Court File No. 36059

IN THE SUPREME COURT OF CANADA
(on Appeal from the British Columbia Court of Appeal)

B E T W E E N:

HER MAJESTY THE QUEEN

Appellant

-and-

OWEN EDWARD SMITH

Respondent

-and-

SANTÉ CANNABIS, CRIMINAL LAWYERS' ASSOCIATION (ONTARIO), CANADIAN CIVIL LIBERTIES ASSOCIATION, BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION, and CANADIAN AIDS SOCIETY, CANADIAN HIV/AIDS LEGAL NETWORK AND HIV & AIDS LEGAL CLINIC ONTARIO

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OVERVIEW

1. The British Columbia Civil Liberties Association ("BCCLA") says that the right to liberty under s.7 affords protection to important choices, the restriction of which detracts from the sphere of personal autonomy, individual dignity, or independence from state interference. The criminalization of modes of ingestion of medical marijuana is an infringement of the right to liberty.

2. The BCCLA urges this Court to forbear from using the terms "fundamental", "inherent" or "core" to describe the interests protected within the right to liberty. These terms contribute little to the meaning of the legal standard except to connote a guarded enthusiasm for autonomy. The threshold for infringement of the right to liberty should be broad and inclusive because it activates scrutiny of a law for consistency with the principles of fundamental justice and justification of the law under s.1.

3. Medical autonomy should not be restricted to choices that threaten life or serious bodily harm. Only trivial choices and interests, the adjudication of which would debase the administration of justice, should be excluded from the liberty right. Medical autonomy should be conceived broadly to include not only amelioration of injury or illness, but also non-trivial enhancement, maintenance and preservation of health or well-being. The right to liberty protects unwise and imprudent choices.

4. The BCCLA takes the position that the Appellant's statement of the objective of the *MMAR* cannot be sustained. There is no scientifically rigorous approval or licensing process for medicinal plants the safety and efficacy of which is well known by custom and usage, either under the *Controlled Drugs and Substances Act* or the *Food and Drugs Act*.

PART I: STATEMENT OF FACTS

5. The following findings of fact at trial inform the analysis of the liberty right:

   a. "[T]he efficacy of marihuana and its therapeutic components in the treatment or management of some medical conditions has been

established by custom and usage, but that the precise basis for the efficacy or success is masked to some extent by the belief set or faith with which many medical users have approached their use, and has been made more difficult to achieve or to measure by the historical proscriptions against marihuana use" (para.45);

b. "lack of science surrounding cannabis marijuana can be partly explained by governmental and public attitudes toward the plant and its products" (para.39);

c. Drugs derived from or based on plants are taken through the *Food and Drugs Act* processes under the *Natural Health Products Regulations*, SOR/2003-196. Cannabis products are excluded from this process by the combined operation of the definition of "natural health product," their inclusion in Schedule II of the *Controlled Drugs and Substances Act*, and their consequent exclusion through Schedule 2 of the *Natural Health Products Regulations* (para.58);

d. Because orally ingested THC or CBD stays in the system longer, it would be better for someone with a chronic condition of pain or glaucoma, where some level of therapeutic dosage would remain while the patient slept (para.45);

e. Smoking achieves a far quicker benefit and also declines much more quickly; smoking is a better way to take a therapeutic dose in case of a sharp increase in pain or discomfort (para.45); and

f. Smoking also has harmful side effects associated with inhaling smoke which, although less deleterious than tobacco smoke, pose risks to health nonetheless (para.45).

PART II: POSITION ON CONSTITUTIONAL QUESTIONS

6. BCCLA takes the following position on the constitutional questions:

a. The overbroad criminal prohibition against medical cannabis under Schedule II of the *Controlled Drugs and Substances Act* infringes the right to liberty protected by s.7 of the *Charter*. This shortcoming may also be characterized as under-inclusiveness of the term "dried marijuana" in the *MMAR*; and

b. This infringement is not a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society.

PART III: ARGUMENT

The Liberty Right: Protecting Autonomy, Dignity and Independence

7. Where risk of death or serious bodily harm results from a deprivation of medical autonomy, there is no pragmatic distinction between the right to liberty and the right to security of the person: see *Carter*[1], *Chaouilli*[2] and *Rodriguez*[3]. In this case, however, where the difference between modes administering cannabis is a matter of medical efficacy and may not always result in serious bodily harm, it is desirable for the Court to place the right to liberty in the foreground and maintain a clear analytical distinction between the different rights under s.7 of the *Charter*.

> *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 SCR 307, 2000 SCC 44 (CanLII) at para.48

8. This Court has variously characterized the threshold at which an interest or choice will be protected by the right to liberty under s.7 of the *Charter*, while acknowledging that the right should be given a generous interpretation[4]:

a. In *Morgentaler*, Wilson J. suggested that liberty "grants the individual a degree of autonomy in making decisions of fundamental personal importance"[5];
b. In *Blencoe*, this Court held that "liberty is engaged where state compulsions or prohibitions affect important and fundamental life choices"[6];
c. In *Godbout v. Longueuil* and *B.(R.)*, this Court has held that liberty includes "the right to an irreducible sphere of personal autonomy

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[1] *Carter v. Canada (Attorney General)*, 2015 SCC 5 (CanLII) at para.64;
[2] *Chaoulli v. Quebec (Attorney General)*, [2005] 1 SCR 791, 2005 SCC 35 (CanLII) at paras.122 and 123
[3] *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 SCR 519, 1993 CanLII 75 (SCC) per Sopinka, J. See also *R. v. Parker*, 2000 CanLII 5762 (ON CA) at paras.88-92, in which the Ontario Court of Appeal concludes in a critical passage that the right to make decisions of fundamental importance will be infringed if there is a deprivation of "the choice of medication to alleviate the effects of an illness with life-threatening consequences". It is incorrect to say, as does the Appellant, that the Ontario Court of Appeal meant that the right to liberty will be infringed only if life is also threatened.
[4] *R. v. Big M Drug Mart Ltd.*, 1985 CanLII 69 (SCC), [1985] 1 S.C.R. 295, at p. 344
[5] *R. v. Morgentaler*, [1988] 1 SCR 30, 1988 CanLII 90 (SCC) at p.166
[6] *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 SCR 307, 2000 SCC 44 (CanLII) at para.49

wherein individuals may make inherently private choices free from state interference"[7]; and

d. This Court in *Godbout* also held that s.7 protection is afforded only when the choices "can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence"[8].

9. From these cases it can be derived that the right to liberty under s.7 affords protection to important choices, the restriction of which detracts from the sphere of personal autonomy, individual dignity, or independence from state interference. To inject a measure of objectivity into this analysis, this Court may wish to limit the protection to "reasonable" interest in autonomy, dignity and independence, perhaps with a "reasonable person" standard.[9]

10. The BCCLA urges this Court to forbear from using the terms "fundamental", "inherent" or "core" to describe the interests protected within the right to liberty. These terms contribute little to the meaning of the legal standard except they can be taken to connote only guarded enthusiasm for autonomy. The threshold for infringement of the right to liberty should be broad and inclusive because it activates scrutiny of a law for consistency with the principles of fundamental justice and justification of the law under s.1. Enthusiasm need not be guarded because the threshold for infringement does not dispose of the balance between individual and collective interests.[10] As scrutiny of the legislative fabric is the task of the Courts[11], the gateway to scrutiny of an infringement of rights should not be unduly narrow.

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[7] *Godbout v. Longueuil (City)*, 1997 CanLII 335 (SCC), [1997] 3 S.C.R. 844, at para. 66; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, 1995 CanLII 115 (SCC), [1995] 1 S.C.R. 315, at para. 80

[8] *Godbout*, *supra*, at para. 66

[9] This position, that a reasonable person would find the choice at issue to relate to an important interest, may be usefully contrasted with the extreme position of the Appellant that the right to liberty will only protect a choice if there is objective scientific evidence of the correctness of the choice (ie. That the mode of administration of cannabis is medically efficacious).

[10] This point may be underscored by the observation that what is required in the balance may vary according to context: *R. v. Rodgers*, 2006 SCC 15.

[11] *Canada (Attorney General) v. Downtown Eastside Sex Workers United Against Violence Society*, [2012] 2 SCR 524, 2012 SCC 45 (CanLII) at paras.31-33; *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2014 SCC 59 (CanLII) at paras.39 and 40; *Reference re Succession of Quebec*, [1998] 2 SCR 217, 1998 CanLII 793 (SCC) at paras.26, 64, 72 and 74

11. This appeal also represents an opportunity to delimit the nature of choices which do not require further scrutiny. In this regard, a majority of this Court in *Malmo-Levine* found an infringement of the right to liberty in the threat of incarceration for recreational use of marijuana but declined to find an infringement of the right to liberty on the basis that the choices involved were too trivial to require constitutional protection:

> 86 While we accept Malmo-Levine's statement that smoking marihuana is central to his lifestyle, the Constitution cannot be stretched to afford protection to whatever activity an individual chooses to define as central to his or her lifestyle. One individual chooses to smoke marihuana; another has an obsessive interest in golf; a third is addicted to gambling. The appellant Caine invokes a taste for fatty foods. A society that extended constitutional protection to any and all such lifestyles would be ungovernable. Lifestyle choices of this order are not, we think, "basic choices going to the core of what it means to enjoy individual dignity and independence" (*Godbout*, *supra*, at para. 66).
>
> 87 In our view, with respect, Malmo-Levine's desire to build a lifestyle around the recreational use of marihuana does not attract *Charter* protection. There is no free-standing constitutional right to smoke "pot" for recreational purposes.
>
> *R. v. Malmo-Levine; R. v. Caine*, 2003 SCC 74 (CanLII)

12. *Malmo-Levine* has been problematically read by regulatory authorities as excluding all "lifestyle" choices from section 7's liberty interest; the phrase "lifestyle" has been taken to connote a broader range of choices than the Court intended. It is reasonable to exclude trivial or unimportant choices from the ambit of the right to liberty because they can be understood as too "trivial" to warrant scrutiny for consistency with the principles of fundamental justice[12]. But restrictions should only be understood to be too "trivial" for constitutional adjudication where the smallness of restricted choices would debase the administration of justice. All non-trivial choices should thus be justiciable.

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[12] The principle should not be if s.7 afforded protection to "golfing lifestyle" then society would become ungovernable. Governable levels of golfing would be consistent with the principles of fundamental justice or be justifiable in a free and democratic society. The true principle of the Courts in setting the threshold for infringement of the right to liberty should be to avoid debasing the administration of justice with the adjudication of golfing and other trivia, in accordance with the common law doctrine *de minimis non curat lex*.

Medical Choices are Protected Under the Right to Liberty

13. Non-trivial choices of a medical nature are protected by the right to liberty under s.7. Garson, JA. found that decisions dealing with "serious health concerns" (para.45) should always be protected as infringements of autonomy, dignity and independence. The BCCLA would go further and urge this Court to find that reasonable persons will always consider decisions dealing with non-trivial health concerns to be protected.

14. In *B.(R.)*, the Court said the following in the context of the s.7 right of parents to make medical choices for their children:

> Where to draw the line between interests and regulatory powers falling within the accepted ambit of state authority will often raise difficulty. But much on either side of the line is clear enough. On that basis, I would have thought it plain that the right to nurture a child, to care for its development, and to make decisions for it in fundamental matters such as medical care, are part of the liberty interest of a parent. As observed by Dickson J. in *R. v. Big M Drug Mart Ltd.*, *supra*, the *Charter* was not enacted in a vacuum or absent a historical context. The common law has long recognized that parents are in the best position to take care of their children and make all the decisions necessary to ensure their well-being.
>
> *B.(R.) v. Chidren's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315, 1995 CanLII 115 (SCC)

15. The *Charter* has reinforced the common law doctrine of the individual as paramount in heath care choices:

> ... The common law right to bodily integrity and personal autonomy is so entrenched in the traditions of our law as to be ranked as fundamental and deserving of the highest order of protection. This right forms an essential part of an individual's security of the person and must be included in the liberty interests protected by s. 7.
>
> *Fleming v. Reid*, 1991 CanLII 2728 (ON CA)

16. In *Carter*, this Court put the connection between medical autonomy and s.7 of the *Charter* decisively:

> [67] The law has long protected patient autonomy in medical decision-making. In *A.C. v. Manitoba (Director of Child and Family Services)*, 2009 SCC 30 (CanLII), [2009] 2 S.C.R. 181, a majority of this Court, per Abella

> J. (the dissent not disagreeing on this point), endorsed the "tenacious relevance in our legal system of the principle that competent individuals are — and should be — free to make decisions about their bodily integrity" (para. 39). This right to "decide one's own fate" entitles adults to direct the course of their own medical care (para. 40): it is this principle that underlies the concept of "informed consent" and is protected by s. 7's guarantee of liberty and security of the person (para. 100; see also *R. v. Parker* (2000), 2000 CanLII 5762 (ON CA), 49 O.R. (3d) 481 (C.A.)). As noted in *Fleming v. Reid* (1991), 1991 CanLII 2728 (ON CA), 4 O.R. (3d) 74 (C.A.), the right of medical self-determination is not vitiated by the fact that serious risks or consequences, including death, may flow from the patient's decision. It is this same principle that is at work in the cases dealing with the right to refuse consent to medical treatment, or to demand that treatment be withdrawn or discontinued: see, e.g., *Ciarlariello v. Schacter*, 1993 CanLII 138 (SCC), [1993] 2 S.C.R. 119; *Malette v. Shulman* (1990), 1990 CanLII 6868 (ON CA), 72 O.R. (2d) 417 (C.A.); and *Nancy B. v. Hôtel-Dieu de Québec* (1992), 86 D.L.R. (4th) 385 (Que. Sup. Ct.).
>
> *Carter v. Canada (Attorney General)*, 2015 SCC 5 (CanLII) at para.67

17. The Appellant argues that a challenger must adduce "objective" evidence of the correctness of their medical choice in order to establish an infringement of the right to liberty under s.7. This argument is founded on the Appellant's inaccurate factual claim that there was no scientific or medical evidence to prove the efficacy of edible marijuana products. Beyond the factual inaccuracy, this argument should be rejected for want of juristic merit; no meaningful conception of medical autonomy excludes poor or reckless choices. In *Starson v. Swayze*, albeit in a non-*Charter* context, this Court stated:

> [6] Ordinarily at law, the value of autonomy prevails over the value of effective medical treatment. No matter how ill a person, no matter how likely deterioration or death, it is for that person and that person alone to decide whether to accept a proposed medical treatment.
>
> ... [and the Court adopted the following] ...
>
> The right knowingly to be foolish is not unimportant; the right to voluntarily assume risks is to be respected. The State has no business meddling with either. The dignity of the individual is at stake.
>
> *Starson v. Swayze*, [2003] 1 SCR 722, 2003 SCC 32 (CanLII) at para.6 and 76

18. In assessing whether state conduct infringes the right to liberty under s.7, the Court should not consider whether the choice is justified, rational or prudent, the product of mental illness or immaturity, or involves unmitigated risks. That nature of approach is not used in respect of s.2 freedoms (eg. freedom of religion, conscience, speech or association) and does not belong in s.7. This Court should not only support the right to discuss the good life; it should support the right to live it.

19. In relation to this appeal, the choice of an individual to use what she or he experiences as the most efficacious mode of ingesting a medication is a non-trivial choice, the restriction of which is an infringement of the right to liberty, whether or not a doctor has prescribed edible marijuana for that individual and with or without scientific proof for that choice.

Liberty is Infringed even where there is a Lawful Alternative

20. The Appellant argues that no infringement of the right to liberty should be found if there is a lawful and, in its view, equally efficacious alternative to a forbidden choice. The Appellant says that there is no infringement because patients who wish to use medical marijuana can use “dried marijuana” as defined by the *Marihuana Medical Access Regulations* or some other approved pharmaceutical drug. The BCCLA submits that the existence of lawful alternatives to a forbidden choice should be addressed during the consideration of whether the restriction on liberty is contrary to the principles of fundamental justice.

21. It is circular to allow the government to limit the right to liberty on the basis that an individual does not have the right to choose an illegal activity, *per se*. The tightness of the circle is incompatible with the principles of democratic legitimacy that require our government to demonstrate normative/empirical justification for exercises of state power that limit liberty:

> To be accorded legitimacy, democratic institutions must rest, ultimately, on a legal foundation. That is, they must allow for the participation of, and accountability to, the people, through public institutions created under the

> Constitution. Equally, however, a system of government cannot survive through adherence to the law alone. A political system must also possess legitimacy, and in our political culture, that requires an interaction between the rule of law and the democratic principle.
>
> *Reference re Secession of Quebec*, 1998 CanLII 793 (SCC) at para.67

22. Contrary to the pursuit of democratic legitimacy through normative/empirical justification, the Appellant attempts to make a virtue of arbitrariness by asserting, without adducing supporting evidence, that there is no infringement of liberty given the medical equivalence of (illegal) edible and (legal) smoked marijuana. Apart from being precluded by the findings of fact, this approach is legally inadequate: the *Charter* must insist on an intelligible and transparent justification for restrictions.

Characterizing the Legislative Objective

23. The Appellant attempts to frame the legislative objective of the *MMAR* and *CDSA* as limiting access to drugs by means of a scientifically rigorous drug approval process under the *Food and Drug Act*.[13] This frame is indispensible to the Appellant's argument that it is not arbitrary, overbroad or disproportionate to restrict access to edible cannabis products.

24. With respect, this argument mischaracterizes the restriction of medical cannabis to "dried marijuana". It is not plausible to say the *MMAR* is the product of or manifestation of a scientifically rigorous drug approval process.

25. Even if the "dried marijuana" restriction in the *MMAR* could be read as an aspect of the drug approval process under the *Food and Drug Act*, the Appellant's argument mischaracterizes the regulatory framework for drug approvals. The *Food and Drug Act* framework allows for varying evidentiary standards depending on the nature of the proposed drug and the perceived risks posed by the proposed drug. The *Food and Drug Act* licensing regulations distinguish between rigourous scientific screening of pharmaceuticals and non-

[13] Appellant's Factum, paras.106, 110 and 116

rigorous and non-scientific screening of the safety and efficacy of natural health products under the *Natural Health Products Regulation*[14].

26. Product licensing for natural health products, which include plants and plant material, homeopathic remedies and traditional medicines (herbal medicines and traditional Chinese, ayurvedic and Aboriginal medicines), does not generally involve double-blind clinical studies or rigourous science. The standards for approval of natural health products applied by Health Canada are non-statutory, highly discretionary and vary with the perceived level of risk posed by the product.[15] It is inaccurate to characterize the intention of this regulatory scheme as necessarily involving a high level of scientific rigour.

27. The Court of Appeal was correct that the Appellant's emphasis on scientific rigour and medical evidence is a "red herring". Alternatively, it could simply be said that the legislative requirement of restricting access to edible cannabis products until the conclusion of double-blind clinical studies on pot brownies is overbroad in respect of each of the four witnesses who testifies that they obtained baked goods from the accused, Mr. Smith. The trial judge found that these "contraband" cannabis edibles are known by custom and usage to be safe and efficacious for those persons.

28. The BCCLA notes that medical cannabis regulation is the product of powers delegated to the executive branch.[16] A sensible order on edible cannabis products, dispensaries and cannabis marketing, whether enacted under the *Food and Drug Act* or the *Controlled Drugs and Substances Act* is a matter of executive discretion.

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[14] SOR/2013-196

[15] Standards for approval of Natural Health Products are not specified in the legislation or in the regulations. Flexible evidentiary standards are embodied in guidance documents, including one document entitled "Pathway for Licensing Natural Health Products Making Modern Health Claims v.1.0". Approval for traditional use products is based on historical use patterns and evidence of efficacy may be consistent within non-Western, non-scientific belief paradigms.

[16] Section 60 of the *CDSA* enacts no limits or specification of the substances that may be added to its Schedule II. The executive branch decides what substances are included in Schedule II. See also SOR/1998-157 and SOR/2003-32. The *Marihuana Medical Access Regulations*, SOR/2001-227 and its successor, the *Marihuana for Medical Purposes Regulations*, SOR/2013-119, are also enactments of the executive under authority delegated to the executive by s.55 of the *CDSA*. Similarly, s.30 of the *Food and Drug* Act, R.S.C. 1985, c.F-27, grants broad powers to the Governor in Council to enact regulations dealing with drug licencing, labelling, manufacture and marketing.

PART IV -- COSTS

29. The BCCLA asks that no costs be awarded in respect of its intervention.

PART V – ORDER REQUESTED

30. BCCLA concurs with the Respondent that this appeal should be dismissed. BCCLA seeks leave to present oral argument at the hearing of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10th day of March, 2015.

"Jason Gratl"

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PART VI: TABLE OF AUTHORITIES

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***Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c 11, ss 1, 2, 7**	***Charte canadienne des droits et libertés, Partie 1 de la Loi constitutionnelle de 1982*, Annexe B de la *Loi de 1982 sur le Canada (R-U)*, 1982, c 11, ss 1, 2, 7**
1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.	**1.** La *Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.
2. Everyone has the following fundamental freedoms: (*a*) freedom of conscience and religion; (*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; (*c*) freedom of peaceful assembly; and (*d*) freedom of association.	**2.** Chacun a les libertés fondamentales suivantes : *a*) liberté de conscience et de religion; *b*) liberté de pensée, de croyance, d'opinion et d'expression, y compris la liberté de la presse et des autres moyens de communication; *c*) liberté de réunion pacifique; *d*) liberté d'association.
7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.	**7.** Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

[All Statutory Provisions produced in Appellant's Book of Authorities, except the *Charter* provisions provided above]