

Analysis of the psilocybin freedom of thought decision

The judge dismissed the freedom of thought challenge. The judge applied a freedom of thought test that makes no sense and ignored an extraordinary evidentiary record. It is a flawed decision (the “decision”). It is not a superior court or a court of appeal decision. It is a lower court decision. It needs to be appealed directly to the Ontario Court of Appeal (the top court in Ontario). We put forward a deep ocean of evidence that should not be wasted.

The implications of the case would be significant. If successful the use of psychedelics and the important thought that comes about from psychedelics would be protected under the Charter of Rights and Freedoms (the “Charter”) subject to reasonable limits. It would open the door to psilocybin access for all healthy Canadians. The first iteration of freedom of thought psilocybin use would probably require psilocybin use at a clinic with a therapist present. This would evolve over time.

I divide the judge’s reasons for dismissing my challenge into four reasons (paras. 201-205 of the decision).

First reason: The judge found that the effects of psilocybin are unpredictable in that no particular outcome can be expected in a given case (para. 126 of the decision). The judge said that the law does not target or restrict any specific thought with specific expressible content so there is no freedom of thought breach (para. 201 of the decision). The judge said that the psilocybin experience may or may not impact one’s perception of oneself and the outside world (para. 201 of the decision) and that psilocybin is too remote from thought (para. 202, last sentence, of the decision). The problem here is in part that the judge applied a defective freedom of thought test and in part the judge seems unaware of the evidence.

The judge applied an ill-fitting test for a freedom of thought tool (this test was created by this judge for the first time ever as there is very little law on freedom of thought). The judge’s test required that a freedom of thought tool, in order to be protected, must be “predictable in that a particular effect can be expected” or that one will have a “specific thought.” This test does not work for a freedom of thought tool. One could never predict what specific thoughts a freedom of thought tool might cause one to think even though it may be perfectly reasonable to use that tool for freedom of thought purposes. For example, the effect that a classic freedom of thought tool such as a philosophy book would have on thought cannot be predicted. There are many types of thoughts that a person could have while reading or after reading a philosophy book. Despite that, it is very reasonable to use a philosophy book for thought related purposes. A psychotherapist is another classic freedom of thought tool. After a session with a psychotherapist one could never predict a particular effect or a specific thought. That is an impossible test which would never succeed for any freedom of thought tool. It will always fail because thought cannot be predicted, but that does not mean there is no such thing as a freedom of thought tool.

A test that better fits a freedom of thought tool is my proposed test in which a freedom of thought tool in order to be protected must be reasonably (viewed objectively) and seriously (viewed subjectively) used for freedom of thought purposes. With psilocybin, like a philosophy book, you might not know exactly what you are going to think, but it is reasonable to use it for

freedom of thought purposes. The requirement that it be reasonably used for thought purposes avoids people claiming something is a freedom of thought tool when in fact its connection to thought is limited. A freedom of thought tool must have a strong connection to thought, viewed objectively. The requirement that it be seriously used to more fully experience thought avoids people claiming something is a freedom of thought tool when the thought benefits are modest. For example, using a freedom of tool for entertainment is not serious use. A philosophy book is a freedom of thought tool as it is used reasonably and seriously for thought purposes. A Stephen King book might prompt some imaginative thinking, but it would fail both tests as it's connection to thought is modest and it's thought-related benefits are not serious.

In addition to having an unworkable test, the judge failed to acknowledge the mountainous evidence connecting psilocybin to thought. The judge said psilocybin has a remote relationship to thought. Those might be the most wrong words ever written about psilocybin. The evidence overwhelmingly showed certain types of thoughts commonly emerge either during or after a psilocybin experience.[i] Further, even on that rare occasion when it does produce a rocky experience, it still often ends up producing important thought-related benefits.

The judge's factual findings on psilocybin's thought-related effects can be found in two small paragraphs (paras. 126-127 of the decision). There were hundreds of pages of transcripts and exhibits on psilocybin's thought-related benefits in yet the judge's findings on this key issue could fit in a thimble. Strangely, the judge did find that psilocybin causes cognitive flexibility (para. 126 of the decision). Cognitive flexibility is a thought-related benefit. The judge found that psilocybin increases neuroplasticity and that with the assistance of a therapist would enable new thought patterns to develop (para. 127 of the decision). That is a thought-related benefit. All three psilocybin experts said that mystical and spiritual effects are very common from psilocybin, but the judge did not find that as a fact. The judge accepted the crown expert's comments about the less pleasant psilocybin effects, but he did not accept the crown expert's evidence on the positive effects such as creativity, peace, transcendence, unity, oneness, numinous, deity encounters, social connectedness, and empathy (para. 126 of the decision). However, the judge's greatest error on the evidence was his misunderstanding of Professor David Nutt's powerful and extensive evidence.

Professor Nutt might be the leading expert in the world on psilocybin. He testified that the vast majority of people who use psilocybin get a sense in which they are more connected either to themselves, to other people or to nature.[ii] He gave evidence that it is very common for a psilocybin experience to include a feeling of unity or understanding of a greater being or a greater presence or something beyond the human psyche.[iii] He said that psilocybin induced changes in consciousness tend to go hand-in-hand with changes in spiritual feeling/ mysticism. Those changes in consciousness are predictive of later benefits.[iv] He said that it is very common for people who have used psilocybin to develop new values or perspectives.[v] He testified that the memory of the spiritual, mystical and/or religious experience persist forever. He stated that it is very common for a person who uses psilocybin to develop new values or perspectives.[vi] He testified that people who have that experience tend to report themselves as being more spiritual ever after.[vii] He gave evidence that a majority of people who take psilocybin go on to experience thought-related benefits.[viii]

The judge said that Professor Nutt, in support of his opinion on thought-related effects, cited five studies involving 160 patients (para. 68 of the decision). That is not remotely close to correct. Professor Nutt, in support of his opinion on thought-related effects, cited 20 studies involving 1,697 people. Professor Nutt, also in support of his opinion on thought-related effects, testified that several hundred psilocybin studies, modern and pre-modern, have revealed thought-related effects.[ix] Professor Nutt, also in support of his opinion on thought-related effects, testified that every study that measured thought-related benefits showed that the majority had thought-related benefits.[x] Professor Nutt, in support of his opinion on thought related effects, also testified about two large surveys about naturalistic psilocybin use involving about 2,400 people which found significant increases in cognitive flexibility, mystical experience, wellbeing and connectedness with others similar to clinical studies.[xi] Professor Nutt, also in support of his opinion on thought-related effects, said that those two surveys are similar to quite a number of other surveys that other groups have done including his team.[xii] Professor Nutt, also in support of his opinion on thought-related effects, testified that there are several thousand ceremonies and retreats happening every weekend around the world in which there is a deliberate attempt to optimize the benefits and that the experiences from these ceremonies have been consistently found in both surveys and observational studies as being positive and valuable resulting in increased wellbeing, creative divergent thinking, cognitive flexibility and mindfulness.[xiii] Professor Nutt, in support of his opinion on thought-related effects, gave extensive evidence about the physiological and psychological support for his assertion that psilocybin produces thought-related benefits. The physiological and psychological science also show that psilocybin causes thought-related benefits. Further still, Professor Nutt, in support of his opinion on thought-related effects, adopted as part of his evidence two studies Watts Day (2017) and Griffiths (2011). Those two studies cited 29 studies that were relevant to thought-related benefits. By adopting the content of those studies, those studies and the citations in those studies become part of Professor Nutt's evidence. Finally, in addition to the vast amount of evidence of Professor Nutt in support of his opinion on thought-related effects, there were other studies filed as exhibits by other experts that corroborated Professor Nutt's evidence.

Professor Zachary Walsh stated that the subjective value and importance of the thought-related experiences is immense and that people consistently rank psilocybin experiences among the most meaningful experiences of their lives, spiritually, personally.[xiv] Professor Walsh gave evidence that mindfulness and ego-dissolution are frequently reported thought-related effects of ingesting psilocybin.[xv] Professor Walsh said that psilocybin can cause consumers to experience positive changes in the thought-related domains of cognitive flexibility, spirituality, life-meaning, ego dissolution, connectedness, mindfulness, and creativity.[xvi] Professor Walsh stated that the entheogenic use of psilocybin among the Indigenous peoples of the Americas dates back to the precolonial era. Evidence documented 49 research articles that identify Indigenous approaches to the use of psilocybe mushrooms with evidence from several centuries clearly documenting use of psilocybin for thought-related purposes such as spirituality and communication.[xvii] Professor Walsh said research shows that thought-related motives are the primary reason people consume psilocybin.[xviii]

The crown expert, Dr. Joshua Rosenblat, said that the acute effects of psilocybin include increased flexibility/ creativity, peace, transcendence, unity, oneness, numinous, deity encounters, social connectedness, and empathy.[xix] Rosenblat defined transcendence as going

above the normal life into the spiritual realm and he defined numinous as meaning spiritual or mystical.[xx] Dr. Rosenblat said his team have a spiritual care chaplain as part of their psilocybin research team because these spiritual effects come up a lot.[xxi] Dr. Rosenblat said that the long-term effects of psilocybin include connectedness, reductions in anxiety, ability to help family/friends, overall wellbeing and a turning point that helped their overall well-being. Dr. Rosenblat said that higher anti-depressant effects are associated with higher mysticism effects.[xxii] Dr. Rosenblat said that psilocybin promotes oceanic boundlessness.[xxiii] Dr. Rosenblat said that there are indications that psilocybin-induced cognitive flexibility has long term effects.[xxiv] The judge stated (at para. 90 of the decision) that Dr. Rosenblat “confirmed that mystical and spiritual experiences are common...”

For the three citizen witnesses psilocybin was profoundly important thought-related benefits. Psilocybin transformed their lives in significant ways, making them better, more well-adjusted people. Their evidence was powerful.

The evidence overwhelmingly established that people commonly have positive thought-related benefits from psilocybin. Somehow the judge missed that.

Reason 2: The judge said that if the challenge were successful it would open the door to innumerable other ways in which government action prohibits experiences and thereby impacts our ability to derive thought-related benefit from that experience (para. 202 of the decision). The reason he makes this statement is because in the previous paragraph (para. 201 of the decision) he described the psilocybin experience as an experience that may or may not impact one’s general perception of themselves and the outside world. He also said psilocybin has a remote relationship to thought. Of course, if one protects a tool that “may or may not impact one’s general perception of themselves and the outside world” or has a remote relationship to thought then innumerable other freedom of thought tools will be protected.

Some might interpret the judge’s comments here as a slippery slope concern that this could open the door to other drugs being protected as freedom of thought tools. That might be true for psychedelics, but not for other drugs. Even if it could be established that a drug like cocaine resulted in thought related benefits it would never pass the section 1 test. On a constitutional challenge the first question is whether there is a breach of a Charter right such as freedom of thought. However, if there is a Charter breach, the law can always be saved at section 1 if the law is proportionate to the concerns that the law seeks to address. If there were a religion that believed in cannibalism, the laws prohibiting cannibalism would be saved by section 1. A prohibition on cannibalism is a proportionate response to society’s concerns with cannibalism. Similarly, a law prohibiting cocaine would be saved under section 1 because cocaine is highly addictive and can cause heart attacks. Freedom of thought would never legalize cocaine or similarly dangerous drugs.

Third reason: The judge said the psilocybin prohibition does not “target” or “restrict” any specific thought with expressible content (para. 201 of the decision). The judge later said that the psilocybin prohibition does not “intrude upon, manipulate or punish a thought or force anyone to think in particular way” (at para. 205 of the decision). That is not the test for a Charter violation in Canada. In Canada, a law can be unconstitutional because it prohibits a Charter tool. In

Canada, the Supreme Court has repeatedly protected Charter tools that allow one to more fully experience a Charter right. There are many Supreme Court cases protecting access to Charter tools that allow one to experience a freedom in a more fulsome manner. Here are some:

In *CBC v. New Brunswick (Attorney General)* the Supreme Court said that freedom of the press encompassed not only the right to transmit news, but also the right to gather the information. In effect, gathering information is a freedom-of-the-press tool that must be protected under freedom of the press.[xxv]

In *Denis v. Cote* the Supreme Court said that freedom of the press encompassed maintaining confidential relationships with journalistic sources.[xxvi] Put another way, maintaining confidential relationships with journalistic sources is a freedom of the press tool.

In *Kamal c. Canada (Procureur general)* the Federal Court of Appeal held that access to a passport engages "the right to enter, remain in and leave Canada" under subsection 6(1) of the Charter. The court is saying that a passport is a freedom of mobility tool that allows one to more fully experience one's rights under subsection 6(1) of the Charter.[xxvii]

In *Law Society of BC v. Trinity Western University*, the focus was on a covenant that set out behavioral expectations including a prohibition on "sexual intimacy that violates the sacredness of marriage between a man and a woman." [xxviii] The evidence established that the covenant helped create an environment in which Trinity Western University students could grow spiritually. Supreme Court found that freedom of religion protected the covenant because it enhanced spiritual growth. Requiring fellow students to sign a covenant was not religious in and of itself, but it was a tool that made it easier for students to adhere to their faith and more fully experience freedom of religion.[xxix]

Subsection 10(b) of the Charter provides the right to retain and instruct counsel without delay and to be informed of that right without delay. The Charter has been interpreted as requiring the police to facilitate access to a phone for those arrested or detained. The phone is a subsection 10(b) tool.[xxx]

Psilocybin is a freedom of thought tool and access to freedom of thought tools subject to reasonable limits cannot be prohibited.

Fourth reason: The judge seems to say that long term safety concerns mean that psilocybin is not a freedom of thought tool (para. 204(ii) of the decision). Safety is not relevant to whether psilocybin is a freedom of thought tool. Safety is relevant, but it is considered at the section 1 stage of the Charter analysis. As I said, it is at section 1 where the court considers whether the government has a good reason, such as safety, for restricting access to a freedom of thought tool. The judge wrongly used safety to dismiss our freedom of thought argument.

There were some important positive findings. The judge found that psilocybin can be safely consumed (para. 125 of the decision). In other words, if psilocybin is a freedom of thought tool then the government cannot save the law under section 1 of the Charter. The judge, in effect, said

that the government would fail the minimal impairment test which means the government would fail the section 1 test.[1]

Also important, the judge found that there were no exemptions practically available for someone seeking access for freedom of thought purposes (para. 123 of the decision). The crown argued that access to psilocybin for thought-related purposes was fine because one can always apply for an exemption under s. 56 of the Controlled Drugs and Substances Act. This is a common crown argument on a constitutional challenge. This argument was rejected.

We put forward an amazing evidentiary record that should not be wasted. The case is too important. It needs to be appealed directly to the Ontario Court of Appeal.

-Paul Lewin

[i] I define thought-related benefits as cognitive flexibility, spirituality, life meaning, connectivity with self, others and nature, ego dissolution, empathy, compassion, and mindfulness.

[ii] Evidence of Prof. Nutt, Transcripts, Feb. 24, 2025, p. 276, l. 24-31 and p. 278, l. 31 - p. 279, l. 32.

[iii] Evidence of Prof. Nutt, Transcripts, Feb. 24, 2025, p. 282, l. 16-30 and p. 283, l. 12-15 and Affidavit of Prof. Nutt, para. 27, pp. 15-16, Application Record, Vol. I

[iv] Evidence of Prof. Nutt, Transcripts, Feb. 24, 2025, p. 283, l. 13-24.

[v] Evidence of Prof. Nutt, Transcripts, Feb. 24, 2025, p. 273, l. 14-31.

[vi] Evidence of Prof. Nutt, Transcripts, Feb. 24, 2025, p. 273, l. 26 – p. 274, l. 7

[vii] Evidence of Prof. Nutt, Transcripts, Feb. 24, 2025, p. 282, l. 16 – p. 283, l. 4; p. 283, l. 16-24

[viii] Evidence of Prof. Nutt, Transcripts, Feb. 24, 2025, p. 251, l. 13-25

[ix] Evidence of Prof. Nutt, Transcripts, Feb. 24, 2025, p. 251, l. 26-32.

[x] Evidence of Prof. Nutt, Transcripts, Feb. 24, 2025, p. 251, l. 13-32

[xi] Evidence of Prof. Nutt, Transcripts, Feb. 25, 2025, p. 358, l. 27-p. 367, l. 28.

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[xiii] Evidence of Prof. Nutt, Transcripts, Feb. 25, 2025, p. 363, l. 11-p. 367, l. 28.

[xiv] Evidence of Prof. Walsh, Transcripts, Feb. 10, 2025, p. 291, l. 18-24; Affidavit of Prof. Walsh, para. 16, p. 144, Application Record, Vol. I.

- [xv] Affidavit of Prof Walsh, para. 15, p. 144, Application Record, Vol. I.
- [xvi] Affidavit of Prof Walsh, para. 7, p. 141, Application Record, Vol. I.
- [xvii] Affidavit of Prof Walsh, para. 21, p. 144, Application Record, Vol. I.
- [xviii] Affidavit of Prof. Walsh, para. 20, p. 145-146, Application Record, Vol. I.
- [xix] Dr. Rosenblat Report, p. 6, para. 19).
- [xx] Evidence of Dr. Rosenblat, Transcripts, Feb. 26, 2025, p. 545, l. 1-4.
- [xxi] Evidence of Dr. Rosenblat, Transcripts, Feb. 26, 2025, p. 537, l. 21 – p. 538, l.11.
- [xxii] Evidence of Dr. Rosenblat, Transcripts, Feb. 26, 2025, p. 551, l. 24-32-p. 552, l.2; p. 547, l. 15-20.
- [xxiii] Evidence of Dr. Rosenblat, Transcripts, Feb. 26, 2025, p. 548, l. 13-15.
- [xxiv] Evidence of Dr. Rosenblat, Transcripts, Feb. 26, 2025, p. 554, l. 10-17.
- [xxv] *CBC v. New Brunswick (Attorney General)*, [1996] S.C.J. No. 38 at paras. 24-26.
- [xxvi] *Denis v. Cote*, 2019 SCC 44 at para. 46.
- [xxvii] *Kamal c. Canada (Procureur general)*, 2009 CAF 21, 2009 FCA 21 at para. 15.
- [xxviii] *Law Society of BC v. Trinity Western University*, 2018 SCC 32 at para. 6.
- [xxix] *Law Society of BC v. Trinity Western University*, 2018 SCC 32 at paras. 70-73 and 75.
- [xxx] *R. v. Taylor*, 2014 SCC 50 at para. 25.

[xxxi] Section 1 is, at its core, a threefold proportionality test comparing the law with the law's objective. The objective of the psilocybin laws, like all drug laws, is health and safety. To save a law under section 1, the government must pass all three steps. First step, the rational connection test requires the government to demonstrate that it is logical and reasonable to conclude that the psilocybin prohibition will help bring about its objective of health and safety. Second step, the minimal impairment test asks whether the limit on the right is reasonably tailored to the objective or, put another way, is there a less harmful or less drastic means of achieving the objective. Third, the proportionality analysis directs the court to balance the impact of the law on protected rights against the beneficial effect of the law. This allows the court to stand back to determine on a normative basis whether a rights infringement is justified in a free and democratic society.

