Federal Court  Cour fédérale

**Date: 20111115**

**Docket: T-1073-09**

**Citation: 2011 FC 1310**

**Ottawa, Ontario, November 15, 2011**

**PRESENT: The Honourable Mr. Justice Shore**

**BETWEEN:**

**CHRISTOPHER BENNETT**

**Applicant**

**and**

**THE ATTORNEY GENERAL FOR CANADA AND THE MINISTER OF HEALTH FOR CANADA**

**Respondents**

## REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] It is not for a Court to deny or affirm a revelatory experience. The revelatory experience exists, in and of itself. It is neither to be denied nor confirmed by law or reason. It exists in a realm of its own, outside the structure and strictures of the outer world by those who live by its essence.

[2] All that can be done is for a court to decide what the law has said and simply to interpret it.

[3] The Government is separated into three branches. The executive branch formulates policy and executes it. The legislative branch formulates the law on behalf of the electorate; and the judiciary is named, not elected, its task is simply to interpret legislation in accordance with the legislation's formulated intention.

[4] Law is formulated in its intention for the collectivity of individuals, for society as a whole; however, the revelatory experience, which is individualistic, is in its own realm. The law is formulated by the legislative branch for the collectivity, while safeguarding the individual inasmuch as possible, when that is not to the recognized detriment of the collectivity as a whole; and, therefore, the judiciary must not do otherwise, but interpret the collective legislative will, which cannot satisfy every individual.

[5] Therefore, the Supreme Court of Canada has been clear that the courts must still show deference when reviewing discretionary decisions that involve complex weighing of interests even where that weighing involves the assessment of a claimant's rights under the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, enacted as Schedule B to the *Canada Act 1982*, (UK) 1982, c 11 [*Charter*] (*Lake v Canada (Minister of Justice)*, 2008 SCC 23, [2008] 1 SCR 761 at para 34-41).

[6] Since its seminal decision in *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295, the Supreme Court of Canada has consistently articulated an expansive definition of freedom of conscience and religion, which revolves around the notion of personal choice and individual autonomy (*Syndicat Northcrest v Amselem*, 2004 SCC 47, [2004] 2 SCR 351 at para 40). As part of that expansive

definition, the court has held that claimants who seek to invoke paragraph 2(*a*) of the *Charter* need not prove that their beliefs or practices are recognized as valid by other members of their religion (*Amselem* at para 43; *R v Jones*, [1986] 2 SCR 284; *Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 SCR 256 at para 35).

[7] As was explained by Justice Frank Iacobucci in *Amselem*, the reason for this approach is that "judicial determinations of theological or religious disputes, or of contentious matters of religious doctrine, unjustifiably entangle the court in the affairs of religion." Thus, in requiring courts to accept a claimant's assertion that a practice is a part of her religion (subject to a limited inquiry into her sincerity), the court in *Amselem* suggested that it was adopting "a personal or subjective conception of freedom of religion" [Emphasis added] (*Amselem* at para 50 and 42).

[8] The court in *Amselem* also held that courts need not accept that a practice is religious (as opposed to non-religious or secular) just because a claimant says so. To the contrary, Justice Iacobucci suggested that an objective inquiry into it is appropriate "since only beliefs, convictions and practices rooted in religion, as opposed to those that are secular, socially based or conscientiously held, are protected by the guarantee of freedom of religion" [Emphasis added] (*Amselem* at para 39).

## II. Introduction

[9] This judicial review concerns a refusal by the Minister of Health to issue a statutory exemption that would have permitted the Applicant to produce and possess enough marihuana to smoke and/or imbibe seven grams of the drug every day without violating the *Controlled Drugs and*

*Substances Act*, SC 1996, c 19 [*CDSA*]. The Applicant, who is a member of the "Church of the Universe," believes that cannabis is the "tree of life" and states that whenever he smokes marihuana, he does so in a religious way. He argues that, as a result, both the statutory prohibitions on the possession and production of marihuana in sections 4 and 7 of the *CDSA* and the denial of his Ministerial exemption request violate his rights under sections 2, 7 and 15 of the *Charter*.

[10] The Applicant's *Charter* arguments are dismissed, based on the evidence before the Court, both his practice of smoking seven grams of marihuana per day and the underlying belief that cannabis is the tree of life are secular in nature. They form the basis of a cannabis-centred lifestyle that the Applicant wishes to pursue without interference by the state. The lifestyle choices such as these are not protected by the right to freedom of religion under paragraph 2(*a*) of the *Charter*.

[11] Although the threat of imprisonment engages his right to liberty under section 7 of the *Charter*, the Applicant has failed to establish a corresponding inconsistency with the principles of fundamental justice. The Applicant's arguments in this regard have been expressly rejected by the Supreme Court of Canada. The Applicant also relies on non corresponding analogies between his desire to smoke marihuana and the needs of seriously ill persons who require access to marihuana for medical reasons and intravenous drug addicts who desire access to safe injection facilities so as to reduce their risk of overdosing or contracting life threatening communicable diseases.

[12] The Applicant has not established any breach of his right to equality under section 15 of the *Charter* as he has not identified a distinction on an enumerated or analogous ground by which to expose any disadvantage that promotes prejudice or stereotyping.

[13] Any *prima facie* breach of his *Charter* rights that the Applicant might establish is demonstrably justifiable under section 1. The objectives pursued by the impugned prohibitions would be undermined if the Applicant were permitted unfettered access to marihuana. When measured against the minimal infringement of the Applicant's ability to hold and manifest his beliefs, any *Charter* deprivation caused by the *CDSA* is both proportional and reasonably justifiable.

III. Background

[14] The Applicant's life revolves around the use of cannabis (Cross-examination of C. Bennett, AR, Tab G, Q 14). He owns a store in Vancouver that sells paraphernalia for use in consuming cannabis (among other drug related items) (Qs 223-228). He has worked as the manager of "Pot TV", a website that streams video programming on subjects relating to cannabis (Qs 283-302). He has acted as a paid judge in cannabis "competitions" around the world (Qs 298-308). He has researched and co-authored three books about the uses of cannabis in various religions throughout history. He is a political activist promoting the industrial uses of cannabis and the legalization of marihuana (Qs 420-451, 964-969), and he is a member of the Church of the Universe, an organization whose central belief is that cannabis is the "tree of life".

[15] The Applicant began smoking marihuana when he was twelve years old and has been doing so regularly ever since (he is now in his forties). At present, he smokes approximately seven grams of marihuana every day. This is the equivalent of approximately 35 "joints" (reference is made to P.M. Brauti and B.G. Puddington, *Prosecuting and Defending Drug Offences*, Aurora: Canada Law Book, 2003 at p 373), if smoked rather than ingested or consumed in an alternative manner (however, about the same quantity is used by him on a regular daily basis). It also constitutes more

than seven times the amount that the Senate Special Committee on Illegal Drugs considered to be "heavy use" that carries the risk of "negative consequences on the physical, psychological and social well-being of the user" (Cannabis: Our Position for a Canadian Public Policy, Ottawa: Library of Parliament, September 2002, AR, Tab M at p 166).

[16] The Applicant joined the Church of the Universe in 1990 shortly after he had a drug induced epiphany that cannabis was the tree of life (Applicant's Statutory Declaration). He was given the title of "Reverend" in the Church upon joining, though this did not require him to undertake any special training or to discharge any responsibilities (Q 469). The Applicant asserts that, in accordance with his belief, that cannabis is the tree of life, cannabis itself is the object of his spiritual faith and that every time he uses it (no matter what the context), he does so in a spiritual or religious way (Qs 311, 320-322, 324-329).

[17] The Respondent Minister of Health is statutorily responsible for the promotion and preservation of the physical, mental and social well-being of the people of Canada and for the administration of legislation and regulations that relate to the health of the people of Canada (*Department of Health Act*, SC 1996, c 8, s 4).

A. *The Legal Regulation of Cannabis in Canada*

[18] There are two broad classes of cannabis plant varieties: those that contain a high concentration of the psychoactive ingredient delta-9-tetrahydrocannabino [THC] in their leaves and flowering tops ("marihuana"), and those that have a very low content of THC ("hemp"). Marihuana is subject to widespread illicit use (*R v Parker* (2000), 49 OR (3d) 481 (Ont CA) at para 152), and

causes a number of well-documented harms to health and society (reference is made to *R v Malmo-Levine; R v Caine*, 2003 SCC 74, [2003] 3 SCR 571 at para 40-60, 135-136). Hemp, which is not psychoactive, has several industrial applications, including use in textiles, oil based products and in the pulp and paper industry (Regulatory Impact Analysis Statement, *Industrial Hemp Regulations*, SOR/98-156, Canada Gazette, Part II, April 1, 1998 [*RIAS*] at pp 1, 8).

[19] The harmful effects of marihuana, as documented, use include bronchial pulmonary harm, psychomotor impairment leading to a risk of automobile accidents with no simple screening device for detection, possible precipitation of relapse in persons with schizophrenia, possible negative effects on the immune system, possible long-term negative cognitive effects in children whose mothers use marijuana while pregnant, possible long-term negative cognitive effects in long-term users, and some evidence that heavy users may develop a dependency (*Parker*, above, at para 143).

[20] Canada is a signatory to three United Nations conventions controlling the import, export, distribution and use of illicit drugs, including marihuana (Reference is made to *Single Convention on Narcotic Drugs, 1961*, as amended by the *1972 Protocol Amending the Single Convention on Narcotic Drugs, 1961; United Nations Convention on Psychotropic Substances, 1971*; and, *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988*; Affidavit of Jocelyn Kula [Kula Affidavit], AR, Vol 3 at para 5). The aim of the conventions is to combat the abuse and illicit trade in drugs like marihuana and to limit their use to medical and scientific purposes (*Hitzig v Canada* (2003), 231 DLR (4th) 104 (Ont CA) at para 32).

[21] The *CDSA* and its regulations are the primary instruments for implementing Canada's international obligations (Kula Affidavit at para 5). The Act came into force in 1997. It provides for the control of substances that can alter mental processes and that may produce harm to health and to society, especially to vulnerable individuals. Sections 4 and 7 of the Act provide that the possession and production of controlled substances listed in several schedules to the Act is illegal unless authorized by regulation. Cannabis is one of the listed substances.

[22] The *CDSA* and its regulations offer several ways in which individuals may gain lawful access to cannabis. For example, the *Industrial Hemp Regulations* provide for a carefully monitored system of licences, permits and authorization that allows for the cultivation, distribution, import, export and processing of industrial hemp.

[23] Under section 67 of the *Narcotic Control Regulations*, CRC, c 1041, the Minister of Health has the discretion to issue licenses to qualified individuals to cultivate, gather or produce marihuana for scientific purposes on such terms and conditions as the Minister deems necessary.

[24] The *Marihuana Medical Access Regulations*, SOR/2001-227 [*MMAR*] provide the means by which individuals can be authorized to produce or possess marihuana for medical purposes. Pursuant to section 6 of the *MMAR*, applicants must provide a declaration from a medical practitioner that includes the applicant's medical condition and the symptom associated with the condition or its treatment that is the basis for the application. The medical declaration must also indicate that conventional treatments for the symptom have been tried or considered and have been found to be ineffective or medically inappropriate.

[25] Finally, section 56 of the *CDSA* vests the Minister with the discretion to "exempt any person or class of persons or any controlled substance or precursor or any class thereof from the application of all or any of the provisions of this Act or the regulations if, in the opinion of the Minister, the exemption is necessary for a medical or scientific purpose or is otherwise in the public interest" (Kula Affidavit at para 5) By way of illustration, the Minister has granted public interest exemptions to law enforcement agencies so that they can produce marihuana for the purpose of training officers involved in drug investigations (Kula Affidavit at para 9).

[26] On four occasions (including the request that precipitated the decision under review in this case) requesters have sought access to a controlled substance in the "public interest" for religious reasons. As with all requests made under section 56, the Minister considered each of these on a case-by-case basis on its own merits (Kula Affidavit at para 11).

B. *The Applicant's Exemption Request*

[27] On February 12, 2009, the Applicant's counsel sent a letter to the Minister in which he asked the Minister to exercise her discretion under section 56 of the *CDSA* to permit the Applicant to produce and possess enough marihuana to smoke seven grams of the drug per day without violating sections 4 and 7 of the Act. The letter said that the Applicant "uses cannabis for religious and spiritual purposes" and that by preventing him from doing so without the threat of criminal sanction, sections 4 and 7 of the *CDSA* violate his rights under sections 2, 7 and 15 of the *Charter* (AR, Vol 1, Tab C).

[28] The letter to the Minister was accompanied by a four-page statutory declaration sworn by the Applicant. In it, the Applicant said that he uses cannabis "religiously" and has done so since 1990 when he had a drug induced epiphany that cannabis was the "Biblical Tree of Life" as mentioned in the Book of Revelation. The Applicant also indicated that he had joined the Church of the Universe because of its "strong foundation of belief in cannabis being the Tree of Life." (Applicant's Statutory Declaration).

[29] The Applicant concluded his statutory declaration by indicating that his "daily cannabis consumption is seven (7) grams per day", (primarily through "inhalation") and that he was "aware of the potential risks associated with an elevated daily consumption of dried marihuana including risks with respect to the effect on [his] cardiovascular and pulmonary systems and psychomotor performance, risks associated with the long-term use of marihuana, as well as potential drug dependency."

[30] The Applicant's request was assessed by Health Canada's Office of Controlled Substances [OCS]. Ms. Jocelyn Kula, who was then the Manager of the Policy and Regulatory Affairs Division with OCS, co-ordinated the assessment. Ms. Kula assigned, Ms. Cheryl Tremblay, Policy Analyst, to carry out an initial review of the request. Ms. Tremblay was asked to focus on the Applicant's claimed right to religious freedom and the manner, if any, in which it was compromised by the *CDSA*'s prohibition on the possession and production of marihuana (Kula Affidavit at para 21, 23).

[31] During the course of Ms. Tremblay's review, she and Ms. Kula discussed the Applicant's request and concluded that while the Applicant was clearly passionate about the benefits of cannabis

to society, his materials did not identify a religious practice or belief that required him to produce enough cannabis so as to consume seven grams of marihuana per day (Kula Affidavit at para 25). Ms. Tremblay drafted a proposed response to the Applicant's request on that basis and, on May 15, 2009, Ms. Kula presented the draft response to Mr. Ronald Denault, the Acting Director of the OCS.

[32] Mr. Denault then independently reviewed the Applicant's request and concluded that it ought to be refused (Kula Affidavit at para 28-30). On May 29, 2009, Mr. Denault wrote the Applicant's counsel and indicated that the Minister was unable to grant the requested exemption as its issuance would not be in the public interest (Kula Affidavit at para 31).

C. *The "Ayahuasca" Request*

[33] In his written arguments, the Applicant makes reference to a section 56 exemption request made by someone other than the Applicant to consume a drug called "ayahuasca." The Applicant asserts that when ayahuasca is ingested it causes an "extremely potent psychoactive experience," that the request for an exemption to consume it without running afoul of the *CDSA* was treated "much more comprehensively" than his own request and that Health Canada developed an interim policy document to guide the ayahuasca request that was not used in the Applicant's case. These assertions are not supported by the evidentiary record before the Court.

[34] The only evidentiary basis cited by the Applicant in this regard is the cross-examination of Ms. Kula; however, the transcript of that cross-examination reveals that while Ms. Kula was asked many questions about the ayahuasca request, counsel for the respondents repeatedly objected to the

vast majority of those questions on the basis of relevance (Cross-examination of Kula Affidavit, AR, Vol 3, Qs 412, 434-436).

[35] The questions that Ms. Kula did answer on the subject were limited to confirming that (1) there was a previous section 56 request by an individual from the Santo Daime Church, which is a Brazilian "syncretic" religion, to consume a tea containing ayahuasca; (2) a decision in that request was still pending; (3) she did not consider the documents from the ayahuasca request to be relevant to the Applicant's request as each such request is considered on a case by case basis (Qs 224-225), (4) as far as she was aware, the draft "guidance document" that was put to her by the Applicant's counsel did not play any role in the consideration of the ayahuasca request (or that of the Applicant) (Qs 462-463); and (5) there had been "some back and forth" between officials in Health Canada and the Applicant in the ayahuasca request (Q 743).

D. *The Application*

[36] This application, which targets the Minister's refusal of the Applicant's exemption request, was filed on June 30, 2009. The Applicant is seeking to strike down sections 4 and 7 of the *CDSA* insofar as they prohibit the possession and production of cannabis. In the alternative, he is seeking an order in the nature of *mandamus* to require the Minister to issue him a section 56 exemption on the terms set out in the Applicant's exemption request. In support of his application, the Applicant adduced an affidavit on his own behalf as well as the affidavits of two academics (Mr. Carl Ruck, Professor Thomas Bradford Roberts) and a layperson (Mr. Robert Hunter). None of these affidavits was before the Minister's delegate when the impugned decision was made.

IV. Issues

[37] (1) What is the appropriate standard of review in respect of the impugned discretionary decision?

(2) Has the Applicant established a breach of paragraph 2(*a*), sections 7 or 15 of the *Charter*? If it is a breach, is it a reasonable limit pursuant to section 1 of the *Charter*?

(3) If the Applicant were to establish an unjustified breach of his *Charter* rights, what remedies ought to be ordered?

[38] Having had the opportunity to review the extensive evidence, written and oral arguments, and having discussed and discerned the subject matter in-depth in regard to every key piece of evidence as linked to the legislation and jurisprudence, in each and every argument of the respective parties, subsequently, that analysis has led the Court to decide in the following manner:

i. The Court agrees with the position of the Respondents that the decision is to be reviewed on a deferential standard of reasonableness;

ii. The Court also fully agrees with the Respondents' position that the Applicant has not established a breach, and, in any regard, the breach, if one exists, is justified as a reasonable limit pursuant to section 1 of the *Charter*;

iii. Furthermore, the Court is in complete agreement with the position of the Respondents that an order in the nature of *mandamus* is unavailable [and, if there were an invalidity (of which there is none), it would be suspended to avoid a lacuna in the law].

V. Analysis

A. *Standard of Review*

[39] When one applies the standard of review analysis set out by the Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, to the present case, the conclusion to be drawn is that the Minister's decision is reviewable on the deferential standard of reasonableness.

[40] Recognizing the separation of powers as specified in the Overview, determining whether or not to exercise the discretion to issue an exemption in the public interest, pursuant to section 56 of the *CDSA*, requires the Minister to balance a number of complex and competing considerations in respect of which the Minister has the discretion that exceeds that of the courts. The Minister must weigh the benefit, on the one hand of the request against the other hand of the public interests served in limiting access to controlled substances, including protecting the health and safety of the public.

[41] It is for this reason that the courts have reviewed discretionary ministerial decisions made under section 56 with deference (reference is made to *Dupuis v Canada (Attorney General)*, 2004 FC 919 266 FTR 41 at para 24; *Paquette v Canada (Attorney General)*, 2002 FCT 759 at para 3, 24-25).

[42] The fact that the Applicant sought to rely upon his rights under the *Charter* when he made his section 56 request changes neither the nature of the Minister's decision nor the applicable standard of review. Courts must still show deference when reviewing discretionary decisions that

involve complex weighing of interest even where that weighing involves the assessment of a claimant's rights under the *Charter* (*Lake*, above).

B. *Charter Rights not Breach*

[43] The Applicant alleges that his inability to produce and possess enough marihuana to smoke seven grams of the drug per day without breaching sections 4 and 7 of the *CDSA* violates his rights under paragraph 2(*a*), sections 7 and 15 of the *Charter*. As the party asserting such violations, the Applicant bears the burden of affirmatively proving each of them (*Reference re Marine Transportation Security Regulations*, 2009 FCA 234 (CA) at para 28). For the following reasons, he has failed to do so.

(1) No Breach of the Right to Freedom of Religion under paragraph 2(*a*) of the *Charter*

[44] In order to establish that his right to freedom of religion under paragraph 2(*a*) of the *Charter* has been infringed, the Applicant must demonstrate (1) that he sincerely believes in a practice or belief that has a nexus with religion; and (2) that the impugned conduct interferes, in a manner that is non-trivial or not insubstantial, with his ability to act in accordance with that practice or belief (*Multani*, above at para 34).

[45] The Applicant has not discharged his burden under this test since he has not shown that his practice of consuming seven grams of marihuana per day has any nexus with religion. While the Applicant has shown that his practice is based on the belief that cannabis is the tree of life, this, in and of itself, does not make it a religious practice.

[46] The Applicant's evidence discloses no connection between his ongoing marihuana use and any comprehensive system of religion that would meet the definition of religion set out by the Supreme Court of Canada. Rather, the evidence suggests that the Applicant's ongoing marihuana use is part of a longstanding lifestyle that he wishes to continue pursuing without the possibility of interference by the state. No matter how strong his desire to do so may be, such a lifestyle choice is not protected by the right to freedom of religion under paragraph 2(*a*) of the *Charter*.

(a) *The Applicant must show a Nexus between his Marihuana Use and Religion*

[47] While much of the controlling jurisprudence on the constitutional guarantee of freedom of religion has emphasized the need for judicial deference to claimants' decisions as to which religious beliefs and practices they may with to adopt, such deference does not extend to the threshold question as to whether a practice or belief has a nexus with an actual religion.

[48] Ascertaining whether putatively religious beliefs or practices have the requisite nexus with religion ensures that paragraph 2(*a*) of the *Charter* is not trivialized by permitting individuals to exempt themselves from the operation of laws of general application by simply saying that it is their "religion" not to comply. Whenever the issue has arisen, courts have not hesitated to assess whether a new or unfamiliar practice or belief is truly religious and thus potentially protected by paragraph 2(*a*). The same scrutiny must be applied to the Applicant's claim that he must be allowed to smoke seven grams of marihuana every day as he does for religious reasons.

[49] Since its seminal decision in *Big M Drug Mart Ltd*, above, the Supreme Court of Canada has consistently articulated an expansive definition of freedom of conscience and religion, which

revolves around the notion of personal choice and individual autonomy (*Amselem*, above, at para 40). As part of that expansive definition, the Court has held that claimants who seek to invoke paragraph 2(*a*) need not prove that their beliefs or practices are recognized as valid by other members of their religion (*Amselem* at para 43; *Jones*, above; *Multani*, above, at para 35).

[50] As was explained by Justice Iacobucci, the reason for this approach is that "judicial determinations of theological or religious disputes, or of contentious matters of religious doctrine, unjustifiably entangle the court in the affairs of religion." Thus, in requiring courts to accept a claimant's assertion that a practice is a part of her religion (subject to a limited inquiry into her sincerity), the court in *Amselem* suggested that it was adopting "a personal or subjective conception of freedom of religion." (*Amselem* at para 50 and 42).

[51] The court, in *Amselem*, also held that courts need not accept that a practice is religious (as opposed to non-religious or secular) just because a claimant says so. To the contrary, Justice Iacobucci suggested that an objective inquiry into the religious nature of practices that are purported to be religious by a claimant is appropriate "since only beliefs, convictions and practices rooted in religion, as opposed to those that are secular, socially based on conscientiously held, are protected by the guarantee of freedom of religion" (*Amselem* at para 39).

[52] The idea that the courts must inquire into whether an asserted belief is objectively religious is entirely consistent with a personal or subjective conception of freedom of religion since it does not require a court to "entangle [itself] in the affairs of religion". Rather, it simply means that if (as in the present case) a claimant alleges an interference with his right to freedom of religion, the Court

ought to be satisfied that the asserted belief or practice has the requisite nexus with a religion – as opposed to some non-religious philosophy or lifestyle.

[53] In including only religious beliefs and practices within the constitutional guarantee of freedom of religion, the Supreme Court has charted a path similar to that taken by courts in comparable common law jurisdictions such as the United States (*United States v Meyers*, 906 F Supp 1494 at 1502*ff* (Wy DC), affm'd 95 F 3d 1475 (10th Circ 1996)); Australia (*Church of the New Faith v Commissioner of Pay-Roll Tax (vic)* [1983] HCA 40 at para 10); South Africa (G. Van der Schyff, "The Legal Definition of Religion and its Application," (2002) 119 *S African LJ* 288).

[54] Given that the religious character of a particular belief or practice is a requirement for the protection of freedom of religion under paragraph 2(*a*), the difficult question that then arises is: how can courts separate the religious from the non-religious so as to determine which beliefs and practices are protected and which are not? In answering that question, Justice Iacobucci offered the following guidelines in *Amselem*:

> **39** … Defined broadly, religion typically involves a particular and comprehensive system of faith and worship. Religion also tends to involve the belief in a divine, superhuman or controlling power. In essence, religion is about freely and deeply held personal convictions or beliefs connected to an individual's spiritual faith and integrally linked to one's self-definition and spiritual fulfilment, the practices of which allow individuals to foster a connection with the divine or with the subject or object of that spiritual faith. [Emphasis added].

[55] The indicia of religion set out by Justice Iacobucci in *Amselem* are similar to those that have been employed by courts in other common law jurisdictions. Fore example, in *Meyers*, above, the 10th Circuit Court of Appeals held that in determining whether a putatively religious practice or

belief is protected by the First Amendment of the United States Constitution, courts should consider whether it is part of a belief system that:

a. addresses ultimate ideas…about life, purpose, and death;

b. contains metaphysical beliefs which transcend the physical and apparent world;

c. contains a moral and ethical system;

d. is comprehensive, providing a *telos*, an overarching array of beliefs that coalesce to provide the believer with answers to many, if not most, of the problems and concerns that confront humans; and

e. bears the accoutrements of religion in that it will: (a) have a founder or prophet, (b) refer to important writings, (c) define gathering places, (d) have keepers of the religion's knowledge such as clergy; (e) prescribe rituals and ceremonies; (f) possess a structure or organization; (g) have sacred holidays; (h) prescribe diet or fasting; (i) prescribe appearance and or clothing; and (j) promote the propagation of its beliefs.

(The First Amendment of the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances" [Emphasis added]).

[56] The guidelines for the identification of religion, used in *Amselem* and *Meyers*, are consistent with the dictionary definition of the term "religion" in the Oxford English Dictionary, which includes "[a] particular system of faith and worship" and "[b]elief in or acknowledgement of some superhuman power or powers (esp. a god or gods) which is typically manifested in obedience, reverence, and worship; such a belief as part of a system defining a code of living, esp. as a means

of achieving spiritual or material improvement" ("religion, n.". Oxford English Dictionary, Online. November 2010. Oxford University Press. 1 December 2010 <http://www.oed.com/viewdictionaryentry/Entry/161944>).

[57] Despite the fact that the Supreme Court in *Amselem* endorsed the use of guidelines similar to those used by the Court of Appeals in *Meyers* (and the Oxford English Dictionary), it did not go on to explicitly apply them to the practices at issue in that case. This is because there was no question that the religion out of which the practice at issue in *Amselem* emerged, was a "comprehensive system of faith and worship" involving "belief in a divine, superhuman or controlling power," etc. As was noted by Justice William Ian Corneil Binnie in dissent (but not on this point), the Court in *Amselem* was not faced with "a religion of one phenomenon, or a non-traditional claim such as the smoking of peyote as part of a claimed religious experience" [Emphasis in original]. Such claims, Justice Binnie held, "will have to be addressed when they arise" (*Amselem* at para 189).

[58] Just such a "non-traditional claim" did subsequently arise in *R v Welsh*, [2007] OJ No 3666 (SCJ). *Welsh* involved a prosecution in which several of the accused sought to exclude evidence documenting their interactions with an undercover police officer. The officer had played the role of a spiritual advisor known as an *Obeah* or *Obeahman* who, among some cultures in the Caribbean Islands, is believed to have the ability to communicate with the spirit world and to influence events in the physical world. While playing the role of *Obeahman*, the police officer elicited inculpatory statements from the accused and members of their family. The accused sought to exclude the evidence on the basis that it violated their right to freedom of religion under paragraph 2(*a*) of the *Charter*.

[59] After canvassing the applicable jurisprudence, beginning with *Big M Drug Mart*, above, and ending with *Amselem*, above, the Court in *Welsh*, above, concluded that "it is not the task of this Court to determine whether or not Obeah is a religion worthy of mainstream recognition; rather, it is necessary only to determine whether the constellation of beliefs and practices for which Obeah is traditionally known are such that they merit consideration under s. 2(*a*) of the *Charter*…" (*Welsh*, above, at para 10).

[60] In order to satisfy that test, the claimants in *Welsh* called the opinion evidence of four academics, all of whom were qualified as experts in fields related to religious history and experience. The experts opined that *Obeah* met the criteria of a religious belief system and that the specific beliefs and practices that had been manifested by the undercover police officer were a part of that religion. The court in *Welsh* concluded that "the evidence of the four experts…clearly and convincingly establish that Obeah is a religious belief system that meets the Supreme Court definition of such in [*Amselem*] and thus warrants s. 2(*a*) protection" (*Welsh* at para 29).

[61] A similar approach was taken more recently by the Court in *R v Kharaghani and Styrsky*, 2011 ONSC 836. The *Kharaghani* decision arose in the context of a prosecution for possession and trafficking in cannabis, contrary to sections 4 and 5 of the *CDSA*. In their defence, the two accused argued that the prohibitions unjustifiably violated their right to freedom of religion under paragraph 2(*a*) of the *Charter*.

[62] Like the applicant in this case, the claimants in *Kharaghani* were both members of the Church of the Universe who believed that smoking marijuana was a religious act. The arguments

they deployed were in many ways indistinguishable from those made by the applicant in the present case. After hearing five weeks of evidence, including numerous lay and expert witnesses, the Court rejected the claimants' constitutional arguments.

[63] The claimants in *Kharaghani* argued that paragraph 2(*a*) is triggered whenever an individual has a practice or belief that subjectively offers them a connection with the divine (*Kharaghani* at para 136). The Crown argued that any such connection must also have an objective nexus with religion in order to be constitutionally protected (*Kharaghani* at para 138-139).

[64] After reviewing the jurisprudence of the Supreme Court of Canada (including *Big M Drug Mart*, above, *R v Edwards Books and Art Ltd*, [1986] 2 SCR 713 and *Amselem*, above) Justice Thea P. Herman held in *Kharaghani*: "I agree with the Crown that something more is needed than a connection to God or to the divine in order to fall under s. 2(a). The connection must have a relationship with religion, in that it is part of a belief system that provides a person with a sense of purpose and meaning" [Emphasis added] (*Kharaghani* at para 190).

[65] In coming to this conclusion, the Court emphasized that "[w]hile the court in *Amselem* articulated both a broad and a highly-individualized definition, there is a danger in applying the definition too broadly or too loosely. To grant protection under s. 2(a) to anyone who says 'I believe this' or 'I do this because it is my religion' runs the risk of trivializing the constitutional protection of freedom of religion" (*Kharaghani* at para 177).

[66] In applying this test to the claimants, Justice Herman held that – on the evidence before her – the claimants' beliefs in fact fall under paragraph 2(*a*) of the *Charter* (*Kharaghani* at para 193).

[67] The Court in *Kharaghani* next considered whether the claimants' beliefs were sincerely held. Justice Herman held that an "in depth" sincerity analysis was called for under the circumstances for several reasons, including the fact that – unlike other religions whose practices involve the consumption of a drug – the drug in this case was the asserted religion (*Kharaghani* at para 214). In addition, heightened scrutiny was required because (on the evidence before the Court) the Church of the Universe has no rules or guidelines as to the use of cannabis: "no limitations as to when it is used, where it is used, how it is used or how much is used" (*Kharaghani* at para 214). Justice Herman held that this unregulated use makes it difficult, if not impossible, for a court to distinguish between religious and non-religious use and between religious and non-religious users.

[68] After reviewing the extensive evidence before it, the Court openly questioned "whether the Church of the Universe is a genuine religious institution or is, instead, a parody of religion, with a primary focus on the legalization of cannabis" (*Kharaghani* at para 339). However, given that the focus was not on the sincerity of the Church *per se*, but on the individual claimants, the Court went on to conclude that, based on the credibility exhibited by the claimants during their extensive *viva voce* testimony, the claimants' personal consumption of marihuana was sincerely religious (*Kharaghani* at para 340, 345 and 347).

[69] While Justice Herman found – on the evidence before her – that the beliefs and practices of the claimants in *Kharaghani* had the requisite nexus with religion, that same finding cannot be made

with respect to the applicant's practice of producing and possessing enough marihuana to smoke seven grams of the drug each day. As was noted by Justice Herman:

> **42** … freedom of religion under the Charter has been given a highly individualized and subjective interpretation: see *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551; and *Big M Drug Mart*. Context is everything: what one adherent of a religion believes does not necessarily correspond with the religious beliefs of another adherent. Similarly, the manifestation of beliefs is individual …

[70] As will be explained below, based on the evidence before the Court in this case the Applicant has not established that his practice has the requisite nexus with religion, as the term is understood in the controlling paragraph 2(*a*) jurisprudence.

[71] The approach taken by the courts in *Welsh* and *Kharaghani* is consistent with that taken by a number of other courts that have assessed non-traditional paragraph 2(*a*) claims by inquiring into whether the claimed belief was in fact objectively religious (reference is made to *R v Thompson* (1986), 30 CCC (3d) 125 (BCCA); *R v Hunter*, [1997] BCJ No 1315 (SC); *R v Locke*, [2004] AJ No 1206 (Prov Ct); *R v Fehr*, [2004] AJ No 1383 (QB)).

[72] The Applicant in the present case is also making a non-traditional claim to protection under paragraph 2(*a*) of the *Charter*. Unlike cases such as *Amselem* or *Multani*, above, which involved practices that emerged out of well established religions, the Court cannot take judicial notice of the fact the Applicant's marihuana use has a nexus with religion.

(b) *Is it "Religious" as Defined?*

[73] While the Applicant has adduced voluminous evidence on the putatively religious uses of cannabis throughout history in other religions, he has produced almost no evidence about his

supposedly religious use of marihuana (save for repeatedly saying that cannabis helps him to "connect to the divine"). Whether the cannabis-related practices of, for example, Rastafarians or Ethiopian Coptic Christians have any nexus with religion is irrelevant. What matters here is whether the Applicant has demonstrated that his practice of smoking marihuana has the requisite nexus with religion.

(i) The Ruck and Roberts Affidavits

[74] Like the claimants in *Welsh* and *Kharaghani*, the Applicant has sought to adduce expert opinion evidence in order to demonstrate that his marihuana consumption is religious; however, unlike the evidence in those cases, the Applicant's academic affiants have failed to demonstrate that his practice of smoking of marihuana has any nexus with religion.

[75] One of the two academic witnesses tendered by the Applicant is Mr. Carl Ruck. Mr. Ruck's affidavit contains opinion evidence on a variety of very general topics including the "origins of religion and religious practice," "cannabis and religion/spirituality" and the "benefits of entheogenic practice." Under the circumstances, in regard to the analysis undertaken by the Court, it is not applicable. As noted above, it is the Applicant's religious beliefs and practices that are at issue, not those of the adherents of some other religion. Also, the affidavit contains no indication as to Mr. Ruck's qualifications. As a result, any opinions expressed therein are either inadmissible or entitled to no weight (Reference is made to *R v Mohan*, [1994] 2 SCR 9; *Trozzo Holdings Ltd v Niagara Holdings Ltd*, 2002 BCCA 655 at para 11; *Webb v Waterloo Regional Police Services Board* (2002), 161 OAC 86 (Ont CA)).

[76] Unlike the affidavit of Mr. Ruck, Professor Thomas Bradford Roberts' affidavit does set out some of his qualifications such that he might be qualified as an expert in religious studies; however, unlike the experts tendered by the claimants in *Welsh* and *Kharaghani*, Professor Roberts does not opine on the one question for which his evidence might have been useful: whether or not the applicant's marihuana use has any nexus with religion. Rather, like Mr. Ruck, Professor Roberts focuses on the religious uses of marihuana in other religions. These religious practices, and, to that which they are linked, are not at issue in this application; therefore, this evidence is also not applicable.

[77] Professor Roberts does opine that – in his view – the Applicant's smoking of marihuana is sincerely religious; however, he bases this opinion on the fact that the Applicant has spent a significant amount of time researching and writing books on the religious uses of marihuana throughout history. Professor Roberts argues that "[a] casual, let's-get-high smoker would not spend such tedious labors as these books required." (Affidavit of Thomas Bradford Roberts, AR, Vol 2, Tab I at p 37). This conclusion must be rejected as the question is not whether the Applicant is a dedicated student of history or a cannabis enthusiast/activist, but whether his practice of smoking marihuana is part of a "particular and comprehensive system of faith and worship". Professor Roberts' evidence ignores this question.

(ii) *Does the Evidence Disclose a Nexus with Religion?*

[78] Since the Applicant has failed to adduce any expert evidence that might establish that his practice of smoking seven grams of marihuana per day has any nexus with religion, the Court is left with the Applicant's own evidence on point. That evidence does not demonstrate the requisite nexus

as it establishes only that – like other members of the Church of the Universe – the Applicant holds a sincere belief that the cannabis plant is a panacea for various societal ills. It does not establish that either this belief or his daily marihuana consumption has any nexus with a "particular and comprehensive system of faith and worship" as described by the Court in *Amselem* (at para 39).

[79] The Applicant states that his practice of smoking seven grams of marihuana per day is connected to his belief that cannabis is the tree of life mentioned in the Book of Revelation in the following passage: "[o]n either side of the River of Life stood the Tree of Life, which bear twelve manner of fruits, and yielded her fruit every month, and the leaves of the tree were for the healing of the nations" (Applicant's Statutory Declaration at para 16).

[80] While this belief references a book from the Bible, the Applicant made it clear on cross-examination that – as far as he is concerned – this belief has no connection to Christianity, the belief in God or even the Bible itself (Qs 656-663). The Applicant testified that he does not believe in the crucifixion (Qs 272-276), the virgin birth, heaven and hell or the existence of the god "Jehovah", as he, himself, states as described in the Old Testament.

[81] Rather, the Applicant's evidence is that when he says that he believes that cannabis is the tree of life, he is actually expressing the very secular idea that the cannabis plant has many useful applications or "fruits" that can and should be employed for the betterment of humanity (Qs 45-46). The Applicant made this clear in his statutory declaration:

> 17. Cannabis has well known, numerous and historical <u>industrial uses</u> (i.e. fruits). Its' leaves have historically been used for <u>healing</u> (and today Canadian residents are able to obtain legal authority to use cannabis for its healing potential pursuant to the MMAR). The seed of the cannabis plant, and oil

> expressed from that seed, have many nutritional benefits. Cannabis is also harvested every month of the year. Knowing these facts and deeply under the influence of cannabis and the religious experience it provoked in me in the circumstances, I found it impossible to ignore these analogies with the Biblical Tree of Life. [Emphasis added].

[82] On its own, a single secular belief such as this cannot plausibly be characterized as a "particular and comprehensive system of faith and worship." Indeed this belief is similar to the belief expressed by the claimant in *Locke*, above, on the basis that the legal obligation to do so violated his rights under paragraph 2(*a*) of the *Charter*, the court held (at para 25) that the claimant's belief was not "of the same order" as the "comprehensive value systems" that are protected by paragraph 2(*a*) (Reference is also made to *Church of the Chosen People (North American Panarchate) v United States*, 548 F Supp 1247 (D Minn 1982) at p 1253).

[83] On cross-examination, the Applicant eventually volunteered that – in addition to the secular belief that cannabis is the tree of life – he and members of the Church of the Universe share one other seemingly unrelated belief: that "god is god." Even if one also considers this additional tautological belief, which the Applicant conceded "can mean many things to many individuals," there is still no evidence that the Applicant's marihuana use has any connection with a "comprehensive system of faith and worship" as described by the Supreme Court in *Amselem*.

[84] For example, the Applicant failed to establish any connection between his practice and any moral or ethical precepts or obligations. He did not even suggest that there are any restrictions imposed by the Church of the Universe on the use of marihuana by its adherents. He did not indicate that the Church prohibits the consumption of marihuana in the presence of children or while driving a car or operating heavy machinery. To the contrary, on cross-examination the Applicant

repeatedly maintained that all uses of cannabis, no matter what the context, are "sacramental" (and thus presumably permitted). His evidence on this point is consistent with the evidence of the accused in *R v Hunter*, above, who testified that the moral dictates of the Church of the Universe could be summed up by the phrase "[d]o as you will".

[85] There is also no indication that the Applicant's practice of consuming marihuana is connected to or part of a particular or comprehensive system of worship. The Applicant never suggested that he consumes marihuana as part of any prescribed rites, rituals, ceremonies or holidays. Given the fact that his daily habit of consuming seven grams of marihuana involves smoking up to 35 joints (P.M. Brauti and B.G. Puddington, above, at p 373), the evidence suggests that the Applicant effectively smokes marihuana almost constantly, no matter what the context (he even admitted to having smoked marihuana before his cross-examination in this case) (Cross-examination of C. Bennett at Qs 3-9). When asked why he requested an exemption to produce and possess enough marihuana to consume seven grams of marihuana per day (as opposed to some other quantity), the Applicant did not point to any religious reasons. Rather, he simply answered that he thought that such a quantity was "pretty reasonable." (Q 131).

[86] On the whole, the Applicant's marihuana use is strikingly similar to that of the claimant in *Meyers*, above, who was a member of the "Church of Marijuana":

i. The central belief of both asserted religions is the existence of marihuana's societal benefits (*Meyers* cited its "medical, therapeutic and social" benefits);
ii. Both claimants eventually volunteered on cross-examination that they and their co-believers shared a second (and completely unconnected) belief. Whereas, the Applicant

believes that "god is god," *Meyers* suggested that members of his Church believe that one ought to "give a hand up not a hand out";

iii. Both claimants used the title of "Reverend" in their respective Churches, though the position did not require any special education or carry with it any responsibilities (Q 469);

iv. Neither of the claimants disclosed any rites, rituals or ceremonies associated with their belief in the value of consuming marihuana. Rather, like the Applicant, the claimant in *Meyers* considered marihuana itself to be the object of his spiritual devotion (Applicant's Memorandum of Fact and Law; *Meyers* at p 1504);

v. Both claimants had been consuming marihuana recreationally since childhood (*Meyers* had been doing so since the age of 16, whereas, the Applicant began at the age of 12) (Qs 410-411), long before they considered the practice to be religious in nature.

[87] In concluding that the claimant's practice of cultivating and trafficking in marihuana was not within the rubric of the constitutional guarantee of freedom of religion, the Court of Appeals in *Meyers* found that the claimant's belief in the benefits of marihuana use were not part of a comprehensive system of beliefs and practices that involved moral or ethical obligations, ultimate ideas about human existence or any rites or rituals. While the claimant's belief in the benefits of consuming of marihuana was deeply held, such a belief was not religious within the meaning of the constitution as it was effectively "derived entirely from [the claimant's] secular beliefs."

[88] The same reasoning must be applied to the assessment of the Applicant's claim in the present case. There is no doubt that the Applicant sincerely believes that the cannabis plant has many useful applications. Nor is there any question that he also sincerely believes this to be a

religious belief. But the Court cannot rely on that sincerity in order to conclude that the Applicant's marihuana use has any objective nexus with religion.

[89] Like the claim advanced in the *Meyers* decision and similar claims advanced by others (as referenced in jurisprudence) in the past (including several members of the Church of the Universe), the Applicant's attempt to shield his marihuana use from the strictures of the law using paragraph 2(*a*) of the *Charter* cannot stand (Reference is made to *R v Hunter*, above; *R v Kerr*, [1986] NSJ No 321 (NSCA), leave to appeal to SCC ref'd [1987] SCCA No 82; *Baldasaro v Canada*, 2003 FC 1008, 239 FTR 81; *Tucker v Canada*, 2004 FC 1729, 264 FTR 299; *Fehr*, above; *R v Smith*, [2005] BCJ No 176).

[90] The *Charter*'s recognition that religion is of great personal importance to its adherents does not flow into the converse conclusion that all practices and beliefs that are of great personal importance to individuals are religious in nature. It would trivialize paragraph 2(*a*) if the Applicant's association with an organization whose singular purpose is the promotion of cannabis use sufficient to trigger a *prima facie* right to avoid compliance with the strictures of the *CDSA*.

(2) No Breach of the Applicant's Rights under section 7 of the *Charter*

[91] An analysis of a section 7 of the *Charter* claim proceeds in two steps. First, the Court must determine whether the impugned provision results in a threshold infringement of a right identified under section 7 (i.e. life, liberty or security of the person). If so, the Court must determine whether that infringement is consistent with the principles of fundamental justice (Reference is made to *Blencoe v British Columbia (Human Rights Commission)*, [2000] 2 SCR 307). A principle of

fundamental justice must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person (*Canadian Foundation for Children, Youth and the Law v Canada (AG)*, 2004 SCC 4, [2004] 1 SCR 76 at para 8). At both stages, the onus of proof rests squarely on the claimant (*Winnipeg Child and Family Services v KLW*, 2000 SCC 48, [2000] 2 SCR 519 at para 70).

[92] The Applicant's inability to structure his life around marihuana without violating the *CDSA* does not restrict a basic choice "going to the core of what it means to enjoy individual dignity and independence." As such, his liberty interest under section 7 is not engaged on that basis. And, as there is no evidence to support the assertion that the law has had a profound impact on his physical or psychological well-being, the Applicant's security of the person interests under section 7 are not engaged either.

[93] While the threat of imprisonment does engage the Applicant's liberty interests under section 7 it does so in a manner that is entirely consistent with the principles of fundamental justice. The Supreme Court of Canada has definitively concluded that – far from being arbitrary – the prohibitions in the *CDSA* are perfectly reasonable and within Parliament's constitutional competence, especially insofar as they concern access to marihuana for non-medical reasons.

[94] The Applicant argues that the prohibitions are arbitrary insofar as they affect him by inaccurately analogizing his situation to that of either (1) seriously ill individuals who require access to marihuana for medical reasons; or (2) intravenous drug addicts in Vancouver's impoverished

Downtown Eastside [DTES] who seek access to a safe injection facility so as to reduce the risks of overdosing or contracting serious communicable diseases.

(a) *No Interference*

[95] The Applicant argues that by preventing him from producing and possessing marihuana, sections 4 and 7 of the *CDSA* interfere with his liberty to make fundamental choices about his religious practice; that practice is really a secular lifestyle choice that has no nexus with religion.

[96] The Applicant's position is no different than that of the claimants in *R v Malmo-Levine*, 2003 SCC 74, [2003] 3 SCR 571, who argued that the prohibition on the possession of marihuana breached their liberty interests because it interfered with their devotion to a lifestyle centered on the consumption of marihuana. The Supreme Court of Canada rejected that argument on the basis that "the Constitution cannot be stretched to afford protection to whatever activity an individual chooses to define as central to his or her lifestyle…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'" [Emphasis added] (*Malmo-Levine* at para 86; reference is also made to *R v Clay*, 2003 SCC 75, [2003] 3 SCR 735 at para 30-33).

(b) *The Applicant's Security of the Person is not at Issue*

[97] The Applicant's argument that a restriction on his ability to produce and possess marihuana violates his right to security of the person is also unfounded. In cases such as *Parker*, above, *R v Morgentaler*, [1988] 1 SCR 30 at pp 59, 105-106, *Rodriguez v British Columbia (AG)*, [1993] 3 SCR 519, and *Canada (AG) v PHS Community Services Society*, 2011 SCC 44, the courts found

that the security of the person interests of the claimants were engaged because the law had a demonstrably profound impact on their psychological or bodily integrity. This case is completely different. The Applicant has provided no evidence showing that the law has had any impact on his health or psychological well-being. To the contrary, he freely admits that his marihuana consumption itself exposes him to adverse health risks.

(c) *Section 7 of the Charter is Engaged by the Risk of Imprisonment*

[98] It is well established that the risk of being sent to jail will engage an individual's liberty interest under section 7 of the *Charter*. As with any offence for which imprisonment is a possibility, the potential deprivation of liberty that arises by virtue of sections 4 and 7 of the *CDSA* must accord with the principles of fundamental justice.

(d) *The Legislation is Consistent with the Principles of Fundamental Justice*

[99] The case law definitively establishes that the impugned prohibitions are rationally connected to the goal of reducing the harms to individual health and society that flow from the illicit use of marihuana. The constitutionality of the provisions is buttressed by the fact that the Minister may grant an exemption from the prohibitions under section 56 in any individual case where enforcement would be contrary to the principles of fundamental justice.

[100] The Applicant's arbitrariness argument was definitively put to rest by the Supreme Court of Canada in *Malmo-Levine*, above, when it held that, while the threat of imprisonment does engage the liberty interests of those who wish to smoke marihuana for non-medical reasons, the prohibition on its possession is consistent with the principles of fundamental justice. After detailing the many harms associated with the use of marihuana, the court held that "[t]he prohibition is not arbitrary but

is rationally connected to a reasonable apprehension of harm. In particular, criminalization seeks to take marihuana out of the hands of users and potential users, so as to prevent the associated harm and to eliminate the market for traffickers" (*Malmo-Levine* at para 136). This finding was recently reaffirmed by the Supreme Court of Canada in *PHS* and by Justice Herman in *Kharaghani* (*PHS*, above, at para 130; *Kharaghani*, above, at para 417).

[101] The *Malmo-Levine* decision remains binding on this Court; and, contrary to the submissions of the Applicant, the Respondents are under no obligation to reproduce the evidence that was adduced by the Crown in that case so as to establish that the facts that underpinned the decision remain true today. Rather, if the Applicant wishes to assert that the factual foundation upon which *Malmo-Levine* was based has changed to such a degree that its holding has been undermined, he would have to adduce evidence to that effect (*R v Normore*, [2005] AJ No 543 (QB)). The Applicant has not done so.

[102] The Applicant attempts to overcome this problem first by inaccurately analogizing his situation to that of individuals who seek access to marihuana as treatment for objectively verifiable medical reasons. While the courts in cases such as *Parker*, above, *Hitzig*, above, and *R v Mernagh*, 2011 ONSC 2121, concluded that the prohibition on the possession of marihuana violated section 7 of the *Charter*, this was only because the claimants' in those cases used the drug for medical purposes; whereas, in the Applicant's case, he admitted that marihuana consumption exposes him to adverse health risks.

[103] The court in *Parker*, above, for example, based its conclusion on the holding of the court in *Rodriguez*, above, that "[w]here the deprivation of the right in question does little or nothing to enhance the state's interest (whatever it may be)…a breach of fundamental justice will be made out, as the individual's rights will have been deprived for no valid purpose." In finding that Mr. Parker's section 7 rights were breached, the court accepted that there were a number of valid objectives that were furthered by the prohibition on the possession of marihuana in general but concluded that the principles of fundamental justice were violated since those objectives were not furthered insofar as the legislation applied to those who needed access to the drug for medical purposes. The court's reasoning in this regard is obviously distinguishable from the present case.

[104] For example, the court in *Parker* held that the state's interest in protecting individuals from the harms to health associated with smoking marihuana could not justify prohibiting a gravely ill person from gaining access to the drug when it could provide treatment for her medical condition. By contrast, there is nothing irrational about preventing a person who wants to smoke marihuana for non-medical reasons from doing so in order to advance the state's interest in protecting public health (*Malmo-Levine*, above, at para 135-146). This is especially true in respect of the Applicant, who is a long term and heavy user of the drug.

[105] It should also be noted that the provision prohibiting the possession of marihuana that was upheld by the Supreme Court in *Malmo-Levine* was in the *Narcotic Control Act*, which did not afford the Minister any discretion to exempt individuals from the relevant prohibitions. This means that, *a fortiori*, the prohibitions in the *CDSA*, which are subject to discretionary Ministerial exemption (i.e. s 56), are constitutional.

[106] Indeed, the availability of a discretionary Ministerial exemption under section 56 played a central role in the Supreme Court's recent decision to uphold the constitutionality of sections 4 and 5 of the *CDSA* in *PHS*. *PHS* concerned a facility known as "Insite," which provided medical services to intravenous drug users in the DTES. The facility, which had been operating under a Ministerial exemption since 2003, was designed to allow clients to inject drugs under medical supervision in order to curtail the rampant spread of infectious diseases such as HIV/AIDS and the high rate of deaths from drug overdoses in the DTES (*PHS*, above, at para 1).

[107] The claimants in *PHS* included a number of Insite's clients. They became concerned that the facility's section 56 exemption might not be renewed before its expiry in 2008. After a summary trial, the trial judge held that because of their effect on the claimants' ability to access medical services at Insite, the *CDSA*'s prohibitions on the possession and trafficking of controlled substances unjustifiably breached section 7 of the *Charter*.

[108] In a unanimous decision written by The Right Honourable Beverley McLachlin, Chief Justice of the Supreme Court of Canada, in *PHS* overruled the trial judge and upheld the constitutionality of the impugned prohibitions. In so doing, the Court first found that the prohibitions on possession and trafficking of controlled substances engaged the claimants' interests in life, liberty and security of the person under section 7 of the *Charter*.

[109] Nevertheless, the Court in *PHS* found that the provisions were consistent with the principles of fundamental justice and thus section 7 of the *Charter*. Not only did they advance the state's

legitimate objectives of protecting health and public safety, they were also subject to exemption by the Minister under section 56 and the provision for regulations guiding exemptions under section 55 of the Act. Sections 55 and 56, the Court held, represent "a safety valve that prevents the *CDSA* from applying where such application would be arbitrary, overbroad or grossly disproportionate in its effects" (*PHS* at para 113).

[110] Unlike the users of Insite, neither the Applicant's right to life nor his security of the person is at issue. As noted above, the only section 7 *Charter* interest that he can properly claim is his right to liberty. If the heightened section 7 *Charter* interests of the users of Insite could not disturb the constitutionality of the impugned provisions in *PHS*, then, *a fortiori*, the Applicant's argument to that effect must be dismissed.

(e) *The Decision is Consistent with the Principles of Fundamental Justice*

[111] The Applicant argues that even if section 56 is constitutional, the decision to refuse his particular request violates section 7. He makes two arguments in this regard, each of which should be rejected. First, he asserts that the Minister's decision violated the principles of fundamental justice because it was made as a matter of "policy *simpliciter*." Second, relying on the decision of the Supreme Court in *PHS*, the Applicant asserts that the decision is arbitrary and grossly disproportionate.

(i) <u>The Applicant's "Policy *Simpliciter*" Argument Cannot Stand</u>

[112] The argument that the Minister's decision was a matter of "policy *simpliciter*" is incorrect as a matter of fact and irrelevant as a matter of law. As a matter of fact the Applicant's request was

carefully considered over a three month period by several officials within Health Canada's Office of Controlled Drugs and Substances. Officials in that office concluded that the Applicant's materials did not demonstrate that his practice of consuming seven grams of marihuana every day had any nexus with religion. The Applicant may disagree with this finding, but he cannot properly allege that it was made as a matter of "policy *simpliciter*" (Kula Affidavit at para 25).

[113] From a legal perspective, the question is not whether the decision was made as a matter of policy or whether it was concluded after sufficient thought and investigation. Rather, the question is whether the decision violated a principle of fundamental justice. The Applicant's argument in this regard fails to identify what principle has been violated by the delegate's supposedly inadequate assessment. This is improper as principles of fundamental justice must be precisely identified.

(ii) The Ministerial Decision in *PHS* is distinguishable

[114] The Applicant's reliance on *PHS* for the proposition that the Minister's decision in this case was unconstitutionally arbitrary and disproportionate must also be dismissed. The Court in *PHS* did find that while the *CDSA*'s prohibitions were constitutional, the Minister's failure to issue an exemption in respect of Insite violated the principles of fundamental justice. This was because – on the particular evidence adduced at trial – doing so had an arbitrary and grossly disproportionate effect on the claimants (*PHS* at para 127-136); however, the factual and legal context that led to this finding is distinguishable from the present case.

[115] The Right Honourable Beverley McLachlin held in *PHS* that failing to issue an exemption was arbitrary and grossly disproportionate because it undermined the *CDSA*'s objectives of protecting health and public safety. This conclusion was rooted firmly in a number of factual

findings made by the trial judge that were specific to the situation involving Insite and intravenous drug abuse in the DTES. These included: (1) traditional criminal law prohibitions have done little to reduce drug use in the uniquely "bleak" conditions of the DTES; (2) the risk to injection drug users of death and disease is reduced when they inject under the supervision of a health professional; and (3) the presence of Insite did not contribute to increased crime rates, increased incidents of public injection or relapse rates in injection drug users (*PHS* at para 131).

[116] As the Applicant in the present case is pursuing an exemption to produce and possess marihuana for non-medical reasons, the reasoning of the Court in *PHS* is inapplicable. Like his attempt at analogizing his desire to smoke marihuana to that of seriously ill persons seeking access to the drug for medical reasons the Applicant's analogy to the users of Insite is inapt. As is set out above, there is nothing arbitrary or grossly disproportionate about trying to protect health and public safety by declining to assist a long term and heavy marihuana user in gaining unfettered legal access to the drug for non-medical reasons.

[117] In other words, the Minister's decision not to issue the Applicant an exemption under section 56 of the Act, which was made after careful consideration and deliberation, was wholly harmonious with the *CDSA*'s statutory goals of protecting health and public safety. As such it is both distinguishable from the decision in *PHS* and fully compliant with section 7 of the *Charter*.

[118] Finally, the Applicant's threat of turning to the "black market" if he does not get an exemption does not make the Minister's decision arbitrary. As was held by the Supreme Court in *Malmo-Levine*, above, a refusal to comply with the law cannot "be elevated to a constitutional

argument…based on the invocation of fundamental principles of justice" (*Malmo-Levine* at para 178).

(3) No breach of the Applicant's Equality Rights under section 15 of the *Charter*

[119] In *R v Kapp*, 2008 SCC 41, [2008] 2 SCR 483, the Supreme Court of Canada articulated a two-part framework for analysis under subsection 15(1) of the *Charter*. Pursuant to this analysis, in order for a claimant to establish a breach of her equality rights she must show: (1) that an impugned law creates a distinction based on an enumerated or analogous ground; and, if so; (2) that this distinction creates disadvantage by perpetuating prejudice or stereotyping. The Applicant has failed to discharge his burden under this framework.

(a) *No Distinction Made on the Basis of Religion*

[120] The Applicant claims that – in denying him access to marihuana – sections 4 and 7 of the *CDSA* make a distinction on the basis of religion. He has stated this since some religious practitioners who use sacraments to connect to the divine (such as Catholics who consume wine as part of the Eucharist) are not caught by the ambit of these provisions; however, as is argued above, the Applicant's desire to consume marihuana stems not from any religion within the meaning of the *Charter*, but from a secular belief in marihuana's general utility. As a result, in order to avail himself of the protection of section 15 of the *Charter*, the Applicant would have had to show that being a person who holds such a belief is somehow analogous to the other grounds set out in that provision.

[121] The Supreme Court of Canada has made it clear that such an analogy is inaccurate. In *Malmo-Levine*, above, the claimant argued that marihuana users have a "substance orientation" that is a personal characteristic analogous to other section 15 grounds such as religion. The court emphatically rejected this argument, holding that its adoption would create "a parody of a noble purpose" underlying section 15 (*Malmo-Levine* at para 185).

(b) *Sections 4 and 7 of the CDSA do not Perpetuate Prejudice or Stereotyping*

[122] The second stage of the *Kapp* analysis is aimed at determining whether a legal distinction that is drawn on an enumerated or analogous ground amounts to discrimination in the substantive sense by perpetuating disadvantage through prejudice or stereotyping (*Kapp* at para 23). Even if the Applicant were able to establish that the impugned provisions drew such a distinction in his case, the prohibitions do not perpetuate prejudice or stereotyping.

[123] There is no evidence before the Court that members of the Church of the Universe, believers in cannabis as the "tree of life" or marihuana users in general are now or have ever been subject to disadvantage, stereotyping or prejudice. The Applicant asserts that the spiritual and religious use of cannabis and other psychoactive sacraments has been marginalized and stigmatized for much of history. Even if there were some evidence of this before the Court, that would not mean that the believers in such sacraments have been marginalized or stigmatized. There is simply no basis to argue that denying the Applicant unfettered access to marihuana serves to either create or perpetuate disadvantage through stereotyping or prejudice.

(4) A Reasonable Limit under section 1 of the *Charter*

[124] As was confirmed by the recent decision of the Ontario Superior Court of Justice in *Kharaghani*, above, if either of the impugned provisions in the *CDSA* or the Minister's decision is found to violate a *Charter* right any such violation is saved as a reasonable limit under section 1 in accordance with the well-known justification analysis in *R v Oakes*, [1986] 1 SCR 103.

[125] Before embarking on the *Oakes* analysis, it must be noted that the regulation of controlled substances such as marihuana represents a complex challenge involving numerous overlapping legislative and policy concerns. The Supreme Court has emphasized that the courts must afford a measure of leeway to governments in determining whether limits on rights caused by programs that deal with such complex social problems are justified under section 1 (Reference is made to *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 SCR 567 at para 35).

[126] As was explained by The Right Honourable Beverley McLachlin in *Hutterian Brethren*, deference to government decision-making in areas of complex policy is particularly important in cases involving freedom of religion:

> [36] Freedom of religion presents a particular challenge in this respect because of the broad scope of the *Charter* guarantee. Much of the regulation of a modern state could be claimed by various individuals to have a more than trivial impact on a sincerely held religious belief. Giving effect to each of their religious claims could seriously undermine the universality of many regulatory programs, including the attempt to reduce abuse of driver's licences at issue here, to the overall detriment of the community. [Emphasis added].

(a) *The Objectives Underlying sections 4 and 7 of the CDSA are Pressing and Substantial*

[127] Three pressing and substantial objectives have been endorsed by the courts in respect of the prohibition against the possession and production of marihuana: (1) protecting against the harmful effects of marihuana consumption, especially those experienced by members of vulnerable groups;

(2) satisfying Canada's international obligations; and (3) controlling the domestic and international trade in illicit drugs (i.e. protecting public safety).

(b) *Sections 4 and 7 of the CDSA are Rationally Connected to their Objectives*

[128] The various courts that have examined the issue in recent years have all concluded that a criminal prohibition on the possession of marihuana is a rational way to pursue the foregoing objectives (*Malmo-Levine*, above, at para 135-136; *Clay*, above, at para 40). The Applicant asserts that the actual effect of the prohibition on cannabis is to cause harm not to prevent it and that, as a result, it "is not rationally connected to that objective." This argument was rejected by the Supreme Court in *Malmo-Levine* at paragraphs 141 to 183 and even more recently, after hearing additional expert evidence on point, by Justice Herman in *Kharaghani*, above, at para 378-417).

(c) *Impairment of the Applicant's Rights is Minimal*

[129] The question at the minimal impairment stage of the section 1 analysis is whether the limit on the right is reasonably tailored to the pressing and substantial goal put forward to justify the limit (*Hutterian Brethren*, above, at para 53). The provisions at issue in this case are reasonably tailored to Parliament's goals as (i) they are subject to Ministerial exemption in the public interest; (ii) they restrict neither the Applicant's freedom to believe that cannabis is the tree of life, nor to teach and disseminate that belief; and (iii) the Applicant's suggested comparison to the MMAR is inappropriate.

(i) The CDSA Prohibitions are Not "Absolute"

[130] The Applicant stated that the impugned provisions are not minimally impairing because they constitute an "absolute prohibition." This is not the situation as the prohibitions are subject to exemption by the Minister pursuant to section 56. Whereas, an absolute ban that violates a section 2 *Charter* right may not necessarily be the least restrictive method that could have been chosen, a prohibition that is subject to an exception that can be granted on a discretionary basis is more likely to be considered proportional (reference is made to *Montréal (City) v 2952-1366 Québec Inc*, 2005 SCC 62, [2005] 3 SCR 141 at para 90).

[131] The Supreme Court's recent decision upholding the constitutionality of sections 4 and 5 of the *CDSA* in *PHS* was based on an analysis of the principles of fundamental justice under section 7 of the *Charter*. Nevertheless, its reliance on the "safety valve" of Ministerial exemptions pursuant to sections 55 and 56 of the *CDSA* should apply equally under a section 1 justifiability analysis.

(ii) Freedom to Believe is not Impaired

[132] The impugned prohibitions do not restrict the Applicant's ability to believe that cannabis is the tree of life. Nor do they restrict his ability to teach and disseminate that belief. They only restrict his ability to produce and possess cannabis in its demonstrably harmful form. This is important given the repeated reminder of the Supreme Court that "although the freedom of belief may be broad, the freedom to act on those beliefs is considerably narrower" (reference is made to *Trinity Western University v British Columbia College of Teachers*, 2001 SCC 31, [2001] 1 SCR 772 at para 30; *RB v Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315 at para 226).

[133] The applicable jurisprudence has also been consistent in emphasizing that it is entirely appropriate that the freedom to act on one's religious beliefs be subject to laws of general application that are geared toward the protection and promotion of public health and safety (reference is made to *Big M Drug Mart*, above, at para 95; *R v Church of Scientology of Toronto*, [1987] OJ No 64 (Ont CA)). Indeed in the quarter century since *Big M Drug Mart* was decided not a single Canadian court has ever struck down a criminal prohibition on the basis that it unconstitutionally violated a claimant's right to freedom of religion.

(iii) Comparison to the Medical Marihuana Access Regulations is Inapt

[134] In upholding the constitutionality of sections 4 and 5 of the *CDSA* in *Kharaghani*, above, Justice Herman considered (at the "minimal impairment" stage of the *Oakes* analysis) whether provision could be made for the claimants' religious use of cannabis. The Court held that no religious exemption could be made firstly because the claimants "place no limits on where, when, how or how much cannabis is used;" [Emphasis added] and, as such, it would be impossible for law enforcement to distinguish religious and recreational use of marihuana (reference is made to *Church of Scientology of Toronto*, above, at para 455-456).

[135] The claimants in *Kharaghani* (like the Applicant in the present case) suggested that this problem could be overcome through the use of a government licensing system similar to that which is employed in the medical marihuana context. The Court found this asserted solution to be "both impractical and troubling." The implementation of a government licensing scheme was troubling to Justice Herman as it "raises the spectre of a religious inquisition by the state. History is replete with horrific examples of such inquisitions. Instead of promoting the value of freedom of religion, such a

system could well undermine that value" [Emphasis added] (*Kharaghani*, above, at para 457 and 459).

[136] Justice Herman also held that the comparison to the medical marihuana licensing system was inapt as (i) "a doctor certifying that an individual requires cannabis for medical reasons is very different from a system that depends on a tribunal or government official certifying the sincerity of an individual's religious beliefs"; and (ii) unlike the claimants' religious use of marihuana, the "prohibition of the medical use of cannabis had the effect of impairing the health of those who required it for medical purposes." (*Kharaghani* at para 463-464. In coming to this conclusion, the Court rejected (at para 431-455) the claimants' reliance on the dissenting reasons in *Employment Division, Department of Human Resources of Oregon v Smith*, 494 US 872 (1990) and *Prince v President of the Law Society of the Cape of Good Hope & others* (2002), 2002 (3) B Const LR 231 (S Afr Const Ct)).

(iv) Deleterious Effects of any Breach outweigh the Salutary Effects

[137] The final stage of the *Oakes* analysis allows for a broader assessment of whether the benefits of the impugned law are worth the cost of the rights limitation (*Hutterian Brethren*, above, at para 77). When the minimal deleterious effects associated with the Applicant's inability to consume marihuana without facing potential criminal consequences are weighed against the salutary effects of either the impugned provisions (or the Minister's denial of the Applicant's exemption request), it is clear that any *Charter* breach is demonstrably justified under section 1.

(a) *Deleterious Effects are Minimal*

[138] In order to assess the seriousness of the effect that the prohibitions in sections 4 and 7 of the *CDSA* have had on the Applicant it is necessary to examine the role that smoking marihuana plays within his asserted religion; however, the Applicant states that since cannabis is itself the object of his devotion, every use to which he might possibly put the plant is "religious" "spiritual" or "sacramental" (Cross-examination of C. Bennett at Qs 311, 320-329, 894-900). As noted above, he has not indicated that the practice of smoking marihuana is part of any rite, ritual or ceremony or even whether its consumption is mandatory or optional. He simply asserts that for him, this practice is always a religious one.

[139] Such a bare assertion is insufficient to establish that the restriction on the Applicant's ability to manifest his beliefs is anything more than minimal. As was held by the court in *Hutterian Brethren*, above:

> [90] … The bare assertion by a claimant that a particular limit curtails his or her religious practice does not, without more, establish the seriousness of the limit for purposes of the proportionality analysis. Indeed to end the inquiry with such an assertion would cast an impossibly high burden of justification on the state. We must go further and evaluate the degree to which the limit actually impacts on the adherent.

[140] The Applicant has failed to establish that the restriction on his ability to smoke marihuana poses anything more than a minor or trivial burden on his ability to manifest his beliefs. In his own words, the Applicant remains free to espouse the "fundamental belief" that cannabis is the tree of life, and to promote "the use of cannabis as the tree of life, whether that would be through selling hemp clothes, hemp food and providing hemp medicines" (at Q 931).

(b) *Salutary Effects of Sections 4 and 7 of the CDSA are Substantial*

[141] The objectives underlying sections 4 and 7 of the *CDSA* would be substantially undermined if the relief being sought by the Applicant were granted. With regard to the objective of protecting against the harmful effects of marihuana consumption, the Applicant himself concedes that his routine consumption exposes him to a wide variety of health risks "including risks with respect to the effect on [his] cardiovascular and pulmonary systems and psychomotor performance, risks associated with the long-term use of marihuana, as well as potential drug dependency" (Applicant's Statutory Declaration at para 22(o)). And, unlike those individuals who qualify for medical marihuana licences under the MMAR, the Applicant's heavy marihuana use cannot be justified by any countervailing medical benefit.

[142] While the provision of medical and scientific access to marihuana is consistent with Canada's international treaty obligations (reference is made to *Parker*, above, at para 146) there is no exemption under those treaties for cases in which individuals desire access to drugs for religious reasons. As a result, this objective would also be undermined if the Applicant were granted the relief that he is seeking.

[143] The goal of controlling the domestic and international trade in illicit drugs would be undermined if the Applicant were successful in this application. Again, the contrast with the MMAR makes this vividly clear. In *Parker*, above, the court held that allowing regulated access to marihuana for medical reasons would not undermine the goal of controlling the trade in illicit drugs as "the number of persons who could legitimately claim access to marihuana for medical purposes" was so small that prohibiting them from possessing the drug would have little impact on "the huge market for illicit marihuana" (*Parker*, above, at para 151).

[144] Whereas the requirement of a physician's declaration imposes some objective rigour on access to marihuana for medical purposes, no such restriction exists to constrain the number of people who could either claim membership in the Church of the Universe or declare that they hold similar beliefs. Given the "huge market for illicit marihuana," to permit individuals to become automatically exempt from the *CDSA* on the basis of the kind of evidence that the Applicant adduced in the present case would effectively eviscerate those provisions and seriously undermine Canada's ability to control the domestic and international trade in illegal drugs.

[145] The foregoing should not be construed as suggesting that the Minister would never grant an exemption to an individual seeking access to marihuana in the public interest on religious grounds. Such an exemption is always possible if it would be in the public interest.

[146] When one considers that the Applicant was seeking an exemption that would have enabled him to regularly consume a significant quantity of marihuana on the basis of what amounted to little more than an unsubstantiated insistence that doing so was – for him – a "spiritual" and "religious" activity, a finding that the failure to grant him such an exemption was unconstitutional would mean that anyone who made a similar assertion would be entitled to the same relief. Such a result would plainly undermine all three of the objectives that underlie sections 4 and 7 of the *CDSA*.

[147] As such, when the salutary benefits of upholding the validity of sections 4 and 7 of the *CDSA* insofar as they apply to the Applicant's production and possession of marihuana are weighed against the minimal interference that these provisions may have on his rights, any *prima facie* violation of the *Charter* must be upheld as a reasonably justifiable limit under section 1.

C. *Remedies: Mandamus is Unavailable*

[148] The Applicant is seeking a declaration that sections 4 and 7 of the CDSA are invalid (insofar as they apply to cannabis) and, in the alternative, an order compelling the Minister to issue him an exemption under section 56 of the Act.

[149] Further to the above analysis, the Court has reached the decision that a declaration of invalidity is inappropriate.

[150] Due to all of the above reasoning, an order in the nature of *mandamus* is unavailable under the circumstances as it is wholly inappropriate, as the Minister's decision was reasonable *Arsenault v Canada (AG)*, 2009 FCA 300 at para 32). Section 56 of the *CDSA* confers a broad discretion on the Minister to determine whether an exemption is in the public interest and, if so, to determine the terms of any exemption. In this case, the Minister has shown that an exemption is not in the public interest, based on the evidence of the present case. There is generally no mandatory result dictated by this discretionary process as each decision will depend on its facts. As such, an order in the nature of *mandamus* is usually unavailable in respect of decisions taken pursuant to section 56.

[151] While the Court in *PHS*, above, did make an order pursuant to subsection 24(1) of the *Charter* in the nature of *mandamus* requiring the Minister to issue an exemption for Insite, The Right Honourable Beverley McLachlin emphasized that the order was being made under "special circumstances" (*PHS*, above, at para 150) that do not arise in the present case.

## VI. Conclusion

[152] In this case, the discretion remains in the hands of the Minister and that discretion as shown above was exercised and resulted in a reasonable decision; therefore, for all of the above reasons, the Applicant's application is dismissed with costs.

**JUDGMENT**

**THIS COURT ORDERS that** the Applicant's application be dismissed with costs.

"Michel M.J. Shore"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | T-1073-09 |
| **STYLE OF CAUSE:** | CHRISTOPHER BENNETT v<br>THE ATTORNEY GENERAL FOR CANADA<br>AND THE MINISTER OF HEALTH FOR CANADA |
| **PLACE OF HEARING:** | Vancouver, British Columbia |
| **DATE OF HEARING:** | November 8, 2011 |
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| **DATED:** | November 15, 2011 |

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