

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

B E T W E E N:

CHRISTOPHER CLAY

#28189

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

- and between -

DAVID MALMO-LEVINE

#28026

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

- and between -

VICTOR EUGENE CAINE

#28148

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

JOINT STATEMENT OF LEGISLATIVE FACTS

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JOINT STATEMENT OF LEGISLATIVE FACTS

A) The factual findings in the courts below concerning the constitutional challenge

1. The trial Judges in *Clay* and *Caine* heard expert opinion evidence from some of the world's leading social scientists, all of whom had devoted much time to studying the effects of cannabis and the criminal prohibition of cannabis. After hearing from more than 10 expert witnesses and 5 civilian witnesses on issues relating to the botanical, pharmacological, medicinal, sociological, criminological and historical aspects of cannabis and the prohibition, the trial Judge in *Clay* concluded that the criminal prohibition on the use of cannabis originated in a "climate of irrational fears" and that the supporters of the prohibition based their arguments on "wild and outlandish claims". He also concluded that "Canada and the United States appear to be somewhat out of step with the rest of the western world" with respect to reforming the law relating to cannabis use. The

Ontario Court of Appeal endorsed those conclusions.

- Reasons for Judgment at trial, Appellant's Record in Clay, Volume XVI, p.3347 *et seq*;
- Reasons for Judgment on appeal, Appellant's Record in Clay, Volume XVI, p.3432 *et seq*.

2. Based upon the evidence presented by a “most impressive number of experts”, the trial judge in *Clay* made the following findings of fact:

1. Consumption of cannabis is relatively harmless compared to the so-called hard drugs and including tobacco and alcohol;
2. There exists no hard evidence demonstrating any irreversible organic or mental damage from the consumption of cannabis;
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. Cannabis is not criminogenic in that there is no evidence of a causal relationship between cannabis use and criminality;
7. That the consumption of cannabis probably does not lead to “hard drug” use for the vast majority of cannabis consumers, although there appears to be a statistical relationship between the use of cannabis and a variety of other psychoactive drugs;
8. Cannabis does not make people more aggressive or violent;
9. There have been no recorded deaths from the consumption of cannabis;
10. There is no evidence that cannabis causes amotivational syndrome;
11. Less than 1% of cannabis consumers are daily users;
12. Consumption in so-called “de-criminalized states” does not increase out of proportion to states where there is no decriminalization;
13. Health related costs of cannabis use are negligible when compared to the costs attributable to tobacco and alcohol consumption.

- Reasons for Judgment at trial, Appellant's Record in Clay, Volume VII, p.3347 *et seq*.

3. The trial Judge in *Clay*, however, also took note of the “four major grounds for social concern” which the LeDain Commission had identified more than 25 years earlier:

... 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, for the additive interaction of cannabis and alcohol and from the difficulties in 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.

In addition to accepting the trial Judge's above-quoted findings in this case, Rosenberg J.A., in the companion case of *R. v. Parker, infra*, summarized the Ontario Court of Appeal's conclusions on the level and *cogency* of the potential harms associated with cannabis consumption 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 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....

[Emphasis added.]

- Reasons for Judgment at trial, Appellant's Record in *Clay*, Volume XVI, p. 3347 *et seq*;
- Reasons for Judgment on appeal, Appellant's Record in *Clay*, Volume XVI, p. 3435;
- *R. v. Parker* (2000), 146 C.C.C.(3d) 193 at 246 (Ont. C.A.).

4. On the basis of evidence very similar to that presented to the trial Judge in *Clay*, the trial Judge in *Caine* made "almost identical" findings of fact to those which were made by the trial Judge in *Clay*:

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. Reports of lung damage are limited to chronic, heavy users 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 causes alteration of mental function and 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 marihuana occasionally or moderately. 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. Consequently, physical dependence is not a major problem. Psychological dependence, however, 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.
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. 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.

As the B.C. Court of Appeal noted, the trial Judge in *Caine* did find that cannabis is not a “completely harmless drug for all individual users” on the basis of the concerns raised by the LeDain Commission. The trial Judge in *Caine* also relied upon the 1994 Australian “Hall Report” in concluding that there were some potential adverse health effects associated with the *chronic* use of cannabis. On the basis of the Hall Report, the trial Judge in *Caine* was also satisfied that the "major probable adverse effects" for chronic use include respiratory diseases, the development of a "cannabis dependence syndrome", and "subtle forms of cognitive impairment, most particularly of attention and memory, which persist while the user remains chronically intoxicated, and may or may not be reversible after prolonged abstinence from cannabis". Finally, as the B.C. Court of Appeal observed, the trial Judge in *Caine* arrived at the following conclusions concerning the potential harm to society from those who consume cannabis:

The trial judge also considered the "risk of harm to others or to society as a whole" from smoking marihuana. She found that the only such risk could be from a person in a state of intoxication should he or she drive, fly, or operate complex machinery. However, the trial judge noted that s. 253 of the Criminal Code already prohibits such activities.

The trial judge also considered the "burden upon society" brought about by smoking marihuana. She concluded that current rates of marihuana consumption have not caused any burden on the health-care system, particularly when compared with the costs associated with alcohol or tobacco.

- Reasons for Judgment on appeal, Appellant’s Record in *Malmo-Levine*, Volume II p.273 et seq.

5. Years prior to the decisions of the courts below, similar constitutional challenges had been brought before the courts in B.C. and in Quebec, though based on very different (*i.e.*, minimal) evidentiary records. In *R. v. Hamon, infra*, the Quebec Court of Appeal dismissed the constitutional challenge to the criminal prohibition on cannabis. The only expert witness called by the Crown in both *Clay* and *Caine*, Dr. Kalant, had also testified at trial for the Crown in the case of *Hamon* in October, 1991. At trial in *Caine*, Kalant testified here that, since the time when he had testified in *Hamon*, there have been a number of significant developments reviewing and updating our scientific knowledge with respect to cannabis. Some of these reports and studies are as follows:

- (i) The review of the scientific evidence by Professor Zimmer and Dr. Morgan entitled *Marihuana Myths and Marihuana Facts*;
- (ii) The 1994 study by Gruber and Pope which found no convincing evidence that marihuana causes serious psychiatric problems;
- (iii) The study by Kouri and Pope in 1985 which found no difference in psychiatric problems when heavy marihuana users were compared with infrequent users;
- (iv) The Australian (or “Hall”) Report and its review of recent scientific literature;
- (v) The Robbe studies in the Netherlands on driving while under the influence of marihuana;
- (vi) The 1993 U.S. National Highway and Transportation Safety Study examining the influence of marihuana on drivers;
- (vii) A study by Slicker in 1992 which looked at organic changes in the brain and found no residual neuro-pathology or detectable bio-chemical differences;
- (viii) The study by Kouri and Pope in 1995 establishing that there is no symptom or syndrome known as the “amotivational syndrome”;
- (ix) The New South Wales and Sydney Reports examining marihuana dependency issues.

In *R. v. Cholette, infra*, Dorgan J. also dismissed the constitutional challenge. Most of the above-noted new advances in the research also post-date Dorgan J.’s decision.

- *R. v. Hamon* (1993), 85 C.C.C.(3d) 490 (Que. C.A.);
- *R. v. Cholette*, [1993], B.C.J. 2616 (B.C.S.C.).

B) The recreational use of cannabis: past and present

6. Cannabis has been around for at least 12,000 years. It is believed that people have been cultivating cannabis sativa for over 5,000 years. There is definitive proof that it was being cultivated by the year 4,000 B.C. in China and by 3,000 B.C. in Turkestan. It has been used as an ingredient in cloth, rope, paper and oils for industrial purposes. It has long been used as a medicine in India, China, the Middle East, South East Asia, South East Africa, and South America. The first evidence of the medicinal use of cannabis is found in a document entitled *Herbal* (an ancient equivalent of the *U.S. Pharmacopoeia*) that was published in China. This document recommended cannabis for malaria, constipation, rheumatic pain, absent-mindedness and female disorders. In India, cannabis

was recommended to quicken the mind, lower fevers, induce sleep, cure dysentery, stimulate appetite, improve digestion, relieve headaches and cure venereal disease. In Africa, it was used for dysentery, malaria and other fevers. Cannabis was also considered by Galen and other physicians of the classical and Hellenistic eras to be a remedy for various ailments.

- Dr. L. Grinspoon Affidavit, Appellant's Record in Clay, Volume XI, p.2218;
- Reasons for Judgment on appeal, Appellant's Record in Clay, Volume XVI, p.3432.

7. Historically, the consumption of "hemp" (*i.e.*, cannabis) was only ever associated with its positive effects. In ancient Summer, hemp was called the "plant of forgetting worries" and the "old men are young again" plant. In Herodotus's "Nine Books of History", the founder of ethnography relates how the Scythians would "howl with joy" after enjoying a hemp "smoke-bath" in tents they made for the event. Democritus - the "laughing philosopher" of ancient Greece - noticed that hemp based beverages promoted "immoderate laughter". Arab doctors in the twelfth century advised that eating "a little" cannabis does help "against sorrow". Tibetan pharmacopias state that hemp produces feelings of "elation". In India, cannabis was called "the giver of delight" and the "soother of distress" from ancient times onward. Linnaeus wrote that cannabis had the effect of "chasing away melancholy", making you "happy and funny".

- Dr. L. Grinspoon Affidavit, Appellant's Record in Clay, Volume XI, p.2418.

8. Throughout the 19th century, and the early part of the 20th century, cannabis was primarily used for medicinal purposes; however, in the 19th century, cannabis became the subject of recreational experimentation among the literary giants of France and England, including Baudelaire, Gauthier, Balzac, and Hugo. In the 1840's, these writers would ingest hashish brought from Egypt and then record their observations on how this substance affected their literary muse. In America, the recreational use of cannabis was limited to a small group of jazz musicians and itinerant Mexican workers crossing the border from Mexico into Texas.

- Dr. L. Grinspoon Affidavit, Appellant's Record in Clay, Volume XI, p.2418.

9. More modern sources of evidence of the uplifting effect of consuming cannabis can be found in the Indian Hemp Drug Commission Report (1893) and all of the subsequent major commissions which have studied the effects of cannabis consumption. It is now known that the cannabis plant

contains many chemical compounds and particularly a number of cannabinoids. The cannabinoid primarily responsible for cannabis's psychoactive effects is delta-9-tetrahydrocannabinol ("THC"). When smoked, the THC enters the systemic circulatory system and is distributed to the fatty tissue, including the brain. It then slowly diffuses from the tissue into blood and is then metabolised and excreted in urine and faeces. The distribution phase lasts approximately 30 minutes and the elimination phase over several days. The LeDain Commission described the psychoactive effects of cannabis consumption as follows:

A cannabis 'high' typically involves several phases. The initial effects are often somewhat stimulating and, in some individuals, may elicit mild tension or anxiety which usually is replaced by a pleasant feeling of well-being. The later effects usually tend to make the user introspective and tranquil. Rapid mood changes often occur. A period of enormous hilarity may be followed by a contemplative silence.

Psychological effects which are typically reported by users include: happiness, increased conviviality, a feeling of enhanced interpersonal rapport and communication, heightened sensitivity to humour, free play of the imagination, unusual cognitive and ideational associations, a sense of extra-ordinary reality, a tendency to notice aspects of the environment of which one is normally unaware, enhanced visual imagery, an altered sense of time in which minutes may seem like hours, changes in visually perceived spatial relations, enrichment of sensory experiences (subjective aspects of sound and taste perception are often particularly enhanced), increased personal understanding and religious insight, mild excitement and energy (or just the opposite), increased or decreased behavioural activity, increased or decreased verbal fluency and talkativeness, lessening of inhibitions, and at higher doses, a tendency to lose or digress from one's train of thought. Feelings of enhanced spontaneity and creativity are often described, although an actual increase in creativity is difficult to establish scientifically. While most experts agree that cannabis has little specific aphrodisiac (sex stimulating) effect, many users report

increased enjoyment of sex and other intimate human contact while under the influence of the drug.

Recently, naturally occurring cannabinoid receptors have been identified in the human body, especially the brain. The naturally occurring substance, an endogenous ligand, which is responsible for generating chemical reactions within the body's biochemical system has been named "anandamide".

- LeDain Commission, Interim Report of the Commission of Inquiry into the Non-Medical Use of Drugs (1970), at pp.78-9 and 202;
- B. Beyerstein, Examination-in-chief, Appellant's Record in Caine, Volume I, p.22 to p.24;
- Dr. H. Kalant, Cross-examination, Appellant's Record in Caine, Volume V, p.795 to p.799.

C) The origins and development of the Canadian criminal prohibition of cannabis

10. The 1911 *Opium and Drug Act* was Canada's first criminal prohibition on narcotics. The 1911 Act contained no reference to cannabis or marijuana. In Canada, cannabis was not classified as a prohibited substance until 1923. When the amendment was first introduced to Parliament there was not one word of debate or discussion. The historical record does not provide any clear indication of why this substance was prohibited in 1923; however, it is clear that the inclusion was not in response to a real or perceived social problem. On the other hand, the historical record does suggest that the creation of the prohibition flowed from the many exaggerated and patently false claims concerning the dangers of cannabis that had been published in the 1920's and 1930's in both Canada and the U.S.

- J. Giffen Affidavit, Appellant's Record in Clay, Volume VII, p.1497;
- E. Oscapella, Examination in-chief, Appellant's Record in Clay, Volume III, p.710;

11. For example, in 1923 the previously obscure plant, *cannabis sativa*, was demonized by the writings of Emily Murphy, Canada's first female judge. Her book, "The Black Candle", spoke of marijuana as a "new menace to society" and claimed that:

... persons using this narcotic plant smoke the dried leaves of the plant, which has the effect of driving them completely insane. The addict loses all sense of moral responsibility. Addicts to this drug, while under its influence, are immune to pain, and could be severely injured without having any realization of their condition. While in this condition they become raving maniacs, and liable to kill, or indulge in any form of violence to other persons, using the most savage methods of cruelty...

Murphy's writings, based on wild and outlandish claims of U.S. police officials, greatly influenced the Canadian Government's decision to include cannabis as a criminally prohibited narcotic.

- N. Boyd, Examination in-chief, Appellant's Record in Clay, Volume IV, p.831 to p.832;
- E. Oscapella, Examination in-chief, Appellant's Record in Clay, Volume III, p.712 to p.714.

12. Despite the putative need to prohibit the use of cannabis in 1923, no one in Canada was convicted of such an offence before 1937. Then, for the next 25 years, there were but a handful of convictions in any given year (approximately 12 per year). By the 1960's, because foreign travel was no longer an activity reserved to the rich, more and more Canadians were venturing out into other parts of the world. During this time period, cannabis became firmly associated with the "hippie movement" and the opposition to the Vietnam war.

- N. Boyd, Examination-in-chief, Appellant's Record in Clay, Volume IV, p.833 to p.835;
- B. Beyerstein, Examination-in-chief, Appellant's Record in Caine, Volume I, p. 22 to p.33;
- N. Boyd, Examination-in-chief, Appellant's Record in Caine, p.73 to p.104;
- Dr. H. Kalant, Examination-in-chief and cross-examination, Appellant's Record in Caine, Volume IV, p.906; Volume VII, p.1105;
- Giffen, P.J., Endicott, S., Lambert S., *Panic and Indifference – the Politics of Canada's Drug Laws – a Study in the Sociology of Law* (Ottawa: Canadian Centre on Substance Abuse, 1991. [part of Exhibit 18 at trial in *Caine*; namely, Appellant *Caine*'s "Brandeis Brief");
- Robbe, H.W.J. *Influence of Marihuana on Driving*, Chapter 2, General Introduction, pp.13-16 – 2.1 History of Cannabis Use, Institute of Human Pharmacology, University of Limberg, Maastricht (1994) [Exhibit 40 at trial in *Caine*];
- *Hansard*, House of Commons Debates [Exhibit 38 at trial in *Caine*];
- Exhibit 18 at trial in *Caine* - "Brandeis Brief" Materials:
 - (Tab 2) Boyd, N. "The Origins of Canadian Narcotics Legislation: The Process of Criminalization in Historical Context", 8 *Dalhousie Law Journal* 102
 - (Tab 3) Bryan, M.C., "Cannabis Canada – a decade of indecision", Federal Legal Publications, Inc. (1980)
 - (Tab 8) Oscapella, E., "Witch Hunts and Chemical McCarthyism: The Criminal Law and Twentieth Century Canadian Drug Policy" (Ottawa: June, 1993)
 - (Tab 14) Abel, E.L. *Marihuana: The First 12,000 Years* (New York: Plenum Press, 1980)
 - (Tab 16) Boyd, N. *High Society: Legal and Illegal Drugs in Canada* (Toronto: Key Porter Books, 1991) pp.9-11
 - (Tab 19) LeDain Commission, *Cannabis: A Report of the Commission of Inquiry into the Non-Medical Use of Drugs* (Ottawa: Information Canada, 1972).

13. Originally, the vast majority of cannabis was imported from South America, India, Mexico, Thailand, Lebanon and other nearby countries. By the 1980's, the domestic production of cannabis began to take hold. According to RCMP intelligence reports, it was estimated that by 1980, over 80% of Canada's cannabis was being domestically produced. People began cultivating the substance in their homes and in their backyards. In fact, the cultivation of cannabis has been, and continues to be, the largest crop grown in British Columbia.

- N. Boyd, Examination-in-chief, Appellant's Record in Clay, Volume IV, p.835 to p.837.

14. While the domestic production and consumption levels grew, so too did the mobilization of the criminal justice system. By 1979, more than 200,000 Canadians, about 85% of whom were under 25 years of age, had been found guilty of the criminal offence of possessing cannabis. It is estimated that approximately (if not more than) 600,000 Canadians have now been saddled with criminal records for simple (*i.e.*, personal) possession of cannabis. Unlike the illicit trade in other "hard" drugs, violence has rarely been a component of the illicit trade in cannabis; though violence is part and parcel of cannabis law enforcement.

- P. Erickson Affidavit, Appellant's Record in Clay, Volume VIII, p.1638;

- N. Boyd, Examination in-chief, Appellant's Record in Clay, Volume IV, p. 848.

D) Social science evidence demonstrating that it is the *criminal prohibition* of cannabis

which causes
significant
social harm
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1) Who uses cannabis and how often?

15. The cannabis consumer in Canada generally has been described as a young single male. He does not belong to any one identifiable occupational or educational group. Over the past 30 years, the recreational use of cannabis has become widespread throughout Canada insofar as its use is not restricted to any particular socioeconomic group. The rate of cannabis consumption is particularly

high amongst professional groups: a recent survey reported 54% of lawyers admitting having used cannabis along with 33% of physicians. An informal survey of law students in 1977 at Osgoode Hall Law School showed that 85% of the graduating class admitted using cannabis and 70% professed an intention to continue their use after graduation.

- P. Erickson, Examination-in-chief, Appellant's Record in Clay, Volume II, p.471 to p.473;
- N. Boyd, Examination-in-chief, Appellant's Record in Clay, Volume IV, p.846.

16. National surveys demonstrate that one out of five adult Canadians has, at some time in their life, consumed cannabis; that is, between 4-5 million Canadians have consumed cannabis. The vast majority of these people, however, have ceased using the drug as they grew older. National surveys suggest that only 4-6% continue to use cannabis throughout the course of their life. Furthermore, of the 22.7% who reported using cannabis in 1995, only 4.4% said that they had used cannabis 40 or more times in the year, and only 1.6% were daily users. In Ontario, surveys have documented that while 29.6% of adults had smoked cannabis at least once in the lives, only 9% of adults in Ontario had reported using cannabis during 1994. The vast majority of those adult users reported using cannabis less often than once per month. Of the 9% that reported using cannabis in 1994, only 2.1% of these adults reported using cannabis at least once a week and only 0.4% reported using it on a daily basis.

- P. Erickson, Examination-in-chief, Appellant's Record in Clay, Volume II, p.474 to p.476;
- The Adolescent Health Survey, Province of British Columbia [Exhibit 14 at trial in *Caine*];
- National Alcohol and other Drugs Survey (1990), Health and Welfare Canada [Exhibit 15 at trial in *Caine*];
- Chapter 4, *Licit and Illicit Drugs*, CCSA/ARF 1995 Canadian Profile [Exhibit 16 at trial in *Caine*];
- *Licit and Illicit Drugs in Canada*, Part II: "Illicit Drug Use" (Health and Welfare Canada, 1989) [Exhibit 17 at trial in *Caine*];
- *Report of the Task Force into Illicit Narcotic Overdose Deaths in British Columbia*, Office of the Chief Coroner, Ministry of the Attorney General, September 6, 1994, (in particular pp.85-94) [Exhibit 19 at trial in *Caine*].

17. According to Dr. H. Kalant, the Federal government's only expert witness in both *Clay* and *Caine*, the total current marihuana using population is estimated to be about 1 million Canadians or 4.2% of the total population aged 15 or older. Of that total group Dr. Kalant estimated that 95% of them were low/occasional/moderate users for whom there were no significant health risks, so long as

they were healthy adults and did not fall into one of the vulnerable groups, namely immature youths, pregnant women and the mentally ill. He estimated the remaining 5% to be chronic users for whom there is a significant health risk primarily from the process of smoking. Kalant defined a chronic user to be a person who uses 1 or more marihuana joints (cigarettes) per day. He agreed that 5% of the total current user population (*i.e.*, 4.2% of Canadians) would amount to .21% or 1/5 of 1% of Canadians; that is, roughly 30,000 people. Kalant agreed that this was a very small group of people. Leaving aside potential harm to others from the acute effects of a user driving, flying, or operating complex machinery, Dr. Kalant confirmed that his concern in regards to this small group is the harm to their health as chronic users and that their use did not involve harm to others or significant harm to society as a whole. He also agreed that those chronic users could substantially reduce the health risks to themselves by using marihuana joints that were more tightly packed to reduce combustion temperatures, contained a filter, were not smoked down to the end (roach) and were not smoked by deep lung inhalation.

- Dr. H. Kalant, Cross-examination, Appellant's Record in *Caine*, Volume VI, p.880, p.889, p.894 to p.898 and p.907;
- B. Beyerstein, Examination-in-chief, Appellant's Record in *Caine*, Volume I, p. 49 to p.53 and p.130 to p.131; Volume II, p.301 and 317 to 319; Volume III, p.404 and p.414;
- N. Boyd, Examination-in-chief, Appellant's Record in *Caine*, Volume I, p.84, p.86, p.88, p.92 to 97, p.106 to p.111, p.115, p.117 and p.127 to128; Volume III, p.404 and p.414;
- Dr. A. Connolly, Examination-in-chief and Cross-examination, Appellant's Record in *Caine*, Volume III, p.489 to p.493 and p.522 to p.526; Volume IV, p.555 to p.557;
- Exhibit 18 at trial in *Caine* - "Brief" Materials:
 - (Tab 1) Boyd, N. "The Question of Marihuana Control: Is De Minimis Appropriate, your Honour?" (1982), 24 *Criminal Law Quarterly* 212
 - (Tab 2) Boyd, N. "The Origins of Canadian Narcotics Legislation: The Process of Criminalization in Historical Context", 8 *Dalhousie Law Journal* 102
 - (Tab 3) Bryan, M.C., "Cannabis Canada – a decade of indecision" (Federal Legal Publications, Inc. 1980)
 - (Tab 7) Nadelmann, E., et al., "The Harm Reduction Approach to Drug Control: International Progress" (New Jersey, 1994)
 - (Tab 8) Oscapeella, E., "Witch Hunts and Chemical McCarthyism: The Criminal Law and Twentieth Century Canadian Drug Policy" (Ottawa, 1993)
 - (Tab 13) "Submission on Bill C-7 the Controlled Drugs and Substances Act", National Criminal Justice Section of the Canadian Bar Association (May 1994)
 - (Tab 14) Abel, E.L. *Marihuana: The First 12,000 Years* (New York: Plenum Press, 1980)

(Tab 16) Boyd, N., *High Society: Legal and Illegal Drugs in Canada* (Toronto: Key Porter Books, 1991), pp. 106-107

(Tab 17) Erickson, P.G., *Cannabis Criminals* (Toronto: A.R.F. 1980)

(Tab 19) LeDain Commission, *Cannabis: A Report of the Commission of Inquiry into the Non-Medical Use of Drugs* (Ottawa: Information Canada, 1972)

(Tab 20) LeDain Commission, *Final Report of the Commission of Inquiry into the Non-Medical Use of Drugs* (Ottawa: Information Canada, 1972).

180 Survey respondents have indicated that the drug is used predominantly as a social activity engaged in with friends and partners during evenings, weekends, and other leisure time. Most users did not consume the drug while at work. When asked about the specific benefits derived from cannabis use, the most commonly mentioned response was relaxation (69%), followed by euphoria, recreation, creativity, insight, pleasure and escapism (by between 12%-24%).

- P. Erickson, Examination-in-chief, Appellant's Record in Clay, Volume II, p.479 to p.482;
- P. Erickson Affidavit, Appellant's Record in Clay, Volume VIII, p.1638.

2) The use of cannabis does not cause users to engage in criminal behaviour

190 Prohibitionists often refer to the “gateway theory” as the principal evil that justifies the criminalization of cannabis. The gateway theory suggests that by taking one kind of drug (*i.e.*, cannabis), an individual increases his/her risk of taking another significantly harmful drug (*e.g.*, cocaine and/or heroin). However, research has shown that the vast majority of cannabis users never go on to use and possess hard drugs. The research has shown that there is nothing magical about the “gateway theory” and there seems to be a complex constellation of social and psychological factors involved in predicting the degree of deviant behaviour a person might pursue. A recent high school survey done in the United States revealed that, of the of graduates who tried cannabis, only 16% of them went on to later try cocaine. Thus, for 84% of high school seniors, cannabis was a terminus, as opposed to a gateway, drug. In Canada, only 1 in 7 cannabis users have reported going on to try cocaine and only 1 in 20 cannabis users have said that they went on to try heroin. The Crown's own expert testified that he was satisfied that recent studies had refuted the “gateway theory”.

- P. Erickson, Examination-in-chief, Appellant's Record in Clay, Volume II, p.484 to p.485;
- P. Erickson Affidavit, Appellant's Record in Clay, Volume VIII, p.1638;
- Dr. J. Morgan Affidavit, Appellant's Record in Clay, Volume XII, p.2585.

200 In addition, cannabis prohibitionists claim that the use of cannabis somehow encourages criminal behaviour. In fact, there is no proven criminogenic potential associated with cannabis use.

There is no documented evidence suggesting that the consumption of cannabis drives individuals to a life of crime or that users commit crimes in order to satisfy their need to consume cannabis. Indeed, cannabis is one of the few intoxicating substances that has proven (in both human and animal research) to be negatively correlated with violence. For a majority of cannabis smokers, cannabis use constitutes their major risk taking activity. According to a survey conducted by Eric Single and Patricia Erickson, it was found that cannabis users do not generally disrespect the law (although they do tend to lack respect for the criminal prohibition on cannabis).

- P. Erickson Affidavit, Appellant's Record in Clay, Volume VIII, p.1638;
- E. Single, Examination-in-chief, Appellant's Record in Clay, Volume IV, p.803.

210 Intoxicated offenders are most often intoxicated by alcohol. Alcohol acts as a disinhibitor and, thus, offenders often use alcohol as a means of abandoning social restraints. In contrast, cannabis is an inhibitor which generally exerts a calming influence on the user. In the British jail system, the prison guards have objected strongly to screening out cannabis use because they find that the prisoners who smoke cannabis are calm and restrained. Cannabis use is believed to lower the incidence of aggression in the jails.

- D. Riley, Examination-in-chief, Appellant's Record in Clay, Volume III, p.597 to p.598.

3) The social harm caused by making cannabis consumption a criminal offence

220 The criminal justice system has devoted an enormous amount of its limited resources to the fight to prohibit the personal and private use of cannabis. A recent report on Canada's criminal prohibition of cannabis noted that "Canada annually arrests more of its citizens per capita for cannabis possession than any other country in the world." It has been estimated that by the 1990's over 600,000 Canadians have received criminal records for cannabis related offences. In recent years, convictions for cannabis possession have fluctuated between 29,119 (1989) and 35,587 (1984), and on average 2,128 individuals/year have been incarcerated for possession of cannabis (note: disposition statistics for marijuana possession have not been published by the government since 1985). Between 1977-1985, 93% of all cannabis convictions have been for simple possession and the majority of all narcotics convictions have been for cannabis-related offences. In 1990, convictions for possession accounted for 50% of all drug related convictions compared to 44% in 1981. In 1990, the most recent statistics for convictions, 33% of the convictions for possession resulted in custodial sentences. Still, only a very small number of admitted cannabis users are

confronted by the criminal justice system and they are disproportionately members of disadvantaged groups.

- B. Beyerstein, Examination-in-chief, Appellant's Record in Caine, Volume I, p.51 to p.53;
- N. Boyd, Examination-in-chief and Re-examination, Appellant's Record in Caine, Volume I, p.79 to p.87, p.91 to p.94, p.104, p.107, p.115 to p.116 and p.126 to p.128; Volume III, p.395 to p.397;
- Dr. A. Connolly, Examination-in-chief, Appellant's Record in Caine, Volume III, p.524 to p.525;
- Dr. H. Kalant, Cross-examination, Appellant's Record in Caine, Volume V, p.865 to p.869; Volume VI, p.889 and p.895 to p.898; Volume VII, p.1061 to p.1062 and p.1102
- Chapter 4, *Licit and Illicit Drugs*, CCSA/ARF 1995 Canadian Profile [Exhibit 16 at trial in *Caine*];
- *Licit and Illicit Drugs in Canada*, Part II: Illicit Drug Use (Health and Welfare Canada, 1989) [Exhibit 17 at trial in *Caine*].

230 The use of marihuana increased dramatically commencing in 1966 and appeared to peak around 1979. Use then appeared to decrease until about 1990 when a further increase was noted, particularly among youths. However, the 1993 *General Social Survey* (a report prepared for the Studies Unit, Health Promotion Directorate of Health Canada) reported that the current rate of use in 1993 was about 1 million, or 4.2% of, Canadians age 15 and older. This represents a **reduction** in use from the 6.5% of those Canadians who reportedly had used cannabis in 1990. User rates today remain substantially lower than those recorded in the late 1960's and early 1970's. Use among 12-17 year olds in 1992 was 8% compared to 24% in 1979. Use among 18-25 year old was 23% in 1992 compared to 46.9% in 1979.

- N. Boyd, Examination-in-chief, Appellant's Record in Clay, Volume IV, p.847 to p.848;
- N. Boyd Affidavit, Appellant's Record in Clay, Volume IX, pp. 1844, 1857, 1870 and 1918;
- P. Erickson Affidavit, Appellant's Record in Clay, Volume VIII, p.1638;
- P. Erickson, Cross Examination, Appellant's Record in Clay, Volume III, p.503;
- *Alcohol and Drug Use Results from the 1993 General Social Survey*, Report prepared for the Studies Unit, Health Promotion Directorate, Health Canada, January, 1995 by Eric Single, Joan Brewster, Patricia McNeil, Jeffrey Hatcher and Katherine Trainer [Exhibit 47 at trial in *Caine*];
- *The Adolescent Health Survey*, Province of British Columbia, Chapter 10 "Substance Use and Abuse" [Exhibit 14 at trial in *Caine*];
- *National Alcohol and other Drugs Survey* (1990), Health and Welfare Canada, Part 2, Other Drugs [Exhibit 15 at trial in *Caine*];

- Chapter 4, *Licit and Illicit Drugs*, Addiction Research Foundation CCSA/ARF 1995 Canadian Profile [Exhibit 16 at trial in *Caine*];
- *Licit and Illicit Drugs in Canada* (1989), Health and Welfare Canada, Part II, “Illicit Drug Use” [Exhibit 17 at trial in *Caine*].

240 It is commonly asserted that the criminal justice system has now taken account of the minimal social harm associated with, and the growing public tolerance of, cannabis consumption by imposing more lenient sentences, such as discharges. However, the trend towards more lenient sentences has been marked by gross inconsistencies from province to province and from year to year. Since 1970, the absolute discharge was used in less than 10% of the cannabis possession cases in Alberta, British Columbia and Quebec, whereas in 1983, 32% and 38% of cannabis users found guilty in Ontario and Manitoba were so sentenced. A fine was imposed in 44% of all cases in both Ontario and Manitoba during this time frame, whereas the fine was imposed in 74% of all such cases in Alberta.

- N. Boyd, Examination-in-chief, Appellant’s Record in *Clay*, Volume IV, p.848 to p.849;
- Exhibit 18 at trial in *Caine* - “Brandeis Brief” Materials:
 - (Tab 1) Boyd, N., “The Question fo Marihuana Control: De Minimis Appropriate, Your Honour?” (1982), 24 *Criminal Law Quarterly* 212
 - (Tab 2) Boyd, N., “The Origins of Canadian Narcotics Legislation: The Process of Criminalization in Historical Context”, 8 *Dalhousie Law Journal* 102
 - (Tab 3) Bryan, M.C., “Cannabis Canada – a decade of indecision”, Federal Legal Publications, Inc. (1980)
 - (Tab 4) Erickson, P.G. and Fischer, B., “Canadian Cannabis Policy: The Impact of Criminalization, the Current Reality and Future Policy Options” (Toronto: A.R.F., 1995)
 - (Tab 8) Oscapella, E., “Witch Hunts and Chemical McCarthyism: The Criminal Law and Twentieth Century Canadian Drug Policy” (Ottawa: June, 1993)
 - (Tab 10) Smith, R., “Prohibition isn’t working – some legislation will help”, (1995), 211 *British Medical Journal* pp.23-30
 - (Tab 13) “Submissions on Bill C-7, the *Controlled Drugs and Substances Act*”, National Criminal Justice Section of the Canadian Bar Association (May, 1994)
 - (Tab 16) Boyd, N. *High Society: Legal and Illegal Drugs in Canada* (Toronto: Key Porter Books, 1991) pp.9-11
 - (Tab 17) Erickson, P.G., *Cannabis Criminals* (Toronto: A.R.F., 1980)
 - (Tab 18) Apap *et al.*, *Questioning Prohibition* (Brussels: International Antiprohibitionist League, 1994), at p. 271 and p.275
 - (Tab 19) LeDain Commission, *Cannabis: A Report of the Commission of Inquiry into the Non-Medical Use of Drugs* (Ottawa: Information Canada, 1972), at p.265 to p.310 and p.301 to p.302 and p. 310

(Tab 20) LeDain Commission, *Final Report of the Commission of Inquiry into the Non-Medical Use of Drugs* (Ottawa: Information Canada, 1973).

250 Although sentencing of cannabis users (*i.e.*, those found guilty of simple possession) is now often tempered by leniency, a significant number of Canadians continue to be incarcerated for possessing cannabis. Prison sentences for possession of cannabis have been used more frequently in Quebec than anywhere else in Canada, comprising over 20% of all such sentences there. While the absolute number of Canadian offenders being incarcerated for simple possession was decreasing in the 1970's and early 1980's, the rate of incarceration for simple possession was actually rising. In 1981, the incarceration rate stood at 6.7%. By 1984, the total number of persons sent to jail for cannabis had decreased, but the percentage of those being incarcerated rose to 8.8%. Unfortunately, it is impossible to provide the Court with more current figures for the rate of incarceration for cannabis offences because in 1985 the Bureau of Dangerous Drugs deliberately discontinued the publication of statistics relating to the disposition of cannabis offences.

- N. Boyd, Examination-in-chief, Appellant's Record in *Clay*, Volume IV, p.849 to p.852.

260 The impact of criminal convictions on the futures of young Canadians has historically been identified as one of the most serious social harms generated by the criminal prohibition of cannabis. Upon being charged, tremendous costs are incurred during the pre-trial period, costs which tend to have a much more dramatic impact on young people. Most of the young people charged with cannabis offences are on the low end of the socioeconomic scale and, thus, for them the financial burden is particularly onerous. Once a person is found guilty of a cannabis charge, s/he must confront the additional adverse effects associated with having a criminal record for such an offence. At trial in *Clay*, Mr. J.J. Shurie provided a detailed account of the impact of being charged for his personal use of cannabis in the privacy of his own home. Prior to being charged with cultivating some cannabis plants in his basement, he was always considered to be a model teacher. His yearly performance evaluations were always positive and his students referred to him as a motivator and role model. Even before being convicted, Mr. Shurie was fired from his teaching position.

- P. Erickson, Examination-in-chief, Appellant's Record in *Clay*, Volume II, p.489, p.490, and p.491.

- P. Erickson Affidavit, Appellant's Record in *Clay*, Volume VIII, p.1638;

- J.J. Shure, Examination-in-chief, Appellant's Record in *Clay*, Volume III, p.551 to p.560;

270 At trial in *Caine*, Dr. Kalant testified that one of the major probable adverse effects of marihuana legal and social policy is the law itself in terms of its disproportionate adverse impact on people caught using. Both the B.C. Court of Appeal and the Ontario Court of Appeal, acknowledged the existence of such a harm, as well as its seriousness. Kalant also pointed out the negative effects which the criminal prohibition has on the ability of scientists to conduct the research that they would like to in order to resolve some of the questions that they still have. He noted that some deaths in the drug field are because of prohibition itself. He agreed that some of the social problems relating to drug use are as a result of the social policy itself. That the law is doing more harm than good is one of the consistent underlying factors forming the basis for the recommendations of various commissions and inquiries to decriminalize simple possession of marihuana. Professor Beyerstein testified at trial in *Caine* that there is an emerging consensus amongst legal scholars, medical scholars, psychologists, sociologists and others, that not only has prohibition been counter-productive, but it has not reached its goals, has exacted a terrible price in various ways that make it really intolerable and that a harm reduction approach should be instituted in its place. The end effect is that the “criminal justice” approach exacerbates the health problems as well as making it more difficult for health professionals to gather reliable data to analyze and assist in understanding and solving the problem, if any.

- Reasons for Judgment on appeal, Appellant’s Record in *Clay*, Volume XVI, p.3432 *et seq*
- Reasons for Judgment on appeal, Appellant’s Record in *Malmo-Levine*, Volume II p.273 *et seq*;
- B. Beyerstein, Examination-in-chief, Appellant’s Record in *Caine*, Volume II, p.233; Volume II, p.315;
- Dr. H. Kalant, Cross-examination, Appellant’s Record in *Caine*, Volume VI, p.901 to p.902; Volume VII, p.1080;
- Dr. A. Connolly, Examination-in-chief, Appellant’s Record in *Caine*, Volume IV, p.526, p.547 and p.565;
- *Drug Prohibition in the U.S. Cost Consequences and Alternatives* [Exhibit 21 at trial in *Caine*];
- “Avoiding Folly” [Exhibit 24 at trial in *Caine*];
- *Report of the Task Force into Illicit Narcotic Overdose Deaths in British Columbia*, Office of the Chief Coroner, Ministry of the Attorney General, September 6, 199 [Exhibit 19 at trial in *Caine*];
- Exhibit 18 at trial in *Caine* - “Brandeis Brief” Materials:

(Tab 4) Erickson, P.G. and Fischer, B., “Canadian Cannabis Policy: The Impact of Criminalization, the Current Reality and Future Policy Options” (Toronto: A.R.F., 1995)

(Tab 7) Nadelmann, E., et al., “The Harm Reduction Approach to Drug Control: International Progress” (New Jersey, 1994)

(Tab 10) Smith, R., “Prohibition isn’t working – some legislation will help”, (1995), 211 *British Medical Journal* pp.23-30

(Tab 13) “Submission on Bill C-7 the Controlled Drugs and Substances Act”, National Criminal Justice Section of the Canadian Bar Association (May 1994)

(Tab 14) Abel, E.L. *Marihuana: The First 12,000 Years* (New York: Plenum Press, 1980)

(Tab 16) Boyd, N., *High Society: Legal and Illegal Drugs in Canada* (Toronto: Key Porter Books, 1991), pp. 106-107

(Tab 18) Apap *et al.*, *Questioning Prohibition* (Brussels: International Antiprohibitionist League, 1994), at p. 271 and p.275

(Tab 21) Weil, A. and Rosen, W., *Chocolate to Morphine: Undertaking Mind-Active Drugs* (Boston: Houghton Mifflin, 1985), Chapter 9.

4) The inefficacy of the *criminal prohibition* as a general or specific deterrent to the consumption of cannabis

280 In spite of the criminal prohibition and the adverse social effects associated with a charge of cannabis possession, 92% of those who were charged with cannabis offences continue to use cannabis, in much the same way as they had been using it before becoming entangled with the criminal justice system. Studies have shown that the intervention by the criminal justice system simply “engineered them into a desire to avoid being caught again and gave them ideas about how to be more careful”. Actual sanctions and the threat of punishment were ineffective deterrents: those who were most likely to continue using cannabis actually perceived a greater risk of re-arrest and a more severe punishment upon a subsequent conviction. The continued upward trend in cannabis use among Canadians, notwithstanding the continuation of the criminal prohibition, demonstrates that the prohibition has been completely ineffective as a general deterrent. In study of a group of older, regular cannabis users (averaging 13 years of use), the group reported no difficulty in obtaining a regular source of supply and expressed little or no concern over the possibility of arrest and prosecution. Conversely, the failure of the criminal prohibition as a specific or general deterrent has translated into an opportunity for some jurisdictions to liberalize the prohibition without increasing

the rate of consumption that increasing rates of cannabis consumption are not triggered by legal reform which has moved in the direction of decriminalizing.

- P. Erickson Examination-in-chief, Appellant's Record in Clay, Volume II, p.494;
- P. Erickson Affidavit, Appellant's Record in Clay, Volume VIII, p.1638;
- E. Single, Examination-in-chief, Appellant's Record in Clay, Volume IV, p.797 to p.803.

290 In 1995, Health Canada conducted its own opinion poll canvassing the views of Canadians on cannabis and the law. Of those surveyed, 27% said they felt that possession of cannabis should be legal and 42% believed that, while it should still be illegal, it should not be subject to custodial sentences and (16.8% felt that it should still be illegal and, even with a first offence, subject to a jail sentence). The results of this poll are remarkably consistent with every other poll conducted over the past 20 years in Canada. It is clear that 69% of the Canadian population have been consistently in favour of some form of law reform in the direction of increased leniency or decriminalization.

- E. Single, Examination in-chief, Appellant's Record in Clay, Volume IV, p.808 to p.810.

E) The evidence fails to establish that cannabis consumption is sufficiently harmful either to users or to others so as to justify the state resorting to a criminal prohibition

300 The assessment of the medical harm related to the consumption of cannabis is limited by the fact that virtually all of the existing studies which are suggestive of medical harm are based upon exposing laboratory rats to extremely large doses. The findings with respect to laboratory rats have not been replicated in studies of human populations. In fact, the human population studies which have been conducted do not confirm the suggestion by some "rat studies" that there is a higher risk of disease and illness amongst the population of cannabis smokers. By contrast, with respect to the harm associated with the smoking of tobacco, the scientific community has only been prepared to endorse the suggestion that it was harmful once the "rat studies" were confirmed in large-scale, controlled, human population studies. With respect to cannabis, the only harm for which some consensus has so far been reached is that related to chronic bronchial inflammation resulting from the mode of delivery, *i.e.*, smoking. Even then, as recently as 1995, the prestigious British medical journal, The Lancet, concluded that "the smoking of cannabis, even long term, is not harmful to health". Indeed, the only expert called by the Crown in the courts below, ***Dr. Kalant, conceded that if cannabis is smoked in moderation there will be no significant risk of harm to the user.***

- Dr. J. Morgan, Examination-in-chief, Appellant's Record in Clay, Volume V, p.1062 to p.1071;

- Dr. H. Kalant, Cross-examination, Appellant's Record in *Clay*, Volume VI, p.1289 to p.1290.

310 In 1981, Dr. H. Kalant chaired the joint Addiction Research Foundation-World Health Organization (ARF/WHO) scientific meeting on Adverse Health and Behavioural Consequence of Cannabis Use. At the time of his testimony at trial in *Caine*, he was serving as the Chair of a Committee of the World Health Organizations (WHO) Program on Substance Abuse (PSA) which was in the process of preparing a report entitled "Health Implications of Cannabis Use". That Committee was formed as a result of requests from a number of World Health Organization member States for further information on the health implications of cannabis and as a result of the 1992 World Health Assembly call for further studies on the use of cannabis. The project commenced in 1993. At the time of the trial in *Caine*, the Committee had yet to complete its report because of some dissension as to the policy implications of the proposed contents of the report. According to Dr. Kalant's testimony, it had been suggested that the American National Institute on Drug Abuse (NIDA) was making efforts to suppress the Committee's proposed report as NIDA believed it would undermine American legal and social policy in relation to cannabis use. The World Health Organization, notwithstanding a request from the trial Judge in *Caine*, declined to provide a copy of the draft report. Nevertheless, Dr. Kalant kindly provided the Court with a complete set of the proposed report's references. Dr. Kalant also testified that he did not expect any surprises from the report in the sense of any additional acute or chronic effects that might give cause for concern in terms of harm to users. On the contrary, he testified that the current Committee did not think that the possible adverse effects in chronic heavy users of an increased risk of leukemia among offspring exposed while *in utero* would warrant mention as a seriously entertained risk today. Similarly, it was his view that the Committee would not consider as significant the risk to pregnant women who smoke at the time of conception developing birth defects to their child. In summary, Dr. Kalant testified that apart from the concerns with respect to acute effects in conjunction with driving or flying, etc., the major significant health threat, apart from concerns to the high risk groups of immature adolescents, pregnant women and the mentally ill, is that the chronic heavy user will develop significant respiratory diseases as a result of smoking. This has everything to do with pyrolysis and nothing to do with THC, the active ingredient in marihuana. In addition, Kalant was of the view that this significant risk could be significantly reduced in the chronic heavy user by

smoking a more tightly packed cigarette with a filter and by not smoking it down to the very end and by not taking deep lung inhalations.

- Dr. H. Kalant, Cross-examination, Appellant's Record in Caine, Volume V, p.776 to p.877; Volume VI, p.878 to p.1058; Volume VII, p.1061 to p.1117
- Exhibit 5 at trial in *Caine* - Crown's "Brandeis Brief" Materials: (Tab 1).

320 Dr. S. Peck, the Deputy Provincial Health Officer for the Province of British Columbia, charged with the responsibility under the Provincial *Health Act* to investigate any health hazards, testified that his office had not received any information to suggest there was a significant health problem as a result of marihuana use in the Province of British Columbia. He said that he operated with local health boards and health officers and health officials across not only British Columbia, but across other Provinces and organizations in Canada (as well as on a global level). Marihuana use had not been brought to his attention as a significant health problem. He referred to the Annual Reports from the Provincial Health Officer from 1992, 1994, 1995 (Exhibits 11, 12, and 13 at trial in *Caine*) and confirmed that marihuana use or marihuana health problems were not referred to in any of those reports as representing any kind of significant health problem in B.C. He said there is not a lot of evidence to show that cannabis use is causing any harm in terms of hospitalisation or deaths or the poisoning of children. He said that there was no evidence of a "burden of illness" either to the cannabis user, to others or to society as a whole.

- B. Beyerstein, Examination-in-chief, Appellant's Record in Caine, Volume I, p.49 to p.53 and p.130 to p.131; Volume II, p.301 and p.317 to p.319; Volume III, p.404 and p.414;
- N. Boyd, Examination-in-chief, Appellant's Record in Caine, Volume I, p.84, p.86, p.88, p.92 to p.97, p.106 to p.111, p.115, p.117 and p.127 to p.128; Volume III, p.395, p.404, and p.414;
- Dr. A. Connolly, Examination-in-chief and Cross-Examination, Appellant's Record in Caine, Volume III, p.489 to p.493 and p.522 to p.526; Volume IV, p.555 to p.557;
- Dr. S. Peck, Examination-in-chief, Appellant's Record in Caine, Volume II, p.159, p.169 to p.170, p.187, p.191, p.196, p.199, p.201, p.202, p.204, p.205 to p.207 and p.230;
- Adlaf, et al , *Alcohol and other drug use* (Toronto: A.R.F., 1994); *Ontario Student Drug Survey* (Toronto: ARF, 1995);
- Annual Report from the Provincial Health Officer, 1992 ; *Annual Report* from the Provincial Health Officer, 1994; *Annual Report* from the Provincial Health Officer, 1995 [Exhibits 11- 13 at trial in *Caine*];
- *Alcohol and Drug Use Results from the 1993 General Social Survey*, Report prepared for the Studies Unit, Health Promotion Director at Health Canada, January, 1995 by Eric Single,

Joan Brewster, Patricia McNeil, Jeffrey Hatcher and Katherine Trainer [Exhibit 47 at trial in *Caine*].

1) Physical dependence or addiction?

330 There is very little evidence to demonstrate that there is anything about the nature of the substance which can trigger a physical addiction to cannabis. Indeed, the addiction potential of cannabis is so low that it is generally considered to be inconsequential. The vast majority of cannabis consumers never experience any type of dependency. Studies show that cannabis is the least likely psychoactive drug to cause dependency. Caffeine is much more likely to produce dependence than cannabis. According to The World Health Organization, the characteristics of an addictive substance are: (1) an overpowering desire or need (compulsion) to continue taking the drug and to obtain the drug and to obtain it by any means; (2) a tendency to increase the dose; and (3) a psychological, and sometimes physical, dependence on the effects of the drug. Cannabis does not exhibit any of these characteristics.

- Dr. J. Morgan, Examination in-chief, Appellant's Record in Clay, Volume V, p.1093 to p.1098 and p.1182;

- Dr. L. Grinspoon Affidavit, Appellant's Record in Clay, Volume XI, p.2418;

340 Reinforcement is a necessary condition of dependence; if a person does not receive a reinforcing effect, there would be no reason to use the drug again and therefore the question of physical dependence or addiction would be non-existent. Studies have shown that cannabis is not a highly rewarding drug for animals, as assessed by the work effort taken by the animal to obtain the substance. In contrast, heroin is strongly rewarding or reinforcing, and cocaine is even more so. Studies have not shown the presence of dramatic withdrawal symptoms with cessation of cannabis use, such as those symptoms observed during the withdrawal from heroin. In one study, 16% of people who purported to experience withdrawal symptoms from a cessation of cannabis consumption described experiencing nervousness, tension, restlessness, sleep disturbance and appetite change, all of which were considered to be very minor withdrawal symptoms as compared to those associated with other drugs. There appears to be little or no risk of physical addiction arising from cannabis use; however, a small percentage of users do seemingly develop problems with psychological dependence. Psychological dependence can relate to many things in our lives.

For example, people commonly become dependent on exercise or other forms of recreational pleasure. Psychological dependence is reportedly experienced by only 2% of all cannabis users.

- D. Riley, Examination in-chief, Appellant's Record in Clay, Volume III, p.593 to p.594;
- Dr. J. Morgan, Examination in-chief, Appellant's Record in Clay, Volume V, p.1182;
- Dr. J. Morgan Affidavit, Appellant's Record in Clay, Volume XII, p.2585;
- Dr. H. Kalant, Examination-in-chief, Appellant's Record in Clay, Volume VI, p.1272; p.1269 to p.1271;
- Dr. L. Grinspoon Affidavit, Appellant's Record in Clay, Volume XI, p.2418.

2) The 'Amotivational' Syndrome?

350 There is no evidence to prove the development of an "amotivational syndrome" in which cannabis users withdraw from the world and drift into lethargy and ennui. Rather, diminished motivation may be a symptom of chronic intoxication but one which dissipates upon cessation of use.

- Dr. J. Morgan, Examination in-chief, Appellant's Record in Clay, Volume V, p.1151 to p.1152;
- Dr. H. Kalant, Examination-in-chief, Appellant's Record in Clay, Volume VI, p.1252;
- Dr. J. Morgan Affidavit, Appellant's Record in Clay, Volume XII, p.2585.

3) Effects on the fetus, fertility and conception?

360 Despite some earlier literature suggesting that pregnant mothers who smoke cannabis during pregnancy have babies who are small in terms of weight, there is no convincing evidence that demonstrates that smoking cannabis causes birth defects. The studies which have been suggestive of underdeveloped babies recently from cannabis are seriously undermined by virtue of the fact that most of the women included in the studies were poverty stricken and were already heavily involved with alcohol, cigarettes and other drugs. Moreover, there is no credible social science evidence demonstration of any major developmental effect in the newborn children of mothers who have smoked cannabis. Psychologist Peter Freid and his colleagues have collected longitudinal data on pre-natal marijuana exposure. Over the years they have studied these children and compared the to children with no fetal exposure to cannabis and have found very few differences between those exposed and not exposed to cannabis during pregnancy. While some tests have shown some impairment of memory, verbal ability and verbal expression of ideas in school age children, the changes were measurably small. More importantly, however, these minimal testing differences have not been linked to poor school performance in later years.

- Dr. J. Morgan Affidavit, Appellant's Record in Clay, Volume XI, p.2585;
- Dr. J. Morgan, Examination in-chief, Appellant's Record in Clay, Volume V, p.1116 to p.1117.

370 There is no conclusive evidence to prove the contention that cannabis harms sexual maturation and reproduction in humans. There is no convincing evidence that cannabis reduces fertility in males, or impairs conception in human females. There may, however, be a brief or acute decrease of sex hormone level in the brain, but this level soon returns to normal even without the complete cessation of cannabis smoking.

- Dr. J. Morgan Affidavit, Appellant's Record in Clay, Volume XII, p.2585;
- Dr. J. Morgan, Examination-in-chief, Appellant's Record in Clay, Volume V, p.1124 to p.1126;
- Dr. H. Kalant, Examination-in-chief and Cross-examination, Appellant's Record in Clay, Volume VI, p.1241 to p.1243; p.1395.

4) Effects on the immune system?

380 There is no sound social science data demonstrating that cannabis impairs the functioning of the human immune system. In the early 1970's, a well publicized study by Dr. Nahas created a misconception that there was some impaired immune responsiveness associated with the consumption of cannabis; however, Dr. Nahas has never been able to replicate the results of that study, nor has any other scientist. As far as all the other studies have shown, cannabis has no effect on the human immune system. There are no studies of any sort which suggest that there is an increased likelihood of a cannabis user contracting an illness from a parasite, bacteria, or virus. There is no evidence of increased infection of any sort in human cannabis smokers, nor of increased susceptibility to infection.

- Dr. J. Morgan Affidavit, Appellant's Record in Clay, Volume XII, p.2585;
- Dr. J. Morgan, Examination-in-chief, Appellant's Record in Clay, Volume V, p.1102 to p.1109;
- Dr. H. Kalant, Examination in-chief, Appellant's Record in Clay, Volume VI, p.1255, to p.1256.

5) Brain damage and mental disorder?

390 There is no reliable evidence that cannabis consumption kills brain cells or causes brain damage in human smokers. In the early 1970's, Dr. Campbell conducted a study indicating that some brain damage could be caused by the heavy consumption of cannabis; however, hundreds of

studies have since been done attempting to replicate these results but without success. In the late 1980's, the National Centre for Toxicology in Arkansas conducted an experiment in which monkeys were exposed to large doses of cannabis over the period of one year: there was no evidence of brain damage from this exposure.

- Dr. J. Morgan Affidavit, Appellant's Record in Clay, Volume XII, p.2585;
- Dr. J. Morgan, Examination-in-chief, Appellant's Record in Clay, Volume V, p.1138;
- Dr. H. Kalant, Examination-in-chief, Appellant's Record in Clay, Volume VI, p.1243 to p.1245.

400 Beyond the complete absence of convincing evidence that long term cannabis use produces demonstrable organic change in the brain, there is also no evidence that the use of cannabis leads to mental problems. There is no convincing evidence that cannabis use is causally related to the development of mental disorder. Cannabis has not been shown to cause psychoses or schizophrenia, although there is some question as to whether or not cannabis can modify the course of a pre-existing psychosis. In the few studies which claim that cannabis-use appeared to result in psychotic behaviour, it is apparent that the individuals who demonstrated psychotic behaviour were suffering from a pre-existing mental disorder. There is no proof that the cannabis use actually provoked overt schizophrenia. In fact, there is also evidence that cannabis use is not psychologically destructive, but rather restitutive or healing insofar as individuals report consuming cannabis as a mechanism for dealing with conflict, anxiety and depression. For example, the Shedler and Bloch study demonstrated that persons who experiment with smoking cannabis were better adjusted in terms of this adolescent development than were the class of abstainers. Of course, the chronic users were the worst adjusted of all three categories.

- Dr. L. Grinspoon Affidavit, Appellant's Record in Clay, Volume XI, p.2418;
- Dr. J. Morgan, Examination-in-chief, Appellant's Record in Clay, Volume V, p.1163 to p.1164;
- Dr. H. Kalant, Examination in-chief, Appellant's Record in Clay, Volume VI, p.1250 to p.1251 and p.1281;
- H. Lehman, Examination-in-chief, Appellant's Record in Clay, Volume IV, p.822 to p.823.

6) Pulmonary harm?

410 Studies have demonstrated that recreational use of cannabis holds much less risk of harm for humans than the use of alcohol or tobacco. Cannabis and tobacco smoke have very similar chemical compositions, except that one contains cannabinoids and the other has nicotine. One must consider

that a “heavy” cannabis smoker may smoke five cannabis "joints" per day (most smoke less) as compared to a heavy smoker who smokes about 40 cigarettes per day. The cigarette smoker gets a much larger dose of tar from the tobacco than a heavy cannabis smoker. Therefore, it is apparent that the heavy cigarette smoker deposits more irritants onto his/her lungs than does the heavy cannabis smoker. There has been no documented evidence of cancer in people smoking only cannabis. Cigarette smoking has been proven to cause not only cancer, but chronic bronchitis and emphysema, neither of which are documented side effects of cannabis smoking. There is now even reason to doubt whether chronic obstructive pulmonary disease (emphysema) is associated with cannabis smoking, although a leading expert, Dr. Tashkin has recently demonstrated that chronic cannabis smoking will lead to chronic bronchial inflammation.

- E. Single, Examination-in-chief, Appellant’s Record in Clay, Volume IV, p.793 to p.795;
- Dr. J. Morgan, Examination-in-chief and Re-examination, Appellant’s Record in Clay, Volume V, p.1061; p.1107 to p.1115; Volume VI, p.1215 to p.1216;
- Dr. J. Morgan Affidavit, Appellant’s Record in Clay, Volume XII, p.2585;
- Dr. H. Kalant, Examination in-chief, Appellant’s Record in Clay, Volume VI, p.1235 to p.1236.

7) Toxicity?

420 There has never been a death directly attributable to the consumption of marihuana; after five thousand years of cannabis use by hundreds of millions of people throughout the world, there is no credible evidence that this drug has ever caused even a single death. Scientists have yet to discover a “LD50” for cannabis (*i.e.*, the dose at which the substance will prove lethal for 50% of the population). By contrast, there is even a “LD50” measurement for caffeine. In Canada, there are approximately 40,000 deaths per year from tobacco, approximately 10,000 deaths per year from alcohol, and approximately 800 deaths from all other illicit drugs combined. Neither alcohol or tobacco are the subject of absolute criminal prohibitions.

- Dr. J. Morgan, Examination in-chief, Appellant’s Record in Clay, Volume V, p.1091 to p.1093;
- Dr. L. Grinspoon Affidavit, Appellant’s Record in Clay, Volume XI, p.2418;
- B. Beyerstein, Examination-in-chief, Appellant’s Record in Caine, Volume I, p.22 to p.24;
- Dr. H. Kalant, Cross-examination, Appellant’s Record in Caine, Volume V, p.795 to p.799;
- Exhibit 18 at trial in *Caine* - “Brandeis Brief” Materials:
(Tab 14) Abel, E.L. *Marihuana: The First 12,000 Years* (New York, Plenum Press, 1980)

(Tab 21) Weil, A. and Rosen, W., *Chocolate to Morphine: Undertaking Mind-Active Drugs* (Boston: Houghton Mifflin, 1985), Chapter 9;

- Robbe, H.W.J. *Influence of Marihuana on Driving*, Institute of Human Pharmacology, University of Limberg, Maastricht (1994) pp.49-50 [Exhibit 40 in Caine].

8) Impairment of driving ability?

43. Studies have not found gross disturbances in city driving while under the influence of cannabis, but have noted a number of lapses in driving performance which potentially could give rise to accidents. The findings contained within the driving studies have not been very dramatic. Most drug-related accidents today involve alcohol, not cannabis. Cannabis may be contributing to accidents, but we cannot really know until larger scale studies are done with proper design characteristics.

- Dr. H. Kalant, Examination in-chief, Appellant's Record in Clay, Volume VI, p.1237 to p.1239;

- Dr. J. Morgan Affidavit, Appellant's Record in Clay, Volume XII, p.2585.

44. However, the fears and concerns with respect to marihuana use and driving appear to have been overstated or exaggerated and the most recent conclusions emanating from the Robbe study in the Netherlands are somewhat reassuring and are as follows:

- Current users of cannabis prefer THC doses of about 300 μ g/kg to achieve their desired 'high'.
- It is possible to safely study the effects of cannabis on driving on highways or city streets in the presence of other traffic.
- Cannabis smoking impairs fundamental road tracking ability with the degree of impairment increasing as a function of the consumed THC dose.
- Cannabis smoking which delivers THC up to a 300 μ g/kg dose slightly impairs the ability to maintain a constant headway while following another car.
- A low THC dose (100 μ g/kg) does not impair driving ability in urban traffic to the same extent as a blood alcohol concentration (BAC) of 0.04g%.
- Drivers under the influence of cannabis tend to over-estimate the adverse effects of the drug on their driving quality and compensate when they can; e.g. by increasing effort to accomplish the task, increasing headway or slowing down, or a combination of these.

- Drivers under the influence of alcohol tend to under-estimate the adverse effects of the drug on their driving quality and do not invest compensatory effort.
- The maximum road tracking impairment after the highest THC dose (300 _g/kg) was within a range of effects produced by many commonly used medicinal drugs and less than that associated with a blood alcohol concentration (BAC) of 0.08g% in previous studies employing the same test.
- It is not possible to conclude anything about a driver's impairment on the basis of his/her plasma concentrations of THC and THC-COOH determined in a single sample.

There has been no indication in those countries and States where there has been actual or de facto decriminalization of simple possession of an increase in impaired driving or emergency room admissions. As a result of the Robbe study and other studies, Morgan and Zimmer in reviewing the scientific evidence on this issue concluded as follows:

There is no compelling evidence that marijuana contributes substantially to traffic accidents and fatalities. At some doses, marijuana affects perceptions and psychomotor performance – changes which could impair driving ability. However, in driving studies, marijuana produces little or no car-handling impairment – consistently less than that produced by low to moderate doses of alcohol and many legal medications. In contrast to alcohol, which tends to increase risky driving practices, marijuana tends to make subjects more cautious. Surveys of fatally injured drivers show that when THC is detected in the blood, alcohol is almost always detected as well. For some individuals, marijuana may play a role in bad driving. The overall rate of highway accidents appears not to be significantly affected by marijuana's widespread use in society.

- Dr. J. Morgan, Examination-in-chief, Appellant's Record in *Caine*, Volume IV, p. 691 to p.697; Volume V, p.714 to p.717 and p.750 .

9) Other possible harms to non-consuming members of society?

45. The health care costs to society associated with tobacco and alcohol are significantly higher than those associated with cannabis use. In 1995, the Canadian Centre on Substance Abuse released a report documenting the total cost of substance abuse in Canada. The study examined morbidity,

mortality, and economic costs associated with the use of alcohol, tobacco, and illicit drugs. The study concluded that the total cost of substance abuse in Canada, in 1992, was \$18.45 billion dollars.

The cost breakdown between alcohol, tobacco, and illicit drugs was as follows:

Alcohol : \$7.5 billion total

Tobacco : \$9.5 billion total

Illicit drugs : \$1.37 billion total

Of the \$1.37 billion in costs attributable to illicit drug use, it is virtually impossible to determine the proportion of costs which is attributable to the use of cannabis; however, in 1992, there were only 154 hospitalizations in all of Canada as a result of cannabis consumption and this represented only 2.1% of all hospitalizations in Canada in 1992 due to illicit drug use.

- E. Single Affidavit, Appellant's Record in *Clay*, Volume XI, p.2322;

- E. Single, Examination- in-chief, Appellant's Record in *Clay*, Volume IV, p.785 to p.793.

46. When testifying at trial for the Crown in *Caine*, Dr. Kalant agreed with the findings of Single's study that the economic costs to Canadian society from marihuana use would be minimal in comparison with the costs associated with the use of alcohol and tobacco. Dr. Peck, the Deputy Provincial Health Officer for the Province of British Columbia charged with the responsibility under the *Health Act of British Columbia* to investigate health hazards in the Province and who operates with local health boards, health officers and health officials not only within British Columbia but in other Provinces and organizations throughout Canada and internationally was unaware of any significant health problem in the Province of British Columbia from marihuana use. He was at pains to try and find some significant health problems or costs. He concluded that given the widespread use of marihuana, there is not a lot of evidence to show that it is causing a great deal of harm in terms of hospitalisation or death or poisoning in our society and if it is put in perspective in relation to other causes of health problems in our society, there is really no evidence of a burden of illness and cost to society at all.

- Dr. H. Kalant, Cross-examination, Appellant's Record in *Caine*, Volume V, p.776 to p.778, p.822 to p.825 and p.845; Volume VI, p.969 to p.983, p.989 and p.1003; Volume VII, p.1061 to p.1117;

- Dr. S. Peck, Examination-in-chief, Appellant's Record in *Caine*, Volume II, p.159, p.168 to p.170, p.187, p.191, p.196, p.199, p.201, p.202, p.204, p.205 to p.207 and p.230

- Dr. A. Connolly, Examination-in-chief, Appellant's Record in *Caine*, Volume III, p.488 to p.527; Volume IV, p.529 to p.570;

- Dr. H. Kalant, Cross-examination, Appellant's Record in Caine, Volume V, p.776 to p.877; Volume VI, p.878 to p.1058; Volume VII, p.1061 to p.1117;
- Dr. J. Morgan, Examination-in-chief, Appellant's Record in Caine, Volume IV, p.573 to p.709, Volume V, p.710 to p.733
- Dr. S. Peck, Examination-in-chief, Appellant's Record in Caine, Volume II, p.155 to p.230;
- Kassirer, J., "Federal Foolishness and Marijuana" (January 30, 1997), *The New England Journal of Medicine*, p. 366;
- New South Wales Report [Exhibit 51 at trial *Caine*];
- Health Implications of Cannabis Use [Exhibit 45 at trial in *Caine*];
- Exhibit 18 at trial in *Caine* - "Brandeis Brief" Materials:
 - (Tab 1) Boyd, N. "The Question of Marihuana Control: Is De Minimis Appropriate, your Honour?" (1982), 24 *Criminal Law Quarterly* 212
 - (Tab 6) Kouri, E. *et al.*, "Attributes of Heavy Occasional Marijuana Smokers in a College Population" (Massachusetts: Society of Biological Psychiatry, 1995)
 - (Tab 12) "Deglamorising cannabis", *The Lancet* Volume 346, No. 8985
 - (Tab 13) "Submission on Bill C-7 the *Controlled Drugs and Substances Act*", National Criminal Justice Section of the Canadian Bar Association (May 1994)
 - (Tab 21) Weil, A. and Rosen, W., *Chocolate to Morphine: Undertaking Mind-Active Drugs* (Boston: Houghton Mifflin, 1985), Chapter 9.

F) The evidence demonstrates that the consumption of cannabis provides material benefits to some people who are very ill

47. There is an overwhelming number of accounts by patients and their caregivers reporting significant improvement in the symptomology of various debilitating illnesses as a result of the smoking of cannabis. Cannabis also has beneficial effects on patients with certain chronic neurological diseases such as multiple sclerosis, cerebral palsy and spinal cord injury, since it relieves muscle pain and helps relax muscle tone and spasms.

- Dr. J. Morgan, Examination in-chief, Appellant's Record in Clay, Volume V, p.1188;
- Dr. J. Morgan Affidavit, Appellant's Record in Clay, Volume XII, p.2585;
- Dr. L. Grinspoon Affidavit, Appellant's Record in Clay, Volume XI, p.2418.

48. A growing body of evidence has also emerged indicating that cannabis has significant medical value with respect to the treatment of glaucoma as well as an anti-emetic to reduce nausea and vomiting from chemotherapy related to cancer treatment. In addition, a significant number of AIDS patients have reported that they are able to use cannabis, both as a treatment for nausea consequential to their disease and their medication, and also as an appetite stimulant to combat AIDS-related wasting syndrome. Although patients have the option of using synthetic forms of THC (the primary psychoactive ingredient in cannabis), many of them do not experience positive,

therapeutic effects when taking the synthetic counterparts. When cannabis is inhaled it effectively reduces nausea and vomiting almost immediately (within 5 to 10 minutes). Many patients report that within 45 minutes to an hour of inhalation, the desire to eat is stimulated. The oral ingestion of Marinol by comparison, has very erratic bio-availability properties. The oil soluble nature of the medicine makes it difficult for the digestive system to access the THC, which means the patient must wait 1 to 4 hours before the nausea and/or vomiting are affected. In nearly all studies where a comparison was made between synthetic counterparts and cannabis, cannabis proved to be a far more reliable, predictable and effective drug.

- N. Tapiero, Examination in-chief, Appellant's Record in Clay, Volume V, p.994;
- Dr. J. Morgan, Examination in-chief, Appellant's Record in Clay, Volume V, p.1185 to p.1186;
- Dr. J. Morgan Affidavit, Appellant's Record in Clay, Volume XII, p.2585;
- Dr. L. Grinspoon Affidavit, Appellant's Record in Clay, Volume XI, p.2418;
- D. Riley, Examination in-chief, Appellant's Record in Clay, Volume IV, p.617;
- Dr. H. Kalant, Examination in-chief, Appellant's Record in Clay, Volume VI, p.1277;
- R. Randall Affidavit, Appellant's Record in Clay, Volume XII, p.2449;
- *R. v. Parker, supra*;
- *R. v. Wakeford* (1999), 173, D.L.R.(4th) 726 (O.C.G.D.);
- *R. v. Wakeford* (1998), 166 D.L.R.(4th) 131 (O.C.G.D.).

G) The LeDain Commission Report and the recent history of Canadian legislative reactions

49. The only comprehensive study ever conducted in Canada regarding the use and effects of cannabis was the Inquiry into the Non-Medical Use of Drugs ("the LeDain Commission") that was commissioned by the Canadian Government in 1969. The Inquiry was commissioned in response to concern over the growing use of cannabis and other hallucinogenic drugs by young people in Canada. The Commission found that the known, probable and possible side effects of the cannabis did not justify the enforcement policies that were then (and, essentially, still are) in place. Furthermore, the Commission held that the costs of a policy of prohibition of simple possession, in general, were not justified by the speculative harm of cannabis use. After four years of hearings and research, the majority of commissioners concluded that simple possession of cannabis should not be a criminal offence.

- M.A. Bertrand Affidavit, Appellant's Record in Clay, Volume VII, p.1546;
- N. Boyd, Examination-in-chief, Appellant's Record in Caine, Volume I, p.88;
- B. Beyerstein, Examination-in-chief, Appellant's Record in Caine, Volume I, p.18 to p.19;
- Exhibit 18 at trial in *Caine* - "Brandeis Brief" Materials:

(Tab 16) Boyd, N., *High Society: Legal and Illegal Drugs in Canada* (Toronto: Key Porter Books, 1991), pp. 106-107

(Tab 19) LeDain Commission, *Cannabis: A Report of the Commission of Inquiry into the Non-Medical Use of Drugs* (Ottawa: Information Canada, 1972)

(Tab 20) LeDain Commission, *Final Report of the Commission of Inquiry into the Non-Medical Use of Drugs* (Ottawa: Information Canada, 1972).

50. In particular, the LeDain Commission concluded that:

- (a) cannabis is not a narcotic;
- (b) few acute physiological effects have been detected from current use in Canada;
- (c) that few consumers (less than 1%) of cannabis move on to use harder and more dangerous drugs.
- (d) that there is no scientific evidence indicating that cannabis use is responsible for other forms of criminal behaviour.
- (e) at present levels of use, the risks or harms from consumption of cannabis are much less serious than the risks or harms from alcohol.
- (f) that the short term physical effects of cannabis are relatively insignificant and there is no evidence of serious long term physical effects.

- M.A. Bertrand, Examination in-chief, Appellant's Record in Clay, Volume III, p.664 to p.666;

- H. Lehmann, Examination in-chief, Appellant's Record in Clay, Volume IV, p.755 to p.762.

51. The conclusions reached by the LeDain Commission are consistent with virtually all of the other inquiries which have been commissioned around the world. The following government-sponsored reports have recommended decriminalization of cannabis in light of their conclusion that cannabis use does not cause sufficient harm to the individual or to society that could justify resort to the criminal sanction:

- 1893 Indian Hemp Commission (British/Indian)
- 1925 Panama Canal Zone Report
- 1944 La Guardia Report (U.S.)
- 1967 President's Commission on Law Enforcement (U.S.)
- 1968 Advisory Committee, the "Wooten Report" (British)
- 1972 Shafer Report (U.S.)
- 1972 Dutch Baan Commission

- 1979 & 1994 Australian and South Australian Reports
- 1995 Dutch Report

A summary of the above-noted reports, prepared by the Appellant Clay, and adopted by the trial Judge in *Clay* as accurate and reliable, are found in the Appendix to the trial Judge's Reasons for Judgment.

- M.A. Bertrand, Examination in-chief, Appellant's Record in Clay, Volume III, p.668 to p.672;
- Dr. J. Morgan and L. Zimmer, *Marihuana Myths, Marihuana Facts: A Review of the Scientific Evidence*, (New York: Lindesmith Centre, 1997), at p. i and p.150 [Exhibit 39 at trial in *Caine*];
- Reasons for Judgment at trial, Appellant's Record in Clay, Volume XVI, p.3347.

52. Despite the LeDain's Commission recommendations, there has not yet been any meaningful reform of the law in Canada. Yet, it was the LeDain Commission's Report which led each federal political party in the decade following to promise progressive law reform with respect to the personal use of cannabis. Those promises have remained unfulfilled. Two years after the LeDain report, Bill S-19 was introduced which would have made the possession of cannabis a summary offence only, would have moved cannabis from the *Narcotics Control Act* to the *Food and Drug Act*, would have reduced the penalties for all offences except cultivation, and would have provided automatic pardons for all first offenders given a discharge for possession. However, this Bill was never enacted nor has it ever been resurrected, thereby leaving the possession laws in virtually the same state as they were before the LeDain Commission.

- M.A. Bertrand Affidavit, Appellant's Record in Clay, Volume VII, p.1546;
- E. Oscapella, Examination in-chief, Appellant's Record in Clay, Volume III, p.716;
- J. Giffen Affidavit, Appellant's Record in Clay, Volume VII, p.1497;
- N. Boyd, Examination-in-chief, Appellant's Record in Caine, Volume I, p.89, p.95, p.102 to p.105.

53. More recently, in 1996 the Standing Senate Committee on Legal and Constitutional Affairs, (chaired by Senator Sharon Carstairs) in reviewing the merits of the new *Controlled Drugs and Substances Act* reached the conclusion that decriminalization would be the best course of action for the Government to take with respect to cannabis; however, in its official recommendation to Parliament, the Committee stopped short of making this recommendation. Instead the Committee chose to advise the government that the LeDain Commission's findings should be revisited and that the Government should study whether or not decriminalization would lead to increased use and

abuse. A House of Commons Standing Committee on Health was then set up to undertake a review of Canada's drug policies; however, the Committee's mandate did not include the task of reviewing the LeDain Commission's finding nor did it specifically require the exploration of any issues specific to cannabis use.

- M.A. Bertrand Affidavit, Appellant's Record in Clay, Volume VII, p.1546;
- E. Oscapella, Examination in-chief, Appellant's Record in Clay, Volume III, p.735 to p.736;
- S. Carstairs Affidavit, Appellant's Record in Clay, Volume XVI, p.3214
- Exhibit 18 at trial in *Caine* - "Brandeis Brief" Materials:
 - (Tab 13) "Submission on Bill C-7 the Controlled Drugs and Substances Act",
National Criminal Justice Section of the Canadian Bar Association (May 1994).

H) Law reform in the international community

54. Jurisdictions which have decriminalized cannabis use have not seen an exponential growth in rates of consumption. For the most part, consumption rates remained stable after decriminalization. Numerous jurisdictions have already decriminalized the personal use of cannabis, including Holland, Spain, Germany, Italy, South Australia, the Australian Capital Territory and 11 American states.

1) Decriminalization in the Netherlands

55. The main objective of drug policy in the Netherlands is to ultimately reduce the risks that drug abuse poses for the user, his/her immediate environment and society as a whole. While legislation in the Netherlands is considered useful, greater value is attached to organized social control. In the Netherlands, the local drug control act was amended in 1976, and since that time, there has been a policy of non-enforcement of the law as it relates to cannabis use and possession. In fact, cannabis and hashish can be openly purchased in numerous licenced cafes.

- D. Riley, Examination-in-chief, Appellant's Record in Clay, Volume III, p.603;
- M.A. Bertrand, Examination-in-chief, Appellant's Record in Clay, Volume III, p.680.

56. The amended *Dutch Opium Act* and prosecution policy in the Netherlands have created a *de facto* decriminalization of the use of cannabis and other cannabis products. These changes have resulted in reduced penalties for small scale cannabis cultivation and use but increased penalties for wholesale dealers and international traffickers. There is undisturbed sale of cannabis in coffee shops, where the use of alcohol and hard drugs are prohibited. The authorities monitor the coffee shops and youth centres to ensure that there is no sale of large quantities, no sale of other drugs, no advertisements, no encouragement to use and no sale to minors. The aim of this policy is to separate

the markets of hard and soft drugs so that cannabis use does not become intertwined with the use of other harmful drugs.

- D. Riley Affidavit, Appellant's Record in Clay, Volume VIII, p.1775;
- D. Riley, Cross-examination, Appellant's Record in Clay, Volume III, p.646 to p.647;
- M.A. Bertrand, Examination-in-chief, Appellant's Record in Clay, Volume III, p.681.

57. Studies have shown that since 1976 the consumption of cannabis and hashish in the Netherlands has not significantly increased. Furthermore, the consumption of cannabis in the Netherlands is substantially lower than that in the United States. Only 12% of high school students in the Netherlands have used cannabis at least once as compared to of 59%, in the United States in the 1970's. Current use by high school students in the Netherlands is also much lower than use in the United States (5.4% versus 29%, respectively).

- D. Riley Affidavit, Appellant's Record in Clay, Volume VIII, p.1775.

58. In the Netherlands, cannabis products are now generally viewed as substances that do not cause unacceptable risks. Despite partial decriminalization, cannabis is used infrequently. More importantly, users are not socially marginalised, have access to services and are not at the same kind of health risks as they would be if forced underground. The Netherlands strategy of *de facto* decriminalization appears to have been very successful. The Dutch government recently reviewed the policy and has decided to continue along this path.

- Hans Jorg Albrecht Affidavit, Appellant's Record in Clay, Volume VII, p.1577.

2) Decriminalization in the United States of America

59. In 1970 there was a movement throughout North America to reform cannabis laws. The widespread and increasing use of cannabis, despite its criminalization, had led to high enforcement and court costs. Public attitudes were becoming more tolerant of cannabis use and there was a distinct trend towards the decriminalization of possession of small amounts for personal use. In October 1973, the state of Oregon reduced the offence of possessing less than one ounce of cannabis to a civil violation, with a maximum penalty of \$100.00, thus protecting the cannabis user from the deleterious impact of the criminal record.

- D. Riley, Examination in-chief, Appellant's Record in Clay, Volume III, p.622;
- D. Riley Affidavit, Appellant's Record in Clay, Volume VIII, p. 1775.

60. Within 5 years, 10 other states had enacted similar legislation. By 1978, 11 states representing one third of the American population had decriminalized cannabis use. Thirty other

states had provisions for conditional discharges and twelve states made provision for purging of records for first possession offenders. The states varied in the extent of decriminalization and in the reduction of penalties. In some of the states the offences became misdemeanours, in others they became civil violations.

- E. Single, Examination in-chief, Appellant's Record in Clay, Volume IV, p.795 to p.796.

61. In 1989, there were various assessments made of the impact of decriminalization on consumption rates. Eric Single's studies found that rates of consumption may have marginally increased in the "decriminalization" states, but more surprisingly, these increases paled in comparison to increases experienced by the non-decriminalization states. Available evidence supports the conclusion that decriminalization measures have had little or no impact on rates of use but that they have substantially reduced the social costs associated with the enforcement of cannabis laws. The State of California has saved a minimum of one billion dollars since 1976 as a result of making possession of an ounce or less of cannabis a minor misdemeanour instead of a felony. This one billion dollars should be considered a minimum estimate of savings because the study did not include savings in the cost of county jails, prosecutors, public defenders, probation departments, misdemeanour court dispositions, juvenile facilities, or peripheral parts of the criminal justice system.

- D. Riley Affidavit, Appellant's Record in Clay, Volume VIII, p.1775;

- E. Single, Examination in-chief, Appellant's Record in Clay, Volume IV, p.797;

- E. Single Affidavit, Appellant's Record in Clay, Volume XI, p.1322.

3) Decriminalization in Australia

62. The Cannabis Expiation Notice System came into effect in South Australia on April 30, 1987, and in the Australian Capital Territory in 1992. The expiation approach was introduced after local authorities had studied the effects of decriminalization in North America and the Netherlands. Under this system, adults found to be possessing, cultivating or privately using small amounts of cannabis (up to 100 grams) are issued with an expiation notice (citation). Provided the recipient pays the prescribed fee within 60 days of receiving the notice, the offence is not prosecuted in court, and no conviction is recorded.

- D. Riley, Cross-examination, Appellant's Record in Clay, Volume III, p.647;

- D. Riley Affidavit, Appellant's Record in Clay, Volume VIII, p.1775;

- Hans-Jorg Albrecht Affidavit, Appellant's Record in Clay, Volume VII, p.1577.

63. Rates of cannabis use in South Australia have not changed since the introduction of this new system. All surveys indicated that there were no changes in South Australia's rates of cannabis use related to the introduction of on the spot fines and there were no significant differences in rates of use between South Australia and other Australian states which had not changed their legislation

- D. Riley, Examination-in-chief, Appellant's Record in Clay, Volume III, p.622;
- D. Riley Affidavit, Appellant's Record in Clay, Volume VIII, p.1775.

4) Decriminalization in Italy

64. In Italy, there has been a movement towards replacing the criminal sanctions for drug use and possession with an administrative sanction. There was a popular referendum on April 18, 1993 in which 700,000 signatures were in favour of the decriminalization of possession, and reclassification of cannabis. This referendum resulted in the abolishment of all remaining penal sanctions for possession of any narcotic or psychotropic substance. Now it is incumbent upon the presiding magistrate to determine if the drugs possessed were for personal use, or for drug dealing. Essentially the Italian drug laws put the recreational user of drugs beyond the reach of the criminal law by creating drug law exemptions for possession, purchase and import of drugs for personal use, while still keeping the drug user under administrative controls.

- M.A. Bertrand, Examination-in-chief, Appellant's Record in Clay, Volume III, p.682 to 683;
- Hans-Jorg Albrecht Affidavit, Appellant's Record in Clay, Volume VII, p.1577.

5) Decriminalization in Germany

65. In Germany, public prosecutors have been given discretion to dismiss minor cases of drug possession unconditionally or on condition that a fine be paid or that community service be completed. Prosecutors have used this discretionary power to dismiss minor drug cases in which the offender purchased, or was in possession of, drugs for personal use. Each state has developed its own guidelines as to when it would be permissible to dismiss a drug case. Some states have adopted guidelines requiring non-prosecution in cases involving 10-30 grams of cannabis, while other states have not yet issued written guidelines. Most recently, the state of Schesweig-Holstein has implemented a five year pilot project in which small amounts of cannabis will be distributed by local pharmacies.

- Hans-Jorg Albrecht Affidavit, Appellant's Record in Clay, Volume VII, p.1577;
- M.A. Bertrand, Examination-in-chief, Appellant's Record in Clay, Volume III, p.685.

66. In 1994, the German Constitutional Court concluded that the manner in which the cannabis prohibition was enforced could potentially violate the constitutional principles of equality and proportionality. In particular, the court was concerned about the fact that non-prosecution policies in various states were not uniform and this disparity should not be tolerated in the face of the German Constitution. Accordingly, the Court urged the Ministries of Justice of the various states to implement uniform rules with respect to non-prosecution for minor cannabis offences. The Court concluded that the failure of a state to implement a policy of unconditional dismissal or non-prosecution of minor cannabis offences could result in a violation of constitutional rights.

- M.A. Bertrand, Examination in-chief, Appellant's Record in Clay, Volume III, p.685 to p.686;
- Hans-Jorg Albrecht Affidavit, Appellant's Record in Clay, Volume VII, p.1577;
- Prof. Dr. jur. Lorenz Böllinger, *Symbolic Criminal Law without Limits, Commentary on the Cannabis decision of the German Federal Constitutional Court*.

6) Decriminalization in Spain

67. As a result of a 1995 amendment to the Penal Code, possession of cannabis for personal use is no longer a criminal offence. Possession of cannabis is only criminalized upon proof of a subjective intent to traffic.

- Hans-Jorg Albrecht Affidavit, Appellant's Record in Clay, Volume VII, p.1577;
- M.A. Bertrand, Examination-in-chief, Appellant's Record in Clay, Volume III, p.684 to p.685.

7) Decriminalization in Colombia

68. In Colombia on May 5th, 1994, the Constitutional Court of the Republic of Colombia declared that the prohibition against possession for personal use was unconstitutional according to the Colombian Constitution.

- *In re: Alexandre Sochandamandou*, Constitutional Court Sentence number C-221/94 ref: record number D-429, May 5th, 1994, Plenary Session of the Constitutional Court of the Republic of Colombia.

8) Decriminalization in Great Britain and Ireland

69. There are no criminal penalties for cannabis possession in Ireland and police generally ignore small scale dealers if they conduct their business in a way that does not disrupt public order. Since

the hearing of the appeals in the courts below, both the police and the legislature in England have begun to take steps towards decriminalizing the simple possession of cannabis.

9) Decriminalization in Switzerland, Belgium and Denmark

70. All of these countries have either already taken steps towards decriminalizing the simple possession of cannabis or they are in the process of implementing those legislative changes.

- *Cannabis Report of the Swiss Federal Commission for Drug Issues* (Swiss Federal Printing and Supplies Office, 1999), Chapter 4.

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