

ONTARIO COURT OF JUSTICE

DATE: October 7, 2025
COURT FILE No.: 23-23104208-01

B E T W E E N :

HIS MAJESTY THE KING

Respondent

— AND —

SAMER AKILA

Applicant

Before Justice G. L. ORSINI
Ruling on Constitution Question
Heard November 21, 22, 27, and 28, 2024; February 10, 11, 12, 24, 25, 26, 28, April 3
and 4, 2025; August 27, September 12, 2025.
Judgment: October 7, 2025

K. Benzakein, A. Pashuk & V. Mazza counsel for the PPSC

P. Lewin.....counsel for the Applicant Samer Akila

ORSINI J.:

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I. INTRODUCTION

[1] Samer Akila is charged with possessing psilocybin (a Schedule III substance) for the purpose of trafficking contrary to s. 5(2) of the *Controlled Drugs and Substances Act (CDSA)*. The charge relates to his involvement in the operation of a psilocybin dispensary under the name *Fun Guyz* located at 256 Richmond Street, London ON.

[2] By way of Notice of Constitutional Question (NCQ) filed pursuant to s. 109 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (CJA) he challenges the constitutionality of s. 5 of the CDSA as it relates to psilocybin alleging it violates both the right to freedom of thought under s. 2(b) and the liberty and security of the person under s. 7 of the *Charter of Rights and Freedoms* (the “Charter”).

[3] Although the applicant claims no personal interest in possessing or consuming psilocybin, he submits that the prohibition on trafficking infringes the rights of others to access it for its thought-related benefits.

[4] He submits that these violations cannot be justified under section 1 of the *Charter* and asks that I find s. 5 of the CDSA constitutionally invalid in this case.¹ Alternatively, he seeks a remedy under s. 24(1) of the *Charter*.

[5] For the reasons below, I find that s. 5(2) of the CDSA does not infringe sections 2(b) or 7 of the *Charter*.

II. EVIDENCE

[6] The evidence in this case included an Agreed Statement of fact and both affidavit and viva voce evidence from 9 witnesses together with a substantial amount of documentary evidence.

¹ Provincial Courts have jurisdiction to decide the constitutional validity of a section of the CDSA but do not have the jurisdiction to make a declaration that the law itself is of no force and effect under s. 52(1) of the Constitution Act, 1982. (*R. v. Big M Drug Mart Ltd. (1985)*, 18 C.C.C. (3d) 385 (S.C.C.) at p. 402 and *R. v. Lloyd (2016)*, 334 C.C.C. (3d) 20 (S.C.C.) at paras. 14-20).

[7] The applicant called the following 6 witnesses:

- (i) 3 civilian witnesses who filed affidavits and who testified about their experiences with psilocybin and its effects;
- (ii) Professor Lucas Swaine, a qualified expert in the fields of thought and freedom of thought;
- (iii) Professor David Nutt, a qualified expert in the fields of psychiatry and neuropsychopharmacology; and
- (iv) Professor Zachary Walsh, a qualified expert in the field of clinical psychology.

[8] The Crown called the following 3 witnesses:

- (i) Dr. Joshua Rosenblat, a qualified expert in the fields of psychiatry and psychopharmacology;
- (ii) Jennifer Pelley, the Director of the Office of Regulatory Affairs (Health Canada); and
- (iii) Ian MacKay, Manager of the Special Access Program (Health Canada).

Agreed Statement of Fact

[9] The facts giving rise to the offence before the court are set out in an Agreed Statement of Fact (“*ASF*”) filed by the parties.

[10] On May 11, 2023, Samer Akila was interviewed by CTV London about the imminent launch of *Fun Guyz*, an illegal psilocybin dispensary located at 256 Richmond Street, London ON (“*Fun Guyz*”). The interview, a copy of which the parties attached as an appendix to the *ASF*, took place inside the *Fun Guyz* store where Mr. Akila was speaking as a spokesperson for the company and wearing company paraphernalia. During the interview, he said the following:

- (i) “What we’re doing is completely illegal.”;
- (ii) “We’re aware of it. There’s not much they can do.”;

- (iii) “What we’re doing is a medical protest, it’s an act of disobedience in order to get magic mushrooms legalized.”;
- (iv) “As soon as they [police] leave the store we’ll be in there with product, opening...”;
- (v) “We’ve already been through six raids. St. Catharines, Niagara, Barrie, Bradford, Danforth in Toronto. It’s going to be very hard to stop us.”;
- (vi) “It’s currently illegal in Ontario, and we do not have a business licence.”; and
- (vii) “We are trying to help people and give them access that the government can’t provide.”

[11] On May 12, 2023, *Fun Guyz* opened for business. At all relevant times, *Fun Guyz* maintained a website advertising and selling psilocybin products. As a result of all the foregoing, police opened an investigation into illegal psilocybin trafficking.

[12] On May 17, 2023, an undercover police officer entered the store and purchased 7 grams of psilocybin for \$60.00 from store employee Kadeem Wilson.

[13] Also on May 17, 2023, police were conducting physical surveillance of *Fun Guyz* and observed several customers entering and exiting the store.

[14] On June 5, 2023, police executed a *CDSA* search warrant and found the following contraband inside the store:

- (i) 113 packages of psilocybin edibles (psilocybin chocolate and gummies);
- (ii) 798 grams of psilocybin in dried mushroom form;
- (iii) 1,920 psilocybin "micro-dosing" pills; and
- (iv) 11 bags of psilocybin in drink powder form (psilocybin tea and hot chocolate).

[15] The estimated retail value of the seizure (based on pricing advertised on the *Fun Guyz* website) was approximately \$17,000.00.

[16] Mr. Akila admits that on the date of the above noted interview, he was in possession of psilocybin for the purpose of trafficking. Specifically, he admits that on that date he was in possession of psilocybin inventory of substantially the same nature,

quantity, quality, and value as outlined above and that it was possessed for the purpose of trafficking.

[17] Photographs taken during the execution of the June 5, 2023 search warrant and photographs of the seized exhibits were also attached as an appendix to the *ASF*.

Civilian Witnesses

[18] At the request of counsel for the applicant and without objection from the Crown, I agreed to identify the civilian witnesses by their initials to preserve their privacy.

A.C.

[19] A.C. is 36 years of age.

[20] He is a board member of Mapping the Mind, a registered but inactive organization that previously hosted psychedelic science conferences from 2017 to 2019. He clarified that his testimony was not connected to the organization and that he is not currently involved in any other related groups. He does not own or operate any psilocybin-related business.

[21] A.C. first experimented with psilocybin as a teenager growing up in rural Spain. He described his childhood as anxious, insecure, and emotionally repressed. He struggled with mental health and identity, particularly during adolescence and early adulthood.

[22] His first experience led to profound emotional insights, including compassion for others and a reevaluation of his relationship with his father and himself.

[23] He continues to use psilocybin occasionally in Canada with a small group of friends, typically two to three times per year for introspection and emotional connection.

[24] He has tried MDMA (5–6 times) and LSD (twice) but prefers psilocybin for its introspective qualities and shorter duration. He finds psilocybin tends to result in “less

visuals and more intense thought stimulation and an increased capacity to evaluate and examine myself.”²

[25] He views psilocybin as a tool for emotional healing, helping him build empathy, self-compassion, and overcoming feelings of inadequacy. It has also enabled him to express emotions more freely and become more forgiving of himself and others.

[26] He also sees psilocybin as a path to spiritual growth, describing divine experiences that foster a sense of universal connection. These encounters deepened his appreciation for Christian values like love and forgiveness, led him to attend Catholic Mass more sincerely, and enriched his familial and cultural connections.

[27] A.C. has not attempted to access psilocybin through legal channels. He referenced clinical trials and exemptions under s. 56 of the *CDSA* but admitted having limited knowledge in this regard.

D.S.

[28] *D.S.* is 52 years old. He resides with his wife and 4 children.

[29] He is a community organizer affiliated with multiple psychedelic advocacy groups, including Etheogenic Research Guild of Toronto (ERGOT), the Kitchener-Waterloo, Cambridge and Guelph (KWCG) Psychedelic Society and the Toronto Psychedelic Society. He confirmed that his involvement in psychedelic advocacy is longstanding and significant, describing it as a personal and community-focused pursuit. He does not own, operate, or work for any business involved in the cultivation or sale of psilocybin.

[30] He consumes psilocybin in mushroom form, sometimes processed into chocolates for dosing consistency. He does not use psilocybin when responsible for his children, citing safety concerns and dose-dependent effects.

[31] His first transformative psychedelic experience was with LSD at age 23, which led him to prefer psilocybin due to its shorter duration. He also emphasized the difficulty of

² Ex. 8 - Affidavit of A.C.

determining LSD dosage due to its potency and unreliable sourcing, contrasting it with psilocybin, which is easier to dose accurately and more readily available. He explained that tolerance to psilocybin builds quickly, requiring a break between doses to maintain efficacy. He distinguished between full doses and microdosing, noting the latter does not produce noticeable effects.

[32] D.S. stated he uses psilocybin primarily for spiritual purposes. Raised in the Catholic faith, he found traditional religious practices lacking in depth and turned to psilocybin for spiritual connection. He described early transformative experiences with LSD and psilocybin, noting spiritual and therapeutic impacts.

[33] He regards psilocybin as a sacrament and a divine gift, enabling reconnection with his soul and a sense of unity with nature and humanity. Psilocybin facilitated ego dissolution, increased empathy, and enhanced mindfulness. It helped him move away from materialism and toward introspection, creativity, and emotional healing. He believes psilocybin allows individuals to re-evaluate personal values and biases authentically and credits psilocybin with making him a more compassionate and mindful parent.

[34] He discussed legal access to psilocybin, referencing the *Special Access Program* (SAP) administered through the Ministry of Health and exemptions under s. 56 of the *CDSA*. He acknowledged not pursuing legal access due to lack of qualifying medical conditions and skepticism about spiritual exemptions.

S.L.

[35] S.L. is 44 years of age. She resides in Toronto and is a Board Member of the Psychedelic Association of Canada (PAC), an educational organization with an emphasis on destigmatizing psychedelics especially psilocybin and MDMA. Her motivation for joining PAC was to share her story and support others, especially in light of mental health challenges in Canada. She has had a long-standing career in public relations and communications where she has held several executive positions. She does not own or operate any psilocybin related business.

[36] S.L. told the court about her personal experience with psilocybin therapy and its impact on her mental health and well-being.

[37] In her affidavit, she disclosed a history of trauma due to emotional abuse by a parental figure. Having undergone almost two decades of talk therapy, she felt she continued to struggle on a subconscious level with unresolved issues resulting in fear, doubt, and shame. She had previously taken antidepressants as a teenager and indicated that her mother and her mother's three sisters had been on antidepressants for some time as well.

[38] In 2022 she sought out the assistance of *The Synthesis Institute (Synthesis)*, an organization operating in the Netherlands which offers professionally guided retreats using psilocybin. She has since attended two retreats, one in October of 2022 and one in August of 2023.

[39] She described a rigorous application process for the retreat, including detailed questions on physical and mental health, drug history, and therapeutic background. This was followed by three weeks of preparation via Zoom prior to her departure for the Netherlands.

[40] She said the retreats were highly structured, safe, and supervised, with facilitators including psychologists, psychiatrists, Indigenous guides, and a paramedic.

[41] During her first retreat in October of 2022, she underwent two psilocybin ceremonies during a five-day stay (with doses of 5g and approximately 20g of truffles), and three weeks of integration post-retreat. While under the influence of psilocybin, she described meeting, interacting with, and consoling her younger self and having memories of events that she believed she unknowingly repressed as a way of protecting her consciousness self. She described how "in an instant" she returned to the present day where she saw her best friend, her mother, brother and other close friends all standing before her. She described how she witnessed herself through the eyes of those that loved her most and how this transformed her own sense of self-worth and intrinsic value. She said her increased sense of self-worth has continued since that time.

[42] She said her second retreat in August of 2023 was drastically different. She said she wasn't experiencing anything recognizable in terms of people, places or memories but was in a vast inanimate space where she experienced a sense of discomfort and underwent a complete "ego dissolution". She says she lost any understanding of who, what or where she was. She said a shapeless energy appeared before her which she interpreted to be the parental figure from her traumatic past. She said she was able to forgive them for the pain they had caused her.

[43] S.L. says that her experiences with psilocybin have allowed her to be more authentic and less pressured to please those around her. She says that she now has a newfound sense of peace and self-assurance and that this empowered her to break free from a job that provided financial security but left her feeling empty. She says psychedelic therapy has allowed her to become more connected to people, nature and the universe.

[44] She said she has never applied and exemption through the *SAP* or clinical trials and remains unfamiliar with s. 56 exemptions.

Expert Evidence

The Nature of Psilocybin

[45] The evidence with respect to the nature of psilocybin is not in dispute.

[46] Psilocybin is a psychoactive substance commonly found in magic mushrooms although it can also be created in synthetic form. When consumed, it is metabolized into psilocin which primarily activates the serotonin 2A receptor in the brain.

[47] When taken in sufficient quantity, psilocybin produces an altered state of consciousness commonly referred to as a "psychedelic trip". The effects as reported in clinical trials include visual and auditory hallucinations, an altered perception of time and space, emotional breakthroughs and enhanced introspection and cognitive flexibility.

[48] A psychedelic dose is typically defined as 2 grams or more dried mushrooms or 15 mg or more pure psilocybin. Effects begin within 15 to 45 minutes and generally last between four and six hours and sometimes up to eight hours.

[49] Disagreement among the experts centred on psilocybin's safety and efficacy.

Applicant's Experts

Professor Lucas Swaine

[50] Professor Swaine has a background in philosophy and political science, having obtained a Doctorate in Philosophy from the University of Sussex in 1995 and a PhD in Political Science at Brown University in 1999. He has been a professor in the Department of Government at Dartmouth College since 2001 where he is presently the Department Chair. He has taught numerous courses which touch on political theory and philosophy as they pertain to fundamental freedoms, including freedom of thought and related international conventions. He has also written extensively in the area of freedom of thought from a political and philosophical perspective and in 2001 was among a number of scholars consulted by the UN Special Rapporteur on Freedom of Religion or Belief.

[51] On consent, Professor Swaine was qualified to give expert evidence on thought, the history of thought, freedom of thought, the history of freedom of thought, liberties and freedoms as understood by philosophers and contained within international conventions.

[52] Council were in agreement that Professor Swaine was not an expert on Canadian law and should not be permitted to opine on how these rights and freedoms should be interpreted by the court given that this is within the exclusive jurisdiction of the Court.

[53] Professor Swaine defines "thought" to include "mental activity" in order to accommodate a broad spectrum of mental processes which would include feelings as well as "reasoning, reflecting, imagining, cogitating, remembering, wishing, questioning, desiring, believing, deliberating, and other activities of the mind."³

[54] He distinguishes thought from speech and conduct given that a person can think or feel without expressing or acting upon one's thoughts or emotions. This he says is consistent with what John Stuart Mill describes in "On Liberty" as the "inward domain of consciousness". In this sense, his definition of thought excludes forms of expression.

³ Affidavit of Professor Swain, Ex. 12

[55] He also indicated that in his opinion mental activity is thought even if it does not lead to a belief or an opinion.

[56] He discussed the role that thought has played in human history, describing it as being fundamental both in terms of its contribution to the formation and success of complex societies. He cited its impact, from a social and political perspective on, the Reformation, the emergence of the modern era and the recognition of individual rights and freedoms. He described how this led to the rise of contemporary constitutional democracies which emphasize individual autonomy and the right to direct one's own life.

[57] Professor Swaine defines "freedom of thought" as the ability to engage in mental activity without interference by others. Interference in the sense includes the actions of another party that result in hindering, obstructing, impeding, reaching, or punishing mental activity. In terms of state action that could lead to a violation of freedom of thought, Professor Swaine identified the following four categories;

- (i) Investigation or Intrusion into one's thoughts
- (ii) Modification or Manipulation of one's thoughts
- (iii) Punishment for one's thoughts
- (iv) Preventing thought

[58] With respect to this latter category, Professor Swaine acknowledged that some care must be given in determining when state action should properly be viewed as thought prevention, given the many ways in which those actions can indirectly impede one's thoughts process. He said that factors to be considered would include the purpose of the prevention, and whether the purpose could be pursued by less invasive means.

[59] As indicated by Professor Swaine, freedom of thought was seen by philosophers as both distinct from other freedoms such as conscience, belief, opinion, expression and religion and foundational to them. He traced the "primacy" of freedom of thought to philosophers including John Stuart Mill, Wilhelm von Humboldt and John Rawls.

[60] Professor Swaine points out that the primacy of freedom of thought is reflected in its placement in relation to other rights in the United Nations *Universal Declaration of Human Rights* which states 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.

[61] Professor Swaine was consulted as part of the United Nations General Assembly Interim Report on *Freedom of Religion or Belief* published in October 2021. The Report was the first attempt to correlate international consensus on freedom of thought.

[62] Professor Swaine said the Report underscores the primacy of freedom of thought which it describes as one's "*forum internum*." Professor Swaine says this is consistent with John Stuart Mill's "*inward domain of consciousness*".

[63] The Report describes the attributes of freedom of thought to include the freedom not to reveal one's thoughts, the freedom from punishment for one's thoughts and protection from impermissible alteration of thought. In this latter category, the Report discusses the ways in which brain structures can be modified by the forcible administration of psychoactive substances.

[64] He acknowledged that the concept of freedom of thought is underdeveloped in both law and philosophy and that there is no thorough consensus among academics or scientists on the full scope of thought. He acknowledged that the Report did not endorse thought prevention as a potential violation of freedom of thought.

Professor David Nutt

[65] Professor Nutt is an experienced psychiatrist and professor of Neuropsychopharmacology at Imperial College in London England. In his work as a psychopharmacologist, he has gained extensive clinical and research experience on the effects of drugs on the brain. This includes clinical research related specifically to psilocybin. He has published extensively on the effects of drugs on the brain. This

includes several books, including most recently a book on the clinical use of psychedelics in psychiatry. He has more than 20 years experience as a member of the United Kingdom government Advisory Council on the Misuse of Drugs (ACMD), including eight years as the Chair of its Technical Committee.

[66] On consent, he was qualified to give expert evidence on the effects of psilocybin, the safety of psilocybin and the safety of psilocybin relative to the safety of other recreational drugs.

[67] According to Professor Nutt, psilocybin is a non-addictive non-toxic substance with a low potential for harm. He said numerous peer-reviewed studies and clinical trials demonstrate psilocybin's safety and efficacy - that it has shown promising therapeutic potential in the treating conditions such as depression, anxiety, PTSD and addiction and that it promotes cognitive flexibility, emotional openness, spiritual insight, ego dissolution and enhanced connectedness to family and others.

[68] Professor Nutt cited five studies⁴ involving a total of 160 patients in support of his opinion that one can reasonably expect to experience the following effects during or after their psilocybin experience: cognitive flexibility (a study involving 20 patients with treatment resistant depression), spirituality (a study of 36 patients, life meaning (14 patients, 7 of whom had treatment resistant depression), connectivity with self, others and nature and ego dissolution. All the studies cited explicitly recognize the limits of extrapolating their findings.

[69] With respect to cognitive flexibility, he said psilocybin was associated with an improved ability to engage with and alter thinking processes, particularly in relation to determinate depressive ruminations. He cited brain imaging studies that reveal the brain is more flexible after psilocybin treatment.

[70] He said these effects persist for up to a month after psychedelic dosing.⁵

⁴ Nutt Affidavit at para 27.

⁵ These effects are related to psychedelic dosing levels and not micro-dosing. The applicant indicate that no reliance was being placed on micro dosing as the evidence suggest that it does not produce significant thought related effects.

[71] He described how psilocybin stimulates the 5-HT_{2A} receptors which are most dense in that part of the brain where abstract and creative thinking, imaging and self reflection take place. He said this stimulation leads to less synchronized brain activity which in turn interrupts established ways of thinking and allows people to think in more creative and diverse ways. He cited this as an explanation for the different levels of consciousness, hallucinations, out of body experiences and personal insights that occur during the psychedelic state.

[72] With respect to risks, he testified that the risks associated with psilocybin use is greater for people who have had past mental health issues. He said this was particularly the case with those suffering from psychosis or those with a close (first-degree) family relative with psychosis. He said there was limited studies on the effects of psilocybin on pregnant women and that he would not recommend that they use psilocybin.

[73] Professor Nutt emphasized that the psychedelic state itself is unpredictable, and that “in theory” it can lead to self-harm or accidental harm as a result of misinterpreting risks associated with a particular behaviour or action. He said that anxiety, both before and during psychedelic dosing, is a major predictor of poor negative outcomes from psilocybin treatment. However, he said these risks are very low when the following best practices are applied:

- (i) conduct medical screening prior to the use of psilocybin by a doctor or dispensing pharmacist,
- (ii) provide good education and preparation;
- (iii) taking psilocybin in a controlled environment in the presence of a therapist or a responsible adult who is not under the influence of psilocybin;
- (iv) providing lower doses to those at higher risk of panic attacks or those with a history of other anxiety disorders; and
- (v) avoiding the use of alcohol or other stimulant drugs as this has also been reported to result in adverse effects.

[74] Overall, he said psilocybin ranks extremely low in terms of harm when compared to other recreation drugs and far less harmful than alcohol.

[75] Given his evidence on the relative safety of psilocybin, Professor Nutt criticized current drug laws as arbitrary and not evidence based. He advocated for the legal access to psilocybin under a regulated harm reduction framework with key safety measures which would exclude vulnerable populations (e.g., those with psychosis) and include supervised or guided use (especially for first-time users), together with education and close controls. He stated, "...given the remarkable safety of psilocybin ... It seems to me inexcusable that it should be denied to people who might want it."⁶

[76] He proposed a licensed access model like that in the Netherlands where individuals could obtain psilocybin with a medical certificate of approval, with screening to exclude people with psychosis or taking contraindicated medications and where a smart card system could limit the number of doses per year. He also endorsed Oregon's legal psilocybin model which provides guided psilocybin experiences in a controlled and therapeutic environment. He did not endorse unrestricted recreational legalization.

Professor Zachary Walsh

[77] Professor Walsh has worked as a clinical psychologist for the past 16 years and is a professor in the Department of Psychology at the University of British Columbia. He has extensive research experience in the use and effects of psychedelic drugs and psilocybin in particular. At the time of giving his evidence, he was the principal investigator of the largest study to date on the microdosing of psychedelics- primarily psilocybin. He has previous clinical experience in psilocybin-assisted psychotherapy through Health Canada's Special Access Program and has published several scientific articles on the use of psilocybin and mental health.

[78] On consent, Professor Walsh was qualified to provide expert evidence on the use, effects, and access to psilocybin, including its prevalence in Canada, the risks associated with psilocybin use and the motivations underlying its consumption. He was also qualified

⁶ Transcript of Evidence of Prof. Nutt, February 25, 2025 at p. 381

to give expert evidence on the health and safety risks associated with the consumption of psilocybin when consumed under circumstances similar to the protocols established for clinical trials or the Special Access Program approved by Health Canada.

[79] Professor Walsh testified that psilocybin is the most widely used serotonergic psychedelic in North America, citing its accessibility, ease of cultivation, and relatively shorter duration of effect compared to other psychedelics such as LSD.

[80] He referenced multiple peer-reviewed studies, including Griffiths et al. (2011, 2008), Smigielski et al. (2019), and Lake & Lucas (2024), which collectively demonstrate that psilocybin reliably induces mystical-type experiences. He says these altered thought experiences are characterized by ego dissolution, a sense of unity or transcendence, and are frequently described by participants as among the most meaningful of their lives. Professor Walsh noted that such experiences are associated with increased well-being, personal growth, and spiritual insight.

[81] Three of the four studies cited in support of his opinion involves a total of hundred and 117 participants. The authors of one study involving 60 healthy participants concluded the following: “results of our study suggest that psychedelics do not enhance creative thinking per se, but rather mediate changes in particular constructs of creative thinking, in a time-dependent manner.” The fourth study was survey-based involving 740 adult users of psychedelics, 80% of whom used psilocybin.

[82] In terms of safety, Professor Walsh opined that psilocybin presents a low risk profile when consumed in controlled settings. He acknowledged that adverse effects may include temporary increases in blood pressure, gastrointestinal discomfort, headaches, and, in some cases, anxiety or disorientation. He emphasized that these risks are generally manageable and significantly reduced when psilocybin is administered in accordance with established protocols, such as those used in clinical trials or in Oregon’s regulated psilocybin framework. He further testified that challenging psychological experiences, while possible, are often therapeutically beneficial when properly supported.

[83] Professor Walsh reviewed the Oregon model for psilocybin access, which includes mandatory screening, preparation sessions, supervised administration by certified facilitators, and optional integration sessions. He endorsed these procedures as reflective of best practices and consistent with those employed in Health Canada's Special Access Program. He noted that individuals with active psychosis, a history of self-harm, or contraindicated medications (e.g., lithium) are excluded from participation under these models given the increased risk. He noted that these trials as well as the SAP only involve patients with mental and physical health problems and that this speaks positively to the anticipated risk associated with consumption for nonmedical, thought-related purposes.

[84] He explained that the primary objective of screening procedures is to mitigate risk by excluding individuals with severe mental illness, given that the psychedelic experience induced by psilocybin can be profoundly intense and disorienting. It was further noted that the use of a controlled setting serves to reduce the likelihood of accidents (e.g. falls) arising from such disorientation, and the presence of a licensed facilitator further diminishes the risk of adverse and potentially harmful acute reactions. Finally, he emphasized the importance of post-treatment reintegration sessions with a trained specialist, aimed at addressing any subsequent concerns and the monitoring of any unexpected negative outcomes.

[85] With respect to prevalence, Professor Walsh cited recent national survey data indicating that approximately two million Canadians reported psychedelic use in the past year, with psilocybin being the most commonly used substance. He accepted the reliability of this data and acknowledged that motivations for use include personal growth, general well-being, and recreation. He testified that psilocybin is not typically associated with compulsive use or substance use disorders, and that its pharmacological profile does not engage the dopaminergic reward system in the same manner as substances such as alcohol or stimulants.

[86] Professor Walsh concluded that while psilocybin is not without risk, those risks are relatively low and comparable to or lower than those associated with legal substances such as alcohol.

Crown Expert

Dr. Joshua Rosenblat

[87] Dr. Rosenblat is a practising psychiatrist at Toronto Western Hospital with specialized training in psychopharmacology. In addition to providing direct clinical care to patients who are suffering from psychiatric illnesses, he conducts research and has authored numerous scientific articles on the use of psychedelics, including psilocybin. He was involved in seven psilocybin clinical trials, having led Canada's first investigator-initiated psilocybin clinical trial. He has experience in writing clinical trial protocols for the administration of psilocybin and has established a training program for mental health providers and physicians to learn how to safely support individuals undergoing psilocybin treatment.

[88] On consent, Dr. Joshua Rosenblat was qualified to give expert evidence on the nature, pharmacology, and toxicology of psilocybin, psilocin, and other psychedelic drugs, including the use, consumption, effects, and factors influencing the incidence and severity of effects of those drugs.

[89] He indicated that psilocybin is a "classic psychedelic" that induces a non-ordinary state of consciousness (NOSC), typically commencing 15–45 minutes after ingestion and lasting 4–8 hours. The effects vary significantly depending on the dose administered, the individual's neurochemistry and psychological state and environmental context, including the physical setting and preparatory support.

[90] Dr. Rosenblat emphasized that psilocybin's effects are inherently unpredictable. Even with identical doses and settings, the same individual may experience different effects across sessions. He confirmed that mystical and spiritual experiences are common and may correlate with positive long-term outcomes, though not universally. He indicated that no specific outcome, whether mystical experience or adverse reaction, are guaranteed to occur.

[91] Dr. Rosenblat categorized psilocybin's effects into acute, subacute, and long-term.

[92] He described the acute effects which last up to eight hours post ingestion to include the following:

- (i) cognitive effects: cognitive flexibility/creativity, disorganization, disorientation, distractibility;
- (ii) perceptual effects: hallucinations, derealization, depersonalization, time/space distortion;
- (iii) emotional effects: anxiety, paranoia, modal ability, agitation;
- (iv) physical effects: increased blood pressure, nausea, headaches; and
- (v) rare but serious effects: seizures, attempts to leave the session, harm to self or others (including suicidality and homicidality).

[93] He described the subacute effects which last from days to weeks post ingestion to include the following:

- (i) An “afterglow” period marked by increased openness, wellbeing, and cognitive flexibility; and
- (ii) Common side effects which include insomnia, appetite changes, headaches, and lingering nausea.

[94] He indicated that the long-term effects were less well understood due to limited follow-up data and selection bias but said the potential risks included Hallucinogen Use Disorder (i.e. addiction) and Hallucinogen Persisting Perception Disorder (*H.P.P.D.*) involving distressing flashbacks. He said the long-term effects had not been observed in clinical trials to date but have been reported in recreational users.

[95] His description of the acute effects mentioned above included the following:

- (i) Cognitive Flexibility: increased ability to change one’s perceptions. He gave an example of how this would permit one to change one’s perception of oneself from “I’m a bad person” to “I’m good person”. He described how this could lead to a change in behaviour and increased social interactions. He agreed that these effects have been seen in the one-month follow-up”, and that there are some long-term studies that suggest that cognitive flexibility may persist past that point. He

said that psilocybin temporarily increases neuroplasticity, the ability of the brain to rewire itself. He indicated that “the theory is that if you have a therapist there to help you rewire it, in a positive adaptive way, probably really helpful versus if there’s someone there who pushes you in the direction of maybe new thought patterns but equally negative and unhelpful thought patterns.” He said this could lead to thinking in a different way i.e., in a more meaningful, logical way.

(ii) Disorganization: “...in an ordinary state of consciousness we typically have linear thought patterns, we think after we finish court, we’ll go have some lunch and then we’ll come back to court, that’s sort of the linear progression, whereas disorganization would be scattered all over the place, thinking about last week, thinking about two weeks from now and really not having a clear linearity to your thought pattern...”

(iii) Disorientation: “Disorientation is specific to knowing where you are. So, disorientation would be when we ask people, ‘Do you know where you are?’ ‘Do you know what date it is?’ and they can’t answer those questions, they’re disoriented, they don’t know where they are or what the date is. Sometimes in extreme situations, they wouldn’t even know what their name is.”

(iv) Distractibility: “Distractibility, that one I think is probably more easy to understand just in terms of being distracted, and if you’re trying to have a conversation, they might be distracted by something on the wall or something behind them, and they really can’t maintain their focus on one person or one topic.”

(v) Hallucinations: “...seeing or hearing things that aren’t there...”

(vi) Derealization: “Derealization is a symptom of dissociation where things feel like they’re not real. It can also be quite distressing where you feel like the person in front of you is fake, is not a real person, the furniture in the room is not real, sometimes feeling that they’re personally not real, so just this general sense that things are not real.”

(vii) Depersonalization: “Depersonalization would be in the same bucket of dissociation, but depersonalization is more so relating to being disconnected from oneself. So, that would be more like your out-of-body experience where you feel like you’ve been removed from your body and sometimes, you’re looking down at yourself, that’s depersonalization.”

(viii) Time distortions: “...with time distortion sometimes people feel like things are moving very slowly or they feel like things are moving very quickly. It would be very common that patients will say to me at the end of the day “I have no idea how long I’ve been in this room for” because they lose track of time;

(ix) Space distortions: “Space distortion as well in terms of sometimes it looking like there’s more room. So, you know, sometimes people tripping and falling because they think that there’s more space between them and something in front of them, so just sort of a distortion of the space between them and other objects around them.”

[96] Dr. Rosenblat testified as to his direct experience in administering approximately 120 doses of psilocybin to 70 patients within regulated clinical trials. He described the rigorous safeguards employed in clinical trials which are subject to Health Canada approval, Research Ethics Board review, and s. 56 exemptions under the *Controlled Drugs and Substances Act* which permit him to both *possess and administer* psilocybin.

[97] Participants are screened to exclude those with psychiatric or medical risk factors. Sessions occur in custom-designed rooms with two trained therapists present and real-time monitoring. Rescue medications such as Gravol and Lorazepam are available for emergent symptoms. He said Serious Adverse Events (SAEs) are rare but require immediate reporting and intervention. Despite this, he noted that incidents requiring rescue interventions, either pharmacological or therapeutic, are common, even if SAEs are not.

[98] While acknowledging the growing body of research, Dr. Rosenblat emphasized the limitations of existing clinical research data. In his opinion, the long-term effects of

psilocybin treatment are still poorly understood. He attributed this to the lack of patient follow up. He cited a lack of research funding required to conduct long term follow-up as well as the declining retention rate of patients following their session.

[99] He discussed the use of survey-based studies but said they are considered lower quality than randomized controlled trials.

[100] Nonetheless, he said there was general consensus regarding the key risk factors associated with psilocybin which include patient factors (e.g., psychiatric history, age), drug factors (e.g., dose, purity, frequency) and environmental factors (e.g., setting, support).

[101] He indicated that psilocybin is not currently approved as a medicine in Canada and that no phase III clinical trials have been completed. He said that two positive phase III randomized control trials demonstrating safety and efficacy are required for FDA or Health Canada approval. He indicated that two such trials are ongoing but have not yet been completed. If successful, he estimated that psilocybin may be approved for medical use in approximately 5 years.

[102] Dr. Rosenblat also addressed the broader context of psychedelic use, referencing survey data (Evans et al.) indicating that while some individuals report extended difficulties following psychedelic use, a majority ultimately view their experiences as beneficial. He cautioned, however, that continued use may reflect dependency rather than therapeutic gain and emphasized the need for continued research to determine whether the benefits outweigh the harms.

Health Canada Witnesses

Ian MacKay

[103] Mr. MacKay manages the *Special Access Program (SAP)* for Health Canada which is responsible for granting exemptions for the use of controlled substances, including psilocybin, for medical purposes.

[104] Mr. MacKay testified that the *SAP* is designed to facilitate access to unapproved drugs for patients with serious or life-threatening conditions, upon request by a licensed healthcare practitioner. The program operates under the Food and Drug Regulations and is not intended to provide access for recreational, philosophical, or non-clinical purposes.

[105] As of October 2024, *SAP* had authorized 245 requests for psilocybin, with approximately 50 additional authorizations granted between October and February 2025. The lead indication for these requests was Major Depressive Disorder. Mr. MacKay confirmed that *SAP* does not currently recognize PTSD as a lead indication for psilocybin, although MDMA is considered appropriate for that condition.

[106] He further testified that one Open Label Individual Patient (OLIP) trial involving psilocybin was also approved. No requests have been received for access to psilocybin based on freedom of thought, spiritual exploration, or personal development. Mr. MacKay emphasized that all *SAP* decisions are grounded in clinical evidence and therapeutic need.

[107] Importantly, Mr. MacKay's testimony confirmed that the *SAP* does not provide a pathway for individuals seeking psilocybin for non-clinical purposes, including those grounded in freedom of thought or spiritual inquiry.

Dr. Jennifer Pelley

[108] Dr. Pelley oversees the development and implementation of policies and regulations under the *CDSA* in her role as the Director of the Office of Regulatory Affairs within Health Canada's *Controlled Substances and Overdose Response Directorate*.

[109] Dr. Pelley explained that psilocybin is classified as a Schedule III controlled substance under the *CDSA* and as a restricted drug under Part J of the *Food and Drug Regulations*. She confirmed that Canada is a party to the 1971 UN *Convention on Psychotropic Substances*, which governs international control of psilocybin.

[110] She outlined three legal pathways for access:

- (i) Clinical trials under the *Food and Drug Act (FDA)*;
- (ii) The Special Access Program (SAP); and
- (iii) Section 56(1) exemptions under the *CDSA* for medical, scientific, or public interest purposes.

[111] Dr. Pelley emphasized that s. 56(1) cannot exempt individuals from prohibitions under the *FDA*, including the sale of unapproved drugs.

[112] At paragraph 23 of her affidavit, Dr. Pelley stated that the purpose of the *CDSA* is “to protect public health and maintain public safety by balancing the need for access to the substances scheduled under the *CDSA* and its regulations for legitimate medical, scientific and industrial uses with the risks associated with their misuse and their diversion to illegal markets.” She cited *Canada v. PHS Community Services Society*,⁷ in support of her position.

[113] Upon cross-examination, Dr. Pelley clarified that her articulation of the *CDSA*’s purpose was based on internal Health Canada briefing materials and not directly derived from the Supreme Court’s decision in *PHS*. She acknowledged that the core purpose is dual: public health and public safety.

[114] In her affidavit she indicated that when considering a s. 56 exemption, the availability of existing regulatory pathways to conduct the activity is one of the factors and that generally, established regulatory pathways should be explored before making a request for an individual s. 56(1) exemption under the *CDSA*.

[115] She further testified that Health Canada has yet to receive a request for an exemption to allow the use psilocybin for “freedom of thought” purposes and that they do not maintain public guidance on how to apply for such exemptions.

[116] She spoke of 82 instances between 2020 and October of 2024 where exemptions for psilocybin use were granted on compassionate grounds for end-of-life treatment involving psychotherapy. In another example, she cited 19 healthcare professionals who

⁷ *Canada v. PHS Community Services Society*, 2011 SCC 44

were granted access to psilocybin for their own personal use. The exemptions were granted on the basis that their own experience with psilocybin would place them in a better position to understand and support the patients they were treating with psilocybin assisted therapy.⁸

[117] She said that Health Canada does not provide any information on what is required in order to obtain a personal exemption for psilocybin use. She explained that apart from exemptions for medical or therapeutic purposes, Health Canada is not in the business of promoting access to what is effectively an illegal drug.

III. FINDINGS OF FACT

[118] Psilocybin is a naturally occurring psychedelic compound found in certain species of mushrooms, often called “magic mushrooms”. It is listed as a Schedule III substance under the *Controlled Drugs and Substances Act*, which prohibits its possession and distribution in the absence of an authorized exemption.

[119] When taken in sufficient quantity, psilocybin produces a psychedelic state or “trip” which lasts from 4-8 hours. The purported thought related benefits are achieved as a result of having experienced a psychedelic trip. The reported benefits include cognitive flexibility, ego dissolution, spiritual insights and enhanced connections with others and nature.

[120] I accept the evidence of the civilian witnesses. Each of them described the therapeutic benefits they received from the consumption of psilocybin. They described experiencing profound emotional and spiritual insights, emotional healing, a newfound sense of self-worth and a greater sense of connectedness to nature and those around them.

⁸ See *Toth v. Canada (Minister of Health and Addictions and Associate Minister of Health)*, [2025] F.C.J. No. 1064 where the Federal Court found that a refusal of a requested s. 56 exemptions for other healthcare professionals (HCP's) was inconsistent with the Ministry's earlier decision in 2020 with respect to the 19 healthcare professionals referred to by Dr. Pelley who were granted “public interest” exemptions. The Court considered section 7 of the *Charter* and found as follows: “The purpose of section 7 is to protect against the “deprivation” by the government of a life, liberty or security interest. There is no deprivation here; rather, the HCPs' asserted *Charter* interests arise only because they have asked for the right to possess a controlled substance. They have voluntarily chosen to put themselves in jeopardy.”

[121] None of them had previously applied pursuant to s. 56 of the *CDSA* for an exemption that would allow them to possess and consume psilocybin on the basis that it enhanced their thought process.

[122] The *SAP* administered by the Ministry of Health does not provide exemptions for nonclinical use of psilocybin. The program exists only for the purpose of providing access to patients with serious or life-threatening conditions.

[123] Based on the evidence of Dr. Pelley which I accept, I am satisfied that individuals seeking access to psilocybin for any thought related benefits have no direct means of doing so through a s. 56 exemption and that any such request would be denied.

[124] More importantly, her evidence satisfies me that the regulatory framework that would be necessary for accessing psilocybin in a controlled environment, with appropriate safeguards, does not exist.

[125] On the evidence of the three medical experts, I am satisfied that psilocybin can be safely administered in a highly regulated and controlled environment. By “safely”, I mean that the risk to self and others can be adequately reduced and that protocols can be put in place to reduce access to individuals with known psychiatric or medical risk factors. This is what is now occurring in clinical trials related to the safety and efficacy of psilocybin for medical and therapeutic use.

[126] I find that the acute effects of a psychedelic dose of psilocybin, which can last between four and eight hours, are as described by Dr. Rosenblatt- that in addition to cognitive flexibility, the psychedelic state itself produces disorganized nonlinear thought patterns, hallucinations, distortions as to time and place, and depersonalization. I find that the effects a psychedelic dose of psilocybin are inherently unpredictable in that no particular outcome can be expected in any given case.

[127] I am also satisfied on the evidence of both Professor Nutt and Dr. Rosenblat that psilocybin increases neuroplasticity and that with the assistance of a therapist, would enable new thought patterns to develop. Studies show these effects can be maintained

for up to a month and there are some long-term studies that suggest this benefit could extend beyond that point.

[128] I also find that although the results of clinical trials conducted thus far are promising with respect to the efficacy of psilocybin in the treatment of certain mental health conditions, those results are preliminary. As indicated by Dr. Rosenblat, several clinical trials are ongoing which, if successful, could lead to the approval of psilocybin for medicinal purposes in approximately five years.

[129] I find that the long-term effects of psilocybin use are still not fully understood.

IV. APPLICABLE LEGISLATION

Courts of Justice Act, R.S.O.1990, c. C.3

Notice of constitutional question

109 (1) Notice of a constitutional question shall be served on the Attorney General of Canada and the Attorney General of Ontario in the following circumstances:

1. The constitutional validity or constitutional applicability of an Act of the Parliament of Canada or the Legislature, of a regulation or by-law made under such an Act or of a rule of common law is in question.
2. A remedy is claimed under subsection 24 (1) of the *Canadian Charter of Rights and Freedoms* in relation to an act or omission of the Government of Canada or the Government of Ontario.

Failure to Give Notice

109(2) If a party fails to give notice in accordance with this section, the Act, regulation, by-law or rule of common law shall not be adjudged to be invalid or inapplicable, or the remedy shall not be granted, as the case may be.

The Controlled Drugs and Substances Act S.C. 1996 c. 19

Interpretation

Definitions

2 (1) In this Act,

possession means possession within the meaning of subsection 4(3) of the *Criminal Code*; (*possession*)

traffic means, in respect of a substance included in any of Schedules I to V,

- (a) to sell, administer, give, transfer, transport, send or deliver the substance,
 - (b) to sell an authorization to obtain the substance, or
 - (c) to offer to do anything mentioned in paragraph (a) or (b),
- otherwise than under the authority of the regulations.

Possession of substance

4 (1) Except as authorized under the regulations, no person shall possess a substance included in Schedule I, II or III.

Punishment

6) Every person who contravenes subsection (1) where the subject-matter of the offence is a substance included in Schedule III

- (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding three years; or
- (b) is guilty of an offence punishable on summary conviction and liable
 - (i) for a first offence, to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding six months, or to both, and
 - (ii) for a subsequent offence, to a fine not exceeding two thousand dollars or to imprisonment for a term not exceeding one year, or to both.

Trafficking in substance

5 (1) No person shall traffic in a substance included in Schedule I, II, III, IV or V or in any substance represented or held out by that person to be such a substance.

Possession for purpose of trafficking

(2) No person shall, for the purpose of trafficking, possess a substance included in Schedule I, II, III, IV or V.

Punishment

(3) Every person who contravenes subsection (1) or (2)

- (a) if the subject matter of the offence is a substance included in Schedule I or II, is guilty of an indictable offence and liable to imprisonment for life;

(a.1) [Repealed, 2018, c. 16, s. 196]

(b) if the subject matter of the offence is a substance included in Schedule III or V,

(i) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years, or

(ii) is guilty of an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months; and

(c) where the subject-matter of the offence is a substance included in Schedule IV,

(i) is guilty of an indictable offence and liable to imprisonment for a term not exceeding three years, or

(ii) is guilty of an offence punishable on summary conviction and liable to imprisonment for a term not exceeding one year.

Exemption by Minister

56 (1) The Minister may, on any terms and conditions that the Minister considers necessary, exempt from the application of all or any of the provisions of this Act or the regulations any person or class of persons or any controlled substance or precursor or any class of either of them if, in the opinion of the Minister, the exemption is necessary for a medical or scientific purpose or is otherwise in the public interest.

Exception

(2) The Minister is not authorized under subsection (1) to grant an exemption for a medical purpose that would allow activities in relation to a controlled substance or precursor that is obtained in a manner not authorized under this Act to take place at a supervised consumption site.

Canadian Charter of Rights and Freedoms

Section 2(b)

2. Fundamental freedoms

Everyone has the following fundamental freedoms:

(a) Freedom of thought, belief, opinion and expression, including freedom of the press and other media communication;

Section 7

7. Life, liberty and security of the person

Everyone has the right to life, liberty and security of the person in the right not to be deprived thereof except in accordance with the principles of fundamental justice.

V. STANDING

Section 5(2)

[130] The applicant has standing to challenge s. 5 of the *CDSA* even though he does not personally claim to use psilocybin for thought related purposes or otherwise. Our law provides that an accused may challenge the constitutionality of a law under which he is charged by pointing to the unconstitutional effects it has on third parties.⁹ To this extent, anyone subject to a criminal prosecution has the right to challenge the constitutionality of an offence with which they are charged.

Section 4(1)

[131] As indicated above, the applicant submits that the prohibition on trafficking in psilocybin unreasonably interferes with the s. 2(b) and 7 rights of others who would seek to benefit from accessing it for thought related purposes. Relying on a number of decisions including the Ontario Court of Appeal decision in *Hitzig v Canada*¹⁰, he submits that, “The right to access a substance must include a means of access”¹¹. In short, the applicant submits that there is a constitutional right to access psilocybin for thought related purposes and that this right is illusory unless the prohibition on trafficking is ruled unconstitutional.

⁹ *R. v. Big M Drug Mart Ltd.* (1985), 18 C.C.C. (3d) 385 (S.C.C.) at para.38; *R. v. Smith*, [2015] 2 S.C.R. 602 at paras. 11-13; and *R. v. Parker*, [2000] O.J. No. 2787 (Ont. C.A.) at para 78.

¹⁰ *Hitzig v Canada*, [2003] OJ no. 3873 (Ont. C.A.) at paras. 109-118.

¹¹ Applicant’s Factum, para. 53.

[132] As part of his argument, the applicant proposes that psilocybin could safely be made available for those wishing to access it for thought related purposes in a supervised and regulated clinical setting similar to the ones now operating in the State of Oregon.

[133] Based on the implied assumption that access necessarily involves possession, the Crown submits that this amounts to a collateral attack s. 4(1) of the *CDSA*. The Crown points to the fact that the applicant has not included s. 4(1) in his *NCQ* or in his plea for relief and therefore he has no standing to directly challenge it.

[134] The Crown submits that an indirect attack on s. 4(1) cannot succeed on its merits given that the law does not recognize a right to possess a controlled substance other than for medical purposes or a right to trafficking generally.

[135] Despite this, the applicant maintained in oral submissions that he was not seeking a ruling on the constitutionality of s. 4(1) of the *CDSA* but argued that if psilocybin is a freedom of thought tool protected by the *Charter*, then laws which restrict access to it by third parties are also unconstitutional.

[136] I find that in the absence of formal Notice and a ruling on standing to challenge s. 4(1) of the *CDSA*, the applicant cannot challenge the constitutionality of s. 5(2), by pointing to its unconstitutional effect on the right of *others to possess* psilocybin for thought related purposes.

[137] In my view, the issue is not whether an indirect attack can succeed on the merits. It rests on the principle that one is not permitted to do indirectly (e.g. challenge the constitutionality of an uncharged offence) that which cannot be done directly (e.g., proceeding with that challenge without filing Notice). Such an approach has consistently been rejected by our courts.¹²

[138] The wording of s. 109 of the *CJA* is such that absent proper notice, I lack the authority to rule on the constitutionality of s. 4 of the *CDSA*. As indicated by the Ontario

¹² *R v. Darroch*, [2000] 2 S.C.R. 443 at para. 26; *R v O'Connor*, [1995] 4 S.C.R. 411 at para. 122; *R v. Osolin*, [1993] 4 S.C.R. 595 at para. 48

Court of Appeal in *R v. Briggs*¹³, “In the absence of the constitutionality of the legislation being raised in the appropriate manner, this Court has no authority to do so. A party intending to challenge the constitutional validity of legislation is required to provide notice of a constitutional question to the Attorneys General of the Province and Canada. In the absence of such notice, the Court is barred from considering the issue.”

[139] As previously stated, accused persons always have the right to challenge the constitutionality of an offence under which they are charged.

[140] Different considerations apply where the accused seeks to challenge the constitutionality of a provision other than the one with which they are charged. In such cases, in addition to filing Notice under the *Courts of Justice Act*, the accused must meet the requirements for either “private interest” and/or “public interest” standing with respect to the uncharged offence. The case of *R v. Mernagh*¹⁴ is a prime example.

[141] Private interest standing requires evidence that the accused has a direct personal interest in the provision in question beyond that of a member of the general public. The interest must be “real and not speculative.”¹⁵

[142] “Public interest” standing to challenge the constitutionality of a provision other than the one charged will be satisfied where an accused can establish:

- (i) that there is a serious issue raised as to the validity of the legislation;
 - (i) that he is directly affected by the impugned provision or has a genuine interest in its validity; and
 - (ii) that there is no other reasonable and effective way this issue could be brought before the court.¹⁶

¹³ *R v. Briggs*, [2001] O.J. No. 3339 (Ont. C.A.) at para. 43; see also *Paluska Jr. v. Cava*, [2002] O.J. No. 1767 (Ont. C.A.)

¹⁴ *R. v. Mernagh*, 2011 ONSC 2121 (Ont. S.C.J.)

¹⁵ *Finlay v. Canada (Minister of Finance)*, [1986] 2 S.C.R. 607 at para. 21-22; *Downtown Eastside Sex Workers United Against Violence v. Canada (Attorney General)*, [2010] B.C.J. No. 1983 (B.C.C.A.) at para. 29; and *R v. Bedford*, 2010 ONSC 4264 at paras. 46-57.

¹⁶ *R v. Mernagh*, supra. at paras. 302 and 314-315; *Canadian Council of Churches v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 236 at para. 37.

[143] In my view, it is unlikely that the applicant would be granted standing to challenge s. 4 of the *CDSA* on the basis of someone else's right to possess psilocybin, even if it was included in the applicant's *Notice*.¹⁷ While this may explain why the applicant decided not to directly challenge s. 4(1), I am not satisfied that the present state of the law grants him another means by which to generate what would in effect be a ruling on that issue.

[144] In my view, in the absence of proper notice, the case law confirms the ability to challenge a charged offense based on its effect on third parties but does not support the ability to do so where the constitutionality of the charged offence rests on the constitutionality of an uncharged offence for which the third party would be liable to prosecution.¹⁸

[145] If an indirect attack were permitted in these circumstances, it would effectively do away with the standing requirements with respect to uncharged offences - requirements that were designed to promote the efficient use of court resource by weeding frivolous or hypothetical disputes. Anyone would be able to challenge the constitutionality of a charged offence based on its effect on third parties to commit other offences with which the accused is not charged.

[146] It would also potentially result in considerable confusion in the law. In the absence of a direct challenge to the prohibition on possession, a finding that s. 5(2) is unconstitutional because it deprives others of a constitutionally protected right to possess psilocybin for thought related purposes would invariably lead the public to believe that they have a right to possess psilocybin when s. 4(1) of the *CDSA* states otherwise.

¹⁷ There is no evidence that the applicant has a personal interest in possessing psilocybin for thought related purposes or otherwise and would have likely have difficulty establishing that there is no other effective way to bring the matter before the court.

¹⁸ Counsel referred the Court to *Carter v. Canada (Attorney General)*, [2015] 1 S.C.R. 331, *Hitzig v Canada*, [2003] OJ no. 3873 (Ont. C.A.), *R v. Smith*, [2015] 2 S.C.R. 602 and *R v. Morgentaler*, [1988] 1 S.C.R. 30. *Hitzig* and *Carter* were civil cases where *Notice* had been filed and standing was argued. *Smith* and *Morgentaler* were criminal cases where the accused automatically had standing given that they were only challenging the sections with which they were charged.

[147] The question remains as to whether there is any other basis upon which the applicant can challenge the constitutionality of s. 5 without relying on the ability of others to possess psilocybin for thought related purposes. This, I find, is what this case is about and why the applicant has consistently referenced the ability of others to “access” as opposed to “possess” psilocybin when referring to the unconstitutional effect that s. 5 of the *CDSA* has on others. Although not specifically stated, the key lies in the difference between possessing a controlled substance and having it administered.

[148] I begin by noting that the *CDSA* defines “traffic” to include the following: “to sell, administer, give, transfer, transport, send or deliver a substance”.¹⁹

[149] The *CDSA* incorporates the definition of “possession” contained in the *Criminal Code*.²⁰ The *Criminal Code* defines possession to include both knowledge of, and control over, the item being possessed.

[150] With these definitions in mind, a controlled substance can be trafficked to someone by administering it to them in circumstances where the person to whom the substance is administered does not have legal possession i.e., control over the substance. This routinely occurs when one receives a vaccine. We “access” the vaccine by having it administered to us in circumstances where we do not possess it in any meaningful sense. Likewise, when a patient receives an injection of a of morphine for pain relief, the patient does not have control of the morphine in any real sense. This happens in our hospitals on a daily basis without the need for the patient to obtain a s. 56 exemption.

[151] As indicated by Dr. Rosenblat, in clinical trials, he obtains a s. 56 exemption to both *possess* and *administer* the psilocybin. The fact that he gets an exemption for “administering” and not “giving” or “transferring” is indicative of the fact that the patient is not expected to be in actual possession of the psilocybin.

[152] This would potentially be the case in the clinic model advocated by the applicant where individuals could access psilocybin in a highly regulated and controlled

¹⁹ Section 2(1) of the *CDSA*.

²⁰ *Ibid*.

environment by having it administered to them in pill form by a trained and licensed facilitator and without being in legal possession or control of it. This would mirror what occurs in clinical trials where psilocybin is administered in a controlled environment with significant safeguards.

[153] In this sense, the applicant is effectively proposing a form of access which would preserve the prohibition on general possession of psilocybin under s. 4(1) of the *CDSA*. This would be entirely consistent with the applicant's position that he is not challenging the constitutionality of s. 4 of the *CDSA*. It would also be consistent with the views expressed by the Professor Nutt and Professor Walsh, neither of whom endorsed the general possession and use of psilocybin outside of a regulated and controlled environment with appropriate safeguards.

[154] Therefore, given that he has not filed Notice to challenge s. 4(1), I find that while the applicant can challenge s. 5 of the *CDSA* based on the right of others to access psilocybin, he cannot do so based on their right to possess it.

[155] It is on this basis that I will consider the following constitutional challenge in this case:

1. Does prohibiting the administration of psilocybin for personal use by others under s.5 of the Controlled Drugs and Substances Act, by reason of the inclusion of this substance in Schedule III to the Act, infringe ss. 2(b) and 7 of the *Canadian Charter of Rights and Freedoms*?
2. If the answer to question one is in the affirmative, is the infringement justified under s.1 of the *Charter*.

VI. CHARTER INTERPRETATION – SECTION 2(B)

[156] *Freedom of thought* occupies a foundational place in the *Canadian Charter of Rights and Freedoms*, appearing first among the fundamental freedoms enumerated in s. 2(b). Yet, despite its prominence, the concept remains largely unexplored by our courts.

[157] Since the enactment of the *Charter*, lower courts have delineated the types of activities that infringe upon thought without providing a detailed interpretation of its scope.

The activities in question primarily related to expressible content:

- (i) prohibiting possession of marijuana does not limit freedom of thought because the effect that marijuana has on the individual's thought processes "does not attract a free-standing constitutional right";²¹
- (ii) requiring a person who was found guilty of the crime, but who believes they are innocent, to admit their guilt limits their freedom of thought;²²
- (iii) mandatory antiterrorism deprogramming imposes belief systems upon the subject and thus limit freedom of thought and expression;²³
- (iv) prohibiting business on Remembrance Day does not limit freedom of thought because its purpose is not to compel remembrance or agreement with the associated ideals;²⁴
- (v) seatbelt laws do not limit freedom of thought, because freedom of thought does not entail a freedom to impact on one's own thoughts;²⁵
- (vi) as a physician made conditional on certain research opinions and on participation in psychotherapy does not limit freedom of thought, or alternatively is a proportionate limit.²⁶

[158] In *R v. Sharpe*²⁷, the Supreme Court of Canada described freedom of thought as falling on a continuum of "intellectual and expressive freedom" but did not articulate a comprehensive framework for its scope, content, or limits:

The right conferred by s. 2(b) of the Charter embraces a continuum of intellectual and expressive freedom – "freedom of thought, belief, opinion and expression". The right to possess expressive material is integrally related to the development of thought, belief, opinion and expression. The possession of such material allows us to understand the thought of others or consolidate our own thought. Without the right to possess expressive material, freedom of thought,

²¹ *R v Normore*, 2005 ABQB 75.

²² *R v. McMillan*, 2019 ONCJ 249.

²³ *Canada (Attorney General v. Diver*, 2016 MBPC 3 at para 52.

²⁴ *R v. Myrridon Inc.*, 1988 CanLII 7102 (MB CA) at paras 142-43, 149-50

²⁵ *R v. Locke*, 2004 ABPC 152

²⁶ *DWC v. College of Physicians and Surgeons of Ontario*, 2017 CanLII 55551 (ONHPARB)

²⁷ *Ibid.*

belief, opinion and expression would be compromised. Thus the possession of expressive materials falls within the continuum of rights protected by s. 2(b) of the *Charter*. The private nature of the proscribed material may heighten the seriousness of a limit on free expression. ... It engages the fundamental right to freedom of thought.²⁸

[159] Accordingly, this Court must turn to the general principles of *Charter* interpretation for assistance.

Position of the Parties

[160] The applicant submits that freedom of thought in s. 2(b) of the *Charter* should be interpreted to protect all mental activity including the process by which thought occurs. He submits that the court should define thought to include feelings as well as “reasoning, reflecting, imagining, cogitating, remembering, wishing, questioning, desiring, believing, deliberating, and other activities of the mind”. The applicant submits that this “large and liberal interpretation”²⁹ is required to give full effect to its purpose.

[161] The applicant submits that psilocybin is a tool that enhances the thought process and that s. 5 of the *CDSA* infringes upon freedom of thought to the extent that it prohibits access to this tool.

[162] The Crown submits that s. 2(b) of the *Charter* should not be taken to include all mental activity and must be interpreted in relation to the other freedoms enumerated in s. 2(b), which focus on expressible content. The Crown further submits that freedom of thought is meant to protect against state intrusion into, manipulation of, or punishment for thoughts and that it does not create an entitlement to enhance or alter one’s thoughts with psychoactive drugs.

[163] The Crown argues that if the applicant’s proposed approach were accepted, the logic underlying it would extend far beyond controlled substances - that any state action

²⁸ *R v. Sharpe* supra at paras 25-26.

²⁹ *R v. Big M Drug Mart*, supra at note 1.

that limited access to anything that affected mental activity would constitute an infringement of freedom of thought. The Crown says this cannot be the law.

[164] The Crown proposes that freedom of thought be interpreted as protecting the kind of ideas, and the processes of developing and arranging those ideas, that can generate beliefs, opinions, and other expressible content. The Crown submits that this would exclude pre-intellectual experiences like feelings. The Crown submits that this is in keeping with the decision in *R v. Sharpe*³⁰ given that the purpose identified by the Supreme Court with respect to freedom of expression focused on the protection of a conveyance of *meaning*.

[165] The Crown then points to the three-part test for identifying breaches of expression developed by the Supreme Court of Canada *Canadian Broadcasting Corp. v. Canada (Attorney General)*³¹ and proposes a similar test adapted to freedom of thought. The Crown submits that the prohibition in s. 5(2) fails under this test.

Principles of Charter Interpretation

[166] Discerning the meaning of the *Charter* right requires the court to go beyond the ordinary rules of statutory interpretation. As indicated in *Hunter v. Southam Inc.*:

A statute defines present rights and obligations. It is easily enacted and as easily repealed. A constitution, by contrast, is drafted with an eye to the future. Its function is to provide a continuing framework for the legitimate exercise of governmental power and, when joined by a *Bill* or a *Charter of Rights*, for the unremitting protection of individual rights and liberties. Once enacted, its provisions cannot easily be repealed or amended. It must, therefore, be capable of growth and development over time to 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. Professor Paul Freund expressed this idea aptly when he admonished the American courts “not to read the provisions of the Constitution like a last will and testament lest it become one”.³²

³⁰ *R v. Sharpe*, 2001 SCC 2

³¹ *Canadian Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 2

³² *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145 at p. 155

[167] In *Big M Drug Mart*, the Supreme Court of Canada provided the following guidance on understanding the purpose of the Charter right:

“...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*.”³³

[168] The starting point is the text of the *Charter* right.³⁴ The court must consider the language used, other *Charter* rights with which the right is associated, and the need for *Charter* rights to be capable of development over time.

[169] However, as indicated by the Supreme Court of Canada in *R v. Poulin*, caution is required to avoid conflating generosity and purposiveness:

As was reiterated in *Grant*, “[the] purpose of a right must always be the dominant concern in its interpretation; generosity of interpretation is subordinate to and constrained by that purpose” (para. 17). This is because an overly generous reading of a right risks protecting “behaviour that is outside the purpose and unworthy of constitutional protection” (Hogg, at p. 36-30). Indeed, “[in] the case of most rights...the widest possible reading of the right, which is the most generous interpretation, will ‘overshoot’ the purpose of the right.”³⁵ [Emphasis added].³⁶

Textual Analysis

[170] In the case of s. 2(b) of the *Charter*, freedom of thought is listed with freedom of “*belief, opinion and expression including freedom of the press and other media of communication.*” It was not listed alongside “conscience and religion” as it was in both the *United Nations Declaration of Human Rights (UNHDR)*³⁷ and the *International Covenant on Civil and Political Rights (ICCPR)*.³⁸ This gives rise to two principles.

³³ *Big M* Supra note 1 at para. 117

³⁴ *Quebec (Attorney General) v. 9147-0732 Québec inc.*, 2020 SCC 32

³⁵ *Ibid* at para 53.

³⁶ *R v. Poulin*, 2019 SCC at para 53.

³⁷ *United Nations Declaration of Human Rights (UNHDR) art. 18.*

³⁸ *International Covenant on Civil and Political Rights (ICCPR) art. 18.*

[171] The presumption against tautology provides that “[every] word in a statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose.”³⁹

[172] The meaning of words is also affected by the words to which it is linked in a sentence.⁴⁰

[173] Therefore, it is reasonable to conclude that freedom of thought is related to but different from opinion, belief, and expression.

[174] From the order in which the words appear, it is also reasonable to conclude that thought is primary in the continuum of rights to the extent that thoughts can lead to beliefs which in turn can lead to opinions which can then lead to expression. While opinions and forms of expression can influence thought, thought is nevertheless primary to the extent that those opinions and forms of expression arise from it.

[175] This interrelationship between thought and expression was reflected in the Interim Report of the UN Special Rapporteur on freedom of thought as follows:

“[thought] and expression are conceptually and practically distinct, yet they engage in a perpetual feedback loop in which expression is a vehicle for exchanging and developing thoughts, and thoughts feed expression.”⁴¹

[176] This approach accords with the textual analysis of freedom of thought set out above and is consistent with the continuum of intellectual freedoms describe in *Sharpe*.

[177] Freedom of expression is said to serve three purposes:

- (i) seeking and attending the truth is an inherently good activity;

³⁹ *Placer Dome Canada Ltd. v. Ontario (Minister of Finance)*, 2006 SCC 20 at para 45; *Schreiber v. Canada (Attorney General)*, 2002 SCC 62 at para. 73.

⁴⁰ *Opitz v Wrzesnewskyi*, 2012 SCC 55 at para 40.

⁴¹ Special Rapporteur Interim Report of the Special Rapporteur on freedom of religion and belief, Ahmed Shaheed. *Freedom of Thought*. United Nations General Assembly A/76/380 (5 Oct 2021), para 18. He draws similar links between opinion and belief.

(ii) participation in social and political decision-making is to be fostered and encouraged; and

(iii) the diversity in forms of individual self-fulfillment in human flourishing ought to be cultivated and then essentially tolerant, indeed welcoming, environment not only for the sake of those who convene a meeting, but also for the sake of those to whom it is conveyed.⁴²

Historical Context

[178] Freedom of thought does not appear in the Canadian Bill of Rights or analogous provincial laws. It originated in international law where it was adopted into early drafts of the *Charter*. Because of this, international law and commentary may illuminate the purpose of the freedom.⁴³

[179] In accordance with the principle of conformity, the *Charter* is presumed to provide protection at least as great as that afforded by similar provisions in international human rights documents which Canada has ratified. The rule is subject to clear legislative intent to the contrary.⁴⁴ Non-binding sources such as commentary from international human rights bodies and experts, while relevant, carry less weight and are only a persuasive value in interpreting the *Charter*.⁴⁵ They play a supportive and confirming role in interpreting the *Charter* and tend to be used to support or confirm the court's interpretation of the *Charter* arrived at by way of a purposive of analysis.⁴⁶

[180] As indicated above, the grouping of rights in s. 2(b) of the *Charter* differs from Article 18 the *United Nations Declaration of Human Rights (UNHDR)* and Article 18 of the *International Covenant on Civil and Political Rights (ICCPR)* where religion is coupled with belief (*UNHDR*) and conscience and religion (*ICCPR*). Both have their origin in the need to protect philosophical and religious belief from compulsion or restraint.⁴⁷

⁴² R v. Big M Drug mart, supra at note 1 at para 95.

⁴³ R v. Hape, [2007] 2 SCR 292 at para 55 cited in *Saskatchewan Federation of Labour v Saskatchewan*, 2025 SCC 4 at para 64.

⁴⁴ *Quebec v. 9147*, supra note 28 at paras 31, 34, 39.

⁴⁵ *Ibid* at para 38.

⁴⁶ R v. Bissonnette, 2022 SCC 23 at para 98; *Quebec v. 9147* supra note 28 at paras 22, 28.

⁴⁷ Jan Christoph Bublitz, "The Mind and Conscience are the Person's Most Sacred Possessions': The Origins of Freedom of Thought in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights", <https://ssrn.com/abstract=4906028> at 5, forthcoming in Patrick

[181] In an early draft of the *Charter*, freedom of thought was moved, apparently at the recommendation of the Special Joint Committee on the Constitution of Canada in 1972, from grouping with conscience and religion, to grouping with belief and opinion:

We would have preferred not to have freedom of thought linked solely with freedom of conscience and religion, since it actually has (and presumably is intended to have) a wider application, and as located it might run afoul of the *eiusdem generis* (same genus) rule of interpretation. We believe it should rather be linked with freedom of opinion and expression.⁴⁸

[182] This history indicates that “thought” in s. 2(b) was understood to protect the same kind of intellectual content as in the above-noted Articles but with a broader (i.e. not necessarily philosophical or religious) application.

Purposive Analysis

[183] The common purpose of the fundamental freedoms, generally, was first described in detail in *Big M*, with a focus on s. 2(a):

“Freedom can primarily be characterized by 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 of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others.”⁴⁹

[184] In *R v. Edwards Books and Art Ltd.*, The Supreme Court of Canada found that s. 2 *Charter* freedoms protected against compulsion or restraint whether “direct or indirect, intentional, or unintentional, foreseeable or unforeseeable, so long as the burden on freedom is more than “trivial or insubstantial.”⁵⁰

O’Callaghan & Bethany Shiner, eds., *The Cambridge Handbook of the Right to Freedom of Thought* (Cambridge University Press, 2024).

⁴⁸ Special Joint Committee on the Constitution of Canada, First Report (1972) at 19.

⁴⁹ *R v. Big M Drug Mart* supra at note 1, para 95.

⁵⁰ *R v. Edwards Books and Art Ltd.*, [1986] 2 SCR 713 at para 97.

[185] There is significant debate among scholars about the meaning of freedom of thought in international human rights law. A recent report from the UN Special Rapporteur on freedom of thought described this lack of consensus as follows:

What constitutes “thought” not only lacks legal precision, but also scientific and philosophical consensus. Neuroscientists generally agree that thoughts are created when billions of neurons (nerve cells) in the brain - connected by trillions of synapses - fired together. But the consensus ends there. Some neuroscientists distinguish “thought” from other cognitive processes including emotions based on the primary part of the brain engaged. Others emphasize the complex, highly interrelated nature of anatomical aspects of the brain that support cognitive functions, comparing efforts to “trace of thought from beginning to end” “to asking where the forest begins”.⁵¹

[186] Nevertheless, the Special Rapporteur’s report shows consensus in international law and commentary on at least three possible “attributes” of freedom of thought:

- (i) Freedom not to reveal one’s thought through state intrusion or surveillance of thinking;
- (ii) Freedom from punishment from one’s thoughts, real or inferred; and
- (iii) Protection from impermissible alteration of thoughts which includes freedom from coercion (not including “applying moral or intellectual persuasion”) and freedom from modification of thoughts (changing an individual’s thoughts through direct alteration of brain chemistry or brain).

[187] Although the Special Rapporteur identifies a fourth *potential* concern similar to what Professor Swaine identified as “preventing thought” namely, that the state is obliged to foster an enabling environment for freedom of thought, he notes that “this is not a universal position and the parameters are limited.”⁵²

VII. Analysis

Section 2(b) of the *Charter*

[188] Freedom of thought falls within what *Sharpe* described as a “continuum of intellectual and expressive freedom.”⁵³ It is primary and hence broader than opinion, belief

⁵¹ Special Rapporteur Interim Report. *supra* at note 36 para 35.

⁵² Interim Report *supra* at note 358 para 10.

⁵³ *R v. Sharpe*, *supra* note 29 at para 25.

or expression because it forms the basis for those other rights. Put another way, one can think without forming an opinion or belief that is expressed or capable of being expressed, but opinions, beliefs and expressions are themselves the products of thought. This explains why freedom of thought is the first protected right in the continuum of expressive freedoms.

[189] The primacy of freedom of thought underscores the need for a broad and liberal interpretation of thought itself. Support for this can also be found in the fact that thought was placed next to opinion, belief, and expression and not next to freedom of conscience and religion where it had originally appeared in an earlier draft of the *Charter*. This suggests an intention to avoid limiting the purpose of freedom of thought to matters of conscience and religion.

[190] However, defining thought to include all mental activity would be overly broad. It would extend freedom of thought beyond its intended purpose. It would amount to defining freedom in isolation to the other related rights mention in s. 2 (b).

[191] Including feelings or emotions as a protected interest under s. 2(b) of the *Charter* risks calling into question the constitutionality of virtually all government action. This could not have been the intended purpose for which the right was enshrined. Such an approach would conflate generosity with purposiveness, something which the Supreme Court of Canada in *Poulin*⁵⁴ cautioned against.

[192] The definition of thought as mental activity also lacks the specificity required to make any thought-related claims justiciable. It would risk extending protection to all external stimuli or experiences that impact upon the mind including all psychotropic drugs currently prohibited under the CDSA.

[193] I agree with the Crown that thought is best understood in relation to expression. In *Sharpe*, the court described the values underlying freedom of expression to include, “individual self-fulfillment, finding the truth through the open exchange of ideas, and the

⁵⁴ *R v. Poulin*, supra note 32 at para 53.

political discourse fundamental to democracy.”⁵⁵ The court defined expression as “activity or communication that conveys or attempts to convey meaning.”

[194] In keeping with this focus on the conveyance of meaning as part of the continuum of intellectual and expressive freedoms, I find that thought is best understood as those ideas that are capable of conveying meaning. I find that purpose of freedom of thought is to protect against the coercion and constraint of ideas related to opinion, belief, and other expressible content.

[195] The parties agree that freedom of thought should be interpreted not only to protect thoughts themselves but should include protecting the process by which thoughts are formed. I agree.

[196] While a process is not itself a thought, the nature of thought is such that a breach of freedom of thought is most often manifested in restrictions of other freedoms, notably expression. Such was the case in *Sharpe*. This flows from the fact that thoughts cannot be seen or known until they manifest themselves in another form. To this extent, protecting only thoughts would not afford any greater protection than that afforded for other rights.

[197] Accordingly, I find that the purpose of freedom of thought is the protection against the coercion and restraint of ideas, including *the process by which those ideas are developed*, that are capable of generating opinions, beliefs, and other expressible content.

[198] In *Canadian Broadcasting Corp. v. Canada (Attorney General)*,⁵⁶ the Supreme Court of Canada developed a three-part test to determine when expressive activity is protected:

1. Does the activity in question have expressive content, thereby bringing it within 2(b) protection?;

⁵⁵ *Ibid* at para 23.

⁵⁶ *Canadian Broadcasting Corp. v. Canada (Attorney General)*, 2011 SCC 2.

2. Does the method or location of this expression remove that protection?; and
3. If the expression is protected by 2(b), does the government in question infringe that protection, either in purpose or effect?

[199] Given its relationship to expression, I adopt the same test for determining when thought is protected:

1. Does the activity involve intellectual content comprised of ideas capable of generating beliefs, opinions or expressive content, thereby bringing it within the scope of s. 2(b) protection?;
2. Does the method or location of the activity remove that protection?; and
3. If the activity is protected by s. 2(b), does the government action in question infringe that protection, either in purpose or effect, through intrusion manipulation or punishment and, if so, is it justified under s. 1 of the *Charter*?

[200] Applying this test, I find the evidence supports a finding that the administration of psilocybin in a psychedelic dose has the potential to change the thought process resulting in cognitive flexibility i.e., the ability to think in more creative and diverse ways. This can lead to changes in self-perception - how we think about ourselves and the outside world. While the precise method by which this occurs is not completely understood and cannot be guaranteed for everyone experiencing a psychedelic dose, it does not change the fact that studies show this effect. This was confirmed by both the Crown and defence experts. They indicated that psilocybin's impact on the thought process can last up to a month or more. It is precisely for this reason that it is being pursued as a form of treatment for those suffering from certain mental health disorders.

[201] However, the prohibition in this case does not target or restrict any specific thought with specific expressible content. Given the random and unpredictable effects of psilocybin on a given individual, what the prohibition restricts is access to an experience that may or may not impact one's general perception of themselves and the outside world.

[202] In my view, protecting an experience in these circumstances is not what freedom of thought was meant to protect. If it did, it would open the door to innumerable other ways in which government action prohibits experiences and thereby impacts our ability to derive a potential thought-related benefit from that experience. Leaving aside whether that could ever result in a successful “thought” related claim, I find that in this case, that claim is too remote to warrant the protection of s. 2(b) of the *Charter*.

[203] Even if I am wrong in this regard, like speech or other forms of expression, not every act that impacts upon thought or the thought process is worthy of protection.

[204] In the case of psilocybin, I find that the means of generating the thought related effects in this case are not worthy of s. 2(b) protection. In coming to this conclusion, I have considered the following:

(i) The thought related effects of psilocybin are random and cannot be predicted in advance. To this extent, I agree with the Crown that psilocybin is not a precise tool for thought. It does not impact on thought in any way “akin to the obvious, known, direct and controllable use of a tool to achieve precise and foreseeable ends...”⁵⁷

(ii) The science with respect to psilocybin and its effect is still nascent. From a scientific perspective, its long-term effects are still largely unknown. It is not presently approved for medical use in Canada and is currently the subject of at least two ongoing Phase III clinical trials which are scheduled to conclude within the next few years. In these circumstances, the unpredictable effect of psilocybin must be measured against the fact that its safety and efficacy have yet to be established.

[205] Finally, there is no basis for finding that s. 5(2), either in purpose or effect, intrudes upon, manipulates or punishes a thought or forces forcing anyone to think in a particular way. As indicated above, the purpose of the *CDSA* is public safety and protection.

[206] For these reasons, I find that s. 5 of the *CDSA* does not infringe s. 2(b) of the *Charter*.

⁵⁷ Crown Factum, para 111.

Section 7 of the *Charter*

[207] The applicant's challenge under s. 7 is largely dependent on a finding that psilocybin is a *Charter* protected tool of thought.

[208] In addition to this, absent a valid medical purpose, our law does not recognize the right to consume controlled substances. The decisions of the Supreme Court in *R v. Marmo-Levine*⁵⁸ and *R v. Clay*⁵⁹ are dispositive.

[209] In light of my ruling with respect to s. 2(b), I find that the right to access or administer psilocybin for non-medical, thought-related purposes, is well outside the scope of the inherently private and fundamentally personal choices protected by s. 7 .

[210] I also find that the security of the person is not engaged in this case. Given that the choice to access psilocybin does not attract *Charter* protection under 2(b), the decision to access or administer psilocybin for non-medical purposes confines it to a matter of a personal lifestyle choice. There is no evidence that the prohibition imposed by s. 5(2) of the *CDSA* amount to state imposed psychological stress.

[211] Although security of the person is triggered by the possibility of imprisonment, there is no minimum sentence applicable in this case and the prospect of jail is low. It cannot be said that the criminalization of the offence in this case is grossly disproportionate. The tariff for similarly situated offenders (illegal storefront employees with no criminal record) convicted of possessing a similar quantity psilocybin for the purpose of trafficking, is still developing but is presently in the range of a fine or a conditional discharge.

[212] The blanket prohibition under s. 5(2) with respect to psilocybin does not offend the principles of fundamental justice. It is neither arbitrary, overbroad or grossly disproportionate. It bears connection to the purpose of the *CDSA* which is the protection

⁵⁸ *R. v. Marmo-Levine*; *R. v. Caine*, 2003 SCC 74 (CanLII), [2003] 3 SCR 571.

⁵⁹ *R. v. Clay*, 2003 SCC 75

of public health and safety. While the risks of psilocybin use may be low, the evidence satisfies me that it is not insignificant even when consumed in a controlled setting. It is not overbroad given that the interests the applicant seeks to protect, namely thought, would make psilocybin available to anyone who sought its use for this purpose. It cannot be said that the prohibition in this case is so extreme in relation to the interests it is meant to protect, namely health and safety, particularly given that psilocybin alters brain function and its effects are still being studied.

[213] For these reasons, I find that section 5(2) of the *CDSA* does not infringe section 7 of the *Charter*.

VIII. CONCLUSION

[214] For all of the above reasons, I find that s. 5(2) of the *CDSA*, does not infringe the right to freedom of thought as contained in s. 2(b) of the *Charter*, or the liberty and security of the person in s. 7 of the *Charter*.

Released: October 7, 2025

Signed: Justice G. Orsini