
CANADA / JUDGMENT

R. v. Clay

2003 SCC 75

COURT

Supreme Court of Canada

DECIDED

23 December 2003

Source: decisions.scc-csc.ca · Research copy typeset by Esheria. Not court-issued or certified.

R. v. Clay

Collection

Supreme Court Judgments

Date

2003-12-23

Neutral citation

2003 SCC 75

Report

[2003] 3 SCR 735

Case number

28189

Judges

McLachlin, Beverley; Gonthier, Charles Doherty; Iacobucci, Frank; Major, John C.; Bastarache, Michel; Binnie, William Ian Corneil; Arbour, Louise; LeBel, Louis; Deschamps, Marie

On appeal from

Ontario

Subjects

Constitutional law

Notes

SCC Case Information: 28189

Decision Content

R. v. Clay, [2003] 3 S.C.R. 735, 2003 SCC 75

Christopher James Clay Appellant

v.

Her Majesty The Queen Respondent

and

Attorney General of Ontario, British Columbia Civil Liberties

Association and Canadian Civil Liberties Association Interveners

Indexed as: R. v. Clay

Neutral citation: 2003 SCC 75.

File No.: 28189.

2003: May 6; 2003: December 23.

Present: McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel and Deschamps JJ.

on appeal from the court of appeal for ontario

Constitutional law — Charter of Rights — Fundamental justice — Liberty and security of person — Narcotic Control Act prohibiting possession of marihuana — Imprisonment available as penalty for simple possession — Whether prohibition infringes s. 7 of Canadian Charter of Rights and Freedoms — Narcotic Control Act, R.S.C. 1985, c. N-1, s. 3(1), Schedule.

The accused owned a store in Ontario where he sold various hemp products including industrial byproducts, marihuana logos and pipes. He also sold small marihuana plant seedlings. Charges were laid under the former Narcotic Control Act after an undercover police officer bought a small marihuana cutting at the store. The police also seized marihuana seedlings and a small amount of marihuana when they executed search warrants at the accused's store and home. The accused's defence largely centred on his contention that the prohibition of the possession of marihuana infringed s. 7 of the Canadian Charter of Rights and Freedoms . This constitutional challenge was dismissed both at trial and on appeal to the Court of Appeal. In the result the accused was convicted of possession of cannabis sativa, possession of cannabis sativa for the purpose of trafficking and trafficking in cannabis sativa. The Court of Appeal dismissed his appeal.

Held (Arbour, LeBel and Deschamps JJ. dissenting in part): The appeal should be dismissed.

Per McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache and Binnie JJ.: While the availability of imprisonment following his conviction for simple possession of marihuana put at risk the accused's liberty and security of the person, it did so in a manner that complied with the principles of fundamental justice. Accordingly, for the reasons given in Malmo-Levine, the appeal should be dismissed.

The liberty right within s. 7 of the Charter touches the core of what it means to be an autonomous human being blessed with dignity and independence in matters that can properly be characterized as fundamentally or inherently personal. This does not include smoking marihuana for recreation.

The marihuana prohibition does not exhibit a degree of overbreadth that violates the accused's s. 7 entitlement to fundamental justice, as it is not grossly disproportionate to the state interest in avoiding harm to users and others caused by marihuana consumption. The evidence indicated that a narrower prohibition would not be effective. The members of at least some of the vulnerable groups and chronic users could not be identified in advance. In any event, the effects of a psychoactive drug like marihuana on users in the acute phase, where for example operation of motor vehicles or other complex machinery by any user constitutes a public danger, provide a rational basis for extending the prohibition to all users.

The accused's argument that the reference to cannabis sativa in the Schedule to the Act should be interpreted so as not to criminally prohibit the possession of plants or other substances which have no tetrahydrocannabinol (THC) and are used exclusively as an industrial product is justified neither on the facts nor on the law. The accused's attempt to "read into" the Act a THC threshold based on Parliament's presumed intent would require the Court to attribute to Parliament an intent to establish an impractical regime inimical to the statute's overall purpose.

There is no ambiguity in the definition of "narcotic" in the Act. The Act does not require the presence of THC for a substance to be classified as a prohibited narcotic.

Per Arbour J. (dissenting in part): For the reasons given in Malmo-Levine, the appeal should be allowed only with respect to the charge of possession of cannabis sativa.

Per LeBel J. (dissenting in part): Subject to the comments made in Malmo-Levine, there was agreement with the disposition of the appeal suggested by Arbour J.

Per Deschamps J. (dissenting in part): Subject to the comments made in Malmo-Levine, there was agreement with the disposition of the appeal suggested by Arbour J.

Cases Cited

By Gonthier and Binnie JJ.

Applied: R. v. Malmo-Levine, [2003] 3 S.C.R. 571, 2003 SCC 74; referred to: R. v. Parker (2000), 146 C.C.C. (3d) 193; R. v. Dymont, [1988] 2 S.C.R. 417; Godbout v. Longueuil (City), [1997] 3 S.C.R. 844; R. v. Morgentaler, [1988] 1 S.C.R. 30; B. (R.) v. Children's Aid Society of Metropolitan Toronto, [1995] 1 S.C.R. 315; R. v. Morgan, [2002] E.W.J. No. 1244 (QL), [2002] EWCA Crim 721; R. v. Ham,

[2002] E.W.J. No. 2551 (QL), [2002] EWCA Crim 1353; R. v. Nova Scotia Pharmaceutical Society, [1992] 2 S.C.R. 606; R. v. Heywood, [1994] 3 S.C.R. 761; Perka v. The Queen, [1984] 2 S.C.R. 232; Bell ExpressVu Limited Partnership v. Rex, [2002] 2 S.C.R. 559, 2002 SCC 42; R. v. Dunn, [1982] 2 S.C.R. 677.

By Arbour J. (dissenting in part)

R. v. Malmo-Levine, [2003] 3 S.C.R. 571, 2003 SCC 74.

By LeBel J. (dissenting in part)

R. v. Malmo-Levine, [2003] 3 S.C.R. 571, 2003 SCC 74.

By Deschamps J. (dissenting in part)

R. v. Malmo-Levine, [2003] 3 S.C.R. 571, 2003 SCC 74.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1 , 7 .

Controlled Drugs and Substances Act, S.C. 1996, c. 19 .

Narcotic Control Act, R.S.C. 1985, c. N-1 [rep. 1996, c. 19, s. 94], ss. 2 “marihuana”, “narcotic”, 3, Sch., item 3 [now S.C. 1996, c. 19 , Sch. II, item 1].

Opium and Narcotic Drug Act, 1923, S.C. 1923, c. 22.

Single Convention on Narcotic Drugs, 1961, Can. T.S. 1964 No. 30, Art. 28(2).

Authors Cited

Canada. Commission of Inquiry into the Non-Medical Use of Drugs. Cannabis: A Report of the Commission of Inquiry into the Non-Medical Use of Drugs. Ottawa: Information Canada, 1972.

Driedger, Elmer A. Construction of Statutes, 2nd ed. Toronto: Butterworths, 1983.

England. Advisory Committee on Drug Dependence. Cannabis: Report by the Advisory Committee on Drug Dependence. London: Her Majesty’s Stationery Office, 1968.

Hall, Wayne, Nadia Solowij and Jim Lemon. National Drug Strategy: The health and psychological consequences of cannabis use. Prepared by the National Drug and Alcohol Research Centre for the National Task Force on Cannabis. Canberra: Australian Government Publishing Service, 1994.

India. Hemp Drugs Commission. Marijuana: Report of the Indian Hemp Drugs Commission 1893-1894. Silver Spring, Md.: Thos. Jefferson Publishing Co., 1969.

New York (City). Mayor’s Committee on Marihuana. The Marihuana Problem in the City of New York. Metuchen, N.J.: Scarecrow Reprint Corp., 1973 (reprint of 1944 ed.).

Single, Eric W. "At the crossroads one more time: the Impact of the 'Decriminalization' of cannabis in the U.S. and elsewhere". Paper presented at the Interdisciplinary Conference on Canadian Cannabis Policy, University of Western Ontario Faculty of Law, London, Ontario, September 23, 1995.

Small, Ernest. *The Species Problem in Cannabis: Science & Semantics*, vols. 1-2. Toronto: Corpus, 1979.

South Australia. Royal Commission into the Non-Medical Use of Drugs. *Cannabis: A Discussion Paper*. Adelaide: Gillingham Printers, 1978.

United States. National Commission on Marihuana and Drug Abuse. *Marihuana: A Signal of Misunderstanding*, First Report. Washington: U.S. Government Printing Office, 1972.

United States. The President's Commission on Law Enforcement and Administration of Justice. Task Force on Narcotics and Drug Abuse. *Task Force Report: Narcotics and Drug Abuse — Annotations and Consultants' Papers*. Washington: U.S. Government Printing Office, 1967.

APPEAL from a judgment of the Ontario Court of Appeal (2000), 49 O.R. (3d) 577, 188 D.L.R. (4th) 468, 135 O.A.C. 66, 146 C.C.C. (3d) 276, 37 C.R. (5th) 170, 75 C.R.R. (2d) 310, [2000] O.J. No. 2788 (QL), affirming a decision of the Ontario Court of Justice (General Division) (1997), 9 C.R. (5th) 349, [1997] O.J. No. 3333 (QL). Appeal dismissed, *Arbour, LeBel and Deschamps JJ.* dissenting in part.

Paul Burstein and Karen Unger, for the appellant.

S. David Frankel, Q.C., Kevin Wilson and W. Paul Riley, for the respondent.

Milan Rupic, for the intervener the Attorney General of Ontario.

Joseph J. Arvay, Q.C., for the intervener the British Columbia Civil Liberties Association.

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

The judgment of McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache and Binnie was delivered by

1 Gonthier and Binnie JJ. — This is one of three appeals before the Court dealing with the constitutional validity of the criminal prohibition against the possession of marihuana for personal use under the Narcotic Control Act, R.S.C. 1985, c. N-1 ("NCA"), since repealed and replaced by the Controlled Drugs and Substances Act, S.C. 1996, c. 19 .

2 The Court's reasons in the two other appeals, *R. v. Malmo-Levine*; *R. v. Caine*, [2003] 3 S.C.R. 571, 2003 SCC 74, are released concurrently.

3 In this trilogy of cases, we affirm the legislative competence of Parliament to prohibit the possession of marihuana. On the principal issue, namely whether the prohibition infringes s. 7 of the Canadian Charter of Rights and Freedoms, it is our view that while the availability of imprisonment following his conviction for simple possession of marihuana put at risk the appellant's liberty and security of the person, it did so in a manner that complied with the principles of fundamental justice. The appeal is therefore dismissed.

4 The task of the Court in relation to s. 7 of the Charter is not to micromanage Parliament's creation or continuance of prohibitions backed by penalties. It is to identify the outer boundaries of legislative jurisdiction set out in the Constitution. Within those boundaries, it is for Parliament to act or not to act. The appellant, together with the appellants in *Malmo-Levine* and *Caine*, has mounted an extensive attack on the wisdom of criminalizing the simple possession of marihuana. The Court's concern is not with the wisdom of the prohibition but solely with its constitutionality. We have concluded that it is within Parliament's jurisdiction to criminalize the possession of marihuana should it choose to continue to do so, but it is equally open to Parliament to decriminalize or otherwise soften any aspect of the marihuana laws that it no longer considers to be good public policy.

I. Facts

5 The appellant was 26 years old at the time of the offence and owned a store called "The Great Canadian Hemporium" in London, Ontario, where he sold various hemp products including industrial by-products, marihuana logos and pipes. He also sold small marihuana plant seedlings. The store maintained an extensive library of books on topics of interest to marihuana users, and distributed marihuana information at no charge. He became something of a crusader for the legalization of marihuana.

6 The appellant is a user of marihuana but does not require it for medical reasons. He has sold marihuana cuttings from his store to persons who did, but they are not before the Court. The issue of the medical use of marihuana therefore does not arise in these appeals.

7 Charges were laid after an undercover police officer bought a small marihuana cutting at the store. The police also seized marihuana seedlings and a small amount of marihuana (6.1 grams), when they executed search warrants at the appellant's store and home. The appellant was charged under the former NCA with possession of cannabis sativa, trafficking in cannabis sativa, possession of cannabis sativa for the purpose of trafficking, and the unlawful cultivation of marihuana.

8 The appellant's defence largely centred on his constitutional challenge, which was dismissed both at trial and on appeal to the Ontario Court of Appeal. He also argued that the Crown had failed to prove the offences. That argument was also dismissed. In this Court, the appellant's challenge was restricted to the constitutionality and interpretation of the possession offence.

II. Relevant Statutory and Constitutional Provisions

Narcotic Control Act, R.S.C. 1985, c. N-1 (repealed S.C. 1996, c. 19, s. 94 , effective May 14, 1997 (SI/97-47))

9 Section 2 of the NCA defines “marihuana” as *Cannabis sativa* L. and a “narcotic” as “any substance included in the schedule or anything that contains any substance included in the schedule”. Marihuana became a scheduled drug when The Opium and Narcotic Drug Act, 1923, S.C. 1923, c. 22 (the predecessor to the NCA), was enacted by Parliament in 1923. The relevant provisions of the NCA, impugned insofar as they relate to the simple possession of marihuana, state:

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
 - (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.

...

Schedule

...

3. *Cannabis sativa*, its preparations, derivatives and similar synthetic preparations, including:
 - (1) *Cannabis* resin,
 - (2) *Cannabis* (marihuana),
 - (3) *Cannabidiol*,
 - (4) *Cannabinol* (3-*n*-amyl-6,6,9-trimethyl-6-dibenzopyran-1-ol),
 - (4.1) *Nabilone* ((*trans*-3 (1,1-dimethylheptyl)-6, 6a, 7, 8, 10, 10a-hexahydro-1-hydroxy-6,6-dimethyl-9H-dibenzo[b,d] pyran-9-one),
 - (5) *Pyrahexyl* (3-*n*-hexyl-6,6,9-trimethyl-7,8,9,10-tetrahydro-6-dibenzopyran-1-ol), and
 - (6) *Tetrahydrocannabinol*,

but not including:

- (7) non-viable *Cannabis* seed.

Canadian Charter of Rights and Freedoms

10 Section 7 of the Charter states:

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.

III. Judicial History

1. Ontario Court of Justice (General Division) (1997), 9 C.R. (5th) 349

11 McCart J. rejected the appellant's argument that conduct must cause actual harm before Parliament can prohibit it. In any case, he was of the opinion that the consumption of marihuana did cause some harm, based on more than two weeks of evidence from several experts called both by the Crown and the defence and extensive submissions. In his reasons he considered in some detail a large number of reports and surveys, some of which were the subject of expert evidence, including: Marijuana: Report of the Indian Hemp Drugs Commission 1893-1894 (India, 1969); The Marihuana Problem in the City of New York (U.S.A., 1973 (reprint of the 1944 ed.)) (the "LaGuardia Report"); The President's Commission on Law Enforcement and Administration of Justice, Task Force on Narcotics and Drug Abuse, Task Force Report: Narcotics and Drug Abuse — Annotations and Consultants' Papers (U.S.A., 1967); Cannabis: Report by the Advisory Committee on Drug Dependence (England, 1968); First Report of the National Commission on Marihuana and Drug Abuse, Marihuana: A Signal of Misunderstanding (U.S.A., 1972) (the "Shafer Commission"); Cannabis: A Report of the Commission of Inquiry into the Non-Medical Use of Drugs (Canada, 1972) (the "Le Dain Commission"); Cannabis: A Discussion Paper by the Royal Commission into the Non-Medical Use of Drugs (South Australia, 1978); Report of the National Task Force on Cannabis, National Drug Strategy: The health and psychological consequences of cannabis use (Australia, 1994) (the "Hall Report").

12 Based on careful consideration of the evidence and other documentary material the trial judge set out his findings at length (which are virtually identical to those of the trial judge in Caine). He then stated, at para. 26:

Having said all of this, there was also general consensus among the experts who testified that the consumption of marijuana is not completely harmless.

and again, at para. 46:

. . . 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.

13 At the same time, he found that the use of marihuana offered potentially beneficial effects as well. He thought it "generally agreed" based on a number of studies that "marijuana is effective in reducing nausea and vomiting. Lowering intra-ocular pressure associated with glaucoma, and decreasing muscle spasm and spasticity. People undergoing cancer chemotherapy have found smoked marijuana to be an effective anti-nauseant — often more effective than available pharmaceutical medications. Marijuana is also smoked by thousands of Aids patients to treat the nausea and vomiting associated with both the disease and AZT drug therapy. Because it stimulates appetite, marijuana also counters HIV-related wasting allowing Aids patients to gain weight and prolong their lives" (para. 33).

14 Accordingly, in the trial judge's view, the use of marihuana can have both harmful and beneficial effects. However, on some aspects of harm, "the jury is still out" (at para. 31):

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.

15 After reviewing the law and practice in a number of foreign jurisdictions, the trial judge concluded that of all the major liberal democracies outside of North America, only France and New Zealand have taken no measures to ease the impact of cannabis laws. Thus (at para. 13):

The national governments of Canada and the United States appear to be somewhat out of step with most of the rest of the western world.

16 Further, with respect to the United States, the trial judge summarized the situation as follows (at para. 19):

In Alaska, Maine, Minnesota, Mississippi, Nebraska and Oregon, possession of small amounts of marijuana is treated as a "civil violation" rather than a crime, much like minor traffic offences. In California, New York and North Carolina, possession of small amounts is deemed a misdemeanour; in Ohio it is a "minor misdemeanour" and in Colorado it is a "petty offence".

(See E. W. Single, "At the crossroads one more time: the Impact of the 'Decriminalization' of cannabis in the U.S. and elsewhere", Paper presented at the Interdisciplinary Conference on Canadian Cannabis Policy, University of Western Ontario Faculty of Law, London, Ontario, September 23, 1995, at fn. 2.)

17 As a result of this general survey the trial judge concluded, at para. 24:

In most of the so-called "decriminalization" areas, the possession of marijuana remains against the law, although the penalties have been eased. However, in no western country has cultivation, trafficking or possession for the purpose of trafficking been decriminalized, nor have the penalties been reduced.

18 Turning to the law, the trial judge accepted that potential imprisonment does engage s. 7, but in light of his other findings of fact he concluded that the prohibition complied with the principles of fundamental justice.

19 In the result, the appellant was convicted of possession of cannabis sativa, two counts of possession of cannabis sativa for the purpose of trafficking and one count of trafficking in cannabis sativa. The appellant was sentenced to a \$750 fine and a period of probation.

2. Ontario Court of Appeal (2000), 49 O.R. (3d) 577

20 On the issue of harm associated with the use of marihuana for non-medical purposes, Rosenberg J.A. summarized his view of the evidence in this case as follows:

In the companion case of *R. v. Clay*, I have reviewed at greater length the state's objectives in prohibiting marihuana. First, the state has an interest in protecting against the harmful effects of use of that drug. Those include bronchial pulmonary harm to humans; psychomotor impairment from marihuana use leading to a risk of automobile accidents and no simple screening device for detection; possible precipitation of relapse in persons with schizophrenia; possible negative effects on [the] immune system; possible long-term negative cognitive effects in children whose mothers used marihuana while pregnant; possible long-term negative cognitive effects in long-term users; and some evidence that some heavy users may develop a dependency. The other objectives are: to satisfy Canada's international treaty obligations and to control the domestic and international trade in illicit drugs.

(*R. v. Parker* (2000), 146 C.C.C. (3d) 193 (Ont. C.A.), at para. 143)

21 The Ontario Court of Appeal was of the view that the use of intoxicants, including marihuana, in the privacy of one's home is not a fundamental aspect of personal autonomy and human dignity such as to engage the liberty or security interests protected by s. 7 of the Charter . As to the potential deprivation of liberty through imprisonment, Rosenberg J.A. accepted for the purpose of the appeal that there was a harm principle to the effect that prohibited activities must present at least a reasoned apprehension of harm to other individuals or society before they can be the subject of a criminal prohibition. Nevertheless, even on that basis, the Crown had established a reasoned apprehension of harm associated with marihuana use that was neither insignificant nor trivial. In light of the findings of fact of the trial judge it could not be said that Parliament lacked a rational basis for the marihuana prohibition, nor was the legislation arbitrary or unfair, or otherwise inconsistent with the principles of fundamental justice.

22 The Crown had proved that the substance found in the appellant's possession was marihuana as listed in the schedule and a narcotic within the meaning of the NCA. His appeal was therefore dismissed.

IV. Constitutional Questions

23 On October 19, 2001, the Chief Justice stated the following constitutional questions:

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?

V. Analysis

24 This appeal was heard together with Malmo-Levine and Caine, and the appellant's principal arguments against the constitutional validity of the prohibition against possession of marihuana are dealt with in the reasons released concurrently in those appeals.

25 There remain three branches to the appellant's argument that have survived into this Court and which were not advanced in Malmo-Levine and Caine.

26 Firstly, he says the principles of fundamental justice are violated by criminalizing any activity that is no more than an exercise of personal autonomy in the privacy of the home unless the Crown can show that the criminalized activity causes substantial harm to society. Further, he says that

[w]hile a reasonable apprehension of a "not insignificant" or "not trivial" harm may suffice to justify a regulatory prohibition on the personal and private consumption of a substance, it is not constitutionally adequate for justifying the use of incarceration and the imposition of a criminal record to deter such consumption. [Emphasis added.]

This is similar to the s. 7 argument in Malmo-Levine and Caine but the appellant in this case puts more emphasis on the privacy aspect (the "privacy argument").

27 Secondly, he contends that the prohibition, if valid, is nevertheless "overbroad". While "the Crown's expert estimates that there are only about 30,000 chronic users in Canada for whom there is some risk of harm, the criminal prohibition has adversely impacted upon no less than 600,000 Canadians" who have criminal records for simple possession of marihuana. A more carefully tailored prohibition would therefore serve Parliament's purpose, and a needlessly broad prohibition is unconstitutional (the "overbreadth argument").

28 Thirdly, he contends that the reference to cannabis sativa in the schedule to the NCA should be interpreted and construed so as not to criminally prohibit the possession of plants (or other substances) which have no psychoactive effects and are used exclusively as an industrial product (hemp). If the prohibition is thus read down, he says, the Crown should bear the burden in any prosecution of proving that a seized substance has a threshold level of the intoxicating component (THC) to establish that the substance in issue is psychoactive or intoxicating and is not purely an industrial product (the "statutory interpretation argument").

29 We will address each of these arguments in turn.

1. The Privacy Argument

30 The appellant says that “a personal decision to intoxicate themselves in private using cannabis instead of other more harmful, lawful intoxicants” is an activity protected by s. 7 of the Charter . He puts the point this way:

While not constitutionally enshrined, the personal and private nature of the activity demands more than a “not insignificant” amount of harm before it can be criminalized.

31 Reliance is placed by the appellant on the observations of La Forest J. that “privacy is at the heart of liberty in a modern state” (R. v. Dymnt, [1988] 2 S.C.R. 417, at p. 427) and that “the right to liberty enshrined in s. 7 of the Charter protects within its ambit the right to an irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference” (Godbout v. Longueuil (City), [1997] 3 S.C.R. 844, at para. 66). However this “privacy” aspect of s. 7 relates to “inherently private choices” of fundamental personal importance. It was invoked by Wilson J., speaking for herself only, to include “the decision of a woman to terminate her pregnancy” in R. v. Morgentaler, [1988] 1 S.C.R. 30, at p. 171. La Forest J., for a plurality in B. (R.) v. Children’s Aid Society of Metropolitan Toronto, [1995] 1 S.C.R. 315, at para. 83, spoke in this regard of “the right to nurture a child, to care for its development, and to make decisions for it in fundamental matters such as medical care”. In Godbout, supra, he extended the “irreducible sphere of personal autonomy” (para. 66) to include “the intensely personal considerations that often inform an individual’s decision as to where to live” (para. 67), but six of the nine judges who decided the appeal did not join in that opinion. What stands out from these references, we think, is that the liberty right within s. 7 is thought to touch the core of what it means to be an autonomous human being blessed with dignity and independence in “matters that can properly be characterized as fundamentally or inherently personal” (Godbout, at para. 66).

32 With respect, there is nothing “inherently personal” or “inherently private” about smoking marihuana for recreation. The appellant says that users almost always smoke in the privacy of their homes, but that is a function of lifestyle preference and is not “inherent” in the activity of smoking itself. Indeed, as the appellant together with Malmo-Levine and Caine set out in their Joint Statement of Legislative Facts, cannabis “is used predominantly as a social activity engaged in with friends and partners during evenings, weekends, and other leisure time” (para. 18). The trial judge was impressed by the view expressed by the defence expert, Dr. J. P. Morgan, that marihuana is largely used for occasional recreation. Reference might also be made on this point to a case under the European Convention on Human Rights decided recently by the English courts under the Human Rights Act 1998 (U.K.). In R. v. Morgan, [2002] E.W.J. No. 1244 (QL), [2002] EWCA Crim 721, the English Court of Criminal Appeal observed, at para. 11, that:

A right to private life did not involve or include a right to self intoxication, nor the right to possession or cultivation of cannabis, whether for personal consumption within one’s home or otherwise.

See also *R. v. Ham*, [2002] E.W.J. No. 2551 (QL), [2002] EWCA Crim 1353. Recreational smoking is not on a par with other activities that have been held to go to the heart of an individual's private existence.

33 We do not think that the more general lifestyle argument, which we considered and rejected in *Malmo-Levine and Caine*, gains any strength by the appellant Clay's invocation of privacy rights.

2. The Overbreadth Argument

34 The appellant says that Parliament's general prohibition against marihuana throws the net too broadly and ensnares vastly more users who have "not really done anything wrong" in an effort (largely ineffective, he says) to prevent harm to a small percentage of chronic users.

35 Overbreadth is a concept that is relevant both to consideration of an infringement of a Charter right (here s. 7) and, if a *prima facie* infringement is found too, the assessment of the proffered s. 1 justification.

36 In its application under s. 1 of the Charter , overbreadth fits comfortably under the "minimal impairment branch" of the *Oakes* test: see *R. v. Nova Scotia Pharmaceutical Society*, [1992] 2 S.C.R. 606, at p. 629. In s. 1, of course, the Court is examining an encroachment on constitutionally protected conduct. A protected Charter right or freedom will already have been found to be infringed, and the s. 1 issue is whether the infringement is a reasonable limit that can be demonstrably justified in a free and democratic society. In the reasons set out in *Malmo-Levine and Caine*, we have concluded that using marihuana is not, as such, a constitutionally protected activity. Thus, overbreadth in its s. 1 aspect is not engaged in this case.

37 The analysis of overbreadth in relation to s. 7 was considered in *R. v. Heywood*, [1994] 3 S.C.R. 761, at p. 793, where Cory J. observed that:

The effect of overbreadth is that in some applications the law is arbitrary or disproportionate.

38 Overbreadth in that respect addresses the potential infringement of fundamental justice where the adverse effect of a legislative measure on the individuals subject to its strictures is grossly disproportionate to the state interest the legislation seeks to protect. Overbreadth in this aspect is, as Cory J. pointed out, related to arbitrariness. In *Heywood*, he went on to note, at p. 793:

In analyzing a statutory provision to determine if it is overbroad, a measure of deference must be paid to the means selected by the legislature. While the courts have a constitutional duty to ensure that legislation conforms with the Charter , legislatures must have the power to make policy choices.

39 The appropriate degree of deference referred to in *Heywood* is built into the applicable standard of "gross disproportionality", as explained in *Malmo-Levine and Caine*. We do not believe that the prohibition on marihuana use is grossly disproportionate to the state interest in avoiding harm to users and others caused by marihuana consumption. We earlier referred to the trial judge's findings of fact in terms of harm. While those findings are moderate and measured,

and emphasize that “the jury is still out” in some respects, they nevertheless identify a state interest which Parliament is entitled to protect.

40 As to the argument that the prohibition is overly broad because it includes smokers who have “not really not done anything wrong”, there is no doubt that Parliament intended a complete prohibition and that is what it enacted. The evidence indicated that a narrower prohibition would not be effective because the members of at least some of the vulnerable groups and chronic users could not be identified in advance. In any event, the effects of a psychoactive drug like marihuana on users in the acute phase, where for example operation of motor vehicles or other complex machinery by any user constitutes a public danger (which to some extent is more problematic than alcohol intoxication because of the absence of a simple and effective screening device for detection), lay a rational basis for extending the prohibition to all users should Parliament consider it good public policy to do so. Accordingly, we do not accept the appellant’s view that the marihuana prohibition exhibits a degree of overbreadth that violates his s. 7 entitlement to fundamental justice.

3. The Statutory Interpretation Argument

41 The appellant argues that the statutory classification of cannabis sativa includes plants that produce nothing but non-intoxicating industrial hemp. Such plants are not harmful and Parliament, he says, cannot have intended their prohibition.

42 It is common ground that the intoxicating (or psychoactive) component of cannabis sativa is tetrahydrocannabinol (THC). The Crown, the appellant argues, is required to prove that a particular seized substance not only tests as cannabis sativa but has intoxicating (or psychoactive) properties, which the appellant says requires proof in every case of a THC content of at least 0.3 percent.

43 In our view this argument is justified neither on the facts nor on the law.

(a) The Factual Basis

44 The statutory text does not refer to THC content. The appellant’s proposal of 0.3 percent THC is taken from a level established for government licences to industrial growers who are required to destroy plant material that exceeds the 0.3 percent threshold. It is also the upper limit for industrial cannabis under European Union regulations.

45 In fact, it appears that THC is a component found in varying percentages of both industrial hemp and psychoactive marihuana. There is a “low intoxicant” strain (or subspecies) and there is a “high intoxicant” strain (or subspecies) and the dividing line is arbitrary according to the government scientist who proposed the standard. His cross-examination disclosed the following:

Q. You determined that one subspecies was very rich in THC, but very weak in cannabidiol, right?

A. Yes.

Q. And, that subspecies tended to correspond with the high intoxicant species?

A. Yes.

Q. And, you also referred to that in your publication as the ‘drug pheno type’?

A. Yes.

Q. And, you referred to it as such because only strains of cannabis containing a sufficiently high concentration of THC was suitable for the preparation of cannabis drugs?

A. Correct.

Q. The other subspecies that you identified, or defined, was rich in cannabidiol, but weak in THC?

A. Correct.

Q. And, that corresponded to the low intoxicant subspecies?

A. Correct. [Emphasis added.]

46 The source of this evidence was Dr. Ernest Small, a senior and widely published scientist with Agriculture Canada and author of a two-volume work entitled *The Species Problem in Cannabis: Science & Semantics* (1979). He explained that the plant genus is cannabis and the species is cannabis sativa. Within the species, further subclassifications can be made to highlight what are thought to be useful attributes. The usefulness of the classification depends on the use to which it is put. However, in terms of botanical classification there is no clear distinction between “high intoxicant” and “low intoxicant” plants. As was explained at trial, different attributes such as THC content are developed simply “by selection”

the same way you breed for any attribute, fast race horses, sweet tasting fruit, any attribute, you just select out, you grow a large number of different kinds, you test for variation, select out those that have the attributes desired and keep selecting from their progeny.

47 Based on his collection of hundreds of cannabis plants gathered worldwide, Dr. Small concluded that plants growing naturally in areas north of 30 degrees latitude tend to be fibrous and low in THC, thus labelled as “low intoxicant subspecies”. Plants collected further south were higher in THC and less suitable as a source of industrial fibre. However Dr. Small, who seems to have originated the 0.3 percent THC cut-off, denied that this benchmark was suitable to “evaluate the potential harm to society”. In cross-examination he said:

. . . in and of itself, that [0.3 percent THC cut-off] was not a sufficient criterion to evaluate the potential harm to society, that there were a number of other related considerations that were essential.

. . .

... I have advised various parties that, in the context of growing cannabis in Canada, the 0.3 percent criterion was one reasonable guideline, but that there were other considerations that bore on the issue of the circumstances under which people would be permitted to grow cannabis or not.

48 While the trial judge did not make a specific finding on this point, he was generally accepting of the evidence of the Crown expert, Dr. Harold Kalant, who testified that with much puffing some intoxicating effect would be produced by 0.1 percent THC. A defence witness, Dr. J. P. Morgan, would have raised the required THC level to 0.5 percent. However, we too are not required to reach a conclusion on this point.

49 The appellant's attempt to "read into" the NCA a THC threshold based on Parliament's presumed intent encounters numerous obstacles. Foremost among them is the impracticality of attempting to enforce such a prohibition. Dr. Small testified that THC levels vary "quite a bit" in different parts of the plant, vary through the life-cycle of the plant, vary with the season, and will even vary in a "minor" way throughout the day. Moreover, the "THC levels are often undeveloped in high THC strains of cannabis when they are very young".

50 Dr. Small further testified that despite decades of working with cannabis sativa, he could not tell from its appearance whether a young plant was a "high intoxicant" or "low intoxicant" plant:

Q. . . . If someone were to hand you a random cannabis plant, would you, speaking as an expert, be able to say with any certainty, that random plant had [high] THC or low THC content?

A. No.

51 The appellant acknowledges that "it would have been difficult, if not impossible, to determine the intoxicating potential of the seedlings sold by the Appellant as the THC was still in a developmental stage". He goes on to say that it is scientifically possible to run a chemical analysis which could determine if a particular seedling will be of a fibre strain or an intoxicant strain based on the ratio between the existing THC and the existing CBD (cannabidiol). This ratio remains fixed throughout the lifespan of the plant. However, the possibility of using such a test was put to Dr. Small and he replied that for all practical purposes the cost of such testing, in the ordinary administration of the NCA, would be "prohibitive". As a matter of statutory interpretation it is not reasonable to attribute to Parliament an intent to establish such an impractical regime so inimical to its overall purpose.

52 It seems clear, as Rosenberg J.A. pointed out, that there is a rational basis for Parliament to prohibit all cannabis sativa to effectively control the harm from psychoactive cannabis. The evidence provides no basis for concluding that "reading in" a THC threshold would carry out rather than undermine achievement of Parliament's intent.

(b) The Legal Basis

53 The appellant's legal submission is that the NCA should not be interpreted to prohibit the possession of plants (or other substances) that have no psychoactive effects and are used exclusively as industrial products. This aspect of his argument is not based on a constitutional objection. The appellant simply contends that it is "unreasonable to conclude that the Narcotic Control Act was intended to apply to non-intoxicating substances" (emphasis in original).

54 A "botanical defence" based on presumed parliamentary intent was rejected in *Perka v. The Queen*, [1984] 2 S.C.R. 232. The accused had argued that the Certificate of Analysis tendered by the prosecution in that case identified the substance at issue only as cannabis but not as *cannabis sativa*. As there were other known varieties of cannabis, it was said that the prosecution had failed to prove the *actus reus* of the offence. The Court disagreed. Dickson J. (as he then was) commented that "[i]t would simply be unreasonable to assume that by using the phrase '*Cannabis sativa* L.', Parliament meant to prohibit only some intoxicating marihuana and exempt the rest" (p. 266 (emphasis added)). The appellant says that it is equally reasonable to assume that Parliament did not intend to prohibit non-intoxicating strains of cannabis.

55 The appellant has a more difficult argument than in *Perka*. In that case the Court "read up" the species *cannabis sativa* to accord with Parliament's intention when it passed the NCA in 1961. Here the appellant has to argue that the Court should not give effect to what is written in the NCA, but to "read down" *cannabis sativa* to exclude non-intoxicating variants within the scheduled species. In other words, the appellant seeks to impose a subclassification which Parliament has not used, and whose imposition would (according to Dr. Small's evidence) undermine the achievement of Parliament's purpose. Absent a successful constitutional challenge to the definition of *cannabis sativa* (which was rejected by the Court of Appeal for Ontario and not renewed in this Court) we cannot do this. As recently affirmed in *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, 2002 SCC 42, at para. 26, the starting point in statutory interpretation is the ordinary sense of the words "read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament" (see *Driedger's Construction of Statutes* (2nd ed. 1983), at p. 87).

56 Here there is no ambiguity. Section 2 of the NCA defines a narcotic as "any substance included in the schedule". The NCA does not reflect a scientific definition of "narcotic". It is a legislated definition. Item 3 of the schedule to the NCA includes: (1) Cannabis resin, (2) Cannabis (marihuana), (3) Cannabidiol, (4) Cannabinol, (4.1) Nabilone, (5) Pyrahexyl, (6) Tetrahydrocannabinol. It excludes (7) non-viable Cannabis seed. There is no ambiguity in this definition. The NCA does not require the presence of THC for a substance to be classified as a prohibited narcotic. See also *R. v. Dunn*, [1982] 2 S.C.R. 677, at p. 683.

57 The appellant seeks to bolster his argument by reference to the U.N. Single Convention on Narcotic Drugs, 1961, Can. T.S. 1964 No. 30, which provides in Article 28 (Control of Cannabis), paragraph 2:

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

58 This point is of no assistance. The Convention does not argue for freedom of marihuana cultivation. It simply says that the Convention as such does not apply to cultivation exclusively for industrial or horticultural purposes, neither of which purposes are of any relevance to the charges against the appellant.

VI. Disposition

(58a) We would therefore dismiss the appeal.

59 The constitutional questions stated by the Chief Justice should be answered as follows:

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 ?

A. No.

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

A. It is not necessary to answer this question.

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?

A. Yes.

The following are the reasons delivered by

60 Arbour J. (dissenting in part) — For the reasons expressed in the companion cases of R. v. Malmo-Levine; R. v. Caine, [2003] 3 S.C.R. 571, 2003 SCC 74, released concurrently, I am of the view that the appeal of the appellant Clay should be allowed only with respect to the charge of possession of cannabis sativa.

The following are the reasons delivered by

61 LeBel J. (dissenting in part) — Subject to my comments in R. v. Malmo-Levine; R. v. Caine, [2003] 3 S.C.R. 571, 2003 SCC 74, I agree with the disposition suggested by Justice Arbour in the present appeal.

English version of the reasons delivered by

62 Deschamps J. (dissenting in part) — Subject to my reasons in *R. v. Malmo-Levine*; *R. v. Caine*, [2003] 3 S.C.R. 571, 2003 SCC 74, I agree with the disposition suggested by Justice Arbour in the present appeal.

Appeal dismissed, Arbour, LeBel and Deschamps JJ. dissenting in part.

Solicitors for the appellant: Burstein, Unger, Toronto.

Solicitor for the respondent: Attorney General of Canada, Toronto.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitors for the intervener the British Columbia Civil Liberties Association: Arvay Finlay, Victoria.

Solicitors for the intervener the Canadian Civil Liberties Association: Paliare, Roland, Rosenberg, Rothstein, Toronto.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://decisions.scc-csc.ca/scc-csc/scc-csc/en/item/2111/index.do>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-v-clay-2003>

Prepared on 30 October 2026 · Esheria