

**ONTARIO COURT OF JUSTICE  
(Southwest Region)**

**B E T W E E N:**

**HIS MAJESTY THE KING**

**Respondent**

**- and -**

**SAMER AKILA**

**Applicant**

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**THE APPLICANT'S FACTUM  
RE: FREEDOM OF THOUGHT CONSTITUTIONAL CHALLENGE**

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**PART I - STATEMENT OF THE CASE**

1. Psilocybin is a freedom of thought tool. It is to freedom of thought what the printing press was to freedom of expression, what a church is to freedom of religion or what a passport is to freedom of mobility. It allows one to experience the freedom in a more fulsome manner.
2. A psilocybin experience is for many one of the most personally meaningful and spiritually significant experiences of their lives.
3. Psilocybin promotes cognitive flexibility, spirituality, life-meaning, connectivity, ego dissolution, empathy, compassion, and mindfulness.
4. Psilocybin is a safe, non-addictive and non-toxic freedom of thought tool.
5. A tool for freedom of thought is especially important. Freedom of thought is described in the *Charter* as a “fundamental” right. It is critical for
  - democratic citizenship;
  - the pursuit of truth;
  - human dignity and existence;
  - protecting the human person’s most sacred and inviolable possessions (a person’s thoughts);
  - human diversity in forms of individual self-fulfillment and human flourishing; and
  - the vitality of other *Charter* freedoms.
6. Freedom of thought is necessary for the proper exercise of most other rights including freedom of religion, freedom of expression, freedom of

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belief, freedom of opinion, and the right to vote. It is a foundational right that fosters mental autonomy, dignity and identity. It is a bulwark against tyranny. It is the most important of all rights.

7. The Applicant, Samer Akila, is charged with possession of psilocybin for the purpose of trafficking contrary to subsection 5(2) of the *Controlled Drugs and Substances Act* (the “*CDSA*”).
8. A Notice of Application (the “*NOA*”) and a Notice of Constitutional Question (the “*NCQ*”) have been served/ filed alleging that subsection 5(2) of the *CDSA* with respect to psilocybin is contrary to subsection 2(b) (freedom of thought) and section 7 of the *Charter of Rights and Freedoms* (the “*Charter*”). The constitutional challenge is scheduled to hear from witnesses on February 10-14, 24-28 and March 3-7, 2025 and hear final submissions on April 3 and 4, 2025.

## **PART II -SUMMARY OF THE FACTS**

### A. The thought-related benefits of psilocybin

9. A psilocybin experience is often deeply-enriching and life-altering.<sup>1</sup> It does this by facilitating good thought.

### Sarah Lange

10. Sarah Lange used psilocybin at a facility in the Netherlands. Before she used psilocybin, she had feelings of fear, doubt and shame from trauma when she was young. She would dwell on negative thoughts and would

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<sup>1</sup> Affidavit of Prof. Walsh, sworn June 4, 2024, para. 16, p. 144, Part 1 of Application Record.

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fear the future. After using psilocybin she focused on the present. Her connections with her mother and brother deepened and she connected with her own feelings and desires. She is now more connected to other people, herself, nature and the universe. She is happier, more fulfilled and more at peace than she ever was in her life.<sup>2</sup> She had not been diagnosed with a serious health condition and it was not an emergency, both of which were required for medicinal access pursuant to the Special Access Program (the “**SAP**”) under section C.08.010 of the *Food and Drug Regulations*, C.R.C., c. 870 (the “**FDR**”). Ms. Lange was an ordinary, high functioning person who wanted to improve her wellness. She wanted to think in a better way.<sup>3</sup>

11. Like Ms. Lange, many people may not have a serious or a life-threatening condition, but still, for them, it is very important that they think in a better way.

Antonio Cillero

12. As a youth growing up in rural Spain, Antonio Cillero was an anxious child who had a difficult relationship with his strict father. Around ages 17-18 he experienced psilocybin and it facilitated better thinking. Psilocybin gave him a new compassion and empathy for his father, for others and for himself.<sup>4</sup>
13. During a later psilocybin experience, Mr. Cillero had an epiphany about his Catholic faith. He had been raised Catholic, but he had

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2 Affidavit of Sarah Lange, sworn June 5, 2024, at paras. 14-16, pp 552-553, of Part 2 of Application Record.

3 Affidavit of Sarah Lange, sworn June 5, 2024, at paras. 3-5, pp. 547-548, of Part 2 of Application Record.

4 Affidavit of Antonio Cillero, sworn June 7, 2024, at paras. 3, 4, 10, 11 and 13, pp. 554, 556, 557, Part 2, Application Record.

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always found the rituals, doctrines and lessons hollow and detached. Following this psilocybin experience, he realized that the unconditional love and forgiveness that he had developed from psilocybin was similar to the message of Jesus Christ. This realization became a bridge reconnecting him to his Christian roots and to his family.<sup>5</sup>

14. Mr. Cillero has used psilocybin and had experiences with what he believes to be the divine. He felt the presence of something that had a connection to all living things. Love was a core part of this entity.<sup>6</sup>
15. Mr. Cillero now feels happier thanks to his experiences with psilocybin.<sup>7</sup>

Derek Snider

16. The first few times Derek Snider used psilocybin he did not intend to have spiritual experiences. However, as a result of his psilocybin use, he has reconnected with his soul. He believes that his soul is a part of everything including nature and God. He believes that psilocybin is a sacrament (brings him closer to God) and a divine gift.<sup>8</sup>
17. Psilocybin use has also made him more mindful. For most of his life he has had a tendency to obsess and ruminate. Psilocybin has changed his thinking making him more in-the-moment and helping him to let go of his obsessions.<sup>9</sup>

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5 Affidavit of Antonio Cillero, sworn June 7, 2024, at paras. 18-19, pp. 557-558, Part 2, Application Record.

6 Affidavit of Antonio Cillero, sworn June 7, 2024, at para. 22, p. 559, Part 2, Application Record.

7 Affidavit of Antonio Cillero, sworn June 7, 2024, at para. 19, p. 558, Part 2, Application Record.

8 Affidavit of Derek Snider, sworn June 6, 2024, at paras. 6-8, pp. 561-562, Part 2, Application Record.

9 Affidavit of Derek Snider, sworn June 6, 2024, at para. 13, p. 563, Part 2, Application Record.

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18. During psilocybin experiences his empathy increases which enhances his senses of connection, community, love, and acceptance.<sup>10</sup>
  19. As a result of psilocybin, Mr. Snider believes his purpose in life is to seek knowledge and help others.<sup>11</sup>

Professor David Nutt on thought-related benefits

20. The thought-related benefits of psilocybin include cognitive flexibility, spirituality, life meaning, connectivity with self, others and nature, ego dissolution, empathy and compassion, and mindfulness.
21. Considerable scientific evidence supports the following effects of psilocybin in both healthy volunteers and some patient groups.
  - a. Cognitive flexibility. This is the improved ability to engage with and alter thinking processes, especially to escape from or terminate depressive ruminations. This subjective experience is supported by brain imaging studies that reveal the brain is more flexible (less modular) after a psilocybin treatment.<sup>12</sup>
  - b. Spirituality. Many rank the psilocybin experience as being among the most personally meaningful and spiritually significant of their lives.<sup>13</sup> Psilocybin can cause those who did not previously identify

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10 Affidavit of Derek Snider, sworn June 6, 2024, at para. 14, p. 563, Part 2, Application Record.

11 Affidavit of Derek Snider, sworn June 6, 2024, at para. 17, p. 563, Part 2, Application Record.

12 Affidavit of Prof. Nutt, sworn April 29, 2024, paras. 27(a), p. 15, 46-60, Part 1 of Application Record; Affidavit of Prof. Walsh, sworn June 4, 2024, paras. 7, 12, pp. 141, 143, Part 1 of Application Record.

13 Affidavit of Prof. Nutt, sworn April 29, 2024, paras. 27(b), p. 15, 53, 90-92 Part 1 of Application Record; Affidavit of Prof. Walsh, sworn June 4, 2024, paras. 7, 9, 10, 12, 13, 17, pp. 141-143, 145, Part 1 of Application Record.



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as spiritual to have spiritual-like experiences, connecting to all other souls.<sup>14</sup>

- c. Life meaning. Many people state that a psilocybin trip is one of the most personally meaningful experiences of their lives. The state of wonder and altered thinking that can emerge in a psilocybin trip is often seen as being very meaningful and spiritual. This occurs not only in people seeking treatment for mental illness but also in healthy volunteers.<sup>15</sup>
- d. Connectivity with self, others and with nature. Psilocybin causes people to feel enhanced connections to self, to those who had abused or wronged them, to close family and friends, to strangers, to all humanity, to the world and to nature. Some describe a deep connection to everyone.<sup>16</sup>
- e. Ego-dissolution. This is a positive experience characterized by the feeling of being outside of or beyond one's typical sense of self or perspective.<sup>17</sup>

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14 Affidavit of Prof. Nutt, sworn April 29, 2024, p. 53, Part 1 of Application Record.

15 Affidavit of Prof. Nutt, sworn April 29, 2024, paras. 27(c), p. 15; pp. 90-92, Part 1 of Application Record; Affidavit of Prof. Walsh, sworn June 4, 2024, paras. 7, 9, 10, 12, pp. 141-143, Part 1 of Application Record.

16 Affidavit of Prof. Nutt, sworn April 29, 2024, paras. 27(d), p. 15; pp. 43, 49-52 and 92, Part 1 of Application Record; Affidavit of Prof. Walsh, sworn June 4, 2024, paras. 7, 10, 13, pp. 141-142, Part 1 of Application Record.

17 Affidavit of Prof. Nutt, sworn April 29, 2024, paras. 27(e)), p. 15-16; p. 92, Part 1 of Application Record; Affidavit of Prof. Walsh, sworn June 4, 2024, paras. 7, 9, 12, pp. 141-143, Part 1 of Application Record.

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- f. Empathy and compassion.<sup>18</sup> Psilocybin promotes feelings of self-worth and self-compassion.<sup>19</sup>
- g. Mindfulness. This is the sense that the person is more able to regulate internal thought processes, especially to suppress or eliminate ones that are counterproductive and self-critical. The ability to control or escape from inner dialogues.<sup>20</sup> Psilocybin can reduce depression and anxiety amongst healthy people.<sup>21</sup>

Professor Zachary Walsh on thought-related benefits

22. Psilocybin use can cause consumers to experience positive changes in the thought-related domains of cognitive flexibility, spirituality, life-meaning, ego dissolution, connectedness, mindfulness, and creativity. These thought-related effects are over-lapping, but also meaningfully distinct.<sup>22</sup>
23. Mystical experience includes spirituality, life-meaning, ego dissolution, and peace. In a 2011 study reported in *Psychopharmacology*, it was found that, “The present study extends previous observations indicating that psilocybin can occasion persisting positive changes in attitudes, mood, life satisfaction, and altruism/ social effects.” In the study, among adults with no experience with psilocybin, 72% experienced a complete mystical experience. The results of this study have been replicated several times and are reliable. In sum, replicated evidence

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18 Affidavit of Prof. Nutt, sworn April 29, 2024, paras. 27(f), p. 16; pp. 51-52, 92, Part 1 of Application Record.

19 Affidavit of Prof. Nutt, sworn April 29, 2024, p. 49, Part 1 of Application Record.

20 Affidavit of Prof. Nutt, sworn April 29, 2024, para. 27(g), p. 16; p. 92, Part 1 of Application Record; Affidavit of Prof. Walsh, sworn June 4, 2024, paras. 7, 13 and 15, p. 141, 143-144, Part 1 of Application Record.

21 Affidavit of Prof. Nutt, sworn April 29, 2024, paras. 34-35, pp. 17-18, Part 1 of Application Record.

22 Affidavit of Prof. Walsh, sworn June 4, 2024, para. 7, p. 141, Part 1 of Application Record.

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across several samples indicates that use of psilocybin can engender mystical experiences and these experiences are distinctly characterized by several of the thought-related effects identified in the question with a particular emphasis on ego-dissolution, spirituality, and life-meaning.<sup>23</sup>

24. Ego dissolution is reliably engendered by psilocybin. Ego dissolution is a positive thought-related experience characterized by the feeling of being outside of or beyond one's typical sense of self or perspective. This has been widely found to have salutary effects.<sup>24</sup>
25. Connectedness. Psilocybin can cause consumers to experience enhanced connectedness. In the Griffiths et. al. 2006, 2008 study, the types of behaviour most frequently cited by volunteers were better social relationships with family and others.<sup>25</sup>
26. Mindfulness is a frequently reported thought-related benefit of ingesting psilocybin. Mindfulness is a thought-related skill involving the capacity to attend to the active and present contents of one's mind.<sup>26</sup>
27. The subjective value and importance of these thought-related benefits is immense.<sup>27</sup> As an example, in Pahnke's Good Friday experiment, the study looked at the very long-term thought-related effects of psilocybin. The study built on an early study of psilocybin-occasioned mystical experiences among divinity students administered psilocybin

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23 Affidavit of Prof. Walsh, sworn June 4, 2024, paras. 9, 10, 12, pp. 142-143, Part 1 of Application Record.

24 Affidavit of Prof. Walsh, sworn June 4, 2024, paras. 9, 12 and 15, pp. 142-144, Part 1 of Application Record.

25 Affidavit of Prof. Walsh, sworn June 4, 2024, para. 10, p. 142, Part 1 of Application Record.

26 Affidavit of Prof. Walsh, sworn June 4, 2024, para. 15, p. 144, Part 1 of Application Record.

27 Affidavit of Prof. Walsh, sworn June 4, 2024, paras. 16-17, pp. 144-145, Part 1 of Application Record.

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in 1962. Assessments conducted shortly after the experiment indicated that participants in the psilocybin condition experienced profound thought-related mystical type experiences and that these experiences were considered highly meaningful and valuable. Interestingly, when followed up 25 years later participants maintained their high esteem for the psilocybin experiences, rating them as being among the most important spiritual event of their lives. As one participant reported:

Just in that one session I think I gained experience I didn't have before and probably could never have gotten from a hundred hours of reading or a thousand hours of reading.<sup>28</sup>

#### Indigenous spiritual and religious use

28. The traditional and contemporary indigenous use of psilocybin mushrooms for spiritual and religious uses are documented in many sources and writings from ethnographers, anthropologists, ethnobotanists, travelers, and others.<sup>29</sup>

#### Psilocybin and the brain

29. The 5-HT<sub>2A</sub> receptors mediate the effects of psilocybin. They are most dense in the most recently evolved parts of the human brain – the transmodal cortex. This is the brain network in which human-specific cognitive processes such as abstract and creative thinking, imaging and self-reflection take place.<sup>30</sup>
30. By stimulating these layer 5-HT<sub>2A</sub> receptors psilocybin disrupts

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28 Affidavit of Prof. Walsh, sworn June 4, 2024, para. 17, p. 145, Part 1 of Application Record.

29 Affidavit of Prof. McKenna, sworn April 29, 2024, paras. 13-17, 20, 22-24, 27-29 and 37-39, pp. 318-327, 332-333, Part 2 of Application Record.

30 Affidavit of Prof. Nutt, sworn April 29, 2024, para. 28, p. 16, Part 1 of Application Record.

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ongoing rhythmic activity of the brain leading to much less synchronised brain activity, a state we call the entropic brain. The entropic state is one in which the regular rhythmic activity of the brain is markedly reduced while significantly increasing connectivity between brain regions. The entropic state usually produces more positive and functional changes to the brain. Because the entropic state breaks down established ways of thinking it allows people to think in more creative and diverse ways.<sup>31</sup>

31. These changes can explain many aspects of the psychedelic state such as different level(s) of consciousness, hallucinations, out of body experiences, wonder and personal insights.<sup>32</sup>
32. Neuroimaging studies reveal that this increased connectivity persists for at least 3 weeks after a single psilocybin dose.<sup>33</sup> Consonant with these neuroimaging studies, people often report improved mental wellbeing, improved cognitive flexibility and an enhanced sense of being more connected with others, with nature and with the world.<sup>34</sup>
33. Of particular relevance was the novel neuroimaging discovery that psilocybin administration leads to a breakdown of a brain network called the Default Mode Network (DMN). This network encodes all aspects of a person's sense of self, both in terms of location in time and space as well as in terms of self-value. Some would say it is the location for the ego. There is evidence that the DMN is over-engaged in people with mental illness such as depression in which repetitive

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31 Affidavit of Prof. Nutt, sworn April 29, 2024, paras. 29 and 31, p. 16, Part 1 of Application Record.

32 Affidavit of Prof. Nutt, sworn April 29, 2024, paras. 29-30, p. 16, Part 1 of Application Record.

33 Affidavit of Prof. Nutt, sworn April 29, 2024, para. 31, p. 16, Part 1 of Application Record.

34 Affidavit of Prof. Nutt, sworn April 29, 2024, para. 32, p. 16, Part 1 of Application Record.

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thought loops (ruminations) dominate thinking and are beyond voluntary control. This can happen to a lesser extent to healthy normal people who sometimes feel depression or anxiety.<sup>35</sup>

34. In such people the entropic state that arises from psilocybin treatment disrupts the DMN and in the post-treatment period it is less self-engaged and is more connected with other brain networks especially the executive and salience ones. This allows more normal functional, i.e., less depressed, brain activity. A very recent as yet unpublished study of ours has found that such improvements in network connectivity occur after a single psilocybin trip in people without a mental illness diagnosis, last for at least a month, and their magnitude correlates with improvement in wellbeing.<sup>36</sup>
35. A further neuroscience discovery with psilocybin is that for some time after their administration a state of facilitated neuroplasticity is found. This is revealed by the growth of new neural processes (dendrites) and synapses, seen in rodent models. It is believed that these neuroplastic processes allow improved learning of new mental states that emerge during the treatment.<sup>37</sup>

#### B. Psilocybin safety

36. Historically psilocybin has been used by many millions of people over thousands of years with very few reports of significant harms. Recently, use in Western countries has become popular with little evidence of significant harms.<sup>38</sup>

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35 Affidavit of Prof. Nutt, sworn April 29, 2024, paras. 33-34, pp. 17-18, Part 1 of Application Record.

36 Affidavit of Prof. Nutt, sworn April 29, 2024, para. 35, p. 18, Part 1 of Application Record.

37 Affidavit of Prof. Nutt, sworn April 29, 2024, para. 36, p. 18, Part 1 of Application Record.

38 Affidavit of Prof. Nutt, sworn April 29, 2024, para. 37, p. 18, Part 1 of Application Record.

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37. In modern trials over 1000 patients have been treated with psilocybin without significant harms emerging consistent with the earlier clinical data. There are no reported cases of healthy volunteers experiencing an emergence of a psychiatric state following a research treatment with psilocybin.<sup>39</sup>
38. Systematic assessments of psilocybin harms compared with numerous other psychoactive drugs have recently been conducted by four independent groups using state-of-the-art methodology – multi criteria decision making. Psilocybin was consistently found to cause either the least harm or almost the least harm of all the drugs studied.<sup>40</sup>
39. Many of the risk perceptions with psilocybin (and other psychedelics) originate from the first wave of psychedelic repression in the middle of the last century often with sensationalized media reports. These still contribute to their current stigmatisation.<sup>41</sup>
40. Across all domains the evidence supports the conclusion that the health risks of consuming psilocybin are very low.<sup>42</sup>
41. Psilocybin is not harmful to mental health.<sup>43</sup>
42. Psilocybin has an extremely low level of dependence, lower than

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39 Affidavit of Prof. Nutt, sworn April 29, 2024, para. 43, pp. 19-20, Part 1 of Application Record.

40 Affidavit of Prof. Nutt, sworn April 29, 2024, paras. 43-47, pp. 19-21; pp. 107-109, 118-119, Part 1 of Application Record; Affidavit of Prof. Walsh, sworn June 4, 2024, para. 29, pp. 150-151, Part 1 of Application Record.

41 Affidavit of Prof. Nutt, sworn April 29, 2024, para. 49 (a), (b), p. 22, Part 1 of Application Record.

42 Affidavit of Prof. Walsh, sworn June 4, 2024, para. 25, p. 148, Part 1 of Application Record.

43 Affidavit of Prof. Walsh, sworn June 4, 2024, para. 27, pp. 149-150, Part 1 of Application Record.

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caffeine.<sup>44</sup>

43. Psilocybin has the lowest incidence of emergency hospital visits of all recreational drugs. Further analyses of cases that led to emergency service use indicated that the few events that did lead to seeking services were short-lived and self-resolving.<sup>45</sup>
44. Psilocybin has an outstanding safety ratio such that a potentially harmful dose is several hundred times larger than what is used for thought-related benefits, making it an order of magnitude safer than aspirin from the perspective of toxicity.<sup>46</sup>
45. The small risk of engaging in harmful behaviours can be almost entirely mitigated by following best practices safety procedures such as screening, integration and facilitation by an attendant not under the influence of psilocybin.<sup>47</sup>
46. Risks from the use of any psychoactive substance are greater in people with current and past mental health problems especially psychosis. It is also possible that people with a close (first-degree) family relative with psychosis would also be at greater risk. For these reasons such individuals are currently excluded from research trials with psychedelics including psilocybin.<sup>48</sup>
47. Beyond psychosis the major predictor of poor or negative outcomes

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44 Affidavit of Prof. Walsh, sworn June 4, 2024, para. 25, p. 148, Part 1 of Application Record.

45 Affidavit of Prof. Walsh, sworn June 4, 2024, para. 25, pp. 148-149, Part 1 of Application Record.

46 Affidavit of Prof. Walsh, sworn June 4, 2024, para. 27, p. 149, Part 1 of Application Record.

47 Affidavit of Prof. Walsh, sworn June 4, 2024, paras. 26 and 34, pp. 149 and 153, Part 1 of Application Record.

48 Affidavit of Prof. Nutt, sworn April 29, 2024, p. 125, Part 1 of Application Record; Affidavit of Prof. Walsh, sworn June 4, 2024, para. 34, p. 153, Part 1 of Application Record.



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from psilocybin is the presence of anxiety before and during the treatment. This can be overcome by good education and preparation and the presence of a non-tripping therapist or friend during the experience. Integration prior to the use of psilocybin, for example by the person's doctor or a dispensing pharmacist would be one way to mitigate this. Prior safe exposures would also be a relevant consideration. Anxiety is also reduced by knowledge that the supplier is providing the exact and correct dose. It can further be reduced by giving lower doses to those at higher risk of panic attacks, e.g. those with prior history of these or other anxiety disorders.<sup>49</sup>

48. Adverse effects of psilocybin are more likely to occur in people who are intoxicated with alcohol and some other drugs e.g. stimulants. Also adverse effects have been reported in people taking some medications such lithium or monoamine oxidase inhibitors. The use of these substances should be avoided in people who use psilocybin. Although there are no systematic studies it seems likely that people with brain injury or other neurological conditions might be more vulnerable to adverse effects from psilocybin. For these reasons they are excluded from research with psilocybin.<sup>50</sup>
49. Risks of psilocybin when used at microdosing levels are low as there is little if any impact on mental processes or cognitions other than those wanted/expected by the user. However, as microdosing tends to be done on a regular daily or 2-3 times weekly basis for months or years there is the question of whether chronic exposure even at such a low/inactive dose for the brain might have negative effects on other organs.

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49 Affidavit of Prof. Nutt, sworn April 29, 2024, para. 49 (e), (f), (h), pp. 22-23, Part 1 of Application Record; Affidavit of Prof. Walsh, sworn June 4, 2024, para. 34, p. 153, Part 1 of Application Record.

50 Affidavit of Prof. Nutt, sworn April 29, 2024, para. 49 (i), (j), p. 23, Part 1 of Application Record.

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This is especially relevant to the heart and pulmonary circulation where the 5-HT<sub>2B</sub> receptor is found and stimulation of which can lead to endothelial thickening. Psilocybin has high affinity for this receptor subtype so in theory its use could promote such growths. However, such changes have not been reported so far.<sup>51</sup>

### **PART III - THE LAW AND ARGUMENT**

#### **THE ISSUES**

50. Does the prohibition on psilocybin selling or sharing contravene freedom of thought under subsection 2(b) or section 7 of the *Charter*?
51. Can the prohibition on psilocybin selling or sharing be saved by section 1 of the *Charter*?

#### **THE LAW**

##### **A. Standing**

52. Accused persons have standing to challenge the constitutionality of laws under which they are charged whether or not the alleged unconstitutional effects are directed at them.<sup>52</sup>
53. The right to access a substance must include a means of access.<sup>53</sup>

##### **B. Purposive analysis for freedom of thought**

54. Relative to other freedoms, freedom of thought has been barely

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<sup>51</sup> Affidavit of Prof. Nutt, sworn April 29, 2024, para. 50, p. 24, Part 1 of Application Record.

<sup>52</sup> *R. v. Smith*, [2015] 2 S.C.R. 602 at paras. 11-13; *R. v. Parker*, [2000] O.J. No. 2787 (Ont. C.A.) at para 78.

<sup>53</sup> *Hitzig v. R.* [2003] OJ No. 3873 (Ont. C.A.) at paras. 109-118.

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considered by Canadian courts. Most often cases that have raised freedom of thought have been, at their core, about freedom of expression or freedom of religion and have been resolved as such.

55. In defining the parameters of *Charter* rights and freedoms, the starting point must be the language of the section. Where questions of interpretation arise, a generous, purposive and contextual approach should be applied.<sup>54</sup>
56. A purposive approach means that the freedom must be understood in the light of the interests it was meant to protect.<sup>55</sup> The Supreme Court in *R. v. Big Drug Mart* set out the definitive approach to determining the purpose of a freedom,

In my view this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought, by reference to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter.<sup>56</sup>

57. Canadian jurisprudence has rejected an approach to constitutional interpretation focused on the primacy of the text. This is because *Charter* rights — like all constitutional rights — are meant to be capable of growth and adaptation. Not only is considering the text as prime unhelpful in interpreting constitutional guarantees, it could unduly constrain the scope of those rights. Overemphasizing the plain text of *Charter* rights creates a risk that, over time, those rights will cease to represent the fundamental values of Canadian society and the

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<sup>54</sup> *R. v. Grant*, 2009 SCC 32 at para. 15.

<sup>55</sup> *R. v. Big M Drug Mart*, [1985] S.C.J. No. 17 at para. 117.

<sup>56</sup> *R. v. Big M Drug Mart*, [1985] S.C.J. No. 17 at para. 118.

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purposes they were meant to uphold. A purely textual reading severs the constitution from the fundamental values of society.<sup>57</sup>

The language of the section

58. The starting point must be the language of the section.<sup>58</sup>
59. Fundamental freedoms  
2 Everyone has the following fundamental freedoms:  
(a) freedom of conscience and religion;  
(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;  
(c) freedom of peaceful assembly; and  
(d) freedom of association.
60. Thought is mental activity. Professor Lucas Swaine defines thought in this way. He describes thought as including reasoning, reflecting, imagining, cogitating, remembering, wishing, questioning, desiring, believing, and deliberating.<sup>59</sup>
61. Freedom is the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the *Charter* is to protect within reason from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain

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<sup>57</sup> *Quebec (Procureure General) c. 9147-0732 Quebec Inc.*, 2020 SCC 32 at paras. 74-76.

<sup>58</sup> *R. v. Grant*, 2009 SCC 32 at para. 15.

<sup>59</sup> Affidavit of Prof. Swaine, sworn April 26, 2024, Application Record, p. 203, para. 12.

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of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others.<sup>60</sup>

62. In looking at the language of the section one must note that freedom of thought, along with all of section 2 of the *Charter*, is described as a fundamental freedom. The importance of fundamental freedoms have been articulated from the earliest *Charter* cases.<sup>61</sup> In *R. v. Big M Drug Mart* the Supreme Court, referring to the American experience, made these remarks albeit in the context of the freedom of conscience and religion in s. 2(a):

It is because of the centrality of the rights associated with freedom of individual conscience both to basic beliefs about human worth and dignity and to a free and democratic political system that American jurisprudence has emphasized the primacy or "firstness" of the First Amendment. It is this same centrality that in my view underlies their designation in the *Canadian Charter of Rights and Freedoms* as "fundamental". They are the *sine qua non* of the political tradition underlying the *Charter*.<sup>62</sup>

The character and the larger objects of the *Charter* itself

63. The purpose of the *Charter* is the unremitting protection of individual rights and liberties. It is motivated by respect for individual conscience and the valuation of human dignity.<sup>63</sup>
64. The *Charter*, unlike a statute, cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to

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60 *R. v. Big M Drug Mart*, [1985] S.C.J. No. 17 at para. 95; *B.(R.) v Children's Aid Society of Metropolitan Toronto*, [1994] S.C.J. No. 24 at para. 79.

61 *Committee for the Commonwealth v. Canada*, [1991] S.C.J. No. 3 at para. 65.

62 *R. v. Big M Drug Mart*, [1985] S.C.J. No. 17 at para. 123.

63 *Canada (Director of Investigation & Research, Combines Investigation Branch) v. Southam Inc.*, [1984] S.C.J. No. 36 at para. 16; *R. v. Big M Drug Mart*, [1985] S.C.J. No. 17 at para. 122.

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meet new social, political and historical realities often unimagined by its framers. The judiciary is the guardian of the constitution and must, in interpreting its provisions, bear these considerations in mind.<sup>64</sup>

The historical origins of the concepts enshrined

65. Under the *Big M Drug Mart* purposive analysis, the purpose of the freedom is to be sought with reference to the historical origins of the concept.<sup>65</sup>
66. Freedom of thought has been very important in human history. Thought has proven salient in central domains of complex societies. It contributes to the success or failure of associations and communities, and it is a fixation of social and educational institutions. It is important in law, commerce and trade, artistry and innovation, and collective action.<sup>66</sup>
67. Thought clearly played a role in the Reformation, in the social and political developments of modernity, and in the emergence of the modern era. Thought has also been crucial in the recognition of individual rights and freedoms, in the expansion of individual-level autonomy, and in the development of democracy. Contemporary constitutional democracies emphasize the value and the importance of individual persons, appreciating that each person is a thinking agent who has prerogative to direct their own life. This is evident in the rights and freedoms afforded to persons, which are predicated on people being agents who can engage responsibly in thought and in action.

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64 *Canada (Director of Investigation & Research, Combines Investigation Branch) v. Southam Inc.*, [1984] S.C.J. No. 36 at para. 16.

65 *R. v. Big M Drug Mart*, [1985] S.C.J. No. 17 at para. 118.

66 Affidavit of Lucas Swaine, sworn April 26, 2024, para. 18, p. 205, Part 1, Application Record.

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Democratic citizenship depends on thought, as well, to the extent that citizens are encouraged to form their own ideas, to plan their lives, to make their own decisions, and ultimately to participate constructively in social and political life.<sup>67</sup>

68. Freedom of thought has been hailed in various philosophical corners as a fundamental freedom. The influential British philosopher John Stuart Mill chose a prominent place for “liberty of thought and feeling,” arguing that it formed part of human liberty’s “first” realm. He invoked freedom of thought at the outset of *On Liberty*, the prominent text on rights and freedoms, mentioning it in his delineation of the appropriate realm of human liberty. As Mill described it, that sphere includes:

the inward domain of consciousness, demanding liberty of conscience in the most comprehensive sense, liberty of thought and feeling, absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral, or theological.<sup>68</sup>

69. One can distinguish a slowly growing appreciation of freedom of thought through the modern era and into the present, both in the discourse of Western social and political theory and in terms of the expansion of that freedom under political and legal institutions.<sup>69</sup>
70. Following the Second World War, the international community vowed to never again allow atrocities like those of that conflict to happen again. World leaders decided to complement the UN Charter with a road map to guarantee the rights of every individual everywhere. The document they considered, and which would later become the

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<sup>67</sup> Affidavit of Lucas Swaine, sworn April 26, 2024, para. 20, pp. 205-206, Part 1, Application Record.

<sup>68</sup> Affidavit of Lucas Swaine, sworn April 26, 2024, para. 40, pp. 213-214, Part 1, Application Record.

<sup>69</sup> Affidavit of Lucas Swaine, sworn April 26, 2024, para. 33, p. 210, Part 1, Application Record.

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*Universal Declaration of Human Rights (UDHR)*, was taken up at the first session of the General Assembly in 1946. The *UDHR* was adopted by the UN General Assembly on 10 December 1948.<sup>70</sup>

71. Article 18 of the *UDHR* proposed that:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.<sup>71</sup>

72. Canada played a central role in drafting the *UDHR* and are a party to it.<sup>72</sup>

73. Freedom of thought was purposely named as the first right in Article 18(1) of the *UDHR*. It was characterized by French delegate, Rene Cassin, as “the origin of all other rights.” Freedom of thought, along with one’s conscience and belief, was regarded as part of one’s forum internum – a person’s inner sanctum where mental faculties are developed, exercised and defined. The drafting history of the *UDHR* suggests that some delegates considered free exercise of these faculties as essential for protecting “the human person’s most sacred and inviolable possessions” which enable people to “perceive the truth, to choose freely and to exist.” For many, Rene Descartes’ statement, “I think, therefore I am” spoke to the essentiality of freedom of thought for the dignity, agency and existence of the human being.<sup>73</sup>

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70 The Universal Declaration of Human Rights, History of the declaration, <https://www.un.org/en/about-us/udhr/history-of-the-declaration>

71 Affidavit of Lucas Swaine, sworn April 26, 2024, para. 47, p. 217, Part 1, Application Record.

72 Canada’s approach to advancing human rights, Government of Canada, [https://www.international.gc.ca/world-monde/issues\\_development-enjeux\\_developpement/human\\_rights-droits\\_homme/advancing\\_rights-promouvoir\\_droits.aspx?lang=eng](https://www.international.gc.ca/world-monde/issues_development-enjeux_developpement/human_rights-droits_homme/advancing_rights-promouvoir_droits.aspx?lang=eng).

73 United Nations General Assembly Interim Report entitled “Freedom of Religion or Belief”, marked as exhibit D to the Affidavit of Lucas Swaine, sworn April 26, 2024, paras. 1-2, p. 290, Part 1, Application



74. Articles 4 and 18 of the International Covenant on Civil and Political Rights (the “*ICCPR*”) confirm the right’s significance, ascribing it absolute protection even during public emergencies. Canada acceded to the *ICCPR* on 18th May 1976. That covenant incorporated the *UNDHR*. United Nations’ declarations and covenants repeatedly affirm the value of freedom of thought.<sup>74</sup>

75. Freedom of thought is named as the first right in subsection 2(b) of the *Charter*. The order the freedoms are listed speaks to the freedoms’ significance.<sup>75</sup>

The meaning and purpose of the other specific rights and freedoms with which freedom of thought is associated within the text of the *Charter*

76. The *Big M Drug Mart* analysis directs the court to consider the meaning and purpose of other specific rights and freedoms with which the freedom being considered is associated within the text of the *Charter*.<sup>76</sup>

77. The purpose of freedom of expression is (1) to seek and attain truth which is an inherently good activity (2) participation in social and political decision-making is to be fostered and encouraged; and (3) the diversity in forms of individual self-fulfillment and human flourishing ought to be cultivated in an essentially tolerant, indeed welcoming, environment not only for the sake of those who convey a meaning, but

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Record.

74 *R. v. Myrmidon* (Man C.A.) 43 C.C.C. (3d) 137 at para. 55; *Kindler v. Canada (Minister of Justice)*, [1991] S.C.J. No. 63 at para. 128; Affidavit of Lucas Swaine, sworn April 26, 2024, para. 49, p. 218, Part 1, Application Record.

75 Affidavit of Lucas Swaine, sworn April 26, 2024, para. 58, p. 221, Part 1, Application Record.

76 *R. v. Big M Drug Mart*, [1985] S.C.J. No. 17 at para. 118.

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also for the sake of those to whom it is conveyed.<sup>77</sup>

78. The purpose of freedom of the press is to contribute to the existence and maintenance of a free and democratic society by investigating, questioning, criticizing and publishing important information. By contributing to the free flow of information, journalists also help to ensure productive debate on questions of public interest.<sup>78</sup>
79. The purpose of freedom of religion and conscience is to ensure that every individual is free to hold and to manifest whatever beliefs and opinions his or her conscience dictates.<sup>79</sup>
80. The purpose of the subsection 2(a) freedoms 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.<sup>80</sup>
81. Freedom of thought is critical for the freedoms of conscience, belief, opinion, expression, religion, and the right to vote or run for office.<sup>81</sup>

The *Big M Drug Mart* purposive analysis factors viewed together

82. Certain themes emerge from the *Big M Drug Mart* purposive analysis.
83. First, looking at the language of the section, one can say that thought is mental activity and freedom is an absence of constraint.

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77 *Irwin Toy Limited v. Quebec (Attorney General)*, [1989] S.C.J. No. 36 at para. 54; *R. v. Keegstra*, [1990] S.C.J. No. 131 at para. 30.

78 *Denis v. Cote*, 2019 SCC 44 at para. 45.

79 *R. v. Big M Drug Mart*, [1985] S.C.J. No. 17 at para. 124.

80 *R. v. Videoflicks Ltd.*, [1986] 2 S.C.R. 713 at para. 98.

81 Affidavit of Lucas Swaine, sworn April 26, 2024, paras. 51-57, pp. 219-220, Part 1, Application Record.

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84. Second, unfettered thought is important for:

- democratic citizenship;
- the pursuit of truth;
- human dignity and existence;
- protecting the human person's most sacred and inviolable possessions (a person's thoughts)
- human diversity in forms of individual self-fulfillment and human flourishing; and
- the vitality of other *Charter* freedoms.

This is consistent with the purpose of other associated freedoms such as freedom of religion, freedom of expression and fundamental freedoms generally under section 2.

85. Third, there is a long history of unfettered thought playing a critical role for the individual and in the progress of civilizations.

86. Fourth, the purpose of freedom of thought is to protect unfettered thought.

87. Fifth, freedom of thought is a particularly important freedom that must not be undermined.

The purposive approach protects constitutional tools

88. The purposive approach means that tools or instruments that allow one to experience a freedom in a more fulsome manner must be protected. Tools further the purpose.

89. If the purpose of freedom of thought is to protect unfettered thought

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then a substance that promotes different types of thought must be protected.

90. In *CBC v. New Brunswick (Attorney General)*, the Supreme Court said that freedom of the press encompassed not only the right to transmit news, but also the right to gather the information. In effect, gathering information is a freedom-of-the-press tool that must be protected under freedom of the press.<sup>82</sup>
91. In *Denis v. Cote*, the Supreme Court said that freedom of the press encompassed maintaining confidential relationships with journalistic sources.<sup>83</sup> Put another way, maintaining confidential relationships with journalistic sources is a freedom of the press tool.
92. In *Kamal c. Canada (Procureur general)*, the Federal Court of Appeal held that access to a passport engages "the right to enter, remain in and leave Canada" under subsection 6(1) of the *Charter*. The court is saying that a passport is a freedom of mobility tool that allows one to more fully experience one's rights under subsection 6(1) of the *Charter*.<sup>84</sup>
93. In *Law Society of BC v. Trinity Western University*, the focus was on a covenant that set out behavioral expectations including a prohibition on "sexual intimacy that violates the sacredness of marriage between a man and a woman."<sup>85</sup> The evidence established that the covenant helped create an environment in which Trinity Western University students could grow spiritually. Supreme Court found that freedom of

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82 *CBC v. New Brunswick (Attorney General)*, [1996] S.C.J. No. 38 at paras. 24-26

83 *Denis v. Cote*, 2019 SCC 44 at para. 46.

84 *Kamal c. Canada (Procureur general)*, 2009 CAF 21, 2009 FCA 21 at para. 15.

85 *Law Society of BC v. Trinity Western University*, 2018 SCC 32 at para. 6.

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religion protected the covenant because it enhanced spiritual growth. Requiring fellow students to sign a covenant was not religious in and of itself, but it was a tool that made it easier for students to adhere to their faith and more fully experience freedom of religion.<sup>86</sup>

94. Subsection 10(b) of the *Charter* provides the right to retain and instruct counsel without delay and to be informed of that right without delay. The case law requires the police to facilitate access to a phone for those arrested or detained. The phone is a subsection 10(b) tool.<sup>87</sup>
95. A purposive approach means that psilocybin, a freedom of thought tool, must be protected under freedom of thought.
96. In addition, the interpretation should be a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter's* protection.<sup>88</sup>

C. Freedom of thought cases (Canadian cases and some US cases)

97. The Canadian freedom of thought cases do not offer a lot of guidance, but they should be reviewed.
98. In *R. v. Sharpe* in 2001 the Supreme Court, in the context of freedom of expression, said that without the right to possess and read expressive material freedom of thought would be compromised as such materials allow us to understand the thoughts of others and consolidate our own

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<sup>86</sup> *Law Society of BC v. Trinity Western University*, 2018 SCC 32 at paras. 70-73 and 75.

<sup>87</sup> *R. v. Taylor*, 2014 SCC 50 at para. 25.

<sup>88</sup> *R. v. Big M Drug Mart*, [1985] S.C.J. No. 17 at para. 118.

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thoughts.<sup>89</sup> In effect the Supreme Court described expressive material as a freedom of thought tool. The court also implied that private expressions of thought and imagination in the realm of solitary creation and enjoyment are particularly deserving of protection.<sup>90</sup>

99. In the pre-Charter case of *Boucher v. The King*, Rand J., who formed a part of the majority which narrowed the scope of the crime of sedition, said, freedom of thought along with freedom of speech and disagreement are of the essence of our life:

Freedom in thought and speech and disagreement in ideas and beliefs, on every conceivable subject, are of the essence of our life. The clash of critical discussion on political, social and religious subjects has too deeply become the stuff of daily experience to suggest that mere ill-will as a product of controversy can strike down the latter with illegality. A superficial examination of the word shows its insufficiency: what is the degree necessary to criminality? Can it ever, as mere subjective condition, be so? Controversial fury is aroused constantly by differences in abstract conceptions; heresy in some fields is again a mortal sin; there can be fanatical puritanism in ideas as well as in morals; but our compact of free society accepts and absorbs these differences and they are exercised at large within the framework of freedom and order on broader and deeper uniformities as bases of social stability. Similarly in discontent, affection and hostility: as subjective incidents of controversy, they and the ideas which arouse them are part of our living which ultimately serve us in stimulation, in the clarification of thought and, as we believe, in the search for the constitution and truth of things generally.<sup>91</sup>

100. In *R. v. Myrrmidon Inc.*, the Manitoba Court of Appeal addressed a challenge to the *Remembrance Day Act* under sections 2(b) (freedom of thought), 7 and 15(1). It was argued that a compelled pause in

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<sup>89</sup> *R. v. Sharpe* 2001 SCC 2 at para. 25.

<sup>90</sup> *Sharpe*, supra, at para. 39.

<sup>91</sup> *Boucher v. The King*, [1950] 1 D.L. R. 657 at para. 85.

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commercial activity offended freedom of thought. The case seemed to be based on arguments analogous to *R. v. Big M Drug Mart*. The court found that citizens were free to disregard the principles set out in *Remembrance Day Act* and that there was no sanction for non-observance. No one was required to do anything or abstain from doing anything.<sup>92</sup> The Honourable Justice Twaddle did make some observations about freedom of thought.

39 The first time that freedom of thought and of opinion was specifically recognized by Canada, as far as I am aware, was when Canada acceded to the International Covenant on Civil and Political Rights on 18th May 1976. That covenant incorporated the United Nations Declaration of Human Rights. In this declaration, "freedom of thought" is coupled with "freedom of conscience and religion" and "freedom of opinion" with "freedom of expression". "Freedom of religion" incorporates the right to manifest one's belief as well as one's religion.

40 Why it is that "thought" and "belief" are coupled with "opinion" and "expression" in the Charter rather than being coupled with "conscience" and "religion" as they are in the Declaration, I do not know. Nor do I think it necessary for me to decide the point in this case. Even if secular beliefs are protected in the same manner as religious beliefs are by the Charter, I do not think the principle established in *R. v. Big M* has any application to this case.<sup>93</sup>

101. An Alberta Queen's Bench case, *R. v. Normore*, appears on its face to be similar, but for various reasons the decision provides little guidance. *Normore* was a cannabis selling case in which the accused raised freedom of thought. The argument appeared to be entirely based on two cases. First, *Sell v. United States* [(2003), 539 U.S. 166 (U.S. S.C. 2003)] (2003) No. 02-5664 US Supreme Court found that forced administration of anti-psychotic drugs did not violate the requirement

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<sup>92</sup> *R. v. Myrrmidon* (Man C.A.) 43 C.C.C. (3d) 137 at paras. 1, 8, 11, 25 and 41.

<sup>93</sup> *R. v. Myrrmidon* (Man C.A.) 43 C.C.C. (3d) 137 at paras. 39-40.

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that the government may not "deprive" any person of "liberty ... without due process of law". Second, *R. v. Owen*, [2003] 1 S.C.R. 779 the dissent which suggested a Review Board's decision unfairly weighted a substance abuse problem. The judge found that the two cases did not support the argument.<sup>94</sup> The judge found that counsel was in fact arguing the harm principle which had been rejected in *R. v. Malmo-Levine*.<sup>95</sup> In *Malmo-Levine* the harm principle (that a matter must cause harm in order to be criminalized) was held not to be a principle of fundamental justice.<sup>96</sup> The harm principle is not being argued in this case.

102. The judge also held that the accused could not raise the constitutional issues because there were no facts to support medical use by the accused or his customers.<sup>97</sup> On one hand, that is incorrect in law. Accused persons have standing to challenge the constitutionality of laws under which they are charged, whether or not the alleged unconstitutional effects are directed at them.<sup>98</sup> On the other hand, the judge appears to be alluding to the lack of an evidentiary foundation. It is essential that a constitutional challenge to legislation be supported by a fulsome evidentiary record.
103. Mr. Justice Holmes' widely-cited dissent in *United States v. Schwimmer*, 279 U.S. 644 (1929)<sup>99</sup> described freedom of thought as the most important constitutional principle. *Schwimmer* concerned a woman who was a conscientious objector. She was denied American

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<sup>94</sup> *R. v. Normore*, 2005 ABQB 75 at paras. 18 and 20.

<sup>95</sup> *R. v. Normore*, 2005 ABQB 75 at para. 19.

<sup>96</sup> *R. v. Malmo-Levine*, 2003 SCC 74 at paras. 114-115, 129 and 134.

<sup>97</sup> *R. v. Normore*, 2005 ABQB 75 at para. 19.

<sup>98</sup> *R. v. Smith*, [2015] 2 S.C.R. 602 at paras. 11-13; *R. v. Parker*, [2000] O.J. No. 2787 (Ont. C.A.) at para 78.

<sup>99</sup> *United States v. Schwimmer*, 279 U.S. 644 (1929)99.



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citizenship because she stated that she would refuse to take up arms in defence of the United States, which was required by the citizenship oath at that time. Here Mr. Justice Holmes described freedom of thought as the most important freedom, a statement that has been adopted by a number of Canadian courts including the Supreme Court of Canada:<sup>100</sup>

[I]f there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought — not free thought for those who agree with us but freedom for the thought that we hate. I think that we should adhere to that principle with regard to admission into, as well as to life within this country.

104. The United States Supreme Court in the influential decision in *Palko v. Connecticut*, Justice Cardozo wrote, “This is true, for illustration, of freedom of thought, and speech. Of that freedom one may say that it is the matrix, the indispensable condition, of nearly every other freedom.”<sup>101</sup>
105. Although the Canadian freedom of thought cases do not provide much guidance, applying a purposive analysis shows that psilocybin must be protected under freedom of thought.

D. Section 7 of the Charter

106. The Applicant has also raised section 7 of the *Charter*. It is the Applicant’s position that the issues raised in this case should properly be addressed under freedom of thought. The Applicant has made extensive freedom of thought arguments. As such, the Applicant will keep the section 7 arguments brief.

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100 *R. v. Zundel* [1992] S.C.J. No. 70 at para. 22; *Roach v. Canada*, [1994] 2 F.C. 406 at paras. 38-40.  
101 *Palko v. Connecticut*, 302 U.S. 319, 326-27 (1937).

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107. Liberty and security of the person are concerned with individual autonomy and dignity. Liberty protects the right to make fundamental personal choices free from state interference. Security of the person encompasses a notion of personal autonomy involving control over one's bodily integrity free from state interference and it is engaged by state interference with an individual's physical or psychological integrity.<sup>102</sup> The decision whether to use psilocybin is a fundamental personal choice. The decision also concerns personal autonomy and control over one's bodily integrity.
108. The possibility of imprisonment infringes the right to (physical) liberty. Any offence that includes incarceration in the range of possible sanctions engages liberty.<sup>103</sup>
109. The objective of the psilocybin prohibition is health and safety. This is consistent with what courts have said about a similar prohibition.<sup>104</sup>
110. A law is arbitrary if it imposes limits on liberty or security of the person that are inconsistent with the law's objectives, have no direct connection to that law's objectives, or are unnecessary in order to achieve those objectives. Such a law exacts a constitutional price in terms of rights without furthering the public good that is said to be the object of the law.<sup>105</sup>
111. The prohibition is overbroad because it takes away rights in a way that generally supports the object of the law, but goes too far by denying the

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102 *Carter v. Canada (Attorney General)*, 2015 SCC 5 at para. 64.

103 *R. v. Smith*, [2015] 2 S.C.R. 602 at para 17.

104 *R. v. Smith*, [2015] 2 S.C.R. 602 at para 24.

105 *Bedford v. Canada* [2013] 3 S.C.R. 1101 at paras 107, 111-112, and 118-119.

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rights of some individuals in a way that bears no relation to the object.<sup>106</sup> A blanket prohibition on psilocybin use is overbroad.

112. The principle of gross disproportionality concerns a law's effects on liberty and security of the person that are so grossly disproportionate to its purposes that they cannot be rationally supported.<sup>107</sup> The harmful effects on liberty and security of the person are grossly disproportionate to the purpose of the prohibition.
113. The prohibition fails the arbitrariness, overbreadth and gross disproportionality tests.

E. Section 1 of the Charter

114. Section 1 of the *Charter* provides,
- The *Charter* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.
115. In *Oakes* the Supreme Court set out the test when considering whether a limitation on a *Charter* right can be excused under section 1.
- (a) Is the limit prescribed by law?
  - (b) Is the purpose for which the limit is imposed pressing or substantial?
  - (c) Is the means by which the goal is furthered proportionate?
- This proportionality test will require courts to address these three questions:
- (i) Are the measures rationally connected or carefully designed to achieve the objective?
  - (ii) Does the limit minimally impair the right?

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<sup>106</sup> *Carter v. Canada (Attorney General)*, 2015 SCC 5 at para. 85.

<sup>107</sup> *Bedford, supra*, at para. 120.

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(iii) Is there a proportionality between the effects of the measures and the objective which has been identified as of sufficient importance?<sup>108</sup>

116. Section 1 has a dual function. It justifies limits on *Charter* rights when appropriate, but it also activates *Charter* rights. The dual functions are both shaped by the phrase “free and democratic society.” The underlying values of a free and democratic society are the genesis of *Charter* rights and the ultimate standard against which limits on those rights must be shown. A free and democratic society embraces the values and principles that Canadians have sought to protect and further by entrenching specific rights and freedoms in the Constitution. These include respect for the inherent dignity of the human person.<sup>109</sup>

The rational connection test

117. To satisfy the rational connection test, the government must demonstrate that it is logical and reasonable to conclude that the impugned action will help bring about its objective, not that it will inevitably succeed. The rational connection is to be established, upon a civil standard, through reason, logic or simply common sense.<sup>110</sup>
118. If the objective is health and safety then there is no rational connection to prohibiting all access to psilocybin. A lot of Canadians use psilocybin despite the prohibition.<sup>111</sup> This suggests that the prohibition is not deterring use, but rather forcing use underground. An unregulated system means of access does not enhance health or safety. It cannot be

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108 *R. v. Oakes*, S.C.J. No. 7 at paras. 73-74.

109 *R. v. Keegstra*, [1990] SCJ No. 131 at paras. 48-49.

110 *R. v. Lucas*, [1998] S.C.J. No. 28 at paras. 52-53; *Mounted Police Association of Canada v. Canada (Attorney General)*, 2015 SCC 1 at para. 143.

111 Affidavit of Prof. Walsh, sworn June 4, 2024, para. 7, p. 141, Part 1 of Application Record.

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inferred that driving psilocybin use underground will promote objective of health and safety.

Does the limit minimally impair the right?

119. The minimal impairment test is whether the limit on the right is reasonably tailored to the objective or, put another way, is there a less harmful or less drastic means of achieving the objective.<sup>112</sup>
120. In considering whether the government's objective could be achieved by other less drastic means, the court need not be satisfied that the alternative would satisfy the objective to exactly the same extent or degree as the impugned measure. The court should not accept an unrealistically exacting or precise formulation of the government's objective which would effectively immunize the law from scrutiny at the minimal impairment stage. The requirement for an "equally effective" alternative measure should not be taken to an impractical extreme. It includes alternative measures that give sufficient protection, in all the circumstances, to the government's goal. While the government is entitled to deference in formulating its objective, that deference is not blind or absolute.<sup>113</sup>
121. In *Carter v. Canada*, on the basis of a consideration of various regimes and how they operate, the Supreme Court agreed with the trial judge that it is possible to establish a regime that addresses the risks associated with physician-assisted death. The risks associated with physician-assisted death can be limited through a carefully designed and monitored system of safeguards. In effect, the government argued

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<sup>112</sup> *Hutterian Brethren of Wilson Colony v. Alberta*, 2009 SCC 37 at para. 53.

<sup>113</sup> *Hutterian Brethren of Wilson Colony v. Alberta*, 2009 SCC 37 at para. 55.

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that a blanket prohibition should be upheld unless the claimant could demonstrate that an alternative approach eliminated all risk. The court found that this effectively reversed the onus under section 1, requiring the claimant whose rights are infringed to prove less invasive ways of achieving the prohibition's object. The burden of establishing minimal impairment is on the government. The claimant does not have the burden of disproving every fear or every threat, nor can the government meet its burden simply by asserting an adverse impact on the public.<sup>114</sup>

122. A blanket prohibition on psilocybin access for freedom of thought purposes does not minimally impair the freedom. There could be a system in which some access is permitted under safe conditions. There could be a form of screening, integration, supervision and quality-controlled products as is done with medical use and use for clinical trials. Health and safety does not require that nobody ever have access under any circumstances.
123. Canadians can access psilocybin for medical purposes pursuant to the *FDR*'s SAP. There are various protocols that ensure the process is safe.<sup>115</sup> Canadians could access psilocybin for freedom of thought purposes with similar protocols as with medical use under the SAP.
124. Canadians can access psilocybin as participants in clinical trials. Similar protocols as with medical access are applied to ensure the clinical trials are safe.<sup>116</sup> Canadians could access psilocybin for freedom of thought purposes with similar protocols as with use in clinical trials.

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114 *Carter v. Canada (Attorney General)*, 2015 SCC 5 at paras. 117-119.

115 Affidavit of Prof. Walsh, sworn June 4, 2024, paras. 33-34, p. 152, Part I, Application Record.

116 Affidavit of Prof. Walsh, sworn June 4, 2024, paras. 33-34, p. 152, Part I, Application Record.

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125. In Oregon, citizens can access psilocybin. The Oregon Health Authority has set out various protocols to ensure the process is safe. Program participants are required to undergo screening, attend a preparation session, only access psilocybin from a licensed quality-assured source and consume it under the supervision of a trained and licensed facilitator.<sup>117</sup>
126. In the Netherlands, Synthesis Institute has also set out comprehensive protocols to ensure the safe use of psilocybin which included multiple medical health intake forms along with a physical and psychological screening.<sup>118</sup>
127. Similar safeguards could be applied for Canadians seeking access for freedom of thought purposes. In fact, accessing psilocybin for medical purposes are facing serious health issues and are at a heightened risk for negative effects. Healthy people accessing psilocybin for thought-related purposes would be at less risk.<sup>119</sup>
128. There clearly is a less harmful or less drastic means of achieving the objective than a blanket prohibition on freedom of thought access.

Is the Law Proportionate in its Effect?

129. The third step of the proportionality analysis requires a court to balance the impact of the law on protected rights against the beneficial effect of the law. This balancing is measured by the values underlying the

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117 Affidavit of Prof. Walsh, sworn June 4, 2024, para. 33, p. 152, Part I, Application Record.

118 Affidavit of Sarah Lange, sworn June 5, 2024, at para. 6, p 548, of Part 2 of Application Record.

119 Affidavit of Prof. Walsh, sworn June 4, 2024, para. 36, p. 154, Part I, Application Record.

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*Charter*.<sup>120</sup> This allows the court to stand back to determine on a normative basis whether a rights infringement is justified in a free and democratic society.<sup>121</sup>

130. Only this last step takes full account of the severity of the deleterious effects of a measure on individuals or groups. It requires placing colliding values and interests side by side and balancing them according to their weight. Where no alternative means are reasonably capable of satisfying the government's objective, the real issue is whether the impact of the rights infringement is disproportionate to the likely benefits of the impugned law.<sup>122</sup>

#### Salutary benefits of the psilocybin prohibition

131. The salutary benefits of having a blanket prohibition on access to psilocybin are negligible. As indicated in the rational connection test, there are no benefits to this law. It will deter a few people from accessing positive benefits. But it will also cause some who want to use psilocybin to use it in an unregulated manner in the underground.

#### Deleterious effects of the psilocybin prohibition

132. The impact of the law on protected rights is terrible. There are two aspects to this.
133. First, the freedom to think as one sees fit is profoundly important for society and for the individual. Freedom of thought is important for:

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120 *R. v. J. (K.R.)*, 2016 SCC 31 at para. 77; *Hutterian Brethren of Wilson Colony v. Alberta*, 2009 SCC 37 at paras. 73 and 76.

121 *R. v. J. (K.R.)*, *supra*, note 64, at paras. 58, 77 and 79.

122 *Hutterian Brethren of Wilson Colony v. Alberta*, 2009 SCC 37 at para. 76.



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- democratic citizenship;
  - the pursuit of truth;
  - human dignity and existence;
  - protecting the human person's most sacred and inviolable possessions (a person's thoughts)
  - human diversity in forms of individual self-fulfillment and human flourishing; and
  - the vitality of other *Charter* freedoms.

This is consistent with the purpose of other associated freedoms such as freedom of religion, freedom of expression and fundamental freedoms generally under section 2.

134. Second, psilocybin provides many positive effects that have immense importance to the person's view of their own worth and dignity, to the person's interactions with others in society and to the person's spiritual beliefs. The subjective value and importance of these thought-related benefits is immense.<sup>123</sup>
135. Many rank the psilocybin experience as being as among the most personally meaningful and spiritually significant of their lives.<sup>124</sup> Psilocybin can cause those who did not previously identify as spiritual to have spiritual-like experiences.<sup>125</sup> Spiritual beliefs have a lot in common with religious beliefs. They are important in the same way. They both contemplate "profoundly personal beliefs that govern one's perception of oneself, humankind, nature, and, in some cases, a higher

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123 Affidavit of Prof. Walsh, sworn June 4, 2024, paras. 16-18, pp. 144-145, Part 1 of Application Record.

124 Affidavit of Prof. Nutt, sworn April 29, 2024, paras. 27(b), p. 15, 53, 90-92 Part 1 of Application Record; Affidavit of Prof. Walsh, sworn June 4, 2024, Part 1 of Application Record, pp. 141-143, 145 (paras. 7, 9, 10, 12, 13, 17)

125 Affidavit of Prof. Nutt, sworn April 29, 2024, p. 53, Part 1 of Application Record.

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or different order of being” as was articulated in *R. v. Videoflicks Ltd.*

136. Psilocybin promotes cognitive flexibility, spirituality, life meaning, connectivity (with self, others and nature), ego dissolution, empathy and compassion, and mindfulness.
137. Psilocybin causes people to feel enhanced connections to self, to close family and friends, to those who had abused or wronged them, to strangers, to all humanity, to the world and to nature.<sup>126</sup>
138. Psilocybin promotes feelings of self-worth and self-compassion.<sup>127</sup>
139. Psilocybin also can reduce depression and anxiety amongst healthy people.<sup>128</sup> Psilocybin use is associated with lower levels of severe psychological distress, reduced likelihood of using inpatient psychiatric services, and lower prevalence of being diagnosed with depression.<sup>129</sup> Psilocybin reduces the likelihood of domestic violence.<sup>130</sup>
140. The types of thought promoted by psilocybin are in harmony with the purposes of freedom of thought.
141. A normative analysis also suggests the court should consider how society views other substances that offer benefits such as health benefits, but also bring safety concerns. There are numerous commonly prescribed medications that have significant negative morbidity and/ or

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126 Affidavit of Prof. Nutt, sworn April 29, 2024, paras. 27(d), p. 15; pp. 43, 49-52 and 92, Part 1 of Application Record; Affidavit of Prof. Walsh, sworn June 4, 2024, Part 1 of Application Record, pp. 141-142 (paras. 7, 10, 13) .

127 Affidavit of Prof. Nutt, sworn April 29, 2024, p. 49, Part 1 of Application Record.

128 Affidavit of Prof. Nutt, sworn April 29, 2024, paras. 34-35, pp. 17-18, Part 1 of Application Record.

129 Affidavit of Prof. Walsh, sworn June 4, 2024, para. 27, p. 149, Part I, Application Record.

130 Affidavit of Prof. Walsh, sworn June 4, 2024, para. 30, p. 151, Part I, Application Record.

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mortality consequences, even when used in appropriate settings for approved indications and dosing.<sup>131</sup> These medications include opioids which have resulted in catastrophic harm to individuals and society.

142. A normative analysis directs the court to consider how society views other substances that are consumed for recreational purposes. Alcohol, cigarettes and cannabis are all legal for recreational use in Canada. The harm caused by a wide range of substances (including alcohol, cigarettes, cannabis and psilocybin) has been recently studied in four studies using state-of-the-art methodology. These studies have examined the harm caused to both the consumer and to society using a multicriteria decision analysis approach which looks at 16 different types of potential harms that could be caused by numerous different drugs. Psilocybin has consistently been found to cause either the least harm or almost the least harm of all the drugs studied. In all of the studies, psilocybin was found to cause much harm than alcohol, cigarettes and cannabis.<sup>132</sup>
143. A normative analysis suggests we should consider the significant caused associated with travel and sports which are considered to be acceptable risks in Canadian society.
144. Canadian society accepts some risk whether it be in matters such prescription medication, recreational drugs or travel/ sports provided there are some benefits. There are significant freedom-of-thought benefits from psilocybin.

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131 Affidavit of Jagpaul Deol, sworn April 29, 2024, paras. 11-20, pp. 368-371, Part 2, Application Record.

132 Affidavit of Prof. Nutt, sworn April 29, 2024, paras. 43-47, pp. 19-21; pp. 107-109, 118-119, Part 1 of Application Record.

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145. The salutary effects of the prohibition on accessing psilocybin are non-existent or modest at best. The deleterious effects of prohibiting Canadians from using a freedom-of-thought tool are significant. The *Charter* shows that it is very important that Canadians be permitted to think as they see fit and have access to the tools that facilitate unfettered thought. Further, this particular freedom-of-thought tool brings fantastic thought-related benefits.
146. The psilocybin prohibition fails the third step of the proportionality analysis because the deleterious effects on freedom-of-thought rights significantly outweigh the salutary effects of the law.

#### F. Remedy

147. The tailored remedies of severance, reading down, and reading in are only appropriate if, on a fair review of the whole legislative scheme, it can be safely assumed that the legislature would have enacted what survives. The seemingly laudable purpose of retaining parts of the legislative scheme which do not offend the *Charter*, rests on the assumption that the legislature would have passed the constitutionally sound part without the unsound part.<sup>133</sup>
148. Severance is when certain words are declared of no force and effect.<sup>134</sup>
149. Reading down is when a court limits the reach of legislation.<sup>135</sup>
150. Reading in is extending a statute with adding further legislative words.

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133 *Schachter v. Canada*, [1992] 2 S.C.R. 679 at paras. 29-30, 39 and 87.

134 *Ontario (Attorney General) v. G.* 2020 SCC 38 at para. 113.

135 *Ontario v. G.*, *supra*, at para. 113.

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There is a higher standard to reading in than severance. With reading in, the court must also know how to extend the statute with a “sufficient degree of precision” on the basis of the constitutional analysis. In such a case, reading in is not an appropriate remedy. It is the legislature’s role to “fill in the gaps,” not the court’s. *Schachter* quotes from *Hunter v Southam*, “It should not fall to the courts to fill in the details that will render legislative lacunae constitutional.”<sup>136</sup>

#### **PART IV - ORDER SOUGHT**

151. The Applicant seeks an order or finding that subsection 5(2) of the *CDSA* with respect to psilocybin is contrary to subsection 2(b) (freedom of thought) and section 7 of the *Charter* and should be, with or without subsection 52(1) of the *Charter*, found, determined or declared to be unconstitutional and not applied. Any finding of guilt and/ or conviction should be judicially stayed with or without subsection 24(1) of the *Charter* or, in the alternative, the count in the Information be quashed.
152. Such further and other relief as counsel may advise and this Honourable Court permit.



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<sup>136</sup> *Schachter, supra*, at paras 53-57; *Ontario (Attorney General) v. G.* 2020 SCC 38 at para. 165.

**ONTARIO COURT OF JUSTICE  
(Southwest Region)**

**BETWEEN:**

**HIS MAJESTY THE KING**

**-and-**

**SAMER AKILA**

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**THE APPLICANT'S FACTUM**

**RE: FREEDOM OF THOUGHT  
CONSTITUTIONAL CHALLENGE**

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