

**CITATION:** R. v. Kharaghani and Styrsky, 2011 ONSC 836

**COURT FILE NO.:** 1-597294

**DATE:** 2011/02/07

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:** )  
)  
HER MAJESTY THE QUEEN ) Nicholas E. Devlin, Donna A. Polgar, for the  
) Respondent  
Respondent )  
)  
- and - )  
)  
)  
SHAHROOZ KHARAGHANI and PETER ) George Filipovic, for the Applicant,  
STYRSKY ) Shahrooz Kharaghani  
)  
) Paul Lewin, for the Applicant, Peter Styrsky  
Applicants )  
)  
)  
)  
) **HEARD:** April 6-9, 12-16, 19-20, 22-23,  
) 26-27, 29-30; May 4; June 1, 3-4, 14-17;  
) July 16; August 3-6; November 1, 2010

**HERMAN J.:**

[1] The applicants, Shahrooz Kharaghani (“Brother Shahrooz”) and Peter Styrsky (“Brother Peter”)<sup>1</sup> have been charged with trafficking in cannabis, possession of cannabis for the purpose of trafficking and possession of the proceeds of crime. They claim that their freedom of religion and the freedom of religion of others are contravened by the prohibitions against the possession, trafficking and cultivation of cannabis in the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 (“*CDSA*”).

[2] Brother Shahrooz and Brother Peter are reverends of the Church of the Universe and members of the G13 Beaches Mission of God. They claim that it is their religious belief that cannabis provides them with a direct connection to God and that it is a sacrament. They contend that the prohibition of the use, possession, cultivation and trafficking of cannabis

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<sup>1</sup> The applicants and some of the witnesses are referred to as Brother at their request.

contravenes their freedom of religion and the freedom of religion of other people for whom the consumption of cannabis is a religious act.

[3] The applicants seek four alternative orders:

(i) an order declaring the provisions to be of no force and effect pursuant to s. 52(1) of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (U.K.), 1982, c. 11, on the grounds that they are inconsistent with the fundamental and overriding rights guaranteed by ss. 2(a) and (b) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*;

(ii) an order reading in an exemption for the applicants and members of all cantheistic religions from the cannabis-related provisions of the *CDSA*;

(iii) a declaration pursuant to s. 24(1) of the *Charter* that the applicants are entitled to a constitutional exemption from the offences in the *CDSA* which prohibit the possession, production and distribution of cannabis-related substances; or

(iv) an order staying the proceedings pursuant to s. 24(1) of the *Charter*.

## ISSUES

[4] This case is about freedom of religion. It raises difficult questions about the definition of religion, what beliefs are protected by the *Charter* and how the court goes about the task of determining the sincerity of an individual's beliefs.

[5] This case is not about the wisdom of the current cannabis laws nor is it about the desirability of legalizing or decriminalizing the possession of marijuana.

[6] The question of whether the current treatment of cannabis is wise public policy is a matter that has been left to the legislature. In *R. v. Malmo-Levine; R. v. Caine*, [2003] 3 S.C.R. 571, the Supreme Court of Canada considered whether the laws concerning cannabis contravened s. 7 of the *Charter*. As noted by Gonthier and Binnie JJ. at para. 173: “the question before us is not whether Parliament *should* change its policy but whether it is *required* by the Constitution to do so” (emphasis in original).

[7] The issue in this case, therefore, is the constitutionality of the legislative provisions related to the possession, cultivation and trafficking of cannabis in so far as these provisions limit the applicants' rights to freedom of religion. Although the notice of application claims a contravention of both s. 2(a) (freedom of conscience and religion) and s. 2(b) (freedom of thought, belief, opinion and expression) of the *Charter*, the applicants limited their arguments to their contention that the legislation offends freedom of religion.

[8] The applicants challenge not only the constitutional basis for the charges against them; they challenge all cannabis-related provisions. Furthermore, they claim that the provisions contravene not just their rights but the rights of all members of cantheistic religions. Therefore, before considering whether the provisions do, indeed contravene the *Charter*, I need first to consider the applicants' standing to challenge the laws on their own behalf and on behalf of others.

[9] After I determine the issue of standing, I will then consider whether the legislative provisions in question limit the right to freedom of religion under s. 2(a) of the *Charter* and, if they do, whether they can, nonetheless, be justified under s. 1 of the *Charter*.

## **STANDING**

[10] Standing becomes an issue where an individual claims a remedy for someone who is not a party to the litigation or for offences with which that individual has not been charged.

[11] The applicants have been charged with trafficking-related offences: trafficking in cannabis; and possession for the purpose of trafficking. In particular, they have been charged with selling cannabis in September and October 2006.

[12] The applicants seek to extend the scope of the court's consideration in two ways: to consider other cannabis-related offences with which they have not been charged; and to consider the religious rights of others who use cannabis for religious reasons, in particular, members of the Rastafari faith.

### **1. Do the applicants have standing to challenge the constitutionality of all cannabis-related provisions?**

[13] The applicants seek a broad determination that all cannabis-related provisions of the *CDSA* contravene their right to freedom of religion. In this case, the applicants were not charged with the possession or cultivation of cannabis; they were charged only with trafficking-related offences. Furthermore, the indictments charge the applicants with specific conduct related to the alleged sale of cannabis on particular dates in September and October 2006.

[14] The *CDSA* covers many other forms of trafficking: administering, giving, transferring, transporting, sending or delivering. It could, for example, cover a person sharing a joint of marijuana with another person.

[15] The *CDSA* also prohibits the production of cannabis. Production includes cultivation or harvesting. While it is undisputed that cannabis was grown on the premises of the G13 Mission, the evidence was that it was grown by individuals who had medical licences.

[16] The Crown took the position throughout the hearing of this application that because the prosecution was limited to certain offences, the constitutional challenge should be limited to these offences, as set out in the indictments. The Crown subsequently conceded that I should also consider the offence of possession because it is an included offence of possession for the purpose of trafficking.

[17] The applicants, however, argue that I should consider all cannabis-related provisions. In their submission, all the provisions contravene their freedom of religion.

[18] The courts have distinguished between private interest standing and public interest standing. The applicants claim both.

[19] Private interest standing refers to the standing of parties who have a “direct, personal interest” in the proceedings beyond the general interest that all members of society have. The relationship between the prejudice caused to the parties by the legislation must not be “indirect, remote or speculative”: *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607, at p. 623.

[20] As members of a religion whose central tenet involves the use of cannabis, the applicants have a direct and personal interest in the legislative provisions they are challenging. Their interest in the constitutionality of the prohibition of possession is clearest given their claim that the use of cannabis is at the core of their religious beliefs and practices.

[21] The Crown submits that there is an insufficient nexus between the possession of cannabis and the other offences in the *CDSA*. The Crown contends that even if I were to conclude that the applicants have a right to use cannabis, it would not follow that others have a right to provide it to them.

[22] The applicants argue that any religious exemption for the use of marijuana must include a way of obtaining it. An individual who consumes cannabis has to either grow it or get it from someone else.

[23] In *Hitzig v. Canada*, [2003] 231 D.L.R. (4<sup>th</sup>) 104 (Ont. C.A.), the Court of Appeal was dealing with the medical use of marijuana. The court referred to the decision of Rosenberg J.A. in *R. v. Parker* (2000), 49 O.R. (3d) 481 (C.A.), as requiring a “practical way of obtaining” medical marijuana as part of a legitimate medical exemption. This “practical way” did not properly include the black market: see *Hitzig* at para. 124.

[24] As in the case of the medical use of cannabis, it would not make sense if the law permitted an individual to use cannabis for religious reasons but did not provide that person with a legal way in which to obtain it.

[25] I therefore conclude that the applicants have a direct personal interest in challenging all the cannabis-related provisions. That interest is not indirect, remote or speculative. They therefore have private interest standing.

[26] In the event that I am wrong, I will consider whether the applicants should be granted public interest standing. In *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236, the Supreme Court of Canada set out three criteria that must be satisfied before a court will grant public interest standing at p. 253:

- (i) There is a serious issue raised as to the validity of the legislation in question;

(ii) The applicant must be directly affected by the legislation or have a genuine interest in its validity; and

(iii) There is no other reasonable and effective way this issue could be brought before the court.

[27] The applicants have raised a serious issue to be tried. In view of their articulated religious beliefs and their use of cannabis, they are directly affected by the legislative provisions and have a genuine interest in their validity.

[28] It is more difficult to determine whether there are any other ways in which the issues could be brought before the court. There is certainly the theoretical possibility that the issues could arise in the context of other prosecutions. A professed religious user could, for example, be charged with trafficking for passing a joint or could be charged with cultivating cannabis.

[29] While such prosecutions are a theoretical possibility, I do not know whether such prosecutions are likely to occur in practice. I do not know whether there are any such cases currently pending nor do I know whether the Crown or police would pursue such charges. It is noteworthy that, notwithstanding the open use of cannabis at the G13 Mission, the applicants were only charged with conduct arising from the alleged sale to police officers.

[30] At the same time, a considerable amount of court time and resources as well as the resources of the parties have been expended in the hearing of this application. No one has suggested that there is a lack of evidence that might prevent me from reaching a decision.

[31] In these circumstances, it is my opinion that, had I not determined that the applicants have private interest standing, it would have been appropriate to grant public interest standing.

**2. Do the applicants have standing to challenge the constitutionality of the provisions as they affect the freedom of religion of members of other religions?**

[32] The applicants claim that the laws in question contravene the rights of members of all cantheistic religions, not just members of their religion. One of the alternative grounds of relief they seek is an order reading in an exemption for the members of all cantheistic religions from the cannabis-related provisions of the *CDSA*.

[33] A cantheistic religion is a religion that is based on the inherent good of the cannabis plant. The applicants point, in particular, to the Rastafari faith.

[34] The evidence about the Rastafari religion came from Dr. Frances Henry, a professor of anthropology at York University and an expert on the Rastafari religion in Jamaica.

[35] According to Dr. Henry, the Rastafari religion originated in Jamaica in the early 1930s. It developed and changed over time. It began as an ideological movement with emphasis on repatriation back to Africa, a rejection of colonization and worship of Haile Selassie, the former emperor of Ethiopia.

[36] The use of cannabis came later. Over time, the religion focused more on spirituality. Also over time, a Rastafari lifestyle incorporated other practices such as a refusal to shave facial hair; wearing dreadlocks; not eating meat; and the use of natural products.

[37] Dr. Henry testified that the Rastafari religion provides its members with a rich and comprehensive world view. It helps them make sense of their place in the world.

[38] According to Dr. Henry, the Rastafari form of worship consists of reasoning. They commonly use cannabis (dagga) during the reasoning process. It assists with the meditative state and is a way of enhancing one's spiritual path to God or "jah." Rastafari may also use cannabis in their homes.

[39] As with many religions, there is a gradation of commitment to the Rastafari faith on the part of its members. Committed members follow its precepts closely, while others may sport Rasta colours or wear dreadlocks more for reasons of identity than for religious reasons.

[40] According to Dr. Henry, the Rastafari faith has spread throughout the Jamaican diaspora in the last few decades, to Canada, the United States, Great Britain, Europe, Asia, and Africa.

[41] An individual who is being prosecuted for an offence may claim that the provision violates the rights of others. This is because s. 52(1) provides that the Constitution is the supreme law of the land. A corollary of this is that no one can be convicted under an unconstitutional law, even though the unconstitutional effects are not directed at the individual who has been charged: see e.g. *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295, at p. 313; and *R. v. Morgentaler*, [1988] 1 S.C.R. 30, at p. 63.

[42] At the same time, 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. This focus on the individual makes it difficult for the court to deal with the faith and practices of people who are not before the court.

[43] In *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713, at pp. 767-768, the Supreme Court refused to grant standing to the applicants to argue on behalf of other religious groups, cautioning that a claim of interference with religious rights of others must be advanced with sufficient precision.

[44] No Rastafari or member of another cantheistic religion personally asked to be exempted from the application of the provisions in question. No Rastafari or member of another cantheistic religion provided evidence in this proceeding. I do not have any evidence before me on the practice of the faith in Canada. I also do not have any evidence on how the Rastafari obtain cannabis and whether or how they distribute it.

[45] There was also no evidence with respect to the beliefs or practices of any other cantheistic religions in Canada with the exception of a link on the Church of the Universe website to "Other 'Tree of Life' Churches/Missions".

[46] Given the lack of evidence and, again, given the individualized focus that an assessment of freedom of religion requires, I am not in a position to determine whether the provisions in question contravene the freedom of religion of members of the Rastafari faith or members of any other cantheistic religions.

[47] I therefore decline to grant the applicants standing with respect to members of other cantheistic religions.

**DO THE CANNABIS-RELATED PROVISIONS OF THE CDSA LIMIT THE APPLICANTS' FREEDOM OF RELIGION?**

[48] Section 2 (a) of the *Charter* provides:

1. Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;

[49] The Supreme Court defined freedom of religion in *Anselem* as follows at para. 46:

[F]reedom of religion consists of the freedom to undertake practices and harbour beliefs, having a nexus with religion, in which an individual demonstrates he or she sincerely believes or is sincerely undertaking in order to connect with the divine or as a function of his or her spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials. [Emphasis added]

[50] Flowing from this definition are the following questions:

1. What are the applicants' professed beliefs as they relate to the use, possession, production and trafficking of cannabis?
2. Do those professed beliefs fall within the scope of freedom of religion in s. 2(a)?
3. Are the applicants' professed beliefs sincerely held?
4. Finally, do the cannabis-related provisions limit the applicants' freedom of religion?

**1. What are the applicants' professed beliefs?**

[51] I consider at this point what the applicants' claimed beliefs are, not whether those beliefs are sincerely held.

[52] Although the focus of the s. 2(a) inquiry is on the individual's beliefs, I will consider other evidence to the extent that it sheds light on the applicants' beliefs. In addition to the applicants, a number of members of the Church of the Universe gave evidence with regard to

their beliefs. I also heard evidence from Dr. Carl Ruck and Dr. Frances Henry on the use of drugs in other religions.

Brother Peter Styrsky

*Background*

[53] Brother Peter is 53 years of age. He lives in Toronto with his wife and four children.

[54] Brother Peter was raised a Roman Catholic. He turned away from the Church as a teenager and explored other religions. He returned to the Catholic Church after the birth of his first child in 1989. He remains a member of the Roman Catholic Church.

[55] Brother Peter first used cannabis when he was 16 years of age. He did not, at first, identify it as spiritual. That realization came to him later.

[56] Brother Peter said he now consumes cannabis for both spiritual and medical reasons. He said that he and his doctor discussed how much he could consume and they decided on about 2 grams daily.

[57] According to Brother Peter, he was greatly affected by the events of 9/11. He was unhappy with his job and decided he had to do something else. He re-examined his life and studied history and religion.

[58] In 2004, Brother Peter and his wife opened a store, the G13 shop, in the basement of their house at 1905 Queen St. East in Toronto. Brother Peter explained that 13 is the number of God. G13 is also his favourite strain of marijuana.

[59] The shop sold cannabis-related products, including seeds, plants, and growing equipment. It had an environmental and healthy lifestyle focus. The shop did not sell cannabis but it had a “friendly patio” where people could smoke it.

[60] In early 2005, as a result of complaints he heard regarding existing compassion clubs, Brother Peter started a compassion club called the “G13 Med Club.” It existed alongside the G13 shop. The purpose of the compassion club was to provide cannabis to people who needed it for health reasons. Brother Peter said he tried to provide high quality cannabis at as low a cost as possible.

[61] Members of the compassion club were required to sign an application regarding their medical use and provide details, including their medical condition, how cannabis helped them, how much they used, and whether their doctor agreed with the use of cannabis. A doctor’s consent was not required nor was a Health Canada license.

[62] In the spring of 2005, members of the Toronto Assembly of the Church of the Universe, located at 180 Main Street, came to visit the G13. They discussed the Church of the Universe.



[63] Brother Peter and the members of the Toronto Assembly decided to hold Church of the Universe services in the backyard of 1905 Queen St. E. on sunny Sundays. The gatherings began in about May 2005.

[64] Word spread and more people started to attend. There were speakers, musicians and pay-what-you-can barbeques. The core of the ceremony was the partaking of the sacrament, cannabis. Brother Peter said that, over time, the gatherings became more spiritual. Brother Shahrooz said that about 40-60 people would attend the Sunday services.

[65] Brother Peter said he felt his calling as a reverend. People asked him for help and people started calling him reverend, although he was not yet officially a reverend.

[66] The Toronto Assembly, represented by Brother Paul Coulbeck, the archbishop of Toronto, gave Brother Peter a certificate indicating that the G13 was a sanctuary of the Assembly of the Church of the Universe. The certificate stated:

This is to certify that this is a place of personal worship and is hereby granted sanctuary by the grace of God according to the calling of the Assembly of the Church of the Universe – We believe that God is All That Is and All That Is Not. The Church holds that cannabis is the Tree of Life and is a sacrament from the hand of God. One heart, one mind, one love.

[67] Brother Peter decided to join the Church of the Universe. He met with Brother Michael Baldasaro and Brother Walter Tucker in Hamilton (“the Hamilton Brothers”). In September of 2005, Brother Peter received a Charter from the Hamilton Brothers stating that the “G13 Beaches Mission of God is a Certified Mission of the Assembly of the Church of the Universe” and that he was the Mission Administrator. Brother Peter was ordained as a reverend of the Church.

[68] According to Brother Peter, the G13 Mission was a friendly and respectful place where members could congregate to worship God and learn about their own spirituality. In addition to being the Mission Administrator, Brother Peter also regarded himself as a spiritual healer and counsellor.

[69] Over time, the Church took over more space in the building. It eventually took up most of the first floor, basement and backyard of the building. Brother Peter and his family lived in an apartment upstairs.

[70] Brother Peter was arrested in October 2005 for possession of cannabis for the purpose of trafficking, aiding in the trafficking of cannabis and possession of the proceeds of crime. He stepped down from his job as administrator of the G13 Mission as a result of the conditions of his bail. Brother William Palmer took over as administrator. The 2005 charges against Brother Peter were stayed in July 2009.

*Brother Peter's Beliefs*

[71] Brother Peter testified that he has four core beliefs: (i) cannabis use provides a direct connection to God; (ii) a healthy and natural life is the best antenna to God; (iii) knowledge is a gift from God and it gives you power; and (iv) God is all and all are one.

[72] Brother Peter explained that “God is all and all are one” means: we are all creation and we are all the creator; everything is religious; and if you hurt yourself, you hurt others.

[73] Brother Peter said that members of the G13 Mission shared two commonalities: belief in the golden rule (“Do not hurt yourself. Do not hurt others”); and the use of cannabis. Other than that, a person’s beliefs and religion were a matter of personal choice. The G13 Mission welcomed people with a diversity of religious beliefs and faiths.

[74] According to Brother Peter, it is up to the individual member to decide how to consume cannabis, how much to consume and when and where to consume it. A member of the Church need not consume cannabis; he or she could choose to use cannabis in other ways, for example, by wearing clothing made of hemp.

[75] Brother Peter said that when the G13 provided cannabis to others, they were sharing cannabis with members of the Church. While he acknowledged that providing cannabis to others was not a religious requirement, it was, nonetheless, necessary because someone had to provide the cannabis to religious users.

[76] Although the G13 Mission was part of the Church of the Universe, Brother Peter said he did not agree with everything on the Church of the Universe website, nor did he agree with everything the Hamilton Brothers said or did. In particular, he disagreed with statements of theirs that he perceived to be expressions of inequality toward women and gay people.

Brother Shahrooz Kharaghani

*Background*

[77] Brother Shahrooz is 31 years of age.

[78] He said that he has been around cannabis most of his life. He first used it when he was about 9 years old. He realized for the first time that it was spiritual when he was about 14 or 15 years of age. He has been consuming 2-3 grams of cannabis on a daily basis since then.

[79] After high school, Brother Shahrooz became a cook. He worked at a restaurant across the street from the G13 shop and lived with his father in an apartment behind the restaurant.

[80] Brother Shahrooz first went to the G13 shop in 2004. In the beginning, he went once or twice a week during his breaks from work. He would consume cannabis and discuss spiritual matters with Brother Peter.

[81] Brother Shahrooz said that he was one of the first members of the G13 when it became a mission. He explained that his life changed radically after becoming a member. At that point, his life became a spiritual journey.

[82] At some point, Brother Shahrooz met with the Hamilton Brothers. He received a card from the Hamilton Brothers indicating that he was a reverend of the Church of the Universe.

[83] Brother Shahrooz testified that the G13 offered him a sanctuary, a positive environment with like-minded individuals. He eventually stopped working at the restaurant and was at the G13 on a daily basis. He received food and clothing from the mission and slept at his father's apartment across the street.

[84] In early 2006, it was agreed that Brother Shahrooz would take over responsibility for providing cannabis to others. This happened because Brother William Palmer became too ill to carry out the responsibility.

[85] Brother Shahrooz said that in addition to sharing the sacrament, he provided counselling to members who requested it and did cleaning and gardening at the Mission.

*Brother Shahrooz's beliefs*

[86] Brother Shahrooz said that his personal beliefs are: God is God; God is within all of us; how I treat others is how I treat myself and vice versa; nature should be revered; cannabis is the tree of life and the connection to God; cannabis is here for the healing of nations; and cannabis should be consumed in all forms. Brother Shahrooz said that the consumption of cannabis is how he pursues his life, his faith in God, the sharing of truth and the betterment of humanity.

[87] Brother Shahrooz was born into the Baha'i faith and remains a follower of that faith. He explained that the Baha'i faith is a universalist faith. Followers of that faith believe in the oneness of God, the oneness of religions and the oneness of humanity. Brother Shahrooz said that he does not get involved in politics because it is contrary to his Baha'i faith.

[88] Brother Shahrooz is also a member and reverend of the Church of the Universe. According to him, members of that Church revere nature and believe in the oneness of humanity and that cannabis is the tree of life. Other than these core beliefs, members may follow different practices and follow different gods.

[89] Brother Shahrooz does not believe that his membership in the Church of the Universe conflicts with his Baha'i faith: both religions accept other religions, revere nature and believe in the golden rule.

[90] Brother Shahrooz testified that he cannot achieve a connection with God without consuming cannabis. It helps him meditate which in turn allows him to block out negative information and energy from the outside world. It also helps him learn how to do good deeds.

[91] Brother Shahrooz testified that he believes that it is his religious obligation to share cannabis, the sacrament, with members of his religious community. However, it is not part of his religious beliefs to sell cannabis to recreational users.

[92] Brother Shahrooz said that his other spiritual activities are laughing yoga and African drumming. He consumes cannabis before participating in both of these activities.

Brother Zenon Michael

[93] Brother Zenon was a member of the G13 Mission and a reverend of the Church of the Universe.

[94] He is 49 years old. He was raised in Toronto in the Greek Orthodox faith. At the age of 12 or 13, he realized he was gay.

[95] As a young person, Brother Zenon said he felt conflicted about the conservatism of the Greek Orthodox faith, especially their views toward women and gay people. He began to investigate other religions.

[96] Brother Zenon said he was drawn to Buddhism because of its inclusiveness and the teaching that he could meditate anywhere at any time. He now considers himself a Buddhist.

[97] Brother Zenon began using cannabis recreationally when he was 14. He said it helped him get through a difficult adolescence.

[98] Brother Zenon said he now uses cannabis for two reasons. The first reason is that it helps prepare him for his meditation practices by calming the mind and slowing the heart beat.

[99] Brother Zenon also uses cannabis for medical reasons. He is HIV positive and uses cannabis to counteract the side effects of the antiretroviral drugs. Brother Zenon has a license to consume and grow cannabis for medicinal purposes.

[100] Brother Zenon said that joining the Church of the Universe was an easy decision. He shares the core spiritual beliefs of the Church: do not hurt yourself and do not hurt others; and cannabis is a sacrament. For him, the G13 Mission was like the Metropolitan Community Church that he had belonged to in San Francisco many years ago: it was non-judgmental, compassionate and kind; and it accepted people regardless of sex, sexual orientation or age.

[101] Brother Zenon spent a lot of time at the G13 and became a reverend in September of 2006. One of his roles was to help people complete the applications to obtain authorization to possess marijuana for medical purposes. He also offered advice on the growing process and which strains were helpful for particular ailments. He said he also discussed religion with new members.

[102] Brother Zenon believes that cannabis is the tree of life and the tree of knowledge. It is hugely beneficial to mankind, showing our compassionate nature and helping us to find kindness. He spoke of one member who, when he first came to the Church, had ADD and was

very introverted. After he joined the church, he “blossomed”: he stopped taking drugs for ADD and became extroverted.

[103] Brother Zenon did not have to give up Buddhism to join the Church. According to him, the Church of the Universe is a universalist, non-dogmatic church. All faiths are accepted and no one religion is valued over another. Belief in God is not required: an individual could be an atheist and still be a member of the Church.

#### Justin James Bill

[104] Mr. Bill was a member and minister of the Church of the Universe congregation, the Toronto Assembly of God. He is no longer associated with the Toronto Assembly, and describes himself as an independent Christian without a parish.

[105] Mr. Bill is 49 years old. He was originally raised in the Anglican faith but lost interest in religion when he was 10 or 11 years old.

[106] Mr. Bill first smoked cannabis when he was 8. He said he had a life-changing experience at the age of 16 when he took LSD. Religion suddenly became real for him.

[107] Mr. Bill looked into various religions. A few years ago, he discovered Quakerism. He enjoys their gatherings and their message of peace. He describes himself as sharing the core beliefs of the Church of the Universe but as also having additional beliefs.

[108] Mr. Bill began attending services at the Toronto Assembly of God. He became a minister of that church in November of 2005.

[109] At Sunday afternoon services at the Toronto Assembly, people would mingle, talk, smoke cannabis and listen to music. A minister would speak and there was guided meditation. Everyone was given a sacramental wafer of cannabis.

[110] For Mr. Bill, the purpose of consuming cannabis is to alter consciousness. In his experience, cannabis is a safe way to do this; other drugs are harmful. He believes that cannabis is the sacrament and it is mandatory to use it to the fullest extent possible. While selling cannabis is not an essential part of the religion, giving the sacrament and providing it to those who need it is part of the priestly role.

[111] Mr. Bill regards the Church of the Universe as a Gnostic church – a church which is about mysticism and has no interest in theology or conversion. He described it as being the original hippy church, a church with countercultural values. It is anti-corporate, pro-environment, and anti-war.

[112] Mr. Bill does not like the Church of the Universe website and finds some of the material on it offensive. He distances himself from both the website and the activities of the Hamilton Brothers.

Brother Wayne Philips

[113] Brother Wayne is 60 years old and has been consuming cannabis for more than 40 years. Brother Wayne joined the Church of the Universe in the late 1990s. He became a missionary in 2002 or 2003 and then a minister in around 2009. He said that, as a missionary, it is his job to share his beliefs.

[114] Brother Wayne is an artist. He feels that he is doing God's work through his art. He uses cannabis and meditation to enable a visualization process that informs his painting. A lot of his artwork relates to cannabis and religion.

[115] Brother Wayne said he also uses cannabis to deal with lower back pain and some other physical ailments although he does not have a medical exemption.

[116] Brother Wayne sees himself as having embraced a messianic, Judeo-Christian religion. He noted several references to an herb in the Bible: in Genesis, Exodus, and the Psalms. He believes that these are references to cannabis.

[117] Brother Wayne is also an on-line member of the THC ministry. The THC ministry is located in Amsterdam. It is described as the first universal church of cantheism.

[118] Brother Wayne has been actively involved in the movement to legalize marijuana. He has written hundreds of letters and participated in protests.

Brother Christopher Harvey Lawson

[119] Brother Lawson identified himself as the unofficial theological consultant for the Church of the Universe since 1995, although he is not listed on the Church of the Universe website as such. He became a minister of the Church in 2007.

[120] Brother Lawson smoked cannabis for the first time when he was 14. Around 1989 he suffered a back injury as a result of a car accident and began using cannabis for medical reasons. He applied for a medical exemption in 1999 but was refused.

[121] Brother Lawson discovered that cannabis also enhances his spiritual life. He considers the Church of the Universe to be his only religion.

[122] Brother Lawson testified that cannabis is sacred to him. It is the tree of life that helps to achieve a balanced bonding between people, nature, and God. It is an agent of enlightenment and comfort and a mechanism to connect with God. It helps people have love and charity and to revere nature.

[123] Brother Lawson's report on the Church of the Universe was included in the Application Record. In it, he detailed the basis for his beliefs regarding cannabis and the Church of the Universe. In particular, he explained the basis for his belief that: "Cannabis is the original 'Tree of Life' and the original 'Tree of Knowledge' (*a.k.a.*, 'the World Tree', 'the World Axis' or

‘*Axis Mundi*’), a spiritual doorway to a Divine connection, a source of healing and an aid to enlightenment.”

[124] Brother Lawson said that there are numerous references to cannabis in the Old and New Testaments. He believes that both Moses and Jesus used an anointing oil that contained cannabis.

[125] According to Brother Lawson, the Church of the Universe is a universalist church. It accepts a broad range of views, united by a common, harmonious theme. He said that his membership in the Church of the Universe helps him understand the ultimate question of why things are the way they are and not better; offers him answers to ultimate questions; provides him with a comprehensive way of life; and teaches us not to cause harm and to live naturally. According to him, the major taboo of the Church of the Universe is violence.

[126] Brother Lawson is also a member of a secular group that advocates for the legalization of marijuana. He described his advocacy work as “spiritually motivated pro-cannabis activism.”

### Drugs and religion

[127] The use of drugs in religion is not unknown.

[128] Dr. Paul Ruck is a professor at Boston University. He gave testimony on the role that psychoactive plants, including cannabis, have played in religious worship.

[129] According to Dr. Ruck, evidence of the use of psychoactive substances in religion can be found in ancient Greece, Rome and Persia as well as in early Christianity, Judaism, Mayan Aztec culture and among Hindus, Egyptians and the Scythians.

[130] In his studies, Dr. Ruck has found that the religious use of psychoactive substances was generally confined to sacred times and sacred places. The use of these substances was not the totality of the religion; rather their use was a confirmation of the religion.

[131] Dr. Frances Henry gave evidence on the use of marijuana, or dagga, by the Rastafari in Jamaica. The Rastafari form of worship consists of reasoning. Members commonly use dagga during the reasoning process. It assists with the meditative state and is a way of enhancing one’s spiritual path to God or “jah.”

[132] The Rastafari faith was recognized as a religion by the Constitutional Court of South Africa in *Prince v. President of the Law Society of the Cape of Good Hope & others* (2002), 2002 (3) B. Const. L.R. 231 (S. Afr. Const. Ct.).

[133] There are, however, differences between the role and use of cannabis in the Church of the Universe and the G13 Mission and the role and use of drugs in the religions discussed by Dr. Ruck and Dr. Henry. In the other religions, the psychoactive substance is not the central belief; rather, the use of the substance is a religious practice that assists people in their worship. Furthermore, the religions discussed by Dr. Ruck tended to make distinctions as to when the substance was used, where it was used and the circumstances under which it was used. The

Church of the Universe and the G13 Mission, on the other hand, place no limits or guidelines on where, when, how and how much cannabis members should use.

[134] Dr. Harold Kalant is an expert on the impact of cannabis on human health. He was asked whether it was possible for an individual to believe that he or she was in touch with God while consuming cannabis. Dr. Kalant explained that the effects of cannabis consumption depend on the individual user, the setting and the context of use. If the cannabis user believes that the use of marijuana is a religious experience, it will have an impact on the experience.

[135] According to Dr. Kalant, cannabis has the potential to alter the way one sees oneself. Someone who is using cannabis could believe that he or she is communicating with God. While high doses of cannabis can produce an “out of body” experience, it was Dr. Kalant’s opinion that small or moderate uses do not typically result in the experience of hallucinogenic effects.

## **2. Do the applicants’ professed beliefs fall within “freedom of religion” under s. 2(a)?**

### The Parties’ Positions

[136] The applicants submit that freedom of religion is triggered where an individual has a connection with the divine or the transcendent. Cannabis provides them with a connection to God. Therefore, their religious beliefs and practices fall within the scope of “religion” under s. 2(a).

[137] The applicants urge that the court accept the definition of religion adopted by William James in *Varieties of Religious Experience*, originally published in 1902 (New York: Penguin Classics, 1985 reprint at p. 31):

Religion ... shall mean for us the feelings, acts and experiences of individual men in their solitude so far as they apprehend themselves to stand in relation to whatever they may consider the divine.

[138] The Crown submits that it is not sufficient that the applicants believe that cannabis connects them to God. Rather, that connection must have a relationship with religion. Religion involves a comprehensive system of belief that provides a means for the individual to find meaning and order in life.

[139] Thus, in the Crown’s submission, there are two aspects to claiming protection under s. 2(a): (i) a subjective belief that a particular belief or practice fosters a connection with the divine or the transcendent; and (ii) an objective connection between the belief or practice and religion.

[140] A version of the Crown’s position is contained in the words of the Australian High Court in *The Church of the New Faith v. The Commissioner of the Pay-Roll Tax* (1983), 154 C.L.R. 120 (H.C.A.), at p. 151: “Any body which claims to be religious, and offers a way to find meaning and purpose in life is religious” (emphasis added).



[141] I was referred to one case in which the court declined to recognize the Church of the Universe as a religion. In *R. v. Hunter* (1997), 35 W.C.B. (2d) 13 (B.C.S.C.), the defendant claimed that his religion, the Church of the Universe, required the use of hemp as a sacrament. Drake J. indicated at para. 12 that the only evidence of belief was that the defendant believed that cannabis was the tree of life and it was right and proper to use it to achieve an ecstatic state. He expressed his view at para. 11 that the fundamental essential of any religion is “belief or faith”. In rejecting the defendant’s claim, he stated at para. 13 that the use of cannabis was an unlawful act “and it is difficult to see how the Charter can protect such.”

[142] I am not bound by the finding in *Hunter*. The focus in s. 2(a), as affirmed in *Amselem*, is on the individuals’ beliefs. My task, therefore, is not to determine whether the Church of the Universe is a legitimate religious institution but to determine whether the applicants’ beliefs and practices fall within s. 2(a). However, evidence with respect to the institution – the Church of the Universe – may be relevant in so far as it sheds light on those beliefs.

#### Expert witnesses

[143] There were two expert witnesses on the meaning of religion: Dr. Katherine Young and Dr. Lorne Dawson.

[144] Dr. Young is a professor in the Faculty of Religious Studies at McGill University. Dr. Young and her colleague, Dr. Paul Nathanson, developed an approach to defining religion (the Young-Nathanson approach).

[145] Based on their examination of world religions and aboriginal religions, Drs. Young and Nathanson posited three worldviews: religious worldviews, secular worldviews and hybrid worldviews.

[146] They concluded that “religious worldviews” share ten characteristics. The first of these ten characteristics comes closest to elements of both the applicants’ and the Crown’s definitions: “They presuppose either supernatural dimensions or ultimate experiences (or both) that transcend but also transform everyday life.”

[147] The second characteristic in the Young-Nathanson approach suggests the added criterion that the Crown proposes: “They help people live with fundamental paradoxes of the human condition and respond to existential questions that emerge from it.”

[148] The remaining characteristics of religious worldviews are: they have symbol systems; they presuppose sacred time and space; there is myth, scripture, hagiography and ritual; they include secondary expressions including kinship, taboo, theology, philosophy and morality; they offer comprehensive or nearly comprehensive ways of life; they sustain groups not merely individuals; they claim sources of authority; and they are successful enough to endure for a long time.

[149] At the other end of the continuum are secular worldviews. Drs. Young and Nathanson proposed that secular worldviews share the following characteristics:

- they presuppose only the natural or cultural order as known to us through the senses; and
- they acknowledge only reason in general and science in particular as the ultimate authority.

[150] In between these two worldviews are hybrid worldviews. These worldviews combine religion and secularity.

[151] Drs. Young and Nathanson applied their approach to the Church of the Universe. In their opinion, the Church of the Universe was extremely “thin” when measured against the characteristics of a religious worldview. They concluded that it was on the boundary between hybrid and secular worldviews.

[152] Drs. Young and Nathanson noted the apparent preoccupation of the Church of the Universe with the legalization of marijuana and concluded that “at least some members are consciously creating religious features in order to make their legal case for a religious exemption plausible.”

[153] It should be noted that Drs. Young and Nathanson reached their conclusions with respect to the Church of the Universe based primarily on their examination of the Church’s website and the links provided on that website. They also considered affidavits filed by Church of the Universe members in previous court cases, and articles about the Church of the Universe published in Cannabis Culture magazine. Drs. Young and Nathanson did not meet with the applicants or any other members of the Church of the Universe nor did they ever go to the G13 Mission or any other mission of the Church.

[154] Dr. Lorne Dawson provided a critique of the Young-Nathanson approach. Dr. Dawson is a professor in the Department of Sociology and Legal Studies at the University of Waterloo, with a cross-appointment to the Department of Religious Studies.

[155] In Dr. Dawson’s opinion, the Young-Nathanson approach is problematic for several reasons: it is difficult to apply; it relies on multiple criteria that cannot be measured; it is too restrictive; and it is systemically biased against new religions in favour of long-standing highly-institutionalized religions.

[156] Dr. Dawson pointed out that the Young-Nathanson approach did not appear to take into account religions such as Quakerism, Unitarian Universalism and Zen Buddhism, religions that focus more on the individual’s experiences and less on institutional structures. According to Dr. Dawson, the more individual-focused approach is in keeping with the way in which many people today experience religion. These individuals are turning away from the “church” or institutionalized model of religion in favour of more individualistic ways of experiencing religion. They want to choose their own beliefs and practices from a variety of sources.

[157] Given the wide diversity of religions and religious experiences, as well as the highly individualized ways in which people construct their own religions, Dr. Dawson indicated that it is extremely difficult to define religion. He suggested that the primary feature that

characterizes religion is the notion of “references to the transcendent.” This definition approximates the definition proposed by the applicants. At the same time, Dr. Dawson agreed that a way one could tell if something was religious would be if it helped the person develop order and meaning in their lives.

[158] In Dr. Dawson’s opinion, the best approach to defining religion is a contextual or task-specific one. In this case, that context is the *Charter*.

[159] I prefer Dr. Dawson’s approach to that of Dr. Yonge and Dr. Nathanson. Dr. Dawson’s focus on the individual, rather than on the institution, is consistent with the Supreme Court’s approach to freedom of religion, as I discuss below. Dr. Dawson also takes a contextual approach. This, too, is in keeping with the approach taken by Canadian courts when they consider rights under the *Charter*.

#### Freedom of religion cases

[160] Canadian courts have taken a purposive, contextual approach to the definition of freedom of religion under s. 2(a). The definition has developed with reference to the purposes of s. 2(a) and the values that underlie that provision and the *Charter*: see *Big M Drug Mart Ltd.* at p. 344.

[161] In *Big M Drug Mart*, Dickson C.J. set out the purpose of freedom of religion at p. 346:

Viewed in this context, the purpose of freedom of conscience and religion becomes clear. The values that underlie our political and philosophic traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided *inter alia* only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own.

[162] Dickson C.J. also gave expression to the purpose of freedom of religion in *Edwards Books and Art Ltd.* at p. 759:

The purpose of s. 2(a) is to ensure that society does not interfere with profoundly personal beliefs that govern one’s perception of oneself, humankind, nature, and, in some cases, a higher or different order of being. These beliefs, in turn, govern one’s conduct and practices.

[163] In the *Prince* decision, the majority and dissenting judgments of the South African Constitutional Court agreed that the Rastafari faith was a religion. In discussing the importance of religion and the individual’s relationship with God, Ngcobo J. cited at para. 48, the Court’s previous comments on freedom of religion in *Christian Education South Africa v. Minister of Education*, 2000 (10) B. Const. L.R. (S. Afr. Const. Ct.), at para. 36:

For many believers, their relationship with God or creation is central to all their activities. It concerns their capacity to relate in an intensely

meaningful fashion to their sense of themselves, their community and their universe. For millions in all walks of life, religion provides support and nurture and a framework for individual and social stability and growth. Religious belief has the capacity to awake concepts of self-worth and human dignity which form the cornerstone of human rights. It affects the believer's view of society and founds the distinction between right and wrong. [Citations omitted.]

[164] It is not for the court to judge the content of a religion or the religious beliefs of an individual. The Ontario Court of Appeal, in *R. v. Church of Scientology of Toronto* (1987), 31 C.C.C. (3d) 449 (Ont. C.A.), at p. 481 cited, with approval, the following statement from the Australian High Court in *The Church of the New Faith* at p. 150:

The truth or falsity of religions is not the business of officials or the courts. If each purported religion had to show that its doctrines were true, then all might fail. Administrators and judges must resist the temptation to hold that groups or institutions are not religious because claimed religious beliefs or practices seem absurd, fraudulent, evil or novel; or because the group or institution is new, the number of adherents small, the leaders hypocrites, or because they seek to obtain the financial or other privileges which come with religious status. In the eyes of the law, religions are equal. There is no religious club with a monopoly of State privileges for its members. The policy of the law is "one in, all in."

[165] Thus, while many may view the beliefs of the applicants and other members of the Church of the Universe as absurd, that is not and cannot be the test of whether the beliefs of members of that Church qualify as a religion for the purposes of the *Charter*. Furthermore, a determination of the applicants' sincerity does not depend on a determination of the sincerity of the leaders of the Church of the Universe.

[166] Those whose beliefs and way of life are mainstream do not generally need the protection of s. 2(a). The right to freedom of religion is in the *Charter* precisely for those whose beliefs and practices are far from the mainstream. It exists in order to safeguard minorities "from the threat of 'the tyranny of the majority'": *Big M Drug Mart* at p. 337.

[167] While the court cannot determine the correctness of an individual's religious beliefs, it can, nonetheless determine whether those beliefs are religious in nature so as to constitute religion under s. 2(a).

[168] Much of the debate between the Crown and the applicants turns on the definition of "religion" and "freedom of religion" articulated by Iacobucci J. in *Amselem*.

[169] Iacobucci J., writing for the majority in the Supreme Court, considered the definition of religion and freedom of religion as follows at para. 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.]

[170] He went on to note at para. 40 that the Court has favoured “an expansive definition of freedom of religion, which revolves around the notion of personal choice and individual autonomy and freedom.”

[171] He summarized as follows at para. 46:

[F]reedom of religion consists of the freedom to undertake practices and harbour beliefs, having a nexus with religion, in which an individual demonstrates he or she sincerely believes or is sincerely undertaking in order to connect with the divine or as a function of his or her spiritual faith, irrespective of whether a particular practice or belief is required by official religious dogma or is in conformity with the position of religious officials. [Emphasis added.]

[172] Iacobucci J. again dealt with the definitional issue at para. 69 where he spelled out what an individual needed to demonstrate in order to fall within s. 2(a):

[That the belief] is either objectively required by the religion, or that he or she subjectively believes that it is required by the religion, or that he or she sincerely believes that the *practice engenders a personal, subjective connection to the divine* or to the subject or object of his or her spiritual faith, *and as long as that practice has a nexus with religion...*[Italics added; underlining in original.]

[173] Thus, the focus is on the individual, not on the institution. As noted by Peter W. Hogg, Q.C. in *Constitutional Law of Canada*, 5th ed., vol. 2 (Toronto: Carswell, 2007), at p. 42-10, the view of freedom of religion articulated in *Amsalem* is “purely personal and private.” Benjamin L. Berger in *Law's Religion: Rendering Culture*, (2007) 45 Osgoode Hall L.J. 277 at 286, similarly noted that the approach to freedom of religion in Canada was “powerfully individualistic” and “invariably [returned] to a sharp focus on the individual.”

[174] It is also clear from *Amsalem* that freedom of religion not only protects a person's religious beliefs, but also protects the person's religious practices, that is, the right to act on his or her beliefs.

[175] Is it sufficient in order to trigger the application of s. 2(a) that the practice provides a connection with God, as proposed by the applicants, or is there an added element that the

practice has a “nexus with religion”, as proposed by the Crown? Turning to this case, is it sufficient that the applicants believe that cannabis provides them with a connection to God or must there be something else in addition to this connection in order to qualify as religion under s. 2(a)?

[176] In *Amselem*, Iacobucci J. did not need to elaborate on the meaning of “nexus with religion”. The relationship between the practice (erecting succahs was a religious requirement) and a religion (Judaism) was not in issue.

[177] While 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. As noted by the Australian High Court in *Church of the New Faith* at p. 132: “The mantle of immunity would soon be in tatters if it were wrapped around beliefs, practices and observances of every kind whenever a group of adherents chose to call them a religion (citing *United States v. Kuch* (1968), 288 F. Supp. 439). A more objective criterion is required.”

[178] Similarly, the European Court of Human Rights, in considering freedom of religion under Article 9 of the *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 U.N.T.S. 221, noted in *Leela Förderkreis E.V. and Others v. Germany*, no. 58911/00, [2008] E.C.H.R. 1269, at para. 80, that not every act motivated or inspired by a religion or belief was protected: “The freedom of thought, conscience and religion [under Article 9] denotes views that attain a certain level of cogency, seriousness, cohesion and importance.”

[179] There are cases in which the court has concluded that the practices in question are too remote to have a nexus with religion. Policy concerns about a flood of claims may have played a role in some of these cases.

[180] In *R. v. Little* (2009), 349 N.B.R. (2d) 54 (C.A.), leave to appeal to S.C.C. refused [2009] S.C.C.A. No. 417, the applicant refused to file his income taxes, claiming protection under s. 2(a) because, as a Roman Catholic, he refused to support the public funding of abortions. The trial judge found that the applicant held the sincere belief that abortion was wrong but he failed to demonstrate that he was required by his religion to refrain from paying his taxes. The trial judge also found that even if there had been a contravention of s. 2(a), the filing of tax returns was only a “trivial and insubstantial” interference. The New Brunswick Court of Appeal at para. 5 voiced concern about:

[T]he fallout from a legal precedent holding that s. 2(a) of the *Charter* provides a valid defence to those who refuse to file annual tax returns or to pay taxes because of a sincere belief that monies used to fund government programs which are objectionable, either on religious grounds or as a matter of conscience...

[181] The Court of Appeal concluded that the refusal to file income tax reports did not qualify as a religious practice but rather was an act of civil disobedience, therefore lacking a sufficient nexus to religion.

[182] Similarly, in *Petrini v. Canada* (1994), 94 D.T.C. 6657 (F.C.A.) leave to appeal to S.C.C. refused [1994] S.C.C.A. No. 504, the Federal Court of Appeal stated the following about a taxpayer's refusal to pay taxes for religious reasons at p. 6657:

[T]he *Charter* guarantees of freedom of conscience and religion cannot operate to prevent the government from employing general tax revenues in ways which offend the religious beliefs or consciences of some of its citizens. The obligation that such citizens have to pay taxes to support the government (and therefore, indirectly, the programs which offend them) does not breach those freedoms.

[183] In my opinion, there is a distinction between a religious or spiritual experience and a religion. It is noteworthy that the applicants use William James' definition of religion. That definition comes from James' book on religious experiences. One of the examples that James uses, at p. 70, is the connection with God that a person might feel in a beautiful natural setting. If an individual were to say, for example, that she had a transcendent experience when she looked at a beautiful sunset, it might well be a religious or spiritual experience, but it would not, in my opinion, qualify as religion under s. 2(a) in the absence of anything else.

[184] There is also a distinction between a lifestyle and religion. There is no question that cannabis played a central role in the day-to-day lives of the applicants. They consumed a significant quantity on a daily basis and had been doing so for years, long before the existence of the G13 Mission.

[185] Cannabis also played a central role in the lives of a number of people who gathered on a regular basis at the G13 Mission. The people who consumed marijuana at the Mission no doubt enjoyed doing so in a warm, welcoming place with like-minded individuals. Some of those individuals consumed marijuana at least, in part, for medical reasons and had medical licences permitting them to do so. It is likely that many of the people at the G13 Mission supported the legalization of marijuana; some of them may have been actively involved in the legalization movement. None of these features make the consumption of marijuana or the distribution of marijuana a religious belief or practice. At the same time, they do not mean that it was not religious.

[186] The debate between the parties as to what is meant by "freedom of religion" in s. 2(a) and "nexus with religion" in *Amslem* can be resolved by referring back to the purpose of the provision. Protection is given to religious beliefs because, as noted by Dickson C.J. in *Edwards Books* at p. 759 religious beliefs govern "one's perception of oneself, humankind, nature, and in some cases, a higher or different order of being" or, as noted by Ngcobo J. in *Prince* at para. 48, they enable people to relate to "their sense of themselves, their community and their universe".

[187] Freedom of religion does not exist to protect the spiritual experience or practice because the experience or practice, in itself, is worthy of protection. Rather, the practice is protected because it is part of something larger that is worth protecting.

[188] Therefore, in order to qualify for protection under s. 2(a) there must be more than a spiritual experience connecting an individual to the transcendent or the divine – more than a claim that the individual feels connected to the divine when he or she consumes cannabis. The requirement that there be a relationship with religion means that the practice in question has a larger meaning in that it relates to the individual's system or set of beliefs. That system need not be complex; it need not be institutionalized. It should, however, go beyond the particular experience and help provide the individual with a sense of meaning, purpose and spiritual fulfillment.

### Conclusion

[189] The parties propose different definitions of religion. The applicants submit that freedom of religion is at play where an individual has a connection to the divine. The Crown submits that something more is needed: a web of meaning or a system of belief that helps an individual find meaning in life and answers to existential questions.

[190] 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. That system of belief need not be complex and it can be highly individualistic.

[191] In my opinion, the applicants' professed beliefs satisfy this definition. They claim that cannabis is their connection to God but they also claim that the connection provides them with meaning and purpose and gives them guidance as to how to live their lives.

[192] While the applicants' religious beliefs may seem absurd to some or to many, that is not a basis on which to challenge those beliefs. The fact that a central tenet of the applicants' beliefs involves an illegal substance is also not a basis on which to decide that those beliefs are not religious in nature.

[193] I conclude, therefore, that the applicants' professed beliefs fall under s. 2(a). What I will consider next is whether those articulated beliefs are sincerely held.

### **3. Are the applicants' professed beliefs sincerely held?**

[194] One element of the definition of freedom of religion under s. 2(a) is the requirement that the religious belief be sincerely held. That requires the court to enter into an inquiry into the sincerity of the applicants' professed religious beliefs.

[195] In this case, I am required to consider both the sincerity of the applicants' religious beliefs as they relate to the substance of the charges against them, as well as the sincerity of their religious beliefs as they relate more generally to the activities that fall under the cannabis-related provisions of the *CDSA*, that is, possession, cultivation and trafficking.



Positions of the Parties

[196] The applicants claim that both their possession of cannabis and their involvement in providing cannabis to others are based on their sincerely held religious beliefs. Furthermore, they assert that any in-depth inquiry into the sincerity of those beliefs is both offensive and contrary to law.

[197] The Crown asserts that the applicants' professed religion is a sham and a joke. In the Crown's submission, the G13 Mission and the Church of the Universe are artifices, designed to legitimize what is otherwise illegal behaviour. The Church of the Universe is not a religion; it is a parody of religion.

[198] The Crown concedes that the G13 Mission might well have been a gathering-place for a limited number of individuals, for whom it provided support, friendship and care, as well as a pleasant environment in which to consume cannabis. The Crown also concedes that the consumption of cannabis may well have been beneficial for some of those individuals, for example, those individuals who used it for medical reasons. However, in the Crown's submission, its consumption was not a sincere religious belief or practice. Neither was it a religious act when the applicants were involved in selling cannabis to undercover police officers and others. Rather, the applicants sold cannabis to others in order to support their lifestyle.

How does a court determine sincerity of belief?

[199] The court is not qualified to rule on the validity of any particular religious practice or belief. It cannot and should not be the arbiter of religious dogma. The court is, however, qualified to inquire into the sincerity of a claimant's beliefs: see *Amselem* at paras. 50 – 51.

[200] As Dickson C.J. stated in *Edwards Books* at p. 780:

Judicial inquiries into religious beliefs are largely unavoidable if the constitutional freedoms guaranteed by s. 2(a) are to be asserted before the courts. We must live with the reality that such an inquiry is necessary in order for the same values to be given effect by the judicial system.

[201] The inquiry into sincerity is necessitated by the highly individualized focus that the courts have given to the scope of religion in s. 2(a). The court is concerned not with whether a particular religion requires its adherents to follow a particular practice, but with whether the practice in question flows from the individual applicant's personal religious beliefs.

[202] In general, the inquiry into sincerity should be as limited as possible. It is limited for two reasons. The first reason is that it is very difficult to probe an individual's innermost beliefs. The second reason is that an overly intrusive inquiry could, in itself, threaten the values of religious freedom. The court should not engage in a judicial inquisition: see *Amselem* at para. 55.

[203] The court does, however, have a gatekeeper function in ensuring that only those religious beliefs that are sincerely held are protected. It is important that the right to freedom of religion is not trivialized. If all a person has to do is say “I believe,” the constitutional notion of freedom of religion could well lose its meaning. The court’s task is to ensure that the religious belief is “in good faith, neither fictitious nor capricious, and that it is not an artifice”: *Amselem* at para. 52.

[204] The assessment of sincerity is a question of fact. The determination of sincerity can be based on several criteria, including the credibility of a claimant’s testimony and an analysis of whether the professed belief is consistent with his or her religious practices: see *Amselem* at para. 53.

[205] The Court in *Amselem* referred to the discussion of criteria in J. Woehrling, “L’obligation d’accommodement raisonnable et l’adaptation de la société à la diversité religieuse” (1998), 43 McGill L.J. 325 at 394. In that article, José Woehrling referred, in turn, to a list of criteria used by the Ontario Public Service Labour Relations Board to assess the sincerity of an applicant who sought an exemption for religious reasons from having to pay union dues. An application for judicial review of that decision was dismissed by the Ontario Divisional Court in *Re Civil Service Association of Ontario (Inc.) and Anderson et al.* (1976), 9 O.R. (2d) 341 at 343 (H.C. (Div. Ct.)).

[206] In that case, the Tribunal considered several factors in order to determine the sincerity of the applicant including: the demeanour of the witness while testifying; the nature of the applicant’s beliefs, their relationship to a divine being and the moral dimensions of such beliefs; the previous religious experience of the applicant; the relationship between that religious experience and the belief currently held by the applicant; the directness of the connection between the religious belief; and the extent to which the religious belief was applied.

[207] The Crown proposes another factor for the court to consider in determining the sincerity of the applicants’ beliefs: the seriousness with which they treat the beliefs and practices for which they now claim religious protection. This seems to me to be a legitimate criterion. Freedom of religion is protected because of its profound connection to an individual’s sense of purpose and meaning. While this does not mean that humour and levity can never play a role in the practice of religion, it does mean that one would expect that people who are sincere in their beliefs would treat those beliefs seriously.

[208] The court’s inquiry into sincerity should focus on the individual’s beliefs at the time of the alleged interference with her or his religious freedom. An individual’s religious beliefs may well change over time. The court should therefore avoid placing undue emphasis on a person’s past beliefs and practices: see *Amselem* at para. 53.

[209] There are a number of cases in which the court has rejected the applicant’s claim to a sincere religious belief.

[210] In *Bruker v. Markovitz*, [2007] 3 S.C.R. 607, the respondent claimed that his right to freedom of religion protected him from having to agree to give his wife a *get* (a divorce under Jewish law). However, he did not offer a religious reason for his refusal. Abella J., for the majority, found that the respondent was motivated not by religion but by anger toward his wife. She concluded, at paras. 68-69, that his belief was not sincerely held.

[211] In *Bothwell v. Ontario (Minister of Transportation)*, [2005] O.J. No. 189 (Div. Ct.), the applicant objected to having his photo taken and stored on a government database in order to obtain a driver's licence. He claimed that as a fundamentalist Christian, he believed that he would be barred from the afterlife if he allowed his photo to be taken and digitally stored. The court found that he failed to demonstrate a sincere belief based on the following facts: he owned a digital camera; he had posted pictures of his family on a website; and he did not object to having his image in the media. The court concluded that the applicant's objection was motivated by secular privacy concerns.

#### Scope of the inquiry in this case

[212] The applicants made numerous objections to the scope of the inquiry into sincerity during the hearing of this application. In particular, counsel for the applicants objected that the cross-examinations of the applicants went well beyond the limited scope of inquiry referred to in *Amsalem*.

[213] I reserved my ruling on most of these objections; the questions were asked and answered.

[214] While an inquiry into sincerity should, in general, be limited, it is my opinion that a more in-depth inquiry is warranted in the circumstances of this case. These circumstances are the following:

- (i) The applicants seek both a stay of the criminal charges against them and the decriminalization or legalization of cannabis. In these circumstances, the applicants should expect that their motivation will be questioned and their professed beliefs and practices will be scrutinized.
- (ii) There are many Canadians who consume cannabis for recreational reasons and many, undoubtedly, who would like to do so legally. As in the New Brunswick case of *Little*, a case involving the failure to file income tax returns, there is a concern about the potential fallout from a legal precedent that s. 2(a) provides a legal defence.
- (iii) There are many reasons why an individual might consume or wish to consume cannabis, including recreational or medicinal purposes. Indeed, the applicants consumed cannabis long before they identified its use as religious. At the time of the charges, Brother Peter's consumed cannabis, at least in part, for medical reasons.

- (iv) Not only the reasons for the applicants' use allegedly changed over time, but the purpose of the G13 changed as well: it began as a shop, later became a compassion club and then transformed into a religious mission.
- (v) Unlike other religions to which I was referred that involve the consumption of a drug, the drug in this case is the religion. The only other tenet shared by all the members of the Church of the Universe is a variation of the golden rule.
- (vi) The G13 Mission and the Church of the Universe have 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. This makes it difficult, if not impossible, for an outsider to distinguish between religious and non-religious use and between the religious and the non-religious user.

[215] While these factors do not necessarily lead to the conclusion that the applicants' beliefs are not sincerely held, they do make it more difficult to distinguish between sincere beliefs and artifice.

[216] While, in general, a more than limited inquiry into an individual's religious beliefs is undesirable, it is unavoidable in this case given the particular circumstances.

### The Evidence

#### *The Church of the Universe*

[217] The applicants objected to questions and evidence about the Church of the Universe, the Church of the Universe website and the Hamilton Brothers. The basis of their objection was that freedom of religion under s. 2(a) is concerned with an individual's beliefs; it is not concerned with the beliefs of an institution or the beliefs of others. I heard the evidence and reserved my rulings on these objections.

[218] In *The Church of the New Faith*, a case of the Australian High Court cited by the Ontario Court of Appeal in *Church of Scientology of Toronto* at p.481, the court considered the relevance of the practices and beliefs of the founder of the Church of the Scientology to the beliefs of its members at p. 141:

[C]harlatanism is a necessary price of religious freedom, and if a self-proclaimed teacher persuades others to believe in a religion which he propounds, lack of sincerity or integrity on his part is not incompatible with the religious character of the beliefs, practices and observances accepted by his followers.

[219] Both Brother Peter and Brother Shahrooz distinguished their own beliefs from those of the Church of the Universe and the Hamilton Brothers. Brother Shahrooz said that he could not speak for the Hamilton Brothers or for what is on the Church of the Universe website. Brother Peter said that he did not agree with all the views of the Hamilton Brothers, in particular, their views toward women and gay people.

[220] I agree with the applicants that it is their individual beliefs at the time of the events in question that are critical, not the beliefs and practices of the founders of the Church of the Universe or the beliefs and practices of other adherents. It was on this basis that I did not admit the testimony of a police officer who had had dealings with the Hamilton Brothers in 2003 and 2004.

[221] However, the teachings, publications and website of the Church of the Universe are relevant to a consideration of the applicants' beliefs and sincerity in so far as they have been adopted by the applicants. Both applicants were ordained by the Hamilton Brothers as reverends of the Church of the Universe. The G13 Mission was a mission of the Church of the Universe, and the Hamilton Brothers' website includes a link to the G13 website under the heading "Missions."

[222] All of the materials that the G13 Mission gave to prospective members (*i.e.* the declaration and the mandate) contained the Church of the Universe symbol. The ordination certificates, the Sanctuary Certificate and the Church Charter on display at the G13 contained the Church of the Universe symbol and the phrase "Church of the Universe." The only religious content on the G13 Mission website was the Church of the Universe logo with a link to the Church of the Universe website. According to Brother Peter, the declaration used to gain access to the G13 was adapted from the Hamilton Brother's declaration because "we were part of their church."

[223] In these circumstances, the applicants cannot disassociate themselves completely from the Church of the Universe, the Hamilton Brothers or the Church of the Universe website. The evidence is therefore relevant, with the caveat that the court's task is to determine the sincerity of the applicants' professed beliefs, not the sincerity of the Church of the Universe or the Hamilton Brothers.

[224] Evidence on the Church of the Universe came primarily from the testimony of the applicants and other members of the Church of the Universe as well as from portions of the Church's website.

[225] The Church of the Universe was founded in 1969 at Clearwater Abbey in Hamilton, Ontario by Brother Walter Tucker.

[226] In an article in Cannabis Culture magazine, the Church of the Universe was described as "Canada's foremost advocate for the legalization of cannabis for religious and spiritual purposes": Dan Loehndorf, "The Canadian Inquisition: A history of the Church of the Universe" *Cannabis Culture Magazine* (31 May 1997), online: Cannabis Culture Magazine <<http://www.cannabisculture.com/v2/articles/1228.html>>.

[227] Mr. Bill, a former member of the Toronto Assembly of the Church of the Universe, has conducted research into the size of the Church of the Universe. Based on his investigations, he estimated that there are about 4,000 Church members in Canada and about 34-36 ministers. He acknowledged that arriving at accurate figures is very difficult because there are members who do not want to publicize their membership.

[228] According to the witnesses, the members of the Church share two common beliefs: cannabis is the tree of life through which one can contact God; and do not harm yourself or others. Other than that, members are free to hold their own individual religious beliefs.

[229] The symbol of the Church of the Universe is a 9-point star. It is on many of the G13 documents and signs. Brother Shahrooz said the 9-point star symbolizes the tree of life and the many paths one can take. According to him, the three sides of the symbol represent God, man, and woman. The eye in the middle represents God. If the star is turned upside down it is considered knowledge. "1969" on the symbol is the year the Church was founded.

[230] For Brother Zenon, the nine-sided star represents the universal oneness we all share.

[231] The Church of the Universe website is at [iamm.com](http://iamm.com). "IAMM" stands for "Institute Advancing Medicinal Marijuana". At the top of the home page there are various symbols of the Church of the Universe. It includes numerous links, some of which have religious content, others which do not.

[232] Under the heading "What is the Church of the Universe," the website states the following:

The Assembly of the Church of the Universe is open to all of God's Creatures who believe God is God.

The Assembly of the Church of the Universe is a modern expression of a Religious Culture "Cult" more commonly known as the "Agriculture" which has existed since the very beginning of time. God put us in the midst of The Garden of Eden and instructed us "*to dress it and to keep it*" for them. Genesis, Chapter 2 Verse 15. God, our Father, God our Mother.

Be well and prosper

In peace, bless you, bless you.

The Assembly of 69.

[233] Elsewhere on the website it states that "[t]he only pre-requisite to joining the Church is a belief in God and adherence to the Word of God".

[234] The website also sets out the Church credo:

We believe that the Tree of Life is necessary to our understanding and worship of Almighty God.

We believe that the Tree of Life opens a path to spiritual growth and connection with Almighty God and us, the Children.

We believe that the Tree of Life is for the healing of the nations  
Revelation Chapter 22.

We believe that everyone has the right to worship God, to explore and  
create their own understanding of spirituality and growth in connection  
with God.

First God, then Humanity, then Government.

We believe in standing and kneeling before Almighty God and no  
other.

[235] Under the heading “Membership Information” the IAMM.com website includes a  
Declaration/Application developed by the Hamilton Brothers. It includes a list of prices, which  
are considered to be donations: Church membership \$25, Missionary certificate \$200; Mission  
Charter \$500; Ministerial Ordination Certificate \$300. Members are not required to make  
donations.

[236] The website includes “Wo-Man’s Auxiliary” which, in turn, includes “The Rules” (the  
first of which is that the female always makes the rules) and “Romance Mathematics”. Brother  
Peter admitted that some might interpret the content as misogynist humour. In his view,  
however, it was a parody which criticized the way in which men treat women.

[237] The website also includes “Missions”, which provides links to member missions and to  
“Other ‘Tree of Life’ Churches/Missions”. One of the links is to the Church of the Gerbil.  
That website included the “10 Condiments”, the first of which was “Thou shall have no fuzzy  
creatures before me”. When asked about the Church of the Gerbil, Brother Shahrooz said he  
could not judge other people’s beliefs: while some people might find the site humorous, there  
could be others who would take it seriously.

[238] A portion of the website is dedicated to legal information, including links to the  
“University of the Universe Legal Self-defence”, “Statutes and legal reference materials”,  
“Never Plead Guilty”, “Court News” and “Religious marijuana cases”.

[239] At the bottom of the home page, there are a number of external links such as “What if  
God smoked marijuana”, “Pure THC.com” and the “Hippy Sanctuary Mission of God”.

### *The premises of the G13*

[240] The G13 started out as a shop. It was originally located in the basement of 1905 Queen  
Street East in Toronto.

[241] At some point after the creation of the G13 Mission, the shop moved upstairs to the first  
floor. In the fall of 2006, the Mission included the shop, a kitchen and a sanctuary/library on  
the first floor; the backyard and patio; and a portion of the basement. Brother Peter’s family  
lived on the second floor of the building.

[242] At the front of the building there was a large banner that said: “G13 Shop: The G13 Beaches Mission of God. The Assembly of the Church of the Universe.” There was a symbol of a hemp leaf inside the maple leaf.

[243] Hanging in the front window, to the right of the door to the Mission, there was a poster of the Golden Rule and the Charter of the G13 Mission that had been issued by the Church of the Universe in Hamilton. There were also signs supporting war resisters, peace signs, a poster from an AIDS conference and information on s. 176 of the *Criminal Code* (“obstructing or violence to or arrest of officiating clergyman”). A blackboard listed the Mission’s hours.

[244] Inside the entrance on the first floor there was a store. It contained: a display of hemp clothing; display cases and shelves holding drums, hemp wallets, candles, as well as marijuana paraphernalia such as pipes, bong, grinders, and rolling papers; and stickers and patches for sale, depicting marijuana leaves, band names and cartoon characters.

[245] In one corner of the main floor there was a kitchen where food was served throughout the day. Coffee, tea, chips, and other snacks were available.

[246] A copy of the Church Charter (identical to the one hanging in the front window) hung on the west wall in the main room. A number of ordination certificates of reverends were displayed along the top of the wall.

[247] There was another room on the first floor, referred to as the sanctuary or library, with numerous books related to world religions, spirituality and philosophy as well as the use of cannabis and other substances. Brother Peter said he also used the room to have private conversations with members who sought his advice as a reverend of the Church.

[248] A sign hanging on the door to the library/sanctuary read: “Warning: Church is under Constant Video/Audio Surveillance.” Brother Shahrooz explained that the sign went up after police officers had trespassed. He said the sign was not intended for members; it was for police officers who tried to push their way into the Mission and behaved aggressively.

[249] Two copies of the “G13 Mission of God Church of the Universe Rules” were on display – one in the library and one in the front store area. The rules were:

Show membership cards everytime. NO EXCEPTIONS

Clean up after yourself

NO dealing

NO tobacco products indoors

NO minors unless with parent or guardian

NO entrance granted to those under the influence of alcohol



NO racism and NO sexism

We reserve the right to refuse service to any member who does not follow our golden rule. DO NOT HARM YOURSELF AND DO NOT HARM OTHERS!!!

[250] There were two signs hanging in the patio at the back. One stated:

G13 Shop Patio Rules

No alcohol. No minors unless with a Parent or Guardian. No Dealing, which includes buying, asking, selling or trading. Persons caught will not be welcome back. No loitering. You must spend \$2.00 minimum.

[251] Brother Peter agreed, in cross-examination, that some of these rules were not applicable to the church, such as, no loitering and the requirement to spend \$2.00. However, some of the rules did apply to the church: no dealing; no minors; and no alcohol. Brother Peter explained that this was one of the first signs they had when they opened the G13 shop. They kept it because they regarded it as a piece of art, even though some of the rules no longer applied.

[252] The second sign on the patio said “G13 Shop” with an arrow pointing down the stairs to the basement. Part of that sign had been covered up by a piece of paper stapled onto it that read “G13 Mission of the Church of the Universe” and displayed the Church of the Universe symbol.

[253] The basement could be reached from inside the house or from stairs in the back of the house. Church members generally went outside and entered the basement from an entrance in the back.

[254] There were two hand-painted signs hanging on the inside of the door to the basement. One stated that:

Theft Will Not be Tolerated. Persons Caught will Be BARRED FOR LIFE

Brother Peter said that this sign was a leftover from the time when the G13 was a shop.

[255] The other sign read:

G13 shop – Customers Must be 18 Years of Age or Over. Minors must be accompanied by Parent or Guardian.

[256] The basement room had wraparound benches on the walls, some tables and chairs, and a computer. There was also a “grow room” in the basement which was used by members who had medical licenses.

[257] One sign in the basement read:

SUNDAY CHURCH BARBEQUE. Please contribute food or a suggested contribution of \$5.00 per person.

The sign displayed the Church of the Universe symbol.

[258] Another sign read:

We Are Here To Serve Our Customers. We Sell Nothing Illegal.

[259] Both Officer Moyer and Rumney testified that they did not see any religious symbols or pictures on the premises. However, the applicants introduced either the originals or copies of numerous pictures with religious themes.

[260] Both officers acknowledged that they were not familiar with many non-Christian symbols. Furthermore, Officer Rumney testified that she had already decided that the G13 was a sham and that, therefore, any symbols or conversation could not be religious.

[261] I accept the applicants' evidence that there were, indeed, several pictures on the premises that had religious themes and symbols as well as pictures related to cannabis.

[262] Officers Moyer and Rumney testified that when they went to the G13 there were usually several people on the premises in addition to the applicants. Some of these individuals were there on two or more of the officers' visits and appeared to the officers to be "regulars".

#### *The G13 Website*

[263] The G13 Shop had a website. The home page of the site indicated that the purpose of the shop was to provide information on how organic growing methods can improve one's health. It noted that the people at the G13 shop were advocates for cannabis as an important medicine. Finally, it welcomed people to the store to buy organic growing supplies and herbal accessories, to find out how to make a difference regarding society's views on cannabis or to just hang out on the patio. The main content of the website was a cannabis seed catalogue.

[264] The website was changed at least twice to reflect the G13 Shop's subsequent affiliation with the Church of the Universe. The dates of the each of these versions of the website are not known.

[265] One version of the website was identical to the earlier version with the exception of the added logo of the Church of the Universe and a statement on the homepage indicating that "The G13 Shop is owned and operated by the Toronto chapter of The Church of the Universe".

[266] Another version of the website included the banner: "G13 Shop – The G13 Beaches Mission, The Assembly of the Church of God". The home page was otherwise the same as the first version except that the Menu no longer listed "Seeds".

*The G13 Finances*

[267] The Crown contends that the applicants sold cannabis in order to support their lifestyles.

[268] According to Brother Peter, the financial goal was to sustain the Church, not to make a profit. The G13 Mission received money from store purchases, membership fees and cannabis. Brothers Peter and Shahrooz characterized the money received from cannabis as donations to the church.

[269] The church provided food to members, including a daily lunch and barbeques on Sundays and provided hemp clothing to people who needed it. There was a donation jar in the store.

[270] Brother Peter was the owner of the building. At first the Church did not pay rent. Over time, the Church was able to help cover the mortgages on the property (totalling approximately \$3,000 per month) and the hydro bill. The hydro bill was high because of the growing operation. Brother Peter said he personally paid the other utilities and the property tax.

[271] According to the applicants, the cannabis that was grown on the premises was only for the use of the individuals who had medical licenses to grow and use it. The church obtained its cannabis from elsewhere.

[272] In October 2006, neither of the applicants had steady employment. Brother Shahrooz had no other employment or source of income. Brother Peter testified that he had done some home renovation work and inherited some property, but it is unclear whether he had these sources of income available to him in the fall of 2006.

*Head coverings*

[273] Brother Peter and Brother Shahrooz said they always wear their head coverings. In the Church mandate it states that: "Church clergy are mandated to wear head gear such as (yarmulke or turbans etc.)."

[274] Brother Peter said that the head covering means that God is on top. It is an antenna to God and it provides members of the Church of the Universe with protection to do their job of protecting the cannabis plant.

[275] Brother Shahrooz testified that the head covering signifies that God rules his life.

[276] Brother Shahrooz said that, as a result of the head covering, he was often stopped by police. Before he became a member of the church, he had only been stopped once or twice; after joining the church and wearing a head covering, he was stopped 20 or 30 times.

[277] According to Brother Lawson, the hemp yarmulke is worn to publicly confess the belief that God is on top. It is always to be worn in court to indicate that God is always the ultimate judge.

[278] The police officers testified that a number of other individuals whom they saw at the church on a regular basis also wore head coverings. Officer Moyer said that on the day of the arrests, approximately seven of the 11 people who were detained were wearing head coverings.

*The G 13 Membership Process*

[279] In order to obtain cannabis at the G13 Mission in the fall of 2006, it was necessary to be a member of the Church. In order to become a member, a person had to be introduced by another member, provide identification, sign a declaration and pay \$25 (although payment was sometimes waived). The individual received a membership card in return.

[280] It is unclear when the G13 started to offer memberships and when they imposed the various requirements. Brother Peter said that there had been a period during which members were required to have a membership card but were not required to sign a declaration. Officer Jeffrey Ross went to the premises on a few occasions in October 2005. According to him, no membership requirements were imposed when he purchased cannabis.

[281] After the police raid and arrests in October 2005, the G13 Mission closed the front door and put a declaration system into effect. According to Brother Zenon, a referral system was brought in at the same time.

[282] Officers Rumney and Moyer described the membership procedure that they went through in September 2006.

[283] The first time the officers went to the G13, on September 21, 2006, they knocked on the door. The man who answered the door told Officer Moyer he could not enter unless he was a member. He gave Officer Moyer a card that said "Styrsky for Mayor" and a paper with the mandate of the Church of the Universe.

[284] The mandate said:

Members are required to use cannabis

Do not hurt yourself

Do not hurt anyone else

Church members are required to use God's Tree of Life (Cannabis, Marijuana), as a sacrament in their lives and worship. It is required in their search for an understanding of their spirituality and connection with Almighty God.

Church members are required to provide medicinal sacrament to the sick.

Church members are encouraged to surround themselves with the holy Tree of Life, not just inhaling it, but wearing it, growing it writing on it,

eating it, etc. They decide for themselves ways and times to use God's Tree of Life.

Church clergy are mandated to wear head gear such as (yarmulke or turbans etc.)

[285] At the bottom of the mandate there was a declaration which stated:

As members of the Church of the Universe and Ordained Clergy, we declare our ancient and common law right to freedom of worship and our right to freedom in the administration and the co-ordination of all sacraments, Baptism, Holy Matrimony, Last Rights, Exorcism and Communion and of the 12 fruit of the Tree of Life, Marijuana as it was in the beginning, is now and ever shall be. Amen.

[286] After the police officers were turned away, they stayed in the area to see if they could get in with somebody. Someone by the name of Dan came out. Officer Moyer asked him if he would take him in. Dan asked Officer Moyer if he was a cop and he assured him he was not.

[287] Officer Moyer went back to the front door with Dan. Dan showed his membership card and they were let in.

[288] Officer Moyer went up to the counter and was asked if he was a member. He said no, that his buddy was going to refer him. He was asked for identification, which he provided in another name. Dan was asked for his card and Officer Moyer was asked for \$25. The man at the counter copied the identification cards, gave Officer Moyer a form to fill out and took a digital photograph of Officer Moyer.

[289] The form that Officer Moyer was given and that he signed was entitled "Church of the Universe Declaration". It stated:

I \_\_\_\_\_ herein, hereby declare that: I believe in God; use the Tree of Life "*Marijuana*" in my worship of God; and that God's Tree of Life is for the "*Healing of the Nations*".

[290] The declaration contained the symbol of the Church of the Universe and places for the applicant to enter his or her address, date of birth, and signature, as well as a place for the reference to sign. Officer Moyer's reference was Dan.

[291] Brother Peter said that the declaration had been adapted from the declaration used by the Hamilton Brothers and had been taken from the website of the Church of the Universe.

[292] According to Officer Moyer, no one discussed the contents of the declaration with him. After he filled out the form, he was told his card would be ready in a few days, but in the meantime, he could use the signed declaration. He was told he was welcome to hang out and smoke on the patio and he could meet Brother Shahrooz in the basement to get the sacrament.

[293] The two officers returned to the premises the next day. Officer Moyer, who now had a temporary membership card, explained that Officer Rumney was with him and they needed to sign her up. Officer Rumney went through the same process as officer Moyer had: she paid \$25, gave her (false) identification and filled out the form. Someone took a photograph of her.

[294] Officer Moyer received a laminated membership card that day. Officer Rumney received her card the next time she went to the Mission.

[295] Both Officers Moyer and Rumney testified that there was no discussion of religion throughout this process. Indeed, they said there was no discussion of religion in all the time they were at the G13.

[296] Brother Shahrooz said he thought there were about 500 members of the G13 in the beginning and that the membership grew to about 1,800 to 2,000 people in the fall of 2006. According to the membership list entered into evidence, there were approximately 840 new members between May 2006 and October 2006.

[297] The last recorded membership number issued on October 23, 2006 is #1826. There were ten additional unnumbered individuals registered between October 23 and 25 (the day of the arrests). There was no evidence as to whether the membership numbers corresponded to the number of memberships issued. However, the list covering May to October 2006 was more or less in numerical order. The final membership number (#1826) is also close to Brother Shahrooz's estimate of the number of members.

[298] I therefore find that there were about 1800 members of the G13 Mission as of October 2006. There was no evidence as to how many times, on average, a member would have obtained cannabis on the premises.

[299] Brothers Peter and Shahrooz as well as Brother Zenon said it was not up to them to determine if a potential member was sincere in his or her beliefs. It was left up to the individual. If a person signed the declaration, they gave them the benefit of the doubt.

[300] Brother Peter admitted to sometimes being a little lax about the membership process, but said that if he knew directly that a prospective member did not have a sincere belief in the tenets of the Church, that person would not be allowed to become a member.

[301] When Brother Peter was asked whether there might have been some young people who joined the G13 compassion club who were not sincere, Brother Peter said he realized that may have been the case, but cannabis was not harmful and they were old enough to decide for themselves. He estimated that about 10% of the members might have been lying about their beliefs when they joined the church.

[302] Mr. Bill observed an incident in which three teenagers tried to get in. According to him, Brother Peter was firm and threw them out.

[303] Brother Shahrooz said that if a new member came, he would read the Church mandate out to them, tell them they needed to do more research and usually send them away. However,

if a new member came to the Church with an existing member, he would assume that the person was already educated about the Church. He would allow that person to sign the declaration and become a member of the Church.

[304] According to Brother Shahrooz, church members were self-regulating. If members of the religious community saw that someone was insincere, it would be dealt with. If someone exhibited insincerity, they would be turned away.

[305] Brother Zenon said that it was generally a reverend, such as himself, who signed up new members. According to him, the screening process included a brief discussion about what the declaration meant. Brother Zenon said that generally new members had to be referred by a current member, although sometimes someone would come who needed help and he would take them at their word and let them join. He only wanted people who truly believed to become members.

[306] Two membership cards for dogs were introduced into evidence. Brother Peter said there was a third dog membership card. Brother Peter thought the dog cards were cute and said he understood how attached people can get to their dogs. Brother Shahrooz said that people at the Church were very attached to one of the dogs who had been issued a card.

[307] Copies of membership cards of individuals who looked very young were also presented in evidence. The Crown submitted that this was evidence that the G13 Mission admitted minors. However, I am unable to conclude on the basis of the pictures alone that the individuals were under 18 years of age.

#### *Providing Cannabis to Others*

[308] Brother Shahrooz testified that he assumed responsibility for providing cannabis to church members when Brother William Palmer became too ill to do so. He said it was his religious obligation to share cannabis with members of his religious community as well as provide it to people who needed it for medical reasons. However, it was not part of his religious belief to sell cannabis to recreational users.

[309] Brother Peter testified that providing cannabis to others was not a religious requirement. However, members of the church had to get the cannabis from somewhere. He expressed his opinion that it would be absurd to permit individuals to possess or use cannabis for religious reasons but not to obtain it.

[310] Mr. Bill testified that providing sacrament was part of the priestly role. However, in his experience, it was preferable if members brought their own cannabis to religious services because providing cannabis in the church complicated things and was distracting.

[311] The evidence as to the circumstances under which cannabis could be obtained came largely from the police officers.

[312] Officer Jeffrey Ross testified that he obtained cannabis at the G13 Mission on several occasions in October 2005. However, this application arises from transactions that took place

one year later, in September and October 2006. I will therefore focus primarily on the evidence related to these later transactions.

[313] Officer Jeff Moyer and Officer Traci Rumney were undercover officers in the Toronto drug squad. According to them, their investigation began as a result of community complaints.

[314] The officers went to the G13 Mission together on 6 occasions; Officer Rumney went twice on her own. One or both of them bought cannabis on 7 of these occasions. On another occasion, the officers went to the G13 at 7:15 p.m. and were told that it was closed for the day (the posted hours were 10-7 Saturday to Wednesday and 10-9 on Thursday and Friday).

[315] The first time the officers went to the G13 was on September 21, 2006, with the intention of trying to purchase marijuana. After Officer Moyer completed the membership process, he went to the basement to purchase cannabis. He entered the basement from the back of the house. He said there were 8-10 people in the room. Several were sitting at tables grinding marijuana; others were waiting to make a purchase.

[316] Brother Shahrooz dealt with the people who were in front of Officer Moyer first. Officer Moyer said that Brother Shahrooz gave them what they ordered and they gave him money in return.

[317] Brother Shahrooz then approached Officer Moyer. Officer Moyer introduced himself as "Henry." He asked if he could get a half quarter (that is, a half of a quarter of an ounce or 3.5 grams); Brother Shahrooz said "sure." Brother Shahrooz left the room, came back and gave Officer Moyer a quantity of marijuana in a clear plastic bag. Officer Moyer gave him \$40, which he said was the usual amount for a half quarter. Officer Moyer then left.

[318] According to Officer Moyer, the transaction took about two minutes at most.

[319] One or both of the officers purchased either marijuana or hashish on 6 more occasions. According to the officers' testimony, the subsequent visits followed the same pattern as the first. The officers went to the front door. On showing their membership cards, they were let in. There were usually several people on the premises in addition to the applicants. Some of these individuals were there on several of the officers' visits and appeared to them to be "regulars".

[320] The officers then went to the basement. On most of the occasions there were one or two people waiting in front of them. There were also usually a few people seated at tables – either smoking marijuana or just sitting there.

[321] After Brother Shahrooz dealt with the people waiting in front of the officers, it was the officers' turn. They would ask him for a quarter [of marijuana], a half quarter [of marijuana] or "40" [\$40 worth of hash]. Brother Shahrooz went to a back room and would return a few minutes later with the requested drug in a clear plastic baggie. He handed them the baggie and the officers gave him the money— either \$40 or \$80 depending on what they had ordered.



[322] In return for her requests for half a quarter (about 3.5 grams) on five separate occasions, Officer Rumney received the following amounts: 3.46 grams; 3.47 grams; 3.69 grams; 4.27 grams; and 3.56 grams.

[323] The officers said they never participated in or heard any religious discussions during any of their visits to the G13.

[324] On all but the last occasion, October 25, 2006 – “take down day” - the officers left the premises immediately after receiving the marijuana or hash.

[325] On October 25, 2006, the officers sat down at a table after receiving their order. They stayed in anticipation of the execution of a search warrant.

[326] Over the course of an hour, Officer Moyer said there was a steady stream of people coming into the basement area to purchase marijuana from Brother Shahrooz. Officer Rumney said she saw about 10-12 people. Some people stayed after receiving marijuana from Brother Shahrooz; others left. There was music and conversation.

[327] Officer Moyer heard a commotion upstairs. Someone ran down stairs, yelling that the police were there. Officer Moyer saw Brother Shahrooz carrying a large white paper bag. According to Officer Moyer, Brother Shahrooz opened a door at the back of the back room and threw the bag in and closed the door.

[328] The police arrested several people on the premises, including Brother Peter and Brother Shahrooz.

[329] Brother Shahrooz said that he did not view these transactions as a sale of cannabis. Rather, he was sharing the sacrament and accepting a donation. He said there was no set price or set amount and he never asked people for money. He said that he often gave cannabis away for free.

[330] According to the police, about \$6,397 was found on the G13 premises the day of the arrest. It was located in the library, in a cash box under the counter and on Brother Shahrooz. Brother Shahrooz had about \$1,500 on him. Brother Shahrooz testified that the money was from the day's donations and would have gone to the church administrator to help cover church costs.

[331] Brother Shahrooz explained that when someone requested an amount of cannabis, he would just put his hands in the bag and take out an amount. He determined the amount by eye and feel; he never weighed it. Although there were scales on the premises, they were only used by the medicinal users.

[332] According to Brother Shahrooz and Brother Peter, the cannabis that was provided by the G13 was high quality. They obtained the cannabis from members and growers who used organic, earth-friendly methods.

[333] Although the officers said their purchases of cannabis at the G13 were similar to other drug buys they had been involved in, they agreed that there were some aspects of the transactions that were not typical: the sign in front of the building that openly identified the premises as having something to do with cannabis; the requirements to provide identification, sign a declaration and become a member before purchasing cannabis; the head coverings worn by several people on the premises; the references to cannabis as a sacrament; and the generous portions of marijuana they received on a few of the occasions.

### Assessment and Conclusion

[334] The onus is on the applicants to establish that the beliefs and practices at issue are religious in nature and that those beliefs are sincerely held.

[335] It is extremely difficult for a court to determine an individual's innermost beliefs. This is particularly so in this case.

[336] There are few, if any, outward signs that would indicate whether the applicants are sincere when they say that the consumption of cannabis brings them into touch with God and provides them with a way to find meaning and purpose in their lives. Each of the applicants has used cannabis for non-religious purposes. Each of the applicants belongs to another religion in addition to the Church of the Universe: Roman Catholicism in the case of Brother Peter; and Baha'i in the case of Brother Shahrooz.

[337] Members of their Church share only two beliefs: cannabis is the tree of life; and you should not harm yourself or others. The applicants' professed religion places no limitations on where, when, how and how much cannabis should be consumed.

[338] Furthermore, the applicants do not distinguish between religious and non-religious acts because they believe that all acts are religious. While a religion may be all-encompassing, it nonetheless makes it difficult for the outsider to distinguish between a religion based on cannabis use and a lifestyle based on cannabis use.

[339] I do question 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. However, my evidence on the Church is limited. More importantly, it is not my task to determine whether the Church of the Universe is a genuine religion. Rather, my task is to determine the sincerity of the applicants' personal beliefs and whether the practices in question stem from those beliefs. While I might doubt the sincerity of the institution's religious proclamations that does not mean that the applicants' professed personal beliefs are not sincere.

[340] I will deal first with the applicants' claim that their consumption of cannabis stems from sincerely held religious beliefs. It is extremely difficult to determine an individual's innermost thoughts and beliefs, particularly where there is very little external evidence. An outsider observing the applicants' use of cannabis would likely not be able to distinguish its use from recreational use. I am therefore left largely with an assessment of the applicants' credibility.

[341] Brother Peter's testimony regarding his personal beliefs and philosophy was generally credible. He appeared to have given a lot of thought to questions of spirituality and religion.

[342] There is evidence that Brother Peter did, indeed, provide guidance and help to others and took this role seriously. Mr. Bill, for example, said that people at the G13 sought out Brother Peter to discuss matters involving life, death and the universe.

[343] Brother Peter made some concessions in the course of his testimony: he admitted that he did not agree with some of the views of the Hamilton Brothers; and he admitted that he was sometimes lax about the membership process. He also acknowledged that providing cannabis to others was not a religious requirement.

[344] In general, Brother Peter's testimony regarding his beliefs and the role of cannabis in his life was consistent with that of Brother Zenon and Mr. Bill. Both of these witnesses came across as sincere and credible witnesses with respect to their personal beliefs and the religious or spiritual role that cannabis has played in their lives.

[345] I conclude that Brother Peter was sincere in his claim that cannabis provides him with a connection to God. That connection gives him knowledge and understanding as to how to live his life. I accept that Brother Peter's use of cannabis is, at least in part, religiously-based.

[346] I had more difficulties with Brother Shahrooz's testimony. He was often evasive and appeared to be tailoring his answers to what he thought the right answer was. He made no concessions that he thought might have weakened his case. As one example, I refer to the series of questions related to the "Church of the Gerbil" website. Brother Shahrooz refused to acknowledge that the website might have been a parody.

[347] In spite of my reservations with his testimony, Brother Shahrooz appeared to be a person who has given a lot of thought to issues related to religion and spirituality. Spiritual matters appear to play an important part in his life. I conclude that he was sincere when he said that consuming cannabis was, at least in part, related to his religious beliefs and practices.

[348] The applicants' testimony concerning providing cannabis to others was more equivocal than their evidence with respect to their personal consumption. Brother Peter acknowledged that providing cannabis to others was not a religious requirement. However, religious users had to obtain the cannabis from somewhere. Brother Shahrooz, on the other hand, said that he had an obligation to share cannabis with members of the religious community. Neither applicant claimed that providing cannabis to recreational users was a religious act.

[349] At the same time, it is an easier task to determine whether providing cannabis to others was a religious act because, in contrast to the applicants' personal consumption, there was at least observable conduct and transactions involving other people.

[350] There was some evidence that would indicate that there was something happening at the G13 that was religious in nature:

- The applicants and other witnesses who were members of the Church of the Universe showed an understanding of and interest in religious and spiritual matters.
- There were religious books, symbols and pictures on the premises.
- Sunday services or gatherings took place. There had been at least one wedding ceremony.
- The G13 provided help to people who were sick or marginalized. Brother Peter provided counselling.
- The applicants and other reverends wore head coverings. In so doing, they arguably made themselves targets for harassment or arrest.
- The applicants did not hide what they were doing. The G13's connection to cannabis was visible from the street.
- Purchasing marijuana from the G13 could well bring undesirable attention to the purchaser. It would arguably be easier to purchase it elsewhere.
- The transactions were different from ordinary street purchases of cannabis: people who wanted cannabis had to become church members and sign a declaration of belief; there were no negotiations over quantity or price; Brother Shahrooz did not weigh the amount of cannabis he gave to others and sometimes provided more than the amount requested. There was also some evidence that the applicants provided high quality cannabis at a reasonable price.

[351] At the same time, there was evidence that calls into question the assertion that providing cannabis to people who signed up as members was a religious act:

- The only requirements to obtain cannabis were to become a member of the G13 Mission, pay a fee, provide identification and sign a one-line declaration.
- There was no determination of sincerity other than the declaration.
- The declaration process was instituted after a police raid and arrests.
- Once an individual joined the G13, he or she was directed to the basement to get cannabis. Although some people stayed after obtaining the cannabis, others left immediately after. For those who left, the only thing they did on the premises was to obtain cannabis.
- The Church of the Universe website appears to be more of a parody of a religion than a genuine religion.

- Statements in various documents were inconsistent with the applicants' testimony regarding their religious beliefs and the tenets of the G13 Mission. For example, the declaration that new members signed had no reference to the golden rule, one of the two tenets of the G13; the mandate that new members were given had a declaration that listed Roman Catholic rites although the G13 was open to people of all faiths.
- Brother Shahrooz obtained a financial benefit from providing cannabis to others in so far as it made it possible for him not to have outside employment.
- Various signs on the premises and the G13 website appeared to be directed more at customers than at members of a church.
- There were several examples of lack of solemnity and seriousness to matters that were allegedly religious: membership cards were given to dogs; the Church of the Universe website had content and links to content that parodied religion; there were various errors on documents that one would have expected would have been treated with more care (for example, errors on the G13 Charter and the reverends' ordination certificates).
- More than 800 people joined the G13 over a 5 ½ month period and about 1,800 over a period of a year and a half – a large number of new members for a new mission. No more than 40 to 60 people attended services.

[352] None of these factors, on their own, necessarily leads to a conclusion that the transactions in question were not of a religious nature. For example, many religious institutions obtain revenue by selling items on their premises.

[353] However, in weighing the evidence as a whole, I do not accept that providing cannabis to people in the basement of the G13 Mission was a religious act. In particular, I do not find it credible that the applicants believed that most of the approximately 1,800 people who became members of the G13 Mission and obtained cannabis did so because of their religious beliefs or used cannabis for religious reasons. While the applicants' personal use of cannabis may have been, at least, in part, religiously-based, their religious beliefs did not extend to providing cannabis to recreational users.

[354] I accept that the applicants' motives may not have been strictly commercial. They believe that cannabis is a beneficial substance and should be legally available. They may well believe that providing it to others is a good thing to do. That does not, however, transform its distribution into a religious belief or practice.

[355] I conclude that the applicants have not established that the provision of cannabis to others was a religious practice stemming from a sincerely held religious belief.

#### **4. Do the cannabis-related provisions limit the applicants' freedom of religion?**

[356] The applicants have not established that providing cannabis to members of the public who became members of the church was a religious act or that it was a religious act when

Brother Shahrooz gave cannabis to the two police officers. They have, however, established, on a balance of probabilities, that their use of cannabis was, at least in part, religiously-based.

[357] Once the applicants establish the sincerity of their religious beliefs and that the practice in question stems from those beliefs, the court's inquiry under s. 2(a) is almost complete. Rather than considering the limits to religious freedom under s. 2(a) of the *Charter*, it is preferable to consider them under s. 1 because "it gives the broadest possible scope to judicial review under the *Charter*, and provides a more comprehensive method of assessing the relevant conflicting values": *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, at para. 74. The Supreme Court in *B.(R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, stated at pp. 383-384 that it has "consistently refrained from formulating internal limits to the scope of freedom of religion".

[358] There is, however, one exception to the application of s. 2(a): it does not include a "trivial or insubstantial" interference with a person's religious beliefs or practices: *R. v. Jones*, [1986] 2 S.C.R. 284, at p. 314. Given the centrality of cannabis consumption to the applicants' religious beliefs and practices, I accept that the prohibition against possession is more than a trivial interference.

[359] I conclude, therefore, that the prohibition against the possession of cannabis limits the applicants' freedom of religion in so far as it prevents them from legally consuming it for religious purposes. I also conclude that the prohibitions against trafficking and cultivation limit their freedom of religion but only in so far as they prevent the applicants from legally obtaining cannabis for religious use. To the extent that the charges that are the subject matter of this case relate to the provision of cannabis to others, the charges do not limit the applicants' freedom of religion under the *Charter*.

#### **ARE THE PROVISIONS A REASONABLE LIMIT?**

[360] Freedom of religion is not absolute. It may be limited where the government establishes that the legislative provisions constitute "such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society": *Charter*, s. 1.

[361] The Crown submits that the provisions of the *CDSA* reflect reasonable limits to any infringement of the applicants' s. 2(a) rights. The Crown argues that the result of giving effect to the applicants' claimed religious beliefs and practices would be tantamount to legalizing marijuana. Whether the possession of cannabis should be legalized is a matter that should be left to Parliament to decide. The Crown further argues that the creation of an exemption for the applicants' conduct would be entirely unworkable.

[362] The applicants' primary argument is that the means chosen by the state, that is the criminalization of the possession, cultivation and distribution of cannabis, are not rationally connected to the government's objective because it is more harmful to criminalize cannabis than it is to make it available. Furthermore, a system to allow for religious exemptions could be instituted to accommodate religious use.

## General Principles

[363] The courts have recognized that there may be limits on freedom of religion. In *Amselem* at para. 61 the Supreme Court stated that “[n]o right, including freedom of religion is absolute. This is so because we live in a society of individuals in which we must always take the rights of others into account.”

[364] What is at issue here is not the applicant’s right to hold their beliefs but their right to act on those beliefs. As noted by the Supreme Court in *B.(R.) v. Children’s Aid Society* at para. 226: “although the freedom of belief may be broad, the freedom to act on those beliefs is considerably narrower”.

[365] Section 1 involves the balancing of competing interests: in this case, the government’s interest in addressing the harms associated with cannabis as against the applicants’ interests in carrying out their religious beliefs.

[366] The burden is on the government to establish that the legislative objective underlying the challenged provisions is pressing and substantial. If it can do so, it must then establish that there is proportionality between the limitation on the right and the benefits of the law: see *R. v. Oakes*, [1986] 1 S.C.R. 103.

[367] Section 1 should not be applied rigidly. In *R.J.R.-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 63, the Supreme Court stated that “[t]his Court has on many occasions affirmed that the Oakes requirements must be applied flexibly, having regard to the specific factual and social context of each case. The word ‘reasonable’ in s. 1 necessarily imports flexibility.”

[368] Similarly, in *R. v. Keegstra*, [1990] 3 S.C.R. 697, at p. 737, the Court stated that a “rigid or formalistic approach to the application of s. 1 must be avoided”. In *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569, at para. 38, the Supreme Court characterized the *Oakes* test as a “guide for determining whether an infringement can be justified”.

[369] Before proceeding with a more detailed analysis, I note that there is a case in which a Canadian court dealt with the application of s. 1 to the prohibition of possession in the *Narcotic Control Act*, R.S.C. 1970, c. N-1, the legislation that was the predecessor to the *CDSA*. In *R. v. Kerr*, [1986] 75 N.S.R. (2d) 305 (C.A.), the appellant had been convicted of cultivating marijuana. He argued that the prohibition against the possession of marijuana infringed his religious beliefs. The Court held that the appellant had not established that his freedom of conscience and religion under s. 2(a) of the *Charter* had been infringed. However, the Court added that, had it been found otherwise, the provisions in question constituted reasonable limits under s. 1. The Court did not provide any further reasons or analysis for this conclusion. An application for leave to appeal to the Supreme Court of Canada was dismissed, without reasons: [1987] S.C.C.A. No. 82.

## 1. Is the objective pressing and substantial?

[370] The Crown submits that the objective of the legislation is to protect members of vulnerable groups from the harms of cannabis consumption. The applicants maintain that the objective is the promotion of public health and safety by limiting access to cannabis. They argue that the legislative provisions do not reflect a pressing and substantial objective because preventing people from obtaining cannabis does not further the objectives of public health and safety.

[371] The Supreme Court considered the interests of the state as reflected in cannabis-related legislation in *Malmo-Levine*. The majority decision placed a low threshold on this portion of the test. That is, it is sufficient that the Crown demonstrate that the harm is “not [in]significant or trivial”: *Malmo-Levine* at para. 133.

[372] It should be noted that *Malmo-Levine* involved s. 7 of the *Charter* – the right to life, liberty and security of the person - not freedom of religion. Because the majority concluded that the appellants had not established an infringement of s. 7, they did not conduct an assessment under s. 1. However, Gonthier and Binnie JJ., writing for the majority referred to the protection of vulnerable groups as a valid federal objective under s. 1 of the *Charter* as follows at paras. 76-77:

[T]he protection of vulnerable groups has also been upheld under s. 1 as a valid federal objective of the exercise of the criminal law power. In *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001, SCC2, we upheld s. 163.1(4) of the *Criminal Code* prohibiting the possession of child pornography, noting that the prevention of harm threatening vulnerable members of society is a valid limit on freedom of expression. Similarly in *R. v. Butler*, [1992] 1 S.C.R. 452 at p. 497, we concluded that “legislation proscribing obscenity is a valid objective which justifies some encroachment on the right to freedom of expression”. In so doing, we emphasized the impact of the exploitation of women and children, depicted in publications and films, which can, in certain circumstances, lead to “abject and servile victimization”. In *R. v. Keegstra*, [1995] 2 S.C.R. 381, we held that the restrictions on free speech imposed by the hate speech provision in the *Criminal Code* was a justifiable limit under s. 1 because of potential attacks on minorities.

...The protection of the chronic users [of cannabis] identified by the trial judge, and adolescents who may not yet have become chronic users, but who have the potential to do so, is a valid criminal law objective. ...In our view, the control of a “psychoactive drug” that “causes alteration of mental function” clearly raises issues of public health and safety, both for the user as well as for those in the broader society affected by his or her conduct.



[373] The justices concluded at paras. 130-132 that the state has a valid interest in the avoidance of harm to Canadians, in particular, the avoidance of harm to vulnerable groups.

[374] I conclude that the legislative provisions reflect a pressing and substantial objective: avoidance of harm to Canadians and, in particular, to members of vulnerable groups. Whether there are alternative means to advance this objective that would not infringe *Charter* rights is considered under the proportionality analysis.

**2. Is there proportionality between the limitation on the right and the benefits of the law?**

[375] It is at the proportionality stage of the s. 1 analysis that the court must weigh the legitimate interests of the government against the rights that have been infringed. It is necessary to focus on the proportionality between the means the government has chosen to accomplish its objective and the infringement of the applicants' right to freedom of religion.

[376] The proportionality review has three steps: (i) there must be a rational connection between the limit on the *Charter* right and the legislative objective; (ii) the limit should impair the *Charter* right as little as possible; and (iii) there should be proportionality between the benefits of the limit and its deleterious effects: see *Oakes* at p. 139.

[377] In order to establish that the benefits of the legislative measures adopted by Parliament are proportional to the limitation of the right, the government does not have to establish that it has used the least restrictive means available. Rather, as the Supreme Court stated in *R. v. Sharpe*, [2001] 1 S.C.R. 45, at para. 96, it is acceptable if:

[T]he means adopted fall within a range of reasonable solutions to the problem confronted. The law must be reasonably tailored to its objectives; it must impair the right no more than reasonably necessary, having regard to the practical difficulties and conflicting tensions that must be taken into account. [Emphasis omitted].

(i) Rational connection between the limit on the *Charter* right and the legislative objective

[378] At the first stage of the proportionality analysis, the court must consider whether there is a rational, non-arbitrary connection between the legislative objective and the legislative provisions that are being challenged. To establish a rational connection, the government "must show a causal connection between the infringement and the benefit sought on the basis of reason or logic": *R.J.R.-MacDonald* at para. 153.

[379] The applicants submit that the criminalization of cannabis is not rationally connected to health and safety. In their submission, the prohibitions do not make people healthier or safer. On the contrary, there are many positive health benefits from the use of cannabis and any adverse health consequences (which, the applicants contend, are minimal) could be better met through education or regulation.

[380] Furthermore, in the applicants' submission, the criminalization of cannabis has significant deleterious effects. In particular, it makes criminals out of otherwise law-abiding individuals; it gives money to organized crime; and it diverts law enforcement from more important activities.

[381] The applicants also contend that, in the circumstances of this case, the criminalization of marijuana has resulted in the elimination of the G13 mission, a church which played a positive role in the community, by, for instance, providing support to people who were in need.

[382] The question before me is not, however, whether the criminalization of cannabis is, on balance, a good idea. The question, at this stage, is whether there is a rational, non-arbitrary connection between the legislative provisions in question and the government's legitimate objective.

[383] The courts have previously commented on the connection between the criminalization of the use of cannabis and the objective of the legislation. The Supreme Court in *Malmo-Levine* reviewed various reports related to the health effects of cannabis use and concluded at para. 61 as follows: "It seems clear that the use of marihuana has less serious and permanent effects than once claimed, but its psychoactive and health effects can be harmful, and in the case of members of vulnerable groups the harm may be serious and substantial."

[384] The majority concluded at para. 136 that the criminalization of the possession of marijuana was not arbitrary, but was rationally connected to a reasonable apprehension of harm, in particular, the harm to members of vulnerable groups:

The criminalization of possession is a statement of society's collective disapproval of the use of a psychoactive drug such as marihuana (*Morgentaler, supra*, at p. 70), and, through Parliament, the continuing view that its use should be deterred. The prohibition is not arbitrary but is rationally connected to a reasonable apprehension of harm.

[385] The trial in *Malmo-Levine* was held more than a decade ago. A number of studies and reports regarding the benefits and harms of marijuana consumption have been issued since that date, some of which were referred to during the course of the hearing of this application.

[386] The Crown and the applicants each put forward a witness as an expert on the effects of cannabis consumption: Dr. Harold Kalant and Dr. David Bearman.

*Dr. Bearman*

[387] The applicants proposed Dr. David Bearman as an expert on the effects of cannabis, other recreational drugs and drugs commonly used as alternatives to medicinal marijuana on human health. The Crown challenged his qualifications as an expert.

[388] Dr. Bearman is a medical doctor. He currently has a private practice in family medicine in Golita, California. His practice focuses on the therapeutic benefits and side effects of medicinal marijuana. He has had extensive involvement in the public health field in the state of

California. He has had experience in providing services to young people and others for whom drug use and abuse was a significant issue.

[389] I had concerns with respect to Dr. Bearman's reliability to testify as an expert in so far as he is not a research scientist; he is a practising doctor. He does not have the expertise or training to effectively critique scientific studies. I had significant concerns about his objectivity and reliability based on the report that he prepared for the court.

[390] However, in light of his experience as a medical practitioner specializing in the medicinal use of cannabis and his extensive involvement in the public health field, I qualified Dr. Bearman for the more limited purpose of testifying on the effects of cannabis on human health, based on his experience in practice.

[391] For the last decade, Dr. Bearman's practice has focused on the medicinal use of cannabis. He testified that about 60% of his patients came to him because of pain. Other conditions that he has found cannabis to be helpful for include: sleep problems, depression, stress, anxiety, migraine headaches, nausea, asthma and loss of appetite. HIV/AIDS patients use cannabis to deal with neuropathic pain and depression, as well as depressed appetite and nausea, which are the common side effects of their medication.

[392] Dr. Bearman indicated that the effectiveness of cannabis varies from person to person as do its side effects. A person's reaction to cannabis may be affected by the setting and by the person's previous experience.

[393] In Dr. Bearman's experience, the most common adverse side-effect of smoking cannabis is a cough. One way to alleviate that is to ingest cannabis by means other than smoking. Dr. Bearman said he has not seen adverse long-term effects on cognitive functioning. Based on what his patients have told him, he indicated that the impact on driving varies: some patients say they can drive safely; others say they cannot.

*Dr. Kalant*

[394] I also had the benefit of a report and the testimony of Dr. Kalant. He was qualified as an expert to give evidence on the impact of cannabis and other drugs on human health. I found Dr. Kalant to be both extremely knowledgeable and balanced in his approach.

[395] Dr. Kalant has a medical degree as well as a PhD in pathological chemistry. He was a professor in the pharmacology department of the Faculty of Medicine at the University of Toronto and the Addiction Research Foundation. He is the author of numerous books and papers on the subjects of drugs, tolerance to drugs, dependence and addiction. He is a nationally and internationally-recognized expert on the subject, having served as chair of the Health Canada committee on research into the medical use of cannabis and a member of the expert panel of the World Health Organization on drugs of dependence.

[396] Dr. Kalant agreed that cannabis has both beneficial and harmful effects, as is the case with many drugs.

[397] Dr. Kalant discussed several beneficial uses of cannabis including:

- Sleep-inducing or anti-anxiety agent due to its relaxing and calming effect;
- Feeling of a good mood;
- Anti-convulsant properties reducing the risk of an epileptic seizure;
- Anti-nauseant properties to combat the side effects of chemotherapy and antiretrovirals;
- Anti-inflammatory properties;
- Appetite stimulant;
- Pain relief; and
- Potential anti-cancer properties.

[398] At the same time, Dr. Kalant testified that a person who consumes cannabis may experience adverse effects. The short-term adverse effects that occur immediately after consumption should be distinguished from the longer-term adverse effects that may manifest themselves in regular and heavy users or in vulnerable individuals.

[399] The short-term effects may include:

- Impairment of cognitive functions, including learning ability and short-term memory;
- Impairment of psychomotor performance, including the ability to drive;
- Increased heart rate, which may be hazardous to patients with high blood pressure and heart disease; and
- Acute toxic psychosis (rare).

[400] Dr. Kalant indicated that the cognitive effects of marijuana are usually short-term and reversible.

[401] Dr. Kalant also discussed the longer-term harmful effects that may arise. These harmful effects are more apt to be experienced by long-term heavy users or by particularly vulnerable individuals. Dr. Kalant noted, however, that the longer-term effects are more difficult to determine than the short-term effects. With this caveat in mind, he testified that there is evidence of the following long-term adverse effects:

- Long-lasting impairments of cognitive functioning;
- Increased dependency syndrome;

- Increased onset and frequency of episodes of schizophrenia in individuals genetically predisposed to developing the disease;
- Increased bronchial and pulmonary disease if the marijuana is smoked;
- Long-term developmental deficits in individuals exposed to marijuana *in utero* leading to a reduction in birth weight and smaller head circumference;
- Precipitating factor for depression, anxiety, and panic disorders;
- Poorer social and intellectual maturation for children who begin to consume the drug in their teen years;
- Potentially decreased educational achievement in youth; and
- Withdrawal syndrome.

[402] With respect to the issue of dependence, Dr. Kalant defined dependence as a situation in which an individual feels that his or her use is out of control and he or she is not able to stop. Dr. Kalant stated that his best guess was that about 10% of users in Canada develop a dependency.

[403] Dr. Kalant also noted that the amount of THC, the main psychoactive ingredient, in cannabis has increased in the last 40 years: in the early 1970's, street samples had 1% or less THC, while the current amount, based on police seizures, is 10-12%.

[404] Notwithstanding the above, Dr. Kalant agreed that the majority of people who use cannabis do not develop problems. In his opinion, the odds of an adverse effect are small if cannabis is used occasionally and in moderate or low amounts. However, the risk of long-term adverse effects increases if use is heavy and regular. The risk also increases in particular vulnerable populations.

[405] Dr. Kalant agreed that, unlike some other drugs, cannabis use is not linked to criminal tendencies beyond the use of cannabis itself. He also agreed that cannabis is not a "gateway drug", that is, it does not lead to the use of other drugs.

[406] When asked to compare the harmfulness of cannabis use to alcohol or tobacco, Dr. Kalant indicated that, under current circumstances and levels of use, cannabis use produces less harm than use of alcohol or tobacco. However, if heavy use of marijuana were to increase, that could change.

[407] The applicants did not challenge much of Dr. Kalant's evidence. There were, however, some points on which they differed.

[408] The applicants pointed to evidence that appears to show that a person who has consumed cannabis and then drives is more careful in her or his driving. Dr. Kalant agreed that a person under the influence of cannabis may be able to compensate for things that can be

anticipated. However, in his opinion, the person who has consumed cannabis and then drives is less able to deal with sudden, unexpected problems.

[409] Dr. Kalant testified that there are no effective methods at the current time to test the presence of cannabis in a person's system similar to the system of testing for the presence of alcohol. The applicants disagreed and contend that the government could effectively regulate cannabis consumption and driving, should it choose to do so.

[410] The applicants questioned Dr. Kalant's opinion with respect to the number of individuals who develop a dependency on cannabis. In particular, they challenged his reliance on studies, which were based on individuals who, on being admitted to a drug treatment centre, identified marijuana as the reason for their problem.

[411] While the applicants accepted that there are studies that have shown a link between depression and cannabis, they raised the question as to whether cannabis consumption leads to depression or depression leads to cannabis consumption.

[412] There was also a debate concerning the relationship between cannabis and schizophrenia. Dr. Kalant indicated that, while there is no proof that cannabis use causes schizophrenia, there is evidence that it can trigger a schizophrenic episode in someone who has a genetic predisposition to schizophrenia.

[413] The defence, however, referred to a recent study, which found that schizophrenics with cannabis use disorder (CUD) performed significantly better on mental processing speed and verbal skills than schizophrenics without CUD: Pamela DeRosse et al., "Cannabis use disorders in schizophrenia: Effects on cognition and symptoms" (2010) 120 *Schizophr. Res.*95. The report's authors state that verbal skills are among the strongest predictors of functional capacity. In Dr. Kalant's opinion, future large-scale studies are needed to elucidate the nature of the relationship between functional ability and CUD.

### *Conclusion*

[414] Based on this evidence, I conclude that, while the use of cannabis does not have serious or permanent effects for many of its users and, indeed, has beneficial effects for some, it may, nonetheless, have adverse effects on some individuals, in particular, heavy and regular users and some members of vulnerable groups.

[415] I accept Dr. Kalant's opinion that under current circumstances and levels of use, cannabis use produces less harm than the use of alcohol or tobacco. However, as the majority noted in *Malmo-Levine* at para. 139, Parliament does not lose its jurisdiction to legislate because there are other substances whose health and safety effects could justify similar treatment. The decision to treat cannabis use in one way and alcohol and tobacco use in other ways does not mean that there is no rational connection between the legislative provisions and their objective.

[416] Many disagree with the means the government has chosen to address the adverse effects of cannabis. They argue that there are more effective means available, such as regulation and education. That is a matter for legitimate debate.

[417] However, the issue at this stage of the analysis is not whether the government has chosen the most effective means to address its objective. Rather, the issue is whether there is a rational connection between the means and that objective. Given the evidence, I conclude that the legislative prohibitions are not arbitrary, but are rationally connected to a reasonable apprehension of harm.

(ii) The limit should impair the *Charter* right as little as possible

[418] The issue at this stage is whether there is another reasonable way for the government to achieve its objective that would not impair the *Charter* right or would have less of an impact on that right.

[419] In *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 S.C.R. 567, at para. 54, McLachlin C.J. writing for the majority, reaffirmed the test at this stage of the inquiry as that articulated by the court in *RJR-Macdonald* at para. 160:

[A]t the second step in the proportionality analysis, the government must show that the measures at issue impair the right of free expression as little as reasonably possible in order to achieve the legislative objective. The impairment must be “minimal”, that is, the law must be carefully tailored so that rights are impaired no more than necessary. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement. On the other hand, if the government fails to explain why a significantly less intrusive and equally effective measure was not chosen, the law may fail. [Emphasis added; citations omitted.]

[420] In making the minimal impairment assessment, the courts will defer to the legislature, particularly with regard to complex social issues: see *Hutterian Brethren* at para. 53.

[421] While the Crown bears the burden of proving that the means chosen by the government passes the minimal impairment test, the applicants may propose alternative measures to the impugned legislation. The applicants propose two alternatives: (i) decriminalize cannabis and address any health and safety concerns through education and regulation; or (ii) create a spiritual exemption system to enable the religious use of cannabis.

[422] The applicants submit that, in light of the significant negative effects associated with the criminalization of cannabis, the negligible benefits and the impact on their religious freedom, the legislation should be struck down. The government could accomplish any health and safety concerns through education and regulation.

[423] Where the purpose of the legislation is unconstitutional, the law may be struck down in its entirety: see e.g. *Schachter v. Canada*, [1992] 2 S.C.R. 679, at p. 682; *Big M Drug Mart* at pp. 349-350; *Canadian Civil Liberties Assn. v. Ontario (Minister of Education)* (1990), 71 O.R. (2d) 341 (C.A.), at p. 365.

[424] The applicants do not argue that the purpose of the law is unconstitutional. Rather, they ask that the provisions in their entirety be struck down because it is bad legislation. They argue that the benefits of the law are far outweighed by its adverse effects.

[425] The applicants believe that cannabis use should be legalized for everyone. That is a view that many Canadians share. However, as I have indicated elsewhere in this decision, whether cannabis use should be decriminalized or legalized for everyone is a decision that is the legislature's to make.

[426] Section 52(1) of the *Charter* provides for the striking down of any law, but only "to the extent of the inconsistency [with the Constitution]". The extent of the alleged inconsistency in this case is that the law does not provide for the religious use of cannabis. The purported constitutional difficulty, then, is that the provisions are overbroad in so far as they do not allow for the religious use of cannabis.

[427] What needs to be considered, therefore, is whether provision can be made for the applicants' religious use of cannabis.

[428] There have been cases in which the court has found a less intrusive means of achieving the state's objective. This was the case in *Multani v. Commission Scolaire Marguerite-Bourgeoys*, [2006] 1 S.C.R. 256, in which the Court found that the absolute prohibition on a Sikh student wearing a kirpan to school was not proportional to the objective of ensuring the safety of the students. The student was permitted to wear the kirpan on school property as long as it was encased in wood or metal and sewn into his clothing.

[429] However, in *Hutterian Brethren*, McLachlin, C.J., writing on behalf of the majority of the court, rejected the alternative proposed by the applicants because it would significantly compromise the government's objective. The claimants objected to having their photographs taken and placed on a central database for the purposes of obtaining driver's licences. They proposed that they be allowed to carry licences without photographs "not to be used for identification purposes." McLachlin C.J. found that this did not sufficiently reduce the risk of identity theft.

[430] The overbreadth of the prohibition against the possession of cannabis was considered in *R. v. Clay*, [2003] 3 S.C.R. 735, at para. 40, albeit within the context of s. 7 of the *Charter*. Gonthier and Binnie JJ., writing for the majority, indicated that a narrower prohibition would not be effective because members of at least some of the vulnerable groups and chronic users could not be identified in advance. Furthermore, one of the main concerns was the public danger posed by users in the acute phase, for example, in the operation of a car or complex machinery.



[431] The applicants pointed to two decisions in which the dissenting justices would have provided for the religious use of an otherwise prohibited drug: one case from the United States involving the use of peyote by members of the Native American Church: *Employment Division, Department of Human Resources of Oregon v. Smith* 494 U.S. 872 (1990); and the other case from South Africa involving the use of cannabis by members of the Rastafari religion: *Prince*.

[432] In *Oregon v. Smith*, two individuals were dismissed from their employment because they ingested peyote for sacramental purposes at a ceremony of the Native American Church. Their application for unemployment compensation was denied on the basis that the reason for their dismissal – the religious use of peyote – constituted misconduct. They sought judicial review of this denial.

[433] The majority dismissed the applicants' claim. The majority decision, written by Scalia J., is of little assistance in the case at bar because it is based on an approach to freedom of religion that is very different from the approach taken under the Canadian *Charter*. In particular, Scalia J. held that an individual cannot be exempted from the application of a neutral law by reason of the Free Exercise Clause of the First Amendment (freedom of religion).

[434] O'Connor J. agreed with the result of the majority decision but not with its reasons. Her interpretation of the First Amendment, at p. 894, falls closer to the Canadian approach in that it requires the government "to justify any substantial burden on religiously motivated conduct by a compelling state interest and by means narrowly tailored to achieve that interest". However, she concluded at pp. 905-906 that the uniform application of the criminal prohibition was essential to accomplish the state's overriding interest in preventing physical harm. She based this conclusion on the state's judgment that the possession and use of controlled substances, even by one person, was inherently harmful and dangerous. Therefore, granting a selective exemption to the applicants would seriously impair Oregon's compelling interest in prohibiting the possession of peyote.

[435] The minority opinion, written by Blackmun J. (and joined in by Brennan and Marshall JJ.) took a similar approach to O'Connor J., that is, that the government's refusal to allow a religious exemption must be justified by a compelling state interest that cannot be served by less restrictive means. He concluded, however, that the government could allow an exemption without threatening its legitimate interest.

[436] In reaching this conclusion, Blackmun J. noted the following circumstances: there was no evidence that the state had enforced its drug laws against the religious use of peyote so that its asserted interest was symbolic only; there was no evidence that the religious use of peyote had ever harmed anyone; the Church placed internal restrictions on and supervised its members' use of peyote; the values and interests of the Church were congruent with the state's interests in that its doctrine forbade the nonreligious use of peyote and its spiritual and social support had been effective in combating the effects of alcoholism; there was practically no illegal traffic in peyote so that its use in religious rituals had no relationship to the general problems associated with illegal drug trafficking; and almost half of the states and the federal government had exemptions for religious peyote use.

[437] Blackmun J. commented at p. 913 on the use of peyote in the Native American Church as follows:

The carefully circumscribed ritual context in which respondents used peyote is far removed from the irresponsible and unrestricted recreational use of unlawful drugs. The Native American Church's internal restrictions on, and supervision of, its members' use of peyote substantially obviate the State's health and safety concerns. [Footnotes omitted.]

[438] Blackmun J. drew a parallel between the use of peyote by members of the Native American Church and the use of sacramental wine by Roman Catholics during Prohibition. He distinguished the use of peyote by members of the Native American Church from the possible religious use of drugs by members of other religions at pp. 917-918:

Allowing an exemption for religious peyote use would not necessarily oblige the State to grant a similar exemption to other religious groups. The unusual circumstances that make the religious use of peyote compatible with the State's interests in health and safety and in preventing drug trafficking would not apply to other religious claims. Some religions, for example, might not restrict drug use to a limited ceremonial context, as does the Native American Church...Some religious claims involve drugs such as marijuana and heroin, in which there is a significant illegal traffic, with its attendant greed and violence, so it would be difficult to grant a religious exemption without seriously compromising law enforcement efforts. That the State might grant an exemption for religious peyote use, but deny other religious claims arising in different circumstances, would not violate the Establishment Clause. Though the State must treat all religions equally, and not favor one over another, this obligation is fulfilled by the uniform application of the 'compelling interest' *test* to all free exercise claims, not by reaching uniform *results* as to all claims. [Footnotes and citations omitted.]

[439] Thus, Blackmun J. distinguished between the religious use of peyote and the religious use of other drugs such as marijuana and heroin. However, in the case of *Prince*, the dissenting judges of the South African Constitutional Court were prepared to allow an exemption for the religious use of cannabis by members of the Rastafari religion.

[440] It is worth noting at this point that the South African Constitution has a similar section to the Canadian *Charter's* s. 1. The Constitutional Court has also adopted an approach to that section similar to the *Oakes* test employed by Canadian courts.

[441] Mr. Prince applied to be admitted to the bar. In his application, he disclosed that he had two previous convictions for possession of cannabis and he intended to continue to use cannabis. He stated that his use of cannabis was inspired by his Rastafari religion. The Law Society took the view that Mr. Prince was not a fit and proper person to be admitted as an

attorney. As long as the use or possession of cannabis was prohibited, the applicant would consistently break the law and would thereby bring the profession into disrepute.

[442] All the judges of the court agreed that the criminalization of the use and possession of cannabis limited the religious rights of members of the Rastafari faith under the South African Constitution. However, they were divided – five to four - on whether the limitation was justifiable. In particular, they disagreed as to whether the state was required to devise an exception to the general prohibition.

[443] In reaching its decision, the majority referred to the decision of the Supreme Court of the United States in *Oregon v. Smith*. They noted that the approach taken by the minority in that decision to freedom of religion was more consistent with the approach of the South African courts. However, they distinguished between the use of peyote by members of the Native American Church and the use of cannabis by members of the Rastafari religion at para. 129:

Cannabis, unlike peyote, is a drug in which there is a substantial illicit trade which exists within South African and internationally. Moreover, the use to which cannabis is put by Rastafari is not simply the sacramental or symbolic consumption of a small quantity at a religious ceremony. It is used communally and privately, during religious ceremonies when two or more Rastafari come together, and at other times and places. According to his own evidence, the appellant uses cannabis regularly at his home and elsewhere. All that distinguishes his use of cannabis from the general use that is prohibited, is the purpose for which he uses the drug, and the self-discipline that he asserts in not abusing it.

[444] The majority concluded at para. 130 that there was no objective way in which a law enforcement official could distinguish between the religious and the recreational use of cannabis, nor could a law enforcement official determine whether the user was genuine when he or she claimed that the use was religious.

[445] The majority referred to the decision of the Ontario Court of Appeal in *R. v. Parker* in which the court held that the legislative provision was unconstitutional because it did not provide for access to cannabis for those who required it for medical purposes. They distinguished the situation of medical exemptions, which was before the court in *Parker*, from the religious exemption sought by Mr. Prince, noting that medical exemptions are amenable to control in ways that an exemption for religious purposes are not: *Prince* at para. 127.

[446] The majority noted, at para. 138, the following problems with permitting Rastafari to consume cannabis: Rastafari would be exposed to the same harm as others, dependent only on their self-discipline to use it in ways to avoid harm; there was no objective way in which a law enforcement official could distinguish between religious use and recreational use; and a system whereby permits would be issued to “bona fide Rastafari” would be inconsistent with freedom of religion. With respect to the last point, they explained that the essence of freedom of

religion is that individuals have a choice that does not depend on permission granted by the state.

[447] The dissenting judges, however, were of the view that it would be possible to tailor an exemption. Ngcobo J. stated at para. 47 that the issue was “whether the granting of a religious exemption would undermine the objectives of the prohibition.” In considering whether an exemption was workable, he noted at para. 40: “the strict discipline and protocol that accompanies the use of cannabis at religious gatherings and ceremonies emphasise the importance of cannabis in the Rastafari religion.”

[448] Ngcobo J. accepted the evidence that the smoking of several joints would not cause harm and concluded that, given the small amounts of cannabis the applicant sought to use, there would be no danger of harm if an exemption were granted.

[449] He noted, as well, at para. 63 that any religious exemption would have to be subject to strict controls including: the purpose for which it could be acquired; the persons who could acquire it; the sources from which it could be acquired; and the amount that could be lawfully possessed.

[450] Ngcobo J. acknowledged at para. 76 that such an exemption might not conform with the way in which the members of the Rastafari faith practised their religion. For example, Mr. Prince did not confine his use of cannabis to religious ceremonies. In the opinion of Ngcobo J., it was appropriate to require accommodation on the part of both the government and the applicant:

[T]he balancing exercise requires a degree of reasonable accommodation from all concerned. Rastafari are expected, like all of us, to make suitable adaptations to laws that are found to be constitutional that impact on the practice of their religion. A narrow and a closely defined exemption that is subject to manageable government supervision does not oblige them “to make an absolute and strenuous choice between obeying a law of the land or following their conscience. They can do both simultaneously”.

[451] Sachs J. concurred with the judgment of Ngcobo J. and provided additional comments. He expressed his opinion that it was possible to apply the principle of reasonable accommodation to protect the core sacramental aspects of Rastafari belief and practice. He suggested the following approach at para 148:

[A]ppropriate balancing and application of the principle of reasonable accommodation would allow for protection to be given to core sacramental aspects of Rastafari belief and practice without unduly impacting upon the broader campaign against harmful drugs. The most useful approach would appear to involve developing an imaginary continuum, starting with easily-controllable and manifestly-religious use at the one end, and ending with difficult-to-police utilization that is

barely distinguishable from ordinary recreational use, at the other.  
[Emphasis added.]

[452] He went on to note, at para. 148, however, that the accommodation should not go so far as to allow for the free use of dagga in the privacy of Rastafari homes: “Such use would be extremely difficult to police and would completely blur the distinction in the public mind between smoking for purposes of religion and recreational smoking.”

[453] The approach taken by Sachs J. suggests that the more difficult it is to identify the religious use or the religious user, the less workable is an exemption.

[454] Sachs J. acknowledged at para. 148 that such an exemption would not give the Rastafari everything they claimed “but at least [it] would cast a flicker of constitutional light into the murky moral catacombs in which they exist and secure to them a modest but meaningful measure of dignity and recognition. The fact that they cannot be given all that they ask for is not a reason for giving them nothing at all.”

[455] The religious use of cannabis by the applicants and by other members of the Church of the Universe falls at the difficult-to-police end of the spectrum that is “barely distinguishable [by the outsider] from ordinary recreational use”: see *Prince* per Sachs J. at para. 148. The highly individualized approach to freedom of religion articulated by the court in *Anselem* requires a highly individualized approach to determining beliefs and sincerity. In the circumstances of the application before me, the determination is a difficult task. Both the religious user and the religious use are difficult to identify. The applicants place no limits on where, when, how or how much cannabis is used.

[456] In these circumstances, it would be extremely difficult for a law enforcement official to be able to identify the religious user and the religious use. The applicants suggest that these difficulties could be addressed by way of a licensing or permit system: either a government official or a tribunal could conduct an inquiry into a person’s beliefs and determine that person’s sincerity.

[457] The applicants’ proposal that a government official or tribunal determine an individual’s sincerity is both impractical and troubling. It is exactly this kind of inquiry that the applicants so strenuously objected to in the course of the hearing of this application.

[458] The fact that it was difficult for me to determine the sincerity of the applicants’ beliefs after a hearing that lasted more than five weeks raises significant concerns about the workability of such a process.

[459] The prospect of a tribunal or a government official inquiring into the sincerity of an individual’s religious beliefs and then certifying whether that person is or is not sincere 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.

[460] The applicants further propose that, having identified the religious user, the government could also place limits on the use of cannabis, should it choose to do so. It could, for example, prescribe the time and place of its consumption and regulate cannabis consumption and driving. It could also identify vulnerable individuals and place limits on quantity and frequency of use.

[461] The applicants accept that such restrictions could result in a permitted use that would be far more limited than their actual religious use of cannabis and would be contrary to their belief that there should be no restrictions. However, they submit that any allowance and recognition of their religious beliefs and practices would be better than none. They point to the minority judgments of Ngcobo and Sachs JJ. in *Prince*, in which the judges envisaged an exemption that was more limited than Mr. Prince's actual consumption.

[462] The analogy to the situation in *Prince* is problematic. While Mr. Prince used cannabis in different settings, there was, nonetheless, a portion of his use, that is, the consumption in religious ceremonies that qualified as "easily-controllable and manifestly-religious". The evidence with respect to the applicants' use and the use of other adherents is that most of the use is barely distinguishable from recreational use. Furthermore, the sincerity of Mr. Prince's religious beliefs was not in issue.

[463] The applicants also draw an analogy to the system in place for medical users of cannabis. However, this analogy is problematic for two reasons. The first is that a system that depends on 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.

[464] The second reason is that the prohibition of the medical use of cannabis had the effect of impairing the health of those who required it for medical purposes. Thus, as Rosenberg J.A. noted in *Parker* at para. 192, "the legislation works in opposition to one of the primary objectives [the prevention of harm to the health of Canadians and the resulting costs to society] and thus could be described as 'arbitrary' or 'unfair'". The same cannot be said about the applicants' religious use of cannabis.

[465] I conclude that, in the circumstances of this case, the difficulties in identifying both the religious user and the religious use of cannabis make an exemption unworkable. The proposed institution of a system of state inquiries into people's religious beliefs has the potential to undermine the value we place on freedom of religion rather than promote it. In reaching this conclusion, I do not mean to suggest that there could never be an allowance made for the religious use of a drug. Rather, in the circumstances of the application before me, such an allowance is not feasible.

(iii) Balance of proportionality between the benefits of the limit and its deleterious effects

[466] If the government has satisfied the other steps in the proportionality analysis, the court must still consider the "proportionality between the effects of the measure which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of 'sufficient importance'": *Oakes* at p. 139. At this stage, the court must consider

not only the objective of the legislative provisions but their effectiveness in achieving the objective as weighed against the infringement on the *Charter* right: see *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, at p. 887.

[467] In *Hutterian Brethren*, McLachlin C.J., writing for the majority addressed the question of what this stage added to the proportionality analysis at paras. 76-77:

It may be questioned how a law which has passed the rigours of the first three stages of the proportionality analysis – pressing goal, rational connection, and minimum impairment – could fail at the final inquiry of proportionality of effects. The answer lies in the fact that the first three stages of *Oakes* are anchored in an assessment of the law’s purpose. Only the fourth branch takes full account of the “severity of the deleterious effects of a measure on individuals or groups”.

...

The final stage of *Oakes* allows for a broader assessment of whether the benefits of the impugned law are worth the cost of the rights limitation.

[468] The applicants submit that the adverse consequences of prohibiting cannabis - the harms of prohibition and the denial of the benefits of cannabis - combined with the impact of the prohibition on their religious practices and on the existence of the G13 Mission far outweigh the negligible benefits that might be realized from its continued prohibition.

[469] However, the question is not whether the adverse consequences of criminalizing cannabis outweigh the benefits of the legislative provisions. Rather, the question is whether the adverse consequences on the applicants’ religious beliefs and practices outweigh the benefits.

[470] In *Hutterian Brethren*, McLachlin C.J. weighed the salutary effects associated with the legislative provision (the universal requirement of a photograph on a driver’s licence) against the deleterious limit on the claimants’ exercise of their s. 2(a) right. She found at para. 99 that the universal requirement did not rise to the level of seriously affecting their right. In balancing the salutary and deleterious effects, she concluded that the impact of the universal photo requirement was proportionate.

[471] In this case, the prohibitions in question have a significant effect on the applicants’ ability to practise their religion, given the centrality of the use of cannabis to their religious beliefs. The difficulty is that allowing for the religious use of cannabis in these circumstances is not workable. This is distinguishable from the situation in the *Hutterian Brethren* case where the issue was not whether an exemption would be possible but whether, on balance, such an exemption was desirable given the competing interests.

[472] As noted by McLachlin C.J. in *Hutterian Brethren* at paras. 60-61, sometimes freedom of religion cases present an “all or nothing” dilemma where there are no alternative measures that would substantially satisfy the government’s objective.

[473] In my opinion, this case presents an “all or nothing” dilemma. The difficulty here, however, is not that the proposed alternative measures would not satisfy the government’s objective. Rather, the difficulty is that the alternative measures are unworkable.

### Conclusion

[474] I conclude that there is a rational connection between the limit on the applicants’ freedom of religion and the legislative objective. There is evidence that the use of cannabis has adverse effects on some individuals, in particular, heavy and regular users and some members of vulnerable groups. The legislative provisions are rationally connected to a valid legislative objective. Whether the government has chosen the best way to address this objective is not a matter for this court to decide.

[475] The limits have a significant impact on the applicants’ ability to practise their religion. They are, however, proportional because there is no effective means to provide for the applicants’ religious use of cannabis. The applicants’ practices and beliefs are such that it is extremely difficult, if not impossible, for an outsider to identify religious use and the religious user. The applicants’ proposed alternative - a state-sponsored inquiry into the sincerity of beliefs - is unworkable and has the potential to threaten freedom of religion rather than further it.

[476] This conclusion is limited to the facts in this case. It does not mean that it would never be possible to provide an exemption for the religious use of a drug.

[477] I conclude that the government has established that the provisions in question constitute a reasonable limit on the applicants’ *Charter* rights.

### **SUMMARY AND CONCLUSIONS**

[478] The applicants have been charged with trafficking in cannabis, possession of cannabis for the purpose of trafficking and possession of the proceeds of crime. They claim that the cannabis-related provisions of the *CDSA* contravene their freedom of religion and the freedom of religion of others.

[479] This case is not about the wisdom of the current laws nor is it about whether the possession of cannabis should be decriminalized or legalized. Rather, the issue is whether the legislative provisions are constitutional in so far as they may limit freedom of religion.

[480] The applicants challenge not only the constitutional basis for the charges against them; they challenge all cannabis-related provisions. Furthermore, they claim that the provisions contravene not just their rights but also the rights of all members of cantheistic religions.

[481] I conclude that the applicants have standing to challenge all cannabis-related provisions, given their direct personal interest. However, they do not have standing to challenge the constitutionality of those provisions with respect to their impact on members of all cantheistic religions, including members of the Rastafari faith.



[482] In order to claim the protection afforded to freedom of religion in s. 2(a), an individual must establish that his or her beliefs qualify as religion under that section and that the beliefs are sincerely held.

[483] Freedom of religion under s. 2(a) focuses on the religious beliefs and practices of the individual, not on the religious institution. It is triggered where the individual has a connection with the divine or the transcendent and that connection has a relationship to religion. Religion, in this context, goes beyond the religious or spiritual experience. It helps provide the individual with a sense of meaning, purpose and spiritual fulfillment.

[484] While the inquiry into sincerity should, in general, be limited, it is my opinion that in the circumstances of this case, more than a limited inquiry is warranted.

[485] The applicants have not established that the provision of cannabis to individuals who became members of the Church was a religious practice stemming from a sincerely held religious belief. Therefore, to the extent that the charges that are the subject matter of this case relate to the provision of cannabis to others, they do not limit the applicants' right to freedom of religion.

[486] The applicants have established that their use of cannabis was, at least, in part related to a sincerely held religious belief, within the meaning of s. 2(a). The prohibition against cannabis is more than a trivial interference. I conclude, therefore, that the prohibition against the possession of cannabis limits the applicants' freedom of religion in so far as it prevents them from legally consuming it for religious purposes. I also conclude that the prohibitions against trafficking and cultivation limit their freedom of religion but only in so far as they prevent the applicants from legally obtaining cannabis for their religious use.

[487] Freedom of religion is not absolute. Once the applicants establish that the legislative provisions limit their *Charter* right, the Crown may establish that the limits are nonetheless reasonable within the meaning of s. 1 of the *Charter*.

[488] The Crown does not have to establish that criminalizing cannabis is the best approach to addressing the harms associated with cannabis use. Rather, it must establish that the legislative objective is pressing and substantial and that there is proportionality between the limits on the *Charter* right and the benefits of the law.

[489] The legislative provisions reflect a pressing and substantive objective, that is, the avoidance of harm to Canadians, in particular, the avoidance of harm to vulnerable individuals. There is a rational connection between that objective and the provisions in question.

[490] The limits are proportional because there is no feasible way to make an allowance for the religious use of cannabis in the circumstances of this case. It is difficult, if not impossible, for an outsider to identify the religious user and religious use because religious use is barely distinguishable from recreational use. The alternative proposed by the applicants – a permit system involving an inquiry into the sincerity of beliefs – is both unworkable and undesirable.

It calls to mind a state-sponsored religious inquisition, with the potential to threaten freedom of religion rather than further it.

[491] I therefore conclude that the limits are reasonable within the meaning of s. 1.

[492] The application is therefore dismissed.

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Herman J.

**Released:** February 7, 2011

**CITATION:** R. v. Kharaghani and Styrsky, 2011 ONSC 836  
**COURT FILE NO.:** 1-597294  
**DATE:** 2011/02/07

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

HER MAJESTY THE QUEEN

Respondent

– and –

SHAHROOZ KHARAGHANI and PETER STYRSKY

Applicants

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**REASONS FOR DECISION**

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Herman J.

**Released:** February 7, 2011