting possession of Cannabis (marihuana) for the purpose of trafficking under s. 4(2) of the ***Narcotic Control Act***, R.S.C. 1985, c. N-1, by reason of the inclusion of this substance in s. 3 of the Schedule to the ***Act*** (now s. 1, Schedule II, ***Controlled Drugs and Substances Act***, S.C. 1996, c. 19), infringe s. 7 of the ***Canadian Charter of Rights and Freedoms***?

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

3. Does prohibiting possession of Cannabis (marihuana) for the purpose of trafficking under s. 4(2) of the ***Narcotic Control Act***, R.S.C. 1985, c. N-1, by reason of the inclusion of this substance in s. 3 of the Schedule to the ***Act*** (now s. 1, Schedule II, ***Controlled Drugs and Substances Act***, S.C. 1996, c. 19), infringe s. 15(1) of the ***Charter*** by discriminating against a certain group of persons on the basis of their substance orientation, occupation orientation, or both?

4. If the answer to Question 3 is in the affirmative, is the infringement justified under s. 1 of the ***Charter***?

Caine

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

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

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

Clay

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

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

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

74. In addition, the following non-constitutional issues are raised:

Malmo-Levine

That the trial Judge's refusal to conduct an evidentiary ***voir dire*** with respect to the constitutional challenge was an error that warrants an order for a new trial.

(Note: This ground is not set out as a Point in Issue on pages 2 and 3 of Malmo-Levine's factum, but is addressed in paragraph 7.)

Clay

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?

Clay Factum, p. 7, para. 10(C)

PART III
ARGUMENT

INTRODUCTION

75. The principal issue raised on these appeals is Parliament's authority to enact penal sanctions, with the possibility of incarceration, for the possession of, and trafficking in, marihuana. It is said these prohibitions infringe rights guaranteed by the ***Charter*** and are, therefore, beyond the competence of both Parliament and the provincial legislatures. It is further contended that even if these laws do not violate the ***Charter***, they are ***ultra vires*** on a division of powers basis.

76. Although marihuana prosecutions underlie these appeals, the effect of the constitutional determinations the Court is being asked to make are far-reaching. The "harm principle" advanced by the Appellants under s. 7 of the ***Charter***, would circumscribe the use of incarceration as a possible penalty in all circumstances. The division of powers question goes to the very ability of Parliament to enact drug control legislation.

77. It cannot be gainsaid that since the 1970s the marihuana laws have generated considerable study and debate. Various opinions have been expressed with respect to such matters as the harmful effects of marihuana, and the efficacy of the legislation. Reasonable people may differ over these questions. Through the ***Narcotic Control Act***, and more recently the ***Controlled Drugs and Substances Act***, our democratically elected representatives have expressed their considered view on this subject. In so doing they have taken a constitutionally acceptable path.

OVERVIEW OF SUBMISSIONS

78. In summary, the Respondent's position on the constitutionality of the legislation is:

(a) The Appellants' liberty interests are engaged only because imprisonment is a potential penalty for the offence;

(b) The rights to "liberty" and "security of the person" do not encompass a free standing right to possess or ingest one's recreational drug of choice;

(c) The principles of fundamental justice do not include a "harm principle", or any ancillary or corollary principles;

(d) To the extent that the principles of fundamental justice include a consideration of the harm addressed by a particular penal provision, the question to be asked is not whether the state can empirically demonstrate such harm, but rather whether the party challenging the law can establish that the legislature has acted in an irrational or arbitrary manner;

(e) Parliament's decision to prohibit possession of marihuana is neither irrational nor arbitrary;

(f) Neither "substance" nor "occupation orientation" is an analogous ground of discrimination, and the "right to deal", is not protected by s.15(1) of the ***Charter***; and

(g) The ***Narcotic Control Act*** as a whole, and the provisions with respect to marihuana in particular, are ***intra vires*** the Parliament of Canada under both the peace order and good government and criminal law heads of power.

79. With respect to the procedural issue raised by Malmo-Levine, it is submitted the trial Judge did not err in declining to hold a ***voir dire*** but that, in any event, the failure to do so did not occasion any substantial wrong or miscarriage of justice (***Criminal Code***, s. 686(1)(b)(iii)).

80. In response to Clay's final point, it is the Respondent's position that the statutory definition of marihuana encompassed all forms of the cannabis plant regardless of how much T.H.C. is present.

CHARTER, SECTION 7

What are the Principles of Fundamental Justice?

81. The "principles of fundamental justice" constrain, ***inter alia***, the actions of the elected legislative branches of government. Accordingly, they must not only be clear, but more importantly, fundamental to our democratic system. As Sopinka J. noted in ***Rodriguez v. B.C. (Attorney General)***, [1993] 3 S.C.R. 519 (at p. 590):

> Discerning the principles of fundamental justice with which deprivation of life, liberty or security of the person must accord, in order to withstand constitutional scrutiny, is not an easy task. A mere common law rule does not suffice to constitute a principle of fundamental justice, rather, as the term implies, principles upon which there is some consensus that they are vital or fundamental to our societal notion of justice are required. Principles of fundamental justice must not, however, be so broad as to be no more than vague generalizations about what our society considers to be ethical or moral. They must be capable of being identified with some precision and applied to situations in a manner which yields an understandable result. They must also, in my view, be legal principles. The now familiar words of Lamer J. (as

he then was) in ***Re B.C. Motor Vehicle Act***, [1985] 2 S.C.R. 486, at pp. 512-13, are as follows:

> Consequently, the principles of fundamental justice are to be found in the basic tenets and principles, not only of our judicial process, but also of the other components of our legal system. [emphasis added]

And (at p. 607):

> The principles of fundamental justice cannot be created for the occasion to reflect the court's dislike or distaste of a particular statute. While the principles of fundamental justice are concerned with more than process, reference must be made to principles which are "fundamental" in the sense that they would have general acceptance among reasonable people.

Process and Onus

82. The three-stage approach for determining whether there has been a breach of s. 7 is set out in ***R. v. White***, [1999] 2 S.C.R. 417, by Iacobucci J.:

> 38 Where a court is called upon to determine whether s. 7 has been infringed, the analysis consists of three main stages, in accordance with the structure of the provision. The first question to be resolved is whether there exists a real or imminent deprivation of life, liberty, security of the person, or a combination of these interests. The second stage involves identifying and defining the relevant principle or principles of fundamental justice. Finally, it must be determined whether the deprivation has occurred in accordance with the relevant principle or principles: see ***R. v. S. (R.J.)***, [1995] 1 S.C.R. 451, at p. 479, *per* Iacobucci J. Where a deprivation of life, liberty, or security of the person has occurred or will imminently occur in a manner which does not accord with the principles of fundamental justice, a s. 7 infringement is made out.

83. Contrary to this Court's jurisprudence the Appellants seek to place the burden on the Crown to establish that penal legislation does not infringe s. 7. For example, Clay takes the position in paragraph 28 that, "the state must produce sound empirical evidence to show that the criminalization of … activity prevents more harm than it causes." Indeed, he asserts on page 20, that on the basis of some thus far unheard of doctrine of constitutional estoppel the failure of Parliament to implement the recommendations of the LeDain Commission renders the law invalid "unless and until it can be justified."

(Note: Clay's erroneous view is also apparent in paragraph 50. He suggests that as a constitutional remedy this Court should stay all possession of marihuana cases in Canada "until such time as Parliament can present sound scientific evidence which provides a 'reasoned' basis