

The Top Five - 2004

Each year Justice Stephen Goudge of the Ontario Court of Appeal identifies five cases that are of significance in the educational setting. This summary, based on his comments and observations, is appropriate for discussion and debate in the classroom setting.



***R. v. Malmø-Levine; R. v. Caine* 2003 SCC 74 (Supreme Court of Canada)**

<http://www.canlii.org/en/ca/scc/doc/2003/2003scc74/2003scc74.html>

In 2003, the Supreme Court of Canada was asked to decide whether Parliament has the authority to criminalize simple possession of marijuana and if so, whether that power violates s. 7 of the *Canadian Charter of Rights and Freedoms* (*Charter*). (Section 7 states that “every person has a 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.”)

The Appellant, Caine, argued that since prison is a possible sentence for conviction, the principles of fundamental justice are violated in the case of activity that causes little or no harm to others. The Appellant, Malmø-Levine, asked the court to find that the prohibition against possession for the purposes of trafficking in marijuana violates peoples’ constitutional rights. In both cases, the British Columbia Court of Appeal decided that certain sections of the Schedule to the *Narcotic Control Act*, R.S.C. 1985, c. N-1 (*NCA*) are constitutionally valid legislation and that the prohibition on simple possession and possession for the purposes of trafficking in marijuana is good law. The Supreme Court of Canada upheld both these decisions.

A brief history of the facts of the two cases are as follows:

Malmø-Levine described himself as a “marijuana/ freedom activist” who operated an organization in Vancouver called the “Harm Reduction Club”. The Club’s objective was to educate the public so as “to minimize any harm from the use of marijuana.” In December of 1996, police entered the Harm Reduction Club and seized 316g of marijuana, mostly in the form of joints. At trial, the judge would not allow Malmø-Levine to present evidence in support of his argument that freedom to use marijuana was a matter of fundamental personal importance protected by s. 7 of the *Charter*. Malmø-Levine was convicted under s. 4(2) of the *NCA* for possession of marijuana for the purpose of trafficking.

In 1993, Caine and a friend were in a van near the ocean in British Columbia when they were approached by two RCMP officers on regular patrol. One of the officers smelled the strong odour of recently smoked marijuana. Caine produced a partially smoked “joint” of marijuana which was for his use and no other purpose. At trial, the judge heard

extensive evidence about the alleged harm of marijuana use. She concluded that she was bound by the decision in Malmo-Levine's case, that the *NCA* was not contrary to s. 7 of the *Charter*, and Caine was convicted under s. 3 of the *NCA* for simple possession.

Caine and Malmo-Levine appealed. The British Columbia Court of Appeal dismissed the appeals, albeit with one judge dissenting.

Nine judges heard the appeals at the Supreme Court of Canada. The majority decision for the Caine case was written by Justices Gonthier and Binnie, with three judges each writing a dissent. In the Malmo-Levine case, all nine judges agreed in the result and Justices Gonthier and Binnie wrote the majority decision.

The majority of the Supreme Court of Canada agreed with the British Columbia Court of Appeal's finding that the trial judge was mistaken not to consider the evidence that Malmo-Levine wished to present at his trial. This evidence included government reports and documents as well as testimony of expert evidence on the debatable and controversial aspects of marijuana use. The majority of the Supreme Court ruled that the Caine trial judge followed the correct procedure in taking notice of this "legislative fact" evidence as it was essential to deciding the issue of "harm" and required testing on cross-examination. (Legislative fact evidence is evidence that establishes the purpose and background of legislation. It is usually of a general nature and subject to lesser scrutiny.) However, on appeal, Malmo-Levine agreed that the Court of Appeal could consider the same legislative fact evidence that was considered in the Caine case. The Court considered the evidence and upheld Malmo-Levine's conviction.

The parties before the Supreme Court agreed that smoking marijuana has some harmful effects. The Court also accepted the findings of the lower courts that there is a general risk of substantial harm to vulnerable persons such as pregnant women and persons with schizophrenia. The Supreme Court recognized that Parliament has the power to create laws that protect vulnerable people.

The majority of the Supreme Court found that the *NCA* fell within Parliament's power to make laws related to criminal law, particularly where the legislation promotes peace, order and good government. The Supreme Court also observed that the availability of imprisonment as a potential sentence automatically triggers judicial scrutiny of a law to see whether it is contrary to s. 7 of the *Charter*.

Malmo-Levine argued that smoking marijuana is an integral part of his lifestyle and that the prohibition on possession for personal use and for trafficking violates his s. 7 *Charter* rights. The Supreme Court found no infringement of his life-style-related liberty interests because liberty "grants the individual a degree of autonomy in making decisions of fundamental personal importance" The Court held there is no free-standing right to smoke pot for recreational purposes. Malmo-Levine argued that by depriving him of marijuana his security of the person would be violated. However, the Supreme Court noted that the appellants had argued that marijuana is non-addictive, so to deprive someone of its use would not cause serious physical or psychological state-

imposed stress that is associated with deprivation of security of the person. The Court did, however, recognize that the availability of imprisonment engaged an individual's liberty interest but it determined that the infringement is justifiable.

The majority of the Supreme Court concluded that the issue of punishment should not be considered as a violation of s. 7 but should be analyzed in light of s. 12 of the *Charter*, which guarantees the right to be free from cruel and unusual treatment or punishment. The legal test for determining whether punishment is "cruel and unusual" is whether the punishment is *grossly disproportional* to the harm caused by the offence. The majority of the court noted that since the *NCA* did not set out a mandatory minimum sentence and since prison time is usually not used as a punishment, then the legal principle of gross proportionality is not violated. The majority of the Court found that it is the *use* of a prison sentence as a punishment, not its *availability* that violates the *Charter*.

In light of Parliament's objectives and the Court's decision that the *NCA* provisions do not violate the *Charter*, both Malmo-Levine's and Caine's convictions were upheld. One Supreme Court judge, Arbour J, who dissented from the majority opinion in Caine's appeal found that the limited harm associated with marijuana use does not justify a potential prison sentence as punishment or its use as a way to deter people from using it.

Another judge who dissented on Caine's appeal, Lebel J, argued that since few people are jailed for simple possession of marijuana, it should be taken off the books as a possible punishment. He also argued that the stigma of a criminal record affects individual's liberty rights disproportionately to the harm that is caused by the activity.

A third judge who dissented from the majority's decision in the Caine appeal, Deschamps J, decided that moderate use of marijuana is relatively harmless and that using the possibility of a jail sentence to deter people from using it is a punishment disproportionate to the harm caused by the offence.