

# **SUPREME COURT OF CANADA**

(On Appeal from the Court of Appeal for  
the Province of Ontario)

**B E T W E E N:**

**HER MAJESTY THE QUEEN**

**Appellant**

- and -

**DAVID EDWIN OAKES**

**Respondent**

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## **RESPONDENT'S FACTUM**

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IN THE SUPREME COURT OF CANADA  
ON APPEAL FROM THE COURT OF APPEAL FOR  
THE PROVINCE OF ONTARIO

10 B E T W E E N:

HER MAJESTY THE QUEEN

Appellant

- and -

DAVID EDWIN OAKES

20

Respondent

FACTUM OF THE RESPONDENT

PART I

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STATEMENT OF FACTS

1. The Respondent acknowledges the agreed facts as found in the Factum of the Appellant, Part I.

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PART II

POINTS IN ISSUE

RESPONDENT'S POSITION

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2. The Respondent respectfully submits that the issues arising from the constitutional question as stated by Laskin, C.J.C. are as follows:

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A. Is section 8 of the Narcotic Control Act inconsistent with section 11(d) of the Canadian Charter of Rights and Freedoms?

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B. Is section 8 of the Narcotic Control Act such a reasonable limit on the right guaranteed by section 11(d) of the Canadian Charter of Rights and Freedoms as can be demonstrably justified in a free and democratic society?

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3. The Respondent's position is that the first question should be answered in the affirmative and the second in the negative, thus rendering section 8 of the Narcotic Control Act of no force or effect.

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PART IIIARGUMENT

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A. IS SECTION 8 OF THE NARCOTIC CONTROL ACT INCONSISTENT WITH SECTION 11(d) OF THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS AND THUS OF NO FORCE AND EFFECT?

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4. It is submitted that section 8 of the Narcotic Control Act is inconsistent with section 11(d) of the Canadian Charter of Rights and Freedoms (the Charter) and that the Court of Appeal for Ontario did not err in concluding that it was.

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(i) Nature of burden imposed by section 8  
of the Narcotic Control Act

10 5. It is respectfully submitted that the procedure set  
out in section 8 of the Narcotic Control Act results in the  
loss of the presumption of innocence and the substitution of a  
presumption of guilt.

Regina v. Vransy, Zikan and Dvorak (1979), 46  
C.C.C. (2d) 14 (Ont. C.A.)

20 Regina v. Carroll (1983), 4 C.C.C. (3d) 131  
(P.E.I.S.C.)

Regina v. Cook (1983), 4 C.C.C. (3d) 419  
(N.S.C.A.)

6. The initial stage of a trial pursuant to section 8 of  
the Narcotic Control Act requires the Crown to prove possession  
of a narcotic on the legal burden of proof beyond a reasonable  
doubt.

30 Regina v. Babcock and Auld [1967] 2 C.C.C.  
235 (B.C.C.A.)

40 7. After a finding by the Court that the accused was in  
possession of a narcotic, the accused bears the burden of  
proving on the balance of probabilities the absence of the  
requisite intention to traffic.

Regina v. Babcock and Auld, *ibid*

8. If the accused fails to establish the lack of the requisite intention then the Court must convict. The accused will be convicted even if there exists a reasonable doubt as to the accused's innocence on the issue of intent.

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Narcotic Control Act, R.S.C. 1970, C.N-1, s. 8

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(ii) Nature of the right guaranteed by section 11 (d) of the Canadian Charter of Rights and Freedoms

9. Section 11(d) of the Charter reads:

10 Any person charged with an offence has the right ...

(d) To be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;

20 10. It is respectfully submitted that a presumption of innocence is the substantive right guaranteed by section 11(d) of the Charter. Since by virtue of section 52 of the Constitution Act, 1982 the Charter is part of the supreme law of Canada, that right may only be overridden according to the provisions of section 33 of the Charter, or by application of section 1 of the Charter.

30 Section 1 of the Canadian Charter of Rights and Freedoms

Section 33 of the Canadian Charter of Rights and Freedoms

Section 52 of the Constitution Act, 1982 .

40 11. It is respectfully submitted that insofar as section 8 of the Narcotic Control Act suspends the presumption of innocence and substitutes a presumption of guilt it violates the provisions of section 11(d) of the Charter. Therefore if the right guaranteed by section 11(d) is to be limited the Court must look to section 1 of the Charter.

(iii) Application of the Woolmington definition of the presumption of innocence and the validity of statutory exceptions

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12. It is respectfully submitted that the doctrine of parliamentary supremacy has been altered by section 1 and section 33 of the Charter and section 52 of the Constitution Act, 1982. The right guaranteed by section 11(d) of the Charter may be limited only by section 1 and section 33.

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13. The common law definition of the presumption of innocence is inclusive of both common law exceptions and certain statutory exceptions. It is, therefore, a limited right, constrained by the history of its development. For this reason it is fundamentally different from a written constitutional presumption of innocence, as in section 11(d), which is a right limited only by section 1 or section 33.

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Woolmington v. Director of Public Prosecutions [1935] A.C. 462 (H.L.)

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14. It is respectfully submitted that Woolmington v. D.P.P. was decided in the context of a constitutional order founded on the doctrine of parliamentary supremacy. To the extent that it defines the presumption of innocence as including overriding statutory exceptions it is based on the doctrine of parliamentary supremacy and is inapplicable to the case at bar.

Woolmington v. Director of Public Prosecutions, supra

Regina v. Carroll, supra

Regina v. Cook, supra

15. It is respectfully submitted that the Woolmington  
definition of the presumption of innocence does not support the  
existence of statutory exceptions which impose a presumption of  
guilt, or which require the accused to raise more than a  
10 reasonable doubt to rebut the presumption.

Woolmington v. Director of Public Prosecutions, supra

The Queen v. Appleby [1972] S.C.R. 303, (1971) 3  
C.C.C. (2d) 354

Rex v. Latour [1951] S.C.R. 19

20 Cross, Rupert S.J., Rede Lectures, "The Golden Thread  
of the English Criminal Law: The Burden of Proof"

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(iv) The Woolmington definition and the Convention for the Protection of Human Rights and Fundamental Freedoms

10 15. It is respectfully submitted that notwithstanding the provision of the Convention, the Courts of the United Kingdom continue to apply the provisions of an Act of Parliament as overriding the provisions of the Convention.

Regina v. Secretary of State for Home Affairs, ex parte Bajan Singh, [1975] 2 All E.R. 1081 (C.A.)

20 Regina v. Secretary of State for Home Affairs, ex parte Phansopkar, [1975] 3 All E.R. 497 (C.A.)

Convention for the Protection of Human Rights and Fundamental Freedoms, 1966

30 16. In Regina v. ex parte Singh, Lord Denning, M.R. expressly rejected the supremacy of the Convention and said that where the Convention and an Act of Parliament conflicted, the Act of Parliament must prevail.

Regina v. Secretary of State for Home Affairs, ex parte Bajan Singh, ibid. at 1083.

40 17. It is respectfully submitted that in interpreting the provisions of an International Convention to which numerous countries with dissimilar legal systems are signatory, only one reasonable meaning can be attributed to the phrase "according to law". That is that proof must be according to the process or system of law of the signatory state. Therefore the response of the courts of the United Kingdom to the convention does not advance the Appellants position.

(v) Application of the decision in The Queen v. Appleby

18. It is respectfully submitted that the reverse onus provision at issue in The Queen v. Appleby is fundamentally different from that at issue in the case at bar and is therefore inapplicable as persuasive authority. The presumption in Appleby was triggered by a finding of fact that the accused occupied the seat normally occupied by the driver of a motor vehicle. The presumed fact of care and control is only one element of the substantive offence. The legal burden of proof remains on the Crown at the the conclusion of the case, entitling the accused to the benefit of a reasonable doubt on any other element of the offence. By way of contrast the presumption in section 8 is triggered by proof of simple possession and the accused must be convicted, if he does anything less than establish innocence on a balance of probabilities.

The Queen v. Appleby, supra

Regina v. Carroll, supra

Stuart, D.R., Canadian Criminal Law,  
(Carswell 1982) pp.32-39

Mandell, M., The Presumption of Innocence and the Canadian Bill of Rights: Regina v. Appleby (1972), 10 Osgoode Hall L. J. 450

(vi) Relationship between section 8 of the Narcotic Control Act and section 2(f) of the Canadian Bill of Rights

10 19. It is respectfully submitted that the Debates of the House of Commons referred to in paragraphs 34, 35, 36 and 37 of the Appellant's factum are of little persuasive value before this Court. The reports, which are verbatim transcripts of the proceedings of the House and a standing committee of the House, are not "admissible extrinsic materials" within the meaning as set out by this Court in Reference Re Residential Tenancies Act.

20 Reference Re Residential Tenancies Act [1981]  
1.S.C.R. 714.

20. It is respectfully submitted that in none of the cases decided under the Canadian Bill of Rights did the issue of the validity of section 33 of the Food and Drugs Act, or section 8 of the Narcotic Control Act, or its predecessor section 3(4) of the Opium and Narcotic Control Act come directly before this Court. In so far as this Court overruled the decision of the Court of Appeal of British Columbia in Regina v. Silk [1970] 3 C.C.C. 1, it is submitted that it did so only on the issue of the nature of the burden of proof on the accused and not on the validity of the impugned section in total.

40 The Queen v. Appleby, supra.

(vii) Relationship between section 2(f) of the Bill of Rights and section 11(d) of the Charter

10 21. A constitution is purposive, a framework for the legitimate exercise of power and the guardian of individual rights and freedoms. It does not simply define present rights and obligations.

Hunter et al v. Southam Inc. (1984) 14 C.C.C. (3rd) 97 (S.C.C.)

20 22. It is submitted that although section 2(f) of the Bill of Rights and section 11(d) of the Charter are virtually identical in wording, the constitutional status of the latter limits the application of cases decided under the former as authoritative.

Regina v. Carroll, supra

30 Regina v. Cook, supra

Tarnoplosky and Beaudoin, The Canadian Charter of Rights and Freedoms, (Carswell 1982)

40 23. The Appellant appears to suggest in paragraphs 40 through 51 of the Appellants Factum that the right guaranteed by section 11(d) is a mere codification of the presumption of innocence found in the Canadian Bill of Rights and the common law. This is the concept of "frozen rights".

24. It is respectfully suggested that the concept of "frozen rights" does not arise in the Charter. To suggest that it does would be to suggest that any existing infringement is acceptable, rendering the rights contained in the Charter illusory.

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Tarnoplosky and Beaudoin, supra at 10 and 135

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(viii) Application of American jurisprudence

25. It is respectfully submitted that inasmuch as Canada has adopted a constitution with an entrenched Charter of Rights, this Court may wish to consider the jurisprudence which has evolved from the Courts of superior jurisdiction in the United States. The concept of a "presumption of innocence" is an integral part of the due process protection.

Morissette v. United States, 342 U.S. 246  
(S.C. 1952) at 274

26. The Supreme Court of the United States has consistently and clearly rejected as unconstitutional the presumption of culpability found in statutes similar to section 8 of the Narcotic Control Act.

In Re Winship, 397 U.S. 358 (U.S.S.C. 1970)

County Court of Ulster County N.Y. v. Allen,  
99 S.Ct. 2213 (1979)

Sandstrom v. Montana, 99 S.Ct. 2450 (1979)

27. The American experience has arisen out of the interpretation of the "due process" provisions of the American Constitution and the Bill of Rights. Specifically, the Courts have held that an accused person may only be convicted upon proof beyond a reasonable doubt of every fact necessary to constitute the charge.

In Re Winship, *ibid* at 364

Sandstrom v. Montana, *ibid* at 2459

28.        CONCLUSION

10            It is respectfully submitted that section 8 of the  
Narcotic Control Act imposes a presumption of guilt of the  
substantive offence and is therefore inconsistent with section  
11(d) of the Canadian Charter of Rights and Freedoms.

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B. IS SECTION 8 OF THE NARCOTIC CONTROL ACT SUCH A REASONABLE LIMIT ON THE RIGHT GUARANTEED BY SECTION 11(d) OF THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS AS CAN BE DEMONSTRABLY JUSTIFIED IN A FREE AND DEMOCRATIC SOCIETY?

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29. It is submitted that section 8 of the Narcotic Control Act is not a reasonable limit on the right guaranteed by section 11(d) of the Charter as can be demonstrably justified in a free and democratic society within the meaning of section 1 of the Charter, and thus it is of no force or effect.

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(i) The onus of proof under section 1 of the Charter

10 30. The onus of establishing that section 8 is a reasonable limit within the meaning of section 1 of the Charter is on the Appellant as the party seeking to limit a prescribed right.

Hunter et al v. Southam Inc., Supra

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(ii) The jurisprudence

10 31. The Respondent adopts the position of the Appellant as found in paragraph 80 of the Appellant's factum. In determining whether a law falls within section 1 of the Charter a Court must examine it in relation to the following:

- 20 (a) whether the law is a reasonable limit;  
(b) whether the limit is prescribed by law;  
(c) whether the limit is such as can be demonstrably justified in a free and democratic society.

Quebec Association of Protestant School Boards et al v. A.G. Quebec et al (No. 2) (1982), 140 D.L.R. (3rd) 33 (Que. S.C.) at 66; affirmed 1 D.L.R. (4d) 573 (C.A.); affirmed 10 D.L.R. (4d) 321 (S.C.C.)

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(a) Reasonable limits

10 32. It is respectfully submitted that the substantive right of a presumption of innocence guaranteed by section 11(d) is replaced by a presumption of guilt in a prosecution under section 8 of the Narcotic Control Act.

20 33. It is respectfully submitted that section 8 of the Narcotic Control Act does not limit or infringe the presumption of innocence but rather completely eradicates it, and therefore could never meet the test of a "reasonable limit".

Re Ontario Film and Video Appreciation Society and Ontario Board of Censors (1984), 7 C.R.R. 129 (Ont. C.A.)

Re Jamieson and The Queen (1982) 142 D.L.R. (3d) 54 C.C.C. (2d) 430

30 Quebec Association of Protestant School Boards et al v. A.G. Quebec et al (No. 2), supra

34. In the alternative it is submitted that in order for a limit to be reasonable it must be shown that there exists a rational basis for the limit, so that:

- 10 (a) there is a rational connection between the fact or facts proven and the fact or facts presumed;
- (b) the presumed fact is one that is rationally open to the accused to disprove, and
- (c) the limit is a proportionate means for achieving the objective envisaged by the statute.

20 The Queen v. Shelley [1981] 2 S.C.R. 196, 59 C.C.C. (2d) 292

Rauca v. The Queen (1983) 41 O.R. (2d) 225 (C.A.) aff'd. 38 O.R. (2d) 705

Regina v. Carroll, supra

30 35. If a statute does require the shifting of the burden of proof then it may do so only where the rational connection criteria referred to above are met, and the accused is required only to meet an evidentiary burden of proof, that of raising a reasonable doubt, on any element of the charge.

The Queen v. Shelley, supra

The Queen v. Appleby, supra

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36. A limit cannot be rational if it represents an arbitrary, capricious or unnecessary restriction on the prescribed right.

Mackay v. The Queen [1980] 2 S.C.R. 370

37. It is respectfully submitted that the reverse onus contained in section 8 of the Narcotic Control Act is not a limit with a rational purpose or justification. It compels a presumption that has no rational connection with the proven facts; and the presumption is not one that is rationally open to the accused to disprove on a balance of probabilities.

38. The respondent respectfully submits that the submission of the appellant in paragraph 95 of the Appellants factum is not an accurate statement of the law. Section 4(2) of the Narcotic Control Act is not "confined" by any threshold test of quantity or other indicia of an intention to traffick related to the circumstances of possession. In fact, at a preliminary hearing the Crown may only lead evidence relating to possession and need only prove possession to obtain a committal for trial.

Regina v. Babcock and Auld, supra

Re Hernandez and The Queen (1974), 16 C.C.C. (2d) 366 (B.C.S.C.)

39. It is respectfully submitted that section 8 of the Narcotic Control Act does not balance the individual's interests and the interests of society. Section 8 gives undue weight to society's interests in controlling the illicit sale of drugs by establishing a trial procedure which significantly increases the risk that an innocent accused might be convicted. It substitutes a presumption of guilt for the presumption of innocence.

Regina v. Carroll, supra at 251



40. It is respectfully submitted that an accused cannot be compelled to negate a required criminal intention solely because the facts are peculiarly within his knowledge.

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Regina v. Edwards [1974] 2 All E.R. 1085  
(C.A.)

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(b) Prescribed by Law

10 41. The Respondent adopts the submission of the Appellant  
in paragraph 97 of the Appellants factum. Section 8 of the  
Narcotic Control Act is a law duly enacted by a Parliament  
competent to do so.

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(c) Demonstrably justified in a free and democratic society

42. It is respectfully submitted that if this Honourable  
 10 Court finds that the impugned section 8 of the Narcotic Control  
 Act is not a reasonable limit then it is unnecessary to  
 consider whether or not it is demonstrably justified in a free  
 and democratic society.

43. In considering whether or not section 8 is  
 20 demonstrably justified, it is submitted that this Court may  
 consider relevant extrinsic material. The Commission of  
 Inquiry into the Non-Medical Use of Drugs recommended that the  
 burden of proof on an accused under section 8 should be to  
 raise a reasonable doubt. The Law Reform Commission of Canada  
 recommended that any presumption operating against an accused  
 be rebutted by raising a reasonable doubt.

30 Reference Re Residential Tenancies, supra

Final Report, Commission of Inquiry into the  
 Non-Medical Use of Drugs,  
 (Information Canada, 1973) at  
 pp. 89-90, 943-946.

Evidence, Law Reform Commission of  
 Canada (Minister of Supply and  
 Services, 1977) at pp. 20-22,  
 57-61

10 44. It is respectfully submitted that none of the free and democratic societies referred to by the Appellant in paragraph 98 of the Appellants Factum have legislated a reverse onus provision of this type. Each has a provision dependent upon a finding of possession of a specified minimum quantity of the drug or narcotic before the presumption is triggered.

Drugs, Poisons and Controlled Substances Act, 1981 (Victoria) section 77

Misuse of Drugs Act, 1975 (New Zealand), Section 30

20 Misuse of Drugs Act, 1981, (Western Australia) section 11

Narcotic and Psychotropic Drugs Act, 1973-74 (South Australia) section s.(4), s.(5)

Poisons and Narcotic Drugs Ordinance 1978 (Australian Capital Territory) section 4.

Hughes and Another v. Regina (1983) 49 A.L.R. 111 (Fed. Ct. Australia)

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45. It is respectfully submitted that the equivalent statute in the United Kingdom to the Narcotic Control Act, does not contain a reverse onus provision for similar offences.

Misuse of Drugs Act, 1971, (United Kingdom) section 5(3)

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46. It is respectfully submitted that none of the free and democratic societies referred to by the Appellant in paragraph 98 of the Appellants Factum have a constitutionally entrenched presumption of innocence and are therefore of little persuasive value in considering this issue.

47. It is respectfully submitted that any infringement of the constitutionally guaranteed presumption of innocence which is disguised as "demonstrably justified in a free and democratic society" contradicts the very nature of a free and democratic society and renders the right itself wholly illusory and fanciful.

48. CONCLUSION

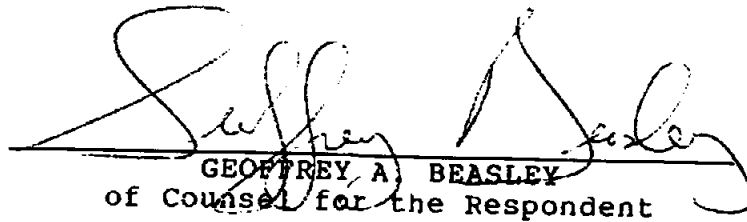
It is submitted that section 8 of the Narcotic Control Act is not a reasonable limit on the right to be presumed innocent as can be just demonstrably justified in a free and democratic society, and thus is of no force or effect.

PART IV

NATURE OF ORDER DESIRED

It is submitted that the question stated by the late Chief Justice of this Court in his Order made the 11th day of April, 1983, be answered in the affirmative and that this appeal be dismissed, with costs to the Respondent on a solicitor and client basis pursuant to the Order of this court granting Leave to Appeal dated March 21st, 1983..

ALL OF WHICH IS RESPECTFULLY SUBMITTED

  
\_\_\_\_\_  
GEOFFREY A BEASLEY  
of Counsel for the Respondent

PART VTABLE OF AUTHORITIES

<u>Cases</u>	<u>Pages</u>
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20 5. <u>MacKay v. The Queen</u> [1980] 2 S.C.R. 370	20
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20	20. <u>Re Ontario Film and Video Appreciation Society and Ontario Board of Censors</u> (1984), 7 C.R.R. 129 (Ont. C.A.)	19
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	23. <u>The Queen v. Appleby</u> [1972] S.C.R. 303, (1971) 3 C.C.C. (2d) 354	8, 10, 11, 20
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	29. <u>Evidence, Law Reform Commission of Canada (Minister of Supply and Services, 1977) at pp. 20-22, 57-61</u>	24



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10	31. Mandell, M., " <u>The Presumption of Innocence and the Canadian Bill of Rights: Regina v. Appleby</u> " (1972), 10 Osgoode Hall L.J. 450	10
	32. <u>Misuse of Drugs Act, 1975</u> (New Zealand), Section 30	25
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	34. <u>Misuse of Drugs Act, 1971</u> , (United Kingdom) section 5(3)	25
20	35. <u>Narcotic and Psychotropic Drugs Act, 1973-74</u> (South Australia) section s.(4), s.(5)	25
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30	38. Tarnopolsky and Beaudoin, <u>The Canadian Charter of Rights and Freedoms</u> , (Carswell 1982)	12, 13