

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE	
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PUBLIC

CT-2024-010

THE COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34;

AND IN THE MATTER OF certain conduct of Google Canada Corporation and Google LLC relating to the supply of online advertising technology services in Canada;

AND IN THE MATTER OF an application by the Commissioner of Competition for one or more orders pursuant to section 79 of the *Competition Act*.

B E T W E E N:

COMMISSIONER OF COMPETITION

Applicant

and

GOOGLE CANADA CORPORATION AND GOOGLE LLC

Respondents

**BOOK OF AUTHORITIES OF GOOGLE CANADA CORPORATION
AND GOOGLE LLC
VOLUME 17 OF 20**

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August 22, 2025

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David Malmo-Levine *Appellant*

v.

Her Majesty The Queen *Respondent*

and

**Attorney General of Ontario, British
Columbia Civil Liberties Association
and Canadian Civil Liberties
Association** *Intervenors*

and between

Victor Eugene Caine *Appellant*

v.

Her Majesty The Queen *Respondent*

and

**Attorney General of Ontario, British
Columbia Civil Liberties Association
and Canadian Civil Liberties
Association** *Intervenors*INDEXED AS: **R. v. MALMO-LEVINE; R. v. CAINE**Neutral citation: **2003 SCC 74.**

File Nos.: 28026, 28148.

2003: May 6; **2003: December 23.**Present: McLachlin C.J. and Gonthier, Iacobucci, Major,
Bastarache, Binnie, Arbour, LeBel and Deschamps JJ.ON APPEAL FROM THE COURT OF APPEAL FOR
BRITISH COLUMBIA*Constitutional law — Charter of Rights — Fundamental
justice — Liberty and security of person — Narcotic
Control Act prohibiting possession of marihuana —
Imprisonment available as penalty for simple posses-
sion — Whether prohibition infringes s. 7 of Canadian***Please see in particular para. 113**

c.

Sa Majest  la Reine *Intim e*

et

**Procureur g n ral de l'Ontario,
British Columbia Civil Liberties
Association et Association canadienne
des libert s civiles** *Intervenants*

et entre

Victor Eugene Caine *Appellant*

c.

Sa Majest  la Reine *Intim e*

et

**Procureur g n ral de l'Ontario,
British Columbia Civil Liberties
Association et Association canadienne
des libert s civiles** *Intervenants*R PERTORI  : **R. c. MALMO-LEVINE; R. c. CAINE**R f rence neutre : **2003 CSC 74.**

N s du greffe : 28026, 28148.

2003 : 6 mai; 2003 : 23 d cembre.

Pr sents : La juge en chef McLachlin et les juges
Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour,
LeBel et Deschamps.EN APPEL DE LA COUR D'APPEL DE LA
COLOMBIE-BRITANNIQUE*Droit constitutionnel — Charte des droits — Justice
fondamentale — Libert  et s curit  de la personne —
Dispositions de la Loi sur les stup fiants interdisant la
possession de marihuana — Possibilit  d'emprisonne-
ment en cas de d claration de culpabilit  pour simple*

Charter of Rights and Freedoms — Narcotic Control Act, R.S.C. 1985, c. N-1, s. 3(1), Schedule.

Constitutional law — Charter of Rights — Equality rights — Narcotic Control Act prohibiting possession of marihuana for purpose of trafficking — Whether prohibition infringes s. 15 of Canadian Charter of Rights and Freedoms — Narcotic Control Act, R.S.C. 1985, c. N-1, s. 4(2), Schedule.

Constitutional law — Division of powers — Criminal law — Narcotic Control Act prohibiting possession of marihuana — Whether prohibition within legislative competence of Parliament — Constitution Act, 1867, s. 91(27).

Two RCMP officers on regular patrol observed C and a male passenger sitting in a van by the ocean. As the officers approached, C, who was in the driver's seat, started the engine and began to back up. As one of the officers came alongside the van, he smelled a strong odour of recently smoked marihuana. C produced for the officer a partially smoked joint which weighed 0.5 gram. He possessed the joint for his own use and not for any other purpose. The former *Narcotic Control Act* states in s. 3(1) that "[e]xcept as authorized by this Act or the regulations, no person shall have a narcotic in his possession". Narcotics are defined in the schedules to the Act. Marihuana is a scheduled drug. The penalty on summary conviction for possession of marihuana is a maximum fine of \$1,000 or imprisonment for up to six months or both for a first offence and a maximum fine of \$2,000 or imprisonment for up to one year or both for a subsequent offence. C's application for a declaration that the provisions of the *Narcotic Control Act* prohibiting the possession of marihuana were unconstitutional was denied at trial. He was convicted of simple possession. The Court of Appeal, in a majority decision, upheld the conviction.

M, who describes himself as a "marihuana/freedom activist", helps operate an organization known as the Harm Reduction Club, a co-operative, non-profit association which recognizes some potential harm associated with the use of marihuana and seeks to reduce it. In December 1996, police entered the premises of the Club and seized over 300 grams of marihuana, much of it in the form of "joints". M was charged with possession of

possession — Cette interdiction porte-t-elle atteinte à l'art. 7 de la Charte canadienne des droits et libertés? — Loi sur les stupéfiants, L.R.C. 1985, ch. N-1, art. 3(1), annexe.

Droit constitutionnel — Charte des droits — Droits à l'égalité — Dispositions de la Loi sur les stupéfiants interdisant la possession de marihuana en vue d'en faire le trafic — Cette interdiction porte-t-elle atteinte à l'art. 15 de la Charte canadienne des droits et libertés? — Loi sur les stupéfiants, L.R.C. 1985, ch. N-1, art. 4(2), annexe.

Droit constitutionnel — Partage des pouvoirs — Droit criminel — Dispositions de la Loi sur les stupéfiants interdisant la possession de marihuana — Cette interdiction relève-t-elle du pouvoir de légiférer du Parlement? — Loi constitutionnelle de 1867, art. 91(27).

Lors d'une patrouille de routine, deux agents de la GRC ont vu C et un passager dans une fourgonnette stationnée à proximité de l'océan. Lorsqu'ils se sont approchés, C, qui était au volant, a mis le contact et commencé à faire marche arrière. Longeant le véhicule, l'un des policiers a senti une forte odeur de marihuana récemment fumée. C a remis au policier un joint partiellement fumé pesant 0,5 gramme. Il l'avait en sa possession pour consommation personnelle et rien d'autre. L'ancienne *Loi sur les stupéfiants* dispose, au par. 3(1), que « [s]auf exception prévue par la présente loi ou ses règlements, il est interdit d'avoir un stupéfiant en sa possession ». Les substances considérées comme des stupéfiants sont énumérées aux annexes de la Loi. La marihuana y figure. Le délinquant est passible, sur déclaration de culpabilité par procédure sommaire, pour une première infraction, d'une amende maximale de 1 000 \$ et d'un emprisonnement maximal de six mois, ou de l'une de ces peines, et, en cas de récidive, d'une amende maximale de 2 000 \$ et d'un emprisonnement maximal d'un an, ou de l'une de ces peines. Au procès, la juge a rejeté la demande de C qui sollicitait un jugement déclarant inconstitutionnelles les dispositions de la *Loi sur les stupéfiants* interdisant la possession de marihuana. Il a été déclaré coupable de simple possession. La Cour d'appel, à la majorité, a confirmé la déclaration de culpabilité.

M, qui se décrit lui-même comme un « défenseur de la liberté et de la consommation de la marihuana », participe à l'exploitation d'une association coopérative sans but lucratif connue sous le nom de « Harm Reduction Club », qui reconnaît l'existence de certains risques associés à l'usage de la marihuana et cherche à les réduire. En décembre 1996, la police a visité les locaux du club et saisi plus de 300 grammes de marihuana, essentiellement

marihuana for the purpose of trafficking under s. 4(2) of the former *Narcotic Control Act*. At trial, M sought to call evidence in support of a constitutional challenge but the trial judge refused to admit the evidence and dismissed the challenge. M was convicted and the Court of Appeal, in a majority decision, upheld the conviction.

Held (Arbour, LeBel and Deschamps JJ. dissenting on C's appeal): The appeals should be dismissed.

Per McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache and Binnie JJ.: All sides agree that marihuana is a psychoactive drug which "causes alteration of mental function". That, indeed, is the purpose for which the accused use it. There are concurrent findings in the courts below of "harm" that is neither insignificant nor trivial. Certain groups in society share a particular vulnerability to its effects. While members of these groups, whose identity cannot in general be distinguished from other users in advance, are relatively small as a percentage of all marihuana users, their numbers are significant in absolute terms. The trial judge in C's case estimated "chronic users" to number about 50,000. Pregnant women and schizophrenics are also said to be at particular risk. Advancing the protection of these and other vulnerable individuals through criminalization of the possession of marihuana is a policy choice that falls within the broad legislative scope conferred on Parliament. Equally, it is open to Parliament to decriminalize or otherwise modify any aspect of the marihuana laws that it no longer considers to be good public policy.

The questions before the Court are issues of law, not policy, namely whether the prohibition, including the availability of imprisonment for simple possession, is not valid legislation, either because it does not properly fall within Parliament's legislative competence, or because the prohibition, and in particular the availability of imprisonment, violate the guarantees of the *Canadian Charter of Rights and Freedoms*.

Control of a psychoactive drug that causes alteration in mental functions raises issues of public health and safety, both for the user and for those in the broader

sous forme de « joints ». M a été accusé de possession de marihuana en vue d'en faire le trafic en vertu du par. 4(2) de l'ancienne *Loi sur les stupéfiants*. Au procès, M a voulu présenter certains éléments de preuve au soutien de son argument d'inconstitutionnalité, mais le juge du procès a refusé d'admettre ces éléments et a rejeté l'argument. M a été déclaré coupable et, en appel, les juges majoritaires de la Cour d'appel ont confirmé la déclaration de culpabilité.

Arrêt (les juges Arbour, LeBel et Deschamps sont dissidents dans le pourvoi de C) : Les pourvois sont rejetés.

La juge en chef McLachlin et les juges Gonthier, Iacobucci, Major, Bastarache et Binnie : Toutes les parties s'accordent pour dire que la marihuana est une drogue psychoactive qui « agit sur les fonctions mentales ». C'est d'ailleurs pour cela que les accusés en consomment. Les conclusions des juridictions inférieures concordent quant à l'existence d'un « préjudice » qui n'est ni insignifiant ni négligeable. Certains groupes de la société sont particulièrement vulnérables aux effets de la marihuana. Bien que les membres de ces groupes ne puissent généralement pas être distingués à l'avance des autres consommateurs et représentent un pourcentage relativement minime de l'ensemble des consommateurs de marihuana, leur nombre est toutefois non négligeable en chiffres absolus. Dans l'affaire C, le juge du procès a évalué à environ 50 000 le nombre de « consommateurs chroniques ». Les femmes enceintes et les schizophrènes seraient également particulièrement à risque. Favoriser la protection de ces personnes et d'autres personnes vulnérables est une décision de politique générale qui relève du large pouvoir de légiférer dont dispose le Parlement. Il est également loisible à celui-ci de décriminaliser ou de modifier de quelque autre façon tout aspect des dispositions régissant la marihuana, s'il ne considère plus que les mesures en question constituent une bonne politique d'intérêt général.

La question que la Cour doit trancher est une pure question de droit, et non une question de politique générale : l'interdiction, y compris la possibilité d'emprisonnement qu'entraîne l'infraction de simple possession, est-elle une disposition législative valide, soit parce qu'elle déborde la compétence législative du Parlement, soit parce que l'interdiction et plus particulièrement la peine d'emprisonnement dont elle est assortie portent atteinte aux droits et libertés garantis par la *Charte canadienne des droits et libertés*?

La réglementation d'une drogue psychoactive qui agit sur les fonctions mentales soulève manifestement des questions de santé et de sécurité publiques, tant

society affected by his or her conduct. The use of marihuana is therefore a proper subject matter for the exercise of the criminal law power. The federal criminal law power is plenary in nature and has been broadly construed. For a law to be classified as a criminal law, it must have a valid criminal law purpose backed by a prohibition and a penalty. The criminal power extends to those laws that are designed to promote public peace, safety, order, health or some other legitimate public purpose. The purpose of the *Narcotic Control Act* fits within the criminal law power, which includes the protection of vulnerable groups. The conclusion that the present prohibition against the use of marihuana can be supported under the criminal law power makes it unnecessary to deal with whether it also falls under the peace, order and good government power.

The availability of imprisonment for the offence of simple possession of marihuana is sufficient to trigger scrutiny under s. 7 of the *Charter*. However, M's desire to build a lifestyle around the recreational use of marihuana does not attract *Charter* protection.

For a rule or principle to constitute a principle of fundamental justice for the purposes of s. 7, it must be a legal principle about which there is significant societal consensus that it is fundamental to the way in which the legal system ought fairly to operate, and it must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person.

The delineation of the principles of fundamental justice must inevitably take into account the social nature of our collective existence. To that limited extent, societal values play a role in the delineation of the boundaries of the rights and principles in question. However, the balancing of individual and societal interests within s. 7 is only relevant when elucidating a particular principle of fundamental justice. That done, it is not within the ambit of s. 7 to bring into account such "societal interests" as health care costs. Those considerations will be looked at, if at all, under s. 1.

Even if the "harm principle" relied upon by the accused could be characterized as a legal principle, it

en ce qui concerne le consommateur lui-même que les personnes dans la société qui sont touchées par son comportement. La consommation de marihuana peut donc à juste titre faire l'objet de mesures édictées en vertu de la compétence relative au droit criminel. La compétence du fédéral en matière criminel comporte la plénitude des pouvoirs à cet égard et a été interprétée de manière généreuse. Pour qu'une loi puisse être considérée comme relevant du droit criminel, elle doit comporter un objet valide de droit criminel assorti d'une interdiction et d'une sanction. Le droit criminel englobe les lois favorisant la paix, la sécurité, l'ordre ou la santé publics et tout autre objectif public légitime. L'objectif de la *Loi sur les stupéfiants* correspond au chef de compétence relatif au droit criminel, lequel vise notamment la protection des groupes vulnérables. La conclusion selon laquelle l'interdiction actuelle visant la consommation de la marihuana peut s'appuyer sur la compétence en matière de droit criminel rend inutile l'examen de la question de savoir si l'interdiction peut s'appuyer sur le pouvoir résiduel de faire des lois pour la paix, l'ordre et le bon gouvernement.

La possibilité d'emprisonnement pour simple possession de marihuana suffit pour justifier un examen fondé sur l'art. 7 de la *Charte*. Toutefois, la décision de M de centrer son mode de vie sur la consommation récréative de marihuana ne bénéficie pas de la protection de la *Charte*.

Pour qu'une règle ou un principe constitue un principe de justice fondamentale au sens de l'art. 7, il doit s'agir d'un principe juridique à l'égard duquel il existe un consensus substantiel dans la société sur le fait qu'il est essentiel au bon fonctionnement du système de justice, et ce principe doit être défini avec suffisamment de précision pour constituer une norme permettant d'évaluer l'atteinte à la vie, à la liberté ou à la sécurité de la personne.

Dans la définition des principes de justice fondamentale, il faut nécessairement prendre en considération la nature sociale de notre existence collective. Ce n'est que dans cette mesure que les valeurs sociétales jouent un rôle dans la détermination de la portée des droits et des principes en question. Cependant, la pondération des droits individuels et des intérêts sociétaux dans l'analyse fondée sur l'art. 7 n'est pertinente que pour préciser un principe de justice fondamentale en particulier. Une fois précisé le principe de justice fondamentale en cause, la prise en compte d'intérêts sociétaux tels les coûts des soins de santé ne fait plus partie de l'analyse fondée sur l'art. 7. Ces considérations seront examinées, si tant est qu'elles le sont, dans l'application de l'article premier.

Même si le « principe du préjudice » invoqué par les accusés pouvait être qualifié de principe juridique,

does not meet the other requirements. First, there is no sufficient consensus that the harm principle is vital or fundamental to our societal notion of criminal justice. While the presence of harm to others may justify legislative action under the criminal law power, the absence of proven harm does not create an unqualified s. 7 barrier to legislative action. Nor is there any consensus that the distinction between harm to others and harm to self is of controlling importance. Finally, the harm principle is not a manageable standard against which to measure deprivation of life, liberty or security of the person.

While the “harm principle” is not a principle of fundamental justice, the state nevertheless has an interest in the avoidance of harm to those subject to its laws which may justify legislative action. Harm need not be shown to the court’s satisfaction to be “serious and substantial” before Parliament can impose a prohibition. Once it is demonstrated, as it has been here, that the harm is not *de minimis*, or not “insignificant or trivial”, the precise weighing and calculation of the nature and extent of the harm is Parliament’s job.

A criminal law that is shown to be arbitrary or irrational will infringe s. 7. However, in light of the state interest in the avoidance of harm to its citizens, the prohibition on marihuana possession is neither arbitrary nor irrational. Marihuana is a psychoactive drug whose “use causes alteration of mental function”, according to the trial judge in C’s case. This alteration creates a potential harm to others when the user engages in driving, flying and other activities involving complex machinery. Chronic users may suffer “serious” health problems. Vulnerable groups are at particular risk, including adolescents with a history of poor school performance, pregnant women and persons with pre-existing conditions such as cardiovascular diseases, respiratory diseases, schizophrenia or other drug dependencies. These findings of fact disclose a sufficient state interest to support Parliament’s intervention should Parliament decide that it is wise to continue to intervene, subject to a constitutional standard of gross disproportionality. While Parliament has directly addressed some of the potential harmful conduct elsewhere in the *Criminal Code*, one type of legal control to prevent harm does not logically oust other potential forms of legal control, subject as always to the limitation of gross disproportionality. Moreover, Parliament’s decision to move in one area of public health and safety without at the same time moving in other areas

il ne satisferait pas aux autres conditions. Tout d’abord, il n’existe pas un consensus sur le caractère primordial ou fondamental de ce principe dans la notion de justice pénale au sein de notre société. Bien que l’existence d’un préjudice causé à autrui puisse justifier le Parlement de légiférer en vertu de sa compétence en matière de droit criminel, l’absence de preuve de l’existence d’un préjudice ne constitue pas, au regard de l’art. 7, un obstacle absolu à l’adoption d’une mesure législative. Il n’y a pas non plus consensus quant à l’importance déterminante de la distinction entre le préjudice à autrui et le préjudice à soi-même. Finalement, le principe du préjudice ne constitue pas une norme fonctionnelle permettant d’évaluer l’atteinte à la vie, à la liberté ou à la sécurité de la personne.

Bien que le « principe du préjudice » ne soit pas un principe de justice fondamentale, il n’en demeure pas moins que l’intérêt qu’a l’État à prévenir les préjudices aux personnes assujetties à ses lois peut le justifier de légiférer. Le législateur peut imposer une interdiction sans être tenu de convaincre les tribunaux de l’existence d’un préjudice « grave et important ». Une fois qu’il est prouvé, comme en l’espèce, que le préjudice n’est pas minime ou qu’il n’est pas « ni insignifiant ni négligeable », l’appréciation et la détermination exactes de la nature et de l’étendue du préjudice relève du Parlement.

Une disposition de droit criminel qui est jugée arbitraire ou irrationnelle porte atteinte à l’art. 7. Cependant, au vu de l’intérêt de l’État à prévenir les préjudices à ses citoyens, l’interdiction frappant la possession de marihuana n’est ni arbitraire ni irrationnelle. La marihuana est une drogue psychoactive dont « la consommation agit sur les fonctions mentales », selon le juge qui a présidé le procès de C. Cette action crée un risque pour autrui lorsque le consommateur conduit un véhicule à moteur, pilote un avion ou exerce d’autres activités exigeant de faire fonctionner un appareil complexe. Les consommateurs chroniques peuvent éprouver de « graves » problèmes de santé. Les groupes vulnérables sont particulièrement à risque, notamment les adolescents qui ont déjà des résultats scolaires médiocres, les femmes enceintes et les personnes qui souffrent d’affections préexistantes comme des maladies cardiovasculaires, des troubles respiratoires, la schizophrénie ou d’autres toxicomanies. Ces conclusions de fait révèlent l’existence que l’État a un intérêt suffisant pour justifier la mesure législative si le Parlement juge opportun de la maintenir, pourvu qu’elle respecte la norme constitutionnelle de la disproportion exagérée. Il est vrai que le législateur s’est attaqué directement à certains comportements susceptibles d’être préjudiciables en créant d’autres infractions dans le *Code criminel*. Le recours à une mesure législative donnée pour prévenir un préjudice n’exclut pas

(e.g., alcohol or tobacco) is not, on that account alone, arbitrary or irrational.

The issue of punishment should be approached in light of s. 12 of the *Charter* (which protects against “cruel and unusual treatment or punishment”), and, in that regard, the constitutional standard is one of gross disproportionality. The lack of any mandatory minimum sentence together with the existence of well-established sentencing principles mean that the mere availability of imprisonment on a marihuana charge cannot, without more, violate the principle against gross disproportionality.

A finding that a particular form of penalty violates s. 12 of the *Charter* may call for a constitutional remedy in relation to the penalty, but leave intact the criminalization of the conduct, which may still be constitutionally punishable by an alternative form of penalty.

The operative concept here is the use of incarceration, not the availability of incarceration. Possession of marihuana carries no minimum sentence. In most possession cases, offenders (whether vulnerable or not) receive discharges or conditional sentences. This is particularly true where the amounts of marihuana involved are small and for recreational uses, where the usual sentence is a conditional discharge. There is no impediment in the legislation to a trial judge imposing a fit sentence after a conviction for simple possession of marihuana.

The “availability” of imprisonment in respect of the scheduled drugs under the *Narcotic Control Act* is part of a statutory framework for dealing with drugs generally and is not specifically directed at marihuana. The case law discloses that it is only in the presence of aggravating circumstances, not likely to be present in the situation of “vulnerable persons”, where a court has been persuaded that imprisonment for simple possession of marihuana was, in the particular case, a fit sentence. There is no need to turn to the *Charter* for relief against an unfit sentence. If imprisonment is not a fit sentence in a particular case it will not be imposed, and if imposed, it will be reversed on appeal.

logiquement le recours à d’autres mesures du genre, sous réserve toujours du respect du critère de la disproportion exagérée. En outre, la décision du Parlement d’intervenir dans un domaine intéressant la santé et la sécurité publiques (la consommation d’alcool et de tabac par exemple) et pas dans un autre n’est pas, de ce seul fait, arbitraire ou irrationnelle.

La question de la sanction doit être examinée au regard de l’art. 12 de la *Charte* (qui protège chacun contre « tous traitements ou peines cruels et inusités ») et, dans de tels cas, la norme constitutionnelle applicable est celle de la disproportion exagérée. L’absence de peine minimale obligatoire et l’existence de principes de détermination de la peine bien établis signifient que la possibilité d’emprisonnement pour une infraction liée à la marihuana ne saurait à elle seule constituer une mesure disproportionnée exagérée.

Le fait de conclure qu’une peine donnée viole l’art. 12 de la *Charte* peut exiger une réparation constitutionnelle liée à la peine sans pour autant remettre en cause la criminalisation du comportement, lequel peut encore, constitutionnellement, être punissable par un autre type de peine.

Le concept clé en l’espèce est le recours à l’incarcération, et non la possibilité d’incarcération. La possession de marihuana n’expose le délinquant à aucune peine minimale. Dans la plupart des affaires de possession, le délinquant (qu’il s’agisse ou non d’une personne vulnérable) fait l’objet d’une absolution ou d’une peine d’emprisonnement avec sursis. Cela se produit particulièrement lorsqu’il est question d’une petite quantité de marihuana à des fins récréatives, auquel cas l’absolution sous condition est la peine habituellement infligée. Il n’y a dans la loi aucun obstacle empêchant le juge du procès d’infliger une peine appropriée à la personne déclarée coupable de simple possession de marihuana.

La « possibilité » d’emprisonnement pour possession d’une drogue figurant à l’annexe de la *Loi sur les stupéfiants* fait partie intégrante du cadre législatif applicable aux drogues en général et non pas seulement à la marihuana en particulier. L’examen de la jurisprudence révèle que ce n’est que lorsqu’il y avait des circonstances aggravantes, circonstances peu susceptibles d’être présentes dans le cas des « personnes vulnérables », que le tribunal a estimé, dans l’affaire dont il était saisi, qu’une peine d’emprisonnement constituait une peine appropriée à l’égard de l’infraction de simple possession de marihuana. Point n’est besoin d’invoquer la *Charte* pour obtenir réparation à l’encontre d’une peine inappropriée. Lorsque, dans un cas donné, une peine d’emprisonnement n’est pas indiquée, elle ne sera pas infligée et, si elle l’est, elle sera annulée en appel.

The effects on the accused of enforcement of the prohibition are not so grossly disproportionate that they render the prohibition on marihuana possession contrary to s. 7 of the *Charter*. The consequences complained of by the accused are largely the product of deliberate disobedience to the law of the land. If the court imposes a sentence on conviction that is no more than a fit sentence, which it is required to do, the other adverse consequences of conviction are really associated with the criminal justice system in general rather than this offence in particular. In any system of criminal law there will be prosecutions that turn out to be unfounded, publicity that is unfairly adverse, costs associated with a successful defence, lingering and perhaps unfair consequences attached to a conviction for a relatively minor offence by other jurisdictions, and so on. These effects are serious but they are part of the social and individual costs of having a criminal justice system. Whenever Parliament exercises its criminal law power, such costs will arise. To suggest that such “inherent” costs are fatal to the exercise of the power is to overshoot the function of s. 7.

Applying a standard of gross disproportionality, the effects on accused persons of the present law, including the potential of imprisonment, fall within the broad latitude within which the Constitution permits legislative action.

The so-called “ineffectiveness” of the prohibition on marihuana possession is simply another way of characterizing a refusal to comply with the law. That refusal cannot be elevated to a constitutional argument against validity based on the invocation of fundamental principles of justice. Moreover, balancing the law’s salutary and deleterious effects is a function that is more properly reserved for s. 1. As the accused have not established an infringement of s. 7, there is no need to call on the government for a s. 1 justification.

M’s equality claim must fail. Prohibiting possession of marihuana for the purpose of trafficking does not infringe s. 15(1) of the *Charter*. A taste for marihuana is not a “personal characteristic” in the sense required to trigger s. 15 protection, but is a lifestyle choice that bears no analogy with the personal characteristics listed.

In the circumstances of M’s case, the trial judge erred in excluding the expert evidence of legislative and

Les effets sur les accusés de l’interdiction visant la possession de la marihuana ne sont pas si exagérément disproportionnés qu’ils rendent cette interdiction contraire à l’art. 7 de la *Charte*. Les conséquences dont se plaignent les accusés sont en grande partie le fruit d’une désobéissance délibérée à la loi du pays. Si le tribunal inflige à la personne déclarée coupable une peine qui n’est rien d’autre qu’appropriée, ce qu’il est tenu de faire, les autres conséquences préjudiciables sont en fait liées au système de justice pénale en général et non à cette infraction en particulier. Dans tout système de droit pénal, il arrive qu’une poursuite se révèle non fondée, que la publicité qui l’entoure soit injustement préjudiciable, qu’une défense fructueuse occasionne des frais, qu’une déclaration de culpabilité pour une infraction relativement mineure ait des conséquences persistantes et peut-être injustes dans d’autres ressorts, et ainsi de suite. Il s’agit de conséquences graves, mais elles font partie des coûts sociaux et personnels qu’entraîne le fait de posséder un système de justice pénale. Chaque fois que le Parlement exerce sa compétence en matière de droit criminel, de tels coûts en résultent. Prétendre que ces coûts « intrinsèques » invalident l’exercice de cette compétence a pour effet d’exagérer le rôle de l’art. 7.

Si l’on applique la norme de la disproportion exagérée, les effets sur les accusés des dispositions actuelles, y compris la possibilité d’emprisonnement, n’excèdent pas la vaste latitude que la Constitution accorde au législateur.

La prétendue « inefficacité » de l’interdiction frappant la possession de marihuana est simplement une autre façon de désigner le refus des gens d’observer la loi. L’on ne saurait, en invoquant les principes de justice fondamentale, faire de ce refus un argument d’inconstitutionnalité. En outre, la pondération des effets bénéfiques et des effets préjudiciables de la loi est une démarche qui relève davantage de l’application de l’article premier. Comme les accusés n’ont pas établi l’existence d’une atteinte aux droits garantis par l’art. 7, il n’est pas nécessaire de demander à l’État de procéder à la justification requise par l’article premier.

L’argument de M fondé sur le droit à l’égalité ne saurait être retenu. L’interdiction d’avoir en sa possession de la marihuana en vue d’en faire le trafic ne porte pas atteinte au par. 15(1) de la *Charte*. Le goût pour la marihuana ne constitue pas une « caractéristique personnelle » entraînant l’application de la garantie prévue à l’art. 15, mais un choix de mode de vie qui n’est en rien analogue aux caractéristiques personnelles énumérées à cet article.

Dans les circonstances propres au pourvoi de M, le juge du procès a fait erreur en refusant d’admettre la

constitutional facts M wished to adduce, which was relevant to his challenge under the *Charter*. While the trial judge was clearly unimpressed by what M wished to establish, in the circumstances he ought to have admitted the evidence, despite his misgivings, so as to permit M to put forward a full record in the event of an appeal. The complications that would otherwise have attended the hearing of the appeal, however, were obviated by the parties' agreement to treat C's evidence of legislative fact as equally applicable to M's appeal. In the result, the trial judge's error did not prejudice M.

Per Arbour J. (dissenting on C's appeal): The impugned provisions fall under the criminal law head of power. As long as the legislation is directed at a legitimate public health evil and contains a prohibition accompanied by a penal sanction, and provided that it is not otherwise a "colourable" intrusion upon provincial jurisdiction, Parliament has, under s. 91(27) of the *Constitution Act, 1867*, discretion to determine the extent of the harm it considers sufficient for legislative action. However, where Parliament relies on the protection of health as its legitimate public purpose, it has to demonstrate the injurious or undesirable effect from which it seeks to safeguard the public. While there is no constitutional threshold level of harm required before Parliament may use its broad criminal law power, conduct with little or no threat of harm is unlikely to qualify as a public health evil.

A law that has the potential to imprison a person whose conduct causes little or no reasoned risk of harm to others offends the principles of fundamental justice. Such a law violates a person's right to liberty under s. 7 of the *Charter*. Be it as a criminal sanction or as a sanction to any other prohibition, imprisonment must, as a constitutional minimum standard, be reserved for those whose conduct causes a reasoned risk of harm to others. In victimizing conduct, the attribution of fault is relatively straightforward because of the close links between the actor's culpable conduct and the resulting harm to the victim. Harm caused to collective interests, as opposed to harm caused to identifiable individuals, is not easy to quantify and even less easy to impute to a distinguishable activity or actor. In order to determine whether specific conduct, which perhaps only causes direct harm to the actor, or which seems rather benign, causes more than little or no risk of harm to others, courts must assess the

preuve d'expert concernant les faits législatifs et constitutionnels que voulait présenter M et qui était pertinente dans le cadre de sa contestation fondée sur la *Charte*. Même si le juge du procès n'était manifestement pas impressionné par ce que M souhaitait établir, dans les circonstances, il aurait dû malgré ses réserves admettre cette preuve afin de permettre à ce dernier de constituer un dossier complet en prévision d'un éventuel appel. Le fait que les parties aient convenu de considérer que la preuve relative aux faits législatifs présentée par C s'appliquait également dans l'appel de M a toutefois permis d'éviter les complications auxquelles l'audition de l'appel aurait autrement donné lieu. En conséquence, l'erreur du juge du procès n'a pas causé préjudice à M.

La juge Arbour (dissidente dans le pourvoi de C) : Les dispositions contestées relèvent du chef de compétence concernant le droit criminel. Si la loi vise un mal légitime pour la santé publique, comporte une interdiction assortie d'une sanction pénale et ne constitue pas par ailleurs un empiétement « déguisé » sur un chef de compétence provinciale, le Parlement possède, en vertu du par. 91(27) de la *Loi constitutionnelle de 1867*, le pouvoir discrétionnaire de déterminer l'étendue du préjudice qu'il juge suffisant pour justifier une mesure législative. Toutefois, lorsque le Parlement invoque la protection de la santé comme objectif public légitime, il doit démontrer l'effet nuisible ou indésirable contre lequel il souhaite protéger la population. Bien que la Constitution n'ait pas pour effet de requérir la preuve d'un préjudice minimal avant que le Parlement puisse utiliser son vaste pouvoir législatif en matière de droit criminel, un comportement ne présentant que peu ou pas de risques de préjudice est peu susceptible d'être considéré comme un mal pour la santé publique.

Une loi menaçant d'emprisonnement une personne dont le comportement ne crée que peu ou pas de risques véritables de préjudice pour d'autres personnes viole les principes de justice fondamentale et elle porte atteinte au droit à la liberté garanti par l'art. 7 de la *Charte*. Que l'emprisonnement soit utilisé comme sanction d'un crime ou d'une autre prohibition, la Constitution requiert au minimum que cette peine soit réservée aux individus dont le comportement crée un véritable risque de préjudice pour autrui. Dans le cas d'un comportement attentatoire, l'imputation de la faute est relativement simple en raison des liens étroits qui existent entre le comportement coupable et le préjudice en résultant pour la victime. Il n'est pas facile de quantifier le préjudice causé à des intérêts collectifs par opposition à celui causé à des personnes identifiables, et il est encore moins facile d'imputer la responsabilité de ce préjudice à une activité ou à un acteur reconnaissable.

interest of society in prohibiting and sanctioning the conduct. “Societal interests” may indeed form part of the s. 7 analysis where the operative principle of fundamental justice necessarily involves issues like the protection of society. Societal interests in prohibiting conduct are evaluated by balancing the harmful effects on society should the conduct in question not be prohibited by law against the effects of prohibiting the conduct. The harm or risk of harm to society caused by the prohibited conduct must outweigh any harm that may result from enforcement.

The harm associated with marihuana use does not justify the state’s decision to use imprisonment as a sanction against the prohibition of its possession. Apart from the risks of impairment while driving, flying or operating complex machinery and the impact of marihuana use on the health care and welfare systems, the harms associated with marihuana use are exclusively health risks for the individual user, ranging from almost non-existent for low/occasional/moderate users of marihuana to relatively significant for chronic users. Harm to self does not satisfy the constitutional requirement that whenever the state resorts to imprisonment, there must be a minimum harm to others as an essential part of the offence.

The majority argue that the potential for imprisonment of members of vulnerable groups is not serious, since it is only in the “presence of aggravating circumstances” that imprisonment for possession will be a fit sentence. This does not strengthen their position; it highlights the difficulty. By their reasoning, it is those who are not members of vulnerable groups and who therefore pose no more than negligible harm to themselves or others who face the threat of imprisonment due to “aggravating circumstances”. The position that the fitness of sentences for possession should be considered under s. 12, and not under s. 7, runs counter to the notion that ss. 8 to 14 of the *Charter* are specific illustrations of the principles of fundamental justice. Where a principle of fundamental justice is invoked which is not specifically set out in ss. 8

Pour déterminer si le comportement en question, qui ne cause peut-être qu’un préjudice direct à son auteur ou semble plutôt bénin, ne cause que peu ou pas de risques de préjudice pour d’autres personnes, les tribunaux doivent évaluer l’intérêt qu’a la société à interdire ce comportement et à le punir. Les « intérêts sociétaux » peuvent effectivement faire partie de l’analyse fondée sur l’art. 7 lorsque le principe de justice fondamentale pertinent fait intervenir des préoccupations telle la protection de la société. L’appréciation de l’intérêt qu’a la société à interdire un comportement consiste à soupeser, d’une part, les effets préjudiciables qu’aurait pour celle-ci le fait de ne pas interdire par voie législative le comportement en cause et, d’autre part, les effets qui découleraient de la prohibition de celui-ci. Le préjudice ou risque de préjudice que crée pour la société le comportement prohibé doit être plus grand que tout préjudice susceptible de résulter des mesures visant à le prévenir.

Le préjudice lié à la consommation de marihuana ne justifie pas la décision de l’État d’avoir recours à l’emprisonnement pour faire respecter l’interdiction visant la possession de cette substance. Exception faite des risques que comporte l’usage de la marihuana lorsque le consommateur conduit un véhicule à moteur, pilote un avion ou fait fonctionner un appareil complexe et des répercussions de l’usage de cette substance sur les systèmes de soins de santé et d’aide sociale, les effets néfastes de la consommation de marihuana présentent exclusivement des risques pour la santé du consommateur, risques qui vont de quasi inexistants pour les personnes qui n’en font qu’une consommation faible, occasionnelle ou modérée à relativement élevés pour les consommateurs chroniques. Le préjudice qu’une personne se cause à elle-même ne satisfait pas à l’exigence constitutionnelle selon laquelle, dans tous les cas où l’État a recours à l’emprisonnement, l’existence d’un préjudice minimal à autrui est un des éléments essentiels de l’infraction.

Selon la majorité, les membres de groupes vulnérables déclarés coupables de possession de marihuana ne risquent pas sérieusement l’emprisonnement, puisque ce n’est qu’en « présence de circonstances aggravantes » que l’emprisonnement constitue une peine appropriée. Cette affirmation n’étaye pas leur position, mais fait plutôt ressortir la principale difficulté que soulève la situation. Si on applique le raisonnement des juges majoritaires, c’est sur les délinquants qui ne font pas partie de groupes vulnérables — c’est-à-dire les personnes qui créent tout au plus un risque négligeable de préjudice pour eux-mêmes et pour autrui — que pèsera la menace d’emprisonnement à cause de la présence de « circonstances aggravantes ». L’argument selon lequel il est préférable d’examiner au regard de l’art. 12 plutôt que de

to 12, the analysis is appropriately conducted pursuant to s. 7.

Sending vulnerable people to jail to protect them from self-inflicted harm does not respect the harm principle as a principle of fundamental justice. Similarly, the fact that some vulnerable people may harm themselves by using marihuana is not a sufficient justification to send other members of the population to jail for engaging in that activity. The state cannot prevent the general population, under threat of imprisonment, from engaging in conduct that is harmless to them, on the basis that other, more vulnerable persons may harm themselves if they engage in it, particularly if one accepts that imprisonment would be inappropriate for the targeted vulnerable groups.

The two spheres of risks to others identified by the trial judges are not sufficient to justify recourse to the most severe penalty imposed by law, a sentence generally viewed as a last resort. First, while the risk that persons experiencing the acute effects of the drug may be less adept at driving, flying and engaging in other activities involving complex machinery is indeed a valid concern, the act of driving while under the influence of alcohol or drugs is a separate activity from mere possession and use. Dangerous driving is already dealt with in the *Criminal Code*, and rightly so, because it is this act which risks victimizing identifiable others as well as society as a whole. The second negative effect on society as a whole that was identified, i.e., general harm to the health care and welfare systems, is just too remote and minor to justify the threat of imprisonment for simple possession of marihuana. Canadians do not expect to face the prospect of imprisonment whenever they embark on some adventure which involves a possibility of injury to themselves. There is no reason to single out those who may jeopardize their health by smoking marihuana. If there remained any doubt as to whether the harms associated with marihuana use justify the state in using imprisonment as a sanction against its possession, this doubt disappears when the harms caused by the prohibition are put in the balance. The record shows, and the trial judges found, that the prohibition of simple possession of marihuana attempts to prevent a low quantum of harm to society at a very high cost. A negligible burden on the health care and welfare systems, coupled with the many significant

l'art. 7 la justesse des peines infligées pour la simple possession de marihuana va à l'encontre de l'idée que les art. 8 à 14 de la *Charte* sont des exemples précis de principes de justice fondamentale. Dans les cas où l'on invoque un principe de justice fondamentale non mentionné expressément aux art. 8 à 12, il faut procéder à l'analyse fondée sur l'art. 7.

Le fait d'envoyer des personnes vulnérables en prison pour les protéger contre elles-mêmes ne respecte pas le principe du préjudice en tant que principe de justice fondamentale. De même, le fait que certaines personnes vulnérables puissent se faire du tort en consommant de la marihuana n'est pas une raison suffisante pour emprisonner d'autres personnes se livrant à cette activité. L'État ne peut pas, en les menaçant d'emprisonnement, empêcher tous les justiciables d'adopter un comportement qui ne leur est pas préjudiciable, pour le motif que d'autres personnes plus vulnérables pourraient se faire du tort si elles adoptaient ce comportement, particulièrement si on reconnaît que l'emprisonnement ne serait pas une mesure appropriée pour les groupes vulnérables visés.

Les deux risques pour autrui dont l'existence a été constatée par les juges de première instance ne suffisent pas pour justifier l'application de la peine la plus sévère prévue par la loi, sanction qui est généralement considérée comme une solution de dernier recours. Tout d'abord, bien que le risque que des personnes ressentant les effets aigus de la drogue puissent être moins aptes à conduire un véhicule à moteur, à piloter un avion ou à exercer d'autres activités exigeant de faire fonctionner un appareil complexe soit effectivement une préoccupation valide, le fait de conduire sous l'effet de l'alcool ou de drogues constitue toutefois une activité distincte du simple fait de posséder et consommer une telle substance. La conduite dangereuse fait déjà l'objet de dispositions dans le *Code criminel*, à juste titre d'ailleurs, parce que c'est cet acte qui risque de causer préjudice à d'autres personnes identifiables ainsi qu'à l'ensemble de la société. Le deuxième effet préjudiciable à l'ensemble de la société dont l'existence a été constatée, c'est-à-dire le préjudice général aux systèmes de soins de santé et d'aide sociale, est tout simplement trop éloigné et trop mineur pour justifier de punir par l'emprisonnement la simple possession de marihuana. Les Canadiens ne s'attendent pas à aboutir en prison chaque fois qu'ils adoptent un comportement susceptible de leur être préjudiciable. Aucune raison ne justifie de réserver un traitement particulier aux personnes qui peuvent mettre leur santé en péril en fumant de la marihuana. S'il subsiste encore des doutes quant à la question de savoir si les préjudices liés à la consommation de marihuana justifiaient le recours par l'État à l'emprisonnement comme sanction applicable en cas de

negative effects of the prohibition, do not amount to more than little or no reasoned risk of harm to society.

As found by the majority, the prohibition of possession for the purpose of trafficking under s. 4(2) of the *Narcotic Control Act* does not discriminate against M in violation of s. 15 of the *Charter* since the decision to possess and traffic in marihuana is not an immutable personal characteristic, and treating persons who choose to do so in a differential manner in no way infringes human dignity or reinforces prejudicial stereotypes or historical disadvantage. On the record, M's constitutional challenge to the prohibition of possession for the purpose of trafficking based on s. 7 fails.

The Crown has not made any submissions regarding s. 1 of the *Charter*, and none of the courts below considered the issue. The burden is on the Crown to establish that the infringement was justified under s. 1. It has not met this burden.

Per LeBel J. (dissenting on C's appeal): There was agreement with the majority that the harm principle should not be raised to the level of a principle of fundamental justice within the meaning of s. 7 of the *Charter*. However, fundamental rights are at stake and were breached and this Court must intervene as part of its constitutional duty to uphold the fundamental principles of our constitutional order. On the available evidence, the law, as it stands, is an arbitrary response to social problems. The Crown has failed to properly delineate the societal concerns and individual rights at stake, more particularly the liberty interest involved in this appeal. A breach of fundamental rights is made out if and when the response to a societal problem may overreach in such a way as to taint the particular legislative response with arbitrariness. Such a legislative overreach happened here. While it cannot be denied that marihuana can cause problems of varying nature and severity to some people or to groups of them, the harm its consumption may cause seems rather mild on the evidence available. On the other hand, the harm and the problems connected with the form of criminalization chosen by Parliament seem plain and

possession of this substance, ils disparaissent lorsque l'on jette dans la balance les effets préjudiciables de l'interdiction. Il ressort du dossier et des constatations des juges de première instance que l'interdiction de la simple possession de marihuana vise à empêcher un faible préjudice pour la société, mais qu'elle le fait à un coût très élevé. Un fardeau négligeable pour les systèmes de soins de santé et d'aide sociale, conjugué aux nombreux effets négatifs importants de l'interdiction, crée davantage qu'un faible risque véritable de préjudice pour la société.

La majorité a conclu que l'interdiction frappant la possession aux fins de trafic que prévoit le par. 4(2) de la *Loi sur les stupéfiants* n'établit pas à l'égard de M de discrimination prohibée par l'art. 15 de la *Charte*, étant donné que la décision d'avoir de la marihuana en sa possession et d'en faire le trafic n'est pas une caractéristique personnelle immuable, et que le fait de traiter différemment les personnes qui choisissent d'agir ainsi ne porte d'aucune façon atteinte à la dignité humaine ni ne renforce des stéréotypes préjudiciables ou des désavantages historiques. À la lumière du dossier, l'argument de M selon lequel l'interdiction visant la possession aux fins de trafic est inconstitutionnelle au regard de l'art. 7 est rejeté.

Le ministère public n'a pas présenté d'observations au sujet de l'article premier de la *Charte* et aucune des juridictions inférieures n'a examiné cette question. Comme il incombait au ministère public d'établir que l'atteinte est justifiée au regard de l'article premier, il ne s'est pas acquitté de ce fardeau.

Le juge LeBel (dissident dans le pourvoi de C) : Il y a accord avec l'opinion de la majorité selon laquelle on ne devrait pas élever le principe du préjudice au rang des principes de justice fondamentale visés à l'art. 7 de la *Charte*. Toutefois, comme des droits fondamentaux sont en jeu et qu'ils ont été violés, notre Cour doit intervenir dans le cadre de l'obligation qui lui incombe, en vertu de la Constitution, de faire respecter les principes fondamentaux de notre ordre constitutionnel. À la lumière de la preuve présentée, dans sa forme actuelle la loi apporte effectivement une solution arbitraire à certains problèmes sociaux. Le ministère public n'a pas été en mesure de bien définir les préoccupations sociales et les droits individuels qui sont en jeu, plus particulièrement le droit à la liberté que soulève le présent pourvoi. Il y a atteinte lorsque la mesure législative édictée pour répondre à un problème social peut avoir une portée à ce point excessive qu'elle en devient arbitraire. La mesure législative en cause présente une portée excessive. Bien qu'il soit indéniable que la marihuana peut causer à certaines personnes ou à certains groupes des problèmes de nature et de gravité variables, le préjudice susceptible d'être causé

important. Few people appear to be jailed for simple possession but the law remains on the books. The reluctance to enforce it to the extent of actually jailing people for the offence of simple possession seems consistent with the perception that the law as it stands amounts to some sort of legislative overreach to the apprehended problems associated with marihuana consumption. Moreover, besides the availability of jail as a punishment, the enforcement of the law has tarred hundreds of thousands of Canadians with the stigma of a criminal record. The fundamental liberty interest has thus been infringed by the adoption and implementation of a legislative response which is disproportionate to the societal problems at issue and therefore arbitrary, in breach of s. 7 of the *Charter*.

Per Deschamps J. (dissenting on C's appeal): Whether pursuant to its jurisdiction over peace, order and good government or under its criminal law power, the prohibition of the possession of drugs lies within Parliament's jurisdiction.

The "harm principle" cannot validly be characterized as a principle of fundamental justice within the meaning of s. 7 of the *Charter*. The criminal law finds its justification in the protection of society, both as a whole and in its individual components. While there can be no doubt that the state is justified in using its criminal law tools to prevent harm to others, the "harm principle" is too narrow to encompass all the elements that may place limits on the state's exercise of the criminal law.

The inclusion of cannabis in the schedule to the *Narcotic Control Act* infringes the accused's right to liberty without regard for the principles of fundamental justice. For the state to be able to justify limiting an individual's liberty, the legislation upon which it bases its actions must not be arbitrary. In this case, the legislation is arbitrary. First, it seems doubtful that it is appropriate to classify marihuana consumption as conduct giving rise to a legitimate use of the criminal law in light of the *Charter*, since, apart from the risks related to the operation of vehicles and the impact on public health care and social assistance systems, the moderate use of marihuana is on the whole harmless. Second, in view of the availability of more tailored methods, the choice of the criminal law for controlling conduct that causes little

par la consommation de cette substance paraît assez peu important compte tenu de la preuve qui a été présentée. À l'opposé, le préjudice et les problèmes associés à la forme de criminalisation retenue par le législateur paraissent clairs et importants. Il semble que peu de gens soient emprisonnés pour simple possession de marihuana, mais il n'en reste pas moins que la loi continue de prévoir cette possibilité. La réticence des tribunaux à infliger cette peine et à emprisonner effectivement une personne déclarée coupable de simple possession semble confirmer la perception selon laquelle la loi, dans sa forme actuelle, constitue en quelque sorte une réaction législative démesurée aux problèmes que fait craindre la consommation de marihuana. De plus, non seulement la loi permet-elle l'emprisonnement, mais son application signifie que des centaines de milliers de Canadiens sont aux prises avec les stigmates qu'entraînent des antécédents judiciaires. L'adoption et l'application d'une mesure législative qui est disproportionnée aux problèmes sociétaux visés et de ce fait arbitraire porte atteinte au droit fondamental à la liberté, contrevenant ainsi à l'art. 7 de la *Charte*.

La juge Deschamps (dissidente dans le pourvoi de C) : Que ce soit en vertu de son pouvoir de légiférer pour assurer la paix, l'ordre et le bon gouvernement ou de sa compétence en matière de droit criminel, la prohibition de la possession de drogues relève de la compétence du législateur fédéral.

Le « principe du préjudice » ne peut valablement être qualifié de principe de justice fondamentale au sens de l'art. 7 de la *Charte*. Le droit criminel trouve sa justification dans la protection de la société, vue tant dans son ensemble que dans ses composantes. En ce sens, s'il est certain que l'État est justifié d'intervenir en utilisant les outils du droit criminel pour prévenir le dommage à autrui, le « principe du préjudice » est trop étroit pour réunir tous les éléments qui peuvent limiter l'action de l'État en droit criminel.

L'inclusion du cannabis dans l'annexe de la *Loi sur les stupéfiants* viole le droit à la liberté des accusés sans égard pour les principes de justice fondamentale. Avant de pouvoir justifier la limitation de la liberté d'un individu, l'État doit se fonder sur une loi qui n'est pas arbitraire. Or, en l'espèce, la loi est arbitraire. Premièrement, il y a lieu de douter de la pertinence de classer l'usage de la marihuana comme conduite donnant ouverture à un recours légitime au droit criminel sous le régime de la *Charte* puisque, dans l'ensemble, sauf les risques liés à la conduite de véhicules et à l'impact sur les régimes publics de soin et d'aide, l'usage modéré de la marihuana s'avère inoffensif. Deuxièmement, vu la disponibilité de moyens mieux adaptés, le choix du droit criminel pour réprimer une conduite qui ne cause que peu de préjudice

harm to moderate users or to control high-risk groups for whom the effectiveness of deterrence or correction is highly dubious is out of keeping with Canadian society's standards of justice. Third, the harm caused by prohibiting marihuana is fundamentally disproportionate to the problems that the state seeks to suppress. This harm far outweighs the benefits that the prohibition can bring.

Since the Crown did not attempt to justify the prohibition under s. 1 of the *Charter*, it has not satisfied its burden.

Cases Cited

By Gonthier and Binnie JJ.

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aux utilisateurs modérés ou pour encadrer des groupes à risque pour lesquels l'effet dissuasif ou correctif est plus que douteux n'est pas à la hauteur des normes de justice de la société canadienne. Troisièmement, les dommages causés par la prohibition sont foncièrement disproportionnés par rapport au problème que l'État cherche à enrayer. Ces dommages dépassent de loin les bienfaits de la prohibition.

Comme le ministère public n'a pas tenté de justifier la prohibition en vertu de l'article premier de la *Charte*, il ne s'est pas acquitté de son fardeau.

Jurisprudence

Citée par les juges Gonthier et Binnie

Arrêts mentionnés : *Danson c. Ontario (Procureur général)*, [1990] 2 R.C.S. 1086; *R. c. Find*, [2001] 1 R.C.S. 863, 2001 CSC 32; *Public School Boards' Assn. of Alberta c. Alberta (Procureur général)*, [2000] 1 R.C.S. 44, 2000 CSC 2; *R. c. Forbes* (1937), 69 C.C.C. 140; *R. c. Clay*, [2003] 3 R.C.S. 735, 2003 CSC 75; *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295; *R. c. Hauser*, [1979] 1 R.C.S. 984; *Industrial Acceptance Corp. c. The Queen*, [1953] 2 R.C.S. 273; *Procureur général du Canada c. Transports Nationaux du Canada, Ltée*, [1983] 2 R.C.S. 206; *R. c. Wetmore*, [1983] 2 R.C.S. 284; *R. c. S. (S.)*, [1990] 2 R.C.S. 254; *Brasseries Labatt du Canada Ltée c. Procureur général du Canada*, [1980] 1 R.C.S. 914; *R. c. Crown Zellerbach Canada Ltd.*, [1988] 1 R.C.S. 401; *Reference re Validity of Section 5(a) of the Dairy Industry Act*, [1949] R.C.S. 1; *Renvoi relatif à la Loi sur les armes à feu (Can.)*, [2000] 1 R.C.S. 783, 2000 CSC 31; *RJR-MacDonald Inc. c. Canada (Procureur général)*, [1995] 3 R.C.S. 199; *Scowby c. Glendinning*, [1986] 2 R.C.S. 226; *Schneider c. La Reine*, [1982] 2 R.C.S. 112; *Dufresne c. The King* (1912), 5 D.L.R. 501; *Ex p. Wakabayashi*, [1928] 3 D.L.R. 226; *Rodriguez c. Colombie-Britannique (Procureur général)*, [1993] 3 R.C.S. 519; *R. c. Morgentaler*, [1988] 1 R.C.S. 30; *R. c. Sharpe*, [2001] 1 R.C.S. 45, 2001 CSC 2; *R. c. Butler*, [1992] 1 R.C.S. 452; *R. c. Keegstra*, [1995] 2 R.C.S. 381; *R. c. Murdock* (2003), 11 C.R. (6th) 43; *R. c. Hydro-Québec*, [1997] 3 R.C.S. 213; *Berryland Canning Co. c. La Reine*, [1974] 1 C.F. 91; *Standard Sausage Co. c. Lee* (1933), 60 C.C.C. 265, complété par des motifs additionnels publiés à (1934), 61 C.C.C. 95; *Renvoi : Motor Vehicle Act de la C.-B.*, [1985] 2 R.C.S. 486; *Godbout c. Longueuil (Ville)*, [1997] 3 R.C.S. 844; *B. (R.) c. Children's Aid Society of Metropolitan Toronto*, [1995] 1 R.C.S. 315; *Blencoe c. Colombie-Britannique (Human Rights Commission)*, [2000] 2 R.C.S. 307, 2000 CSC 44; *Buhlers c. British Columbia (Superintendent of Motor Vehicles)* (1999), 170 D.L.R. (4th) 344; *Horsefield c. Ontario (Registrar of Motor Vehicles)* (1999), 44 O.R.

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By Arbour J. (dissenting in *Caine*)

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Malmo-Levine (1998), 54 C.R.R. (2d) 291, [1998] B.C.J. No. 1025 (QL), and the decision of the Provincial Court in *R. v. Caine*, [1998] B.C.J. No. 885 (QL). Appeal in *Malmo-Levine* dismissed. Appeal in *Caine* dismissed, Arbour, LeBel and Deschamps JJ. dissenting.

David Malmo-Levine, on his own behalf.

John W. Conroy, Q.C., for the appellant *Caine*.

S. David Frankel, Q.C., *Kevin Wilson* and *W. Paul Riley*, for the respondent.

Milan Rupic, for the intervener the Attorney General of Ontario.

Joseph J. Arvay, Q.C., for the intervener the British Columbia Civil Liberties Association.

Andrew K. Lokan and *Andrew C. Lewis*, for the intervener the Canadian Civil Liberties Association.

The judgment of McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache and Binnie JJ. was delivered by

GONTHIER AND BINNIE JJ. — In these appeals, the Court is required to consider whether Parliament has the legislative authority to criminalize simple possession of marihuana and, if so, whether that power has been exercised in a manner that is contrary to the *Canadian Charter of Rights and Freedoms*. The appellant *Caine* argues in particular that it is a violation of the principles of fundamental justice for Parliament to provide for a term of imprisonment as a sentence for conduct which he says results in little or no harm to other people. The appellant *Malmo-Levine* puts in issue the constitutional validity of the prohibition against possession for the purpose of trafficking in marihuana.

The British Columbia Court of Appeal rejected the appellants' challenges to the relevant provisions of the *Narcotic Control Act*, R.S.C. 1985, c. N-1 ("NCA"), and, in our view, it was right to do so. Upholding as we do the constitutional validity of the simple possession offence, it follows, for the same reasons, that *Malmo-Levine's* challenge to the

dans *R. c. Malmo-Levine* (1998), 54 C.R.R. (2d) 291, [1998] B.C.J. No. 1025 (QL), et la décision de la Cour provinciale dans *R. c. Caine*, [1998] B.C.J. No. 885 (QL). Pourvoi rejeté dans *Malmo-Levine*. Pourvoi rejeté dans *Caine*, les juges Arbour, LeBel et Deschamps sont dissidents.

David Malmo-Levine, en personne.

John W. Conroy, c.r., pour l'appelant *Caine*.

S. David Frankel, c.r., *Kevin Wilson* et *W. Paul Riley*, pour l'intimée.

Milan Rupic, pour l'intervenant le procureur général de l'Ontario.

Joseph J. Arvay, c.r., pour l'intervenante British Columbia Civil Liberties Association.

Andrew K. Lokan et *Andrew C. Lewis*, pour l'intervenante, l'Association canadienne des libertés civiles.

Version française du jugement de la juge en chef McLachlin et des juges Gonthier, Iacobucci, Major, Bastarache et Binnie rendu par

LES JUGES GONTHIER ET BINNIE — Dans les présents pourvois, notre Cour est appelée à décider si le Parlement a le pouvoir de légiférer pour criminaliser la simple possession de marihuana et, dans l'affirmative, s'il a exercé ce pouvoir d'une manière contraire à la *Charte canadienne des droits et libertés*. L'appelant *Caine* soutient en particulier que le Parlement a violé les principes de justice fondamentale en créant une peine d'emprisonnement pour un acte qui ne cause que peu ou pas de préjudice à autrui. L'appelant *Malmo-Levine* conteste la question de la validité constitutionnelle de l'interdiction visant la possession de marihuana en vue d'en faire le trafic.

La Cour d'appel de la Colombie-Britannique a rejeté la contestation par les appelants des dispositions pertinentes de la *Loi sur les stupéfiants*, L.R.C. 1985, ch. N-1 (la « Loi ») et, à notre avis, elle a eu raison de le faire. Comme nous confirmons la constitutionnalité de l'infraction de simple possession de marihuana, les prétentions de M. *Malmo-Levine*

prohibition against possession for the purpose of trafficking must also be rejected.

3

All sides agree that marihuana is a psychoactive drug which “causes alteration of mental function”. That, indeed, is the purpose for which the appellants use it. Certain groups in society share a particular vulnerability to its effects. While members of these groups, whose identity cannot in general be distinguished from other users in advance, are relatively small as a percentage of all marihuana users, their numbers are significant in absolute terms. The trial judge estimated “chronic users” to number about 50,000. A recent Senate Special Committee report estimated users under 16 (which may overlap to some extent with the chronic user group) also at 50,000 individuals (*Cannabis: Our Position for a Canadian Public Policy* (2002) (the “Senate Committee Report”), vol. I, at pp. 165-66). Pregnant women and schizophrenics are also said to be at particular risk. Advancing the protection of these vulnerable individuals, in our opinion, is a policy choice that falls within the broad legislative scope conferred on Parliament.

4

A conviction for the possession of marihuana for personal use carries no mandatory minimum sentence. In practice, most first offenders are given a conditional discharge. Imprisonment is generally reserved for situations that also involve trafficking or hard drugs. Except in very exceptional circumstances, imprisonment for simple possession of marihuana would constitute a demonstrably unfit sentence and, if imposed, would rightly be set aside on appeal. Availability of imprisonment in a statute that deals with a wide variety of drugs from opium and heroin to crack and cocaine is not unconstitutional, and its rare imposition for marihuana offences (as a scheduled drug) can and should be dealt with under ordinary sentencing principles. A fit sentence, by definition, complies with s. 7 of the

relatives à l’interdiction visant la possession de cette substance en vue d’en faire le trafic doivent elles aussi être rejetées pour les mêmes motifs.

Toutes les parties s’accordent pour dire que la marihuana est une drogue psychoactive qui [TRADUCTION] « agit sur les fonctions mentales ». C’est d’ailleurs pour cela que les appelants en consomment. Certains groupes de la société sont particulièrement vulnérables aux effets de la marihuana. Bien que les membres de ces groupes ne puissent généralement pas être distingués à l’avance des autres consommateurs et représentent un pourcentage relativement minime de l’ensemble des consommateurs de marihuana, leur nombre est toutefois non négligeable en chiffres absolus. Le juge du procès a évalué à environ 50 000 le nombre de [TRADUCTION] « consommateurs chroniques ». Dans un rapport publié récemment, le Comité spécial du Sénat sur les drogues illicites a estimé à 50 000 le nombre de consommateurs âgés de moins de 16 ans (dont certains peuvent aussi être des consommateurs chroniques) (*Le Cannabis : Positions pour un régime de politique publique pour le Canada* (2002) (le « Rapport du Comité sénatorial »), vol. I, p. 176-177). Les femmes enceintes et les schizophrènes seraient également particulièrement à risque. Selon nous, favoriser la protection de ces personnes vulnérables est une décision de politique générale qui relève du large pouvoir de légiférer dont dispose le Parlement.

La possession de marihuana pour consommation personnelle n’entraîne aucune peine minimale obligatoire en cas de déclaration de culpabilité. Dans la plupart des cas, une première infraction donne en pratique lieu à une absolution sous condition. En général, il n’y a emprisonnement que si le délinquant s’adonne aussi au trafic ou consomme des drogues dures. Sauf dans de très rares circonstances, une peine d’emprisonnement pour simple possession de marihuana est de toute évidence injuste et, si elle est infligée, elle sera à juste titre annulée en appel. La possibilité d’emprisonnement que prévoit une loi visant une grande variété de stupéfiants, allant de l’opium à la cocaïne en passant par le crack et l’héroïne, n’est pas une mesure inconstitutionnelle, et dans les rares cas où une telle peine est infligée pour

Charter. The mere fact of the *availability* of imprisonment in a statute dealing with a variety of prohibited drugs does not, in our view, make the criminalization of possession of a psychoactive drug like marihuana contrary to the principles of fundamental justice.

The appellants have assembled much evidence and argument attacking the wisdom of the criminalization of simple possession of marihuana. They say that the line between criminal and non-criminal conduct has been drawn inappropriately and that the evil effects of the law against marihuana outweigh the benefits, if any, associated with its prohibition. These are matters of legitimate controversy, but the outcome of that debate is not for the courts to determine. The Constitution provides no more than a framework. Challenges to the wisdom of a legislative measure within that framework should be addressed to Parliament. Our concern is solely with the issue of constitutionality. We conclude that it is within Parliament's legislative jurisdiction to criminalize the possession of marihuana should it choose to do so. Equally, it is open to Parliament to decriminalize or otherwise modify any aspect of the marihuana laws that it no longer considers to be good public policy.

The appeals are therefore dismissed.

I. Facts

A. *Malmo-Levine*

The appellant describes himself as a "marihuana/freedom activist". Self-represented in these proceedings, his primary concern is with interference by the state in what he believes to be the personal autonomy of its citizens. He stated in his oral argument:

I'm part of a growing number of such activists, who view cannabis re-legalization as a key part of protecting

une infraction liée à la marihuana (drogue figurant à l'annexe), les principes habituels de détermination de la peine peuvent et doivent être appliqués. Une peine juste est par définition conforme à l'art. 7 de la *Charte*. Le seul fait qu'une loi portant sur diverses drogues prohibées prévoit la *possibilité* d'une peine d'emprisonnement n'a pas selon nous pour effet de rendre incompatible avec les principes de justice fondamentale la criminalisation de la possession d'une drogue psychoactive telle la marihuana.

Les appelants ont rassemblé de nombreux éléments de preuve et arguments contestant l'opportunité de la criminalisation de la simple possession de marihuana. Ils prétendent que le Parlement n'a pas distingué adéquatement les comportements criminels et non criminels et soutiennent que les effets néfastes de l'interdiction visant la marihuana l'emportent sur ses avantages, s'il en est. Il s'agit d'un débat légitime, mais qu'il n'appartient pas aux tribunaux de trancher. La Constitution ne fait qu'établir un cadre. Les attaques contre l'opportunité d'une mesure législative eu égard à ce cadre doivent être adressées au Parlement. Nous nous attachons seulement à la constitutionnalité de la mesure. Nous arrivons à la conclusion que le Parlement a le pouvoir de légiférer pour criminaliser la possession de marihuana s'il juge opportun de le faire. De même, il lui est loisible de décriminaliser ou de modifier de quelque autre façon tout aspect des dispositions régissant la marihuana, s'il ne considère plus que les mesures en question constituent une bonne politique d'intérêt général.

Les pourvois sont en conséquence rejetés.

I. Les faits

A. *Malmo-Levine*

L'appellant se décrit lui-même comme un [TRADUCTION] « défenseur de la liberté et de la consommation de la marihuana ». Se représentant lui-même, il dénonce principalement l'ingérence de l'État dans ce qu'il estime être une facette de l'autonomie personnelle des citoyens. Voici un extrait de sa plaidoirie :

[TRADUCTION] Je fais partie de ces activistes de plus en plus nombreux qui considèrent que la relégislation du

human rights and our Mother Earth, while, at the same time, helping to end [the] war on poverty.

As you can see, I'm not a lawyer. I am, however, a cannabis user and a researcher, and I would like very much to be a cannabis retailer and perhaps grow a few plants.

8 Malmo-Levine does not deny that marihuana use can have harmful effects. On the contrary, since October 1996, he has helped operate an organization in East Vancouver known as the "Harm Reduction Club", a co-operative, non-profit association which recognizes some potential harm associated with the use of marihuana and seeks to reduce it. The stated object of the Club is to educate its users and the general public about marihuana and provide unadulterated marihuana at cost. It provides instruction about safe smoking habits "to minimize any harm from the use of marihuana", and requires its members to pledge not to operate motor vehicles or heavy equipment while under its influence.

9 On December 4, 1996, police entered the premises of the Harm Reduction Club and seized 316 grams of marihuana, much of it in the form of "joints". The appellant was charged with possession of cannabis (marihuana) for the purpose of trafficking. At trial, he sought to call evidence in support of a constitutional challenge but the trial judge refused to admit the evidence. On appeal, the majority of the Court of Appeal dismissed the appeal, Prowse J.A. dissenting.

B. *Caine*

10 On June 13, 1993, two RCMP officers on regular patrol observed the appellant and a male passenger sitting in a van by the ocean at White Rock, B.C. As the officers approached, the appellant, who was seated in the driver's seat, started the engine and began to back up. As one of the officers came alongside the van, he smelled a strong odour of recently smoked marihuana. The appellant Caine produced for the officer a partially smoked cigarette

cannabis est un élément clé de la protection des droits de la personne et de notre mère la Terre, qui aide en même temps à la lutte contre la pauvreté.

Comme vous pouvez le constater, je ne suis pas avocat. Je suis cependant un consommateur de cannabis et un chercheur, et j'aimerais beaucoup devenir détaillant de cannabis et peut-être en faire pousser quelques plants.

M. Malmo-Levine ne nie pas que l'usage de la marihuana peut avoir des effets néfastes. Au contraire, il participe depuis octobre 1996 à l'exploitation d'une association coopérative sans but lucratif située dans East Vancouver et connue sous le nom de « Harm Reduction Club », qui reconnaît l'existence de certains risques associés à l'usage de la marihuana et cherche à les réduire. L'objectif déclaré du club est d'informer ses membres et le public en général sur la marihuana et de fournir de la marihuana non adultérée au prix coûtant. Le club enseigne des moyens sûrs de fumer de la marihuana [TRADUCTION] « en vue de réduire au minimum tout préjudice découlant de la consommation de marihuana » et il exige que ses membres s'engagent à ne pas conduire un véhicule à moteur ou faire fonctionner de la machinerie lourde lorsqu'ils sont sous l'effet de cette substance.

Le 4 décembre 1996, la police a visité les locaux du Harm Reduction Club et saisi 316 grammes de marihuana, essentiellement sous forme de « joints ». L'appelant a été accusé de possession de marihuana en vue d'en faire le trafic. Au procès, il a voulu présenter certains éléments de preuve au soutien de son argument d'inconstitutionnalité, mais le juge du procès a refusé d'admettre ces éléments. En appel, les juges majoritaires de la Cour d'appel (la juge Prowse étant dissidente) ont débouté l'appelant.

B. *Caine*

Le 13 juin 1993, à White Rock en Colombie-Britannique, lors d'une patrouille de routine, deux agents de la GRC ont vu l'appelant et un passager dans une fourgonnette stationnée à proximité de l'océan. Lorsqu'ils se sont approchés, l'appelant, qui était au volant, a mis le contact et commencé à faire marche arrière. Longeant le véhicule, l'un des policiers a senti une forte odeur de marihuana récemment fumée. L'appelant Caine a remis au

of marihuana that weighed 0.5 gram. He possessed the marihuana cigarette for his own use and not for any other purpose.

The appellant Caine's application for a declaration that the provisions of the NCA prohibiting the possession of marihuana were unconstitutional was denied at trial. The appeal was also dismissed, Prowse J.A. dissenting.

II. Relevant Statutory and Constitutional Provisions

Narcotic Control Act, R.S.C. 1985, c. N-1 (repealed S.C. 1996, c. 19, s. 94, effective May 14, 1997 (SI/97-47))

Section 2 of the NCA defines "marihuana" as *Cannabis sativa* L. and a "narcotic" as "any substance included in the schedule or anything that contains any substance included in the schedule". Marihuana became a scheduled drug when *The Opium and Narcotic Drug Act*, 1923, S.C. 1923, c. 22 (the predecessor to the NCA) was enacted by Parliament. The relevant provisions of the NCA, impugned insofar as they relate to the simple possession and use of marihuana, state:

3. (1) Except as authorized by this Act or the regulations, no person shall have a narcotic in his possession.

(2) Every person who contravenes subsection (1) is guilty of an offence and liable

(a) on summary conviction 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, 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; or

(b) on conviction on indictment, to imprisonment for a term not exceeding seven years.

. . .

SCHEDULE

. . .

3. *Cannabis sativa*, its preparations, derivatives and similar synthetic preparations, including:

policier une cigarette de marihuana partiellement grillée pesant 0,5 gramme. Il l'avait en sa possession pour consommation personnelle et rien d'autre.

Au procès, la juge a rejeté la demande de l'appelant Caine qui sollicitait un jugement déclarant inconstitutionnelles les dispositions de la Loi interdisant la possession de marihuana. Il a également été débouté en appel, la juge Prowse étant dissidente.

II. Les dispositions législatives et constitutionnelles applicables

Loi sur les stupéfiants, L.R.C. 1985, ch. N-1 (abrogée par L.C. 1996, ch. 19, art. 94, en vigueur le 14 mai 1997 (TR/97-47))

Aux termes de l'art. 2 de la Loi, « marihuana » s'entend du *Cannabis sativa* L. et « stupéfiant » de toute « [s]ubstance énumérée à l'annexe, ou toute préparation en contenant ». La marihuana est devenue une drogue inscrite à l'annexe lorsque la *Loi de l'opium et des drogues narcotiques*, 1923, S.C. 1923, ch. 22 (remplacée par la Loi) a été édictée par le Parlement. Voici le texte des dispositions pertinentes de la Loi qui sont contestées, dans la mesure où elles portent sur la simple possession de la marihuana :

3. (1) Sauf exception prévue par la présente loi ou ses règlements, il est interdit d'avoir un stupéfiant en sa possession.

(2) Quiconque enfreint le paragraphe (1) commet une infraction et encourt, sur déclaration de culpabilité :

a) par procédure sommaire, pour une première infraction, une amende maximale de mille dollars et un emprisonnement maximal de six mois, ou l'une de ces peines, et, en cas de récidive, une amende maximale de deux mille dollars et un emprisonnement maximal d'un an, ou l'une de ces peines;

b) par mise en accusation, un emprisonnement maximal de sept ans.

. . .

ANNEXE

. . .

3. Chanvre indien (*Cannabis sativa*), ses préparations, dérivés et préparations synthétiques semblables, notamment :

11

12

- (1) Cannabis resin,
- (2) Cannabis (marihuana),
- (3) Cannabidiol,
- (4) Cannabinol (3-n-amy-6,6,9-trimethyl-6-dibenzopyran-1-ol),
- (4.1) Nabilone ((±)-trans-3 (1,1-diméthylheptyl)-6, 6a, 7, 8, 10, 10a-hexahydro-1-hydroxy-6,6-diméthyl-9H-dibenzo[b,d]pyran-9-one),
- (5) Pyrahexyl (3-n-hexyl-6,6,9-triméthyl-7,8,9,10-tetrahydro-6-dibenzopyran-1-ol), and
- (6) Tetrahydrocannabinol,

but not including:

- (7) non-viable Cannabis seed.

Canadian Charter of Rights and Freedoms

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

Constitution Act, 1867

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next herein-after enumerated; that is to say, —

. . .

27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.

III. Judicial History

A. *Trial Court*

1. Malmo-Levine (1998), 54 C.R.R. (2d) 291 (B.C.S.C.)

Curtis J., after a lengthy *voir dire*, refused to hear evidence tendered to show the offence of possession

- (1) Résine de cannabis,
- (2) Cannabis (marihuana),
- (3) Cannabidiol,
- (4) Cannabinol (n-amy-3 triméthyl-6,6,9 dibenzo-6 pyran-1-ol),
- (4.1) Nabilone ((±)-trans-(diméthylheptyl-1,1)-3 hexahydro-6, 6a, 7, 8, 10, 10a hydroxy-1 diméthyl-6, 6 9H-dibenzo [b,d] pyranone-9),
- (5) Pyrahexyl (n-hexyl-3 triméthyl-6,6,9 tétrahydro-7,8,9,10 dibenzo-6 pyran-1-ol),
- (6) Tétrahydrocannabinol,

mais non compris :

- (7) Graine de cannabis stérile.

Charte canadienne des droits et libertés

7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

Loi constitutionnelle de 1867

91. Il sera loisible à la Reine, de l'avis et du consentement du Sénat et de la Chambre des Communes, de faire des lois pour la paix, l'ordre et le bon gouvernement du Canada, relativement à toutes les matières ne tombant pas dans les catégories de sujets par la présente loi exclusivement assignés aux législatures des provinces; mais, pour plus de garantie, sans toutefois restreindre la généralité des termes ci-haut employés dans le présent article, il est par la présente déclaré que (nonobstant toute disposition contraire énoncée dans la présente loi) l'autorité législative exclusive du parlement du Canada s'étend à toutes les matières tombant dans les catégories de sujets ci-dessous énumérés, savoir :

. . .

27. La loi criminelle, sauf la constitution des tribunaux de juridiction criminelle, mais y compris la procédure en matière criminelle.

III. Les décisions des juridictions inférieures

A. *Tribunal de première instance*

1. Malmo-Levine (1998), 54 C.R.R. (2d) 291 (C.S.C.-B.)

Au terme d'un long *voir-dire*, le juge Curtis a refusé d'entendre la preuve tendant à établir

of marihuana for the purpose of trafficking to be unconstitutional. He found that the proposed evidence was not relevant to his analysis under s. 7 of the *Charter*.

In his view, the freedom to use marihuana is not a matter of fundamental, personal importance, and such use is therefore not protected by s. 7 of the *Charter*. “There being no right to use marijuana created by the right to life, liberty and security of the person, the question of the principles of fundamental justice need not be considered” (p. 295). Malmo-Levine was subsequently convicted under s. 4(2) of the NCA for possession of marihuana for the purpose of trafficking.

2. Caine, [1998] B.C.J. No. 885 (QL) (Prov. Ct.)

Howard Prov. Ct. J. heard extensive evidence about the alleged harm caused by marihuana. We will address her careful findings of fact in this regard later in these reasons. In the end, she held that she was bound by the decision in *Malmo-Levine* that the NCA did not infringe s. 7. Caine was therefore convicted under s. 3 of the NCA for simple possession.

- B. *British Columbia Court of Appeal* (2000), 138 B.C.A.C. 218, 2000 BCCA 335

1. Braidwood J.A.

Braidwood J.A., Rowles J.A. concurring, concluded that the “harm principle” was a principle of fundamental justice within the meaning of s. 7. “[The harm principle] is a legal principle and it is concise. Moreover, there is a consensus among reasonable people that it is vital to our system of justice. Indeed, I think that it is common sense that you don’t go to jail unless there is a potential that your activities will cause harm to others” (para. 134).

l’inconstitutionnalité de l’infraction de possession de marihuana en vue d’en faire le trafic. Il a estimé qu’elle n’était pas pertinente pour son analyse fondée sur l’art. 7 de la *Charte*.

De l’avis du juge Curtis, la liberté de consommer de la marihuana ne revêt pas une importance personnelle fondamentale et elle n’est en conséquence pas garantie par l’art. 7 de la *Charte* : [TRADUCTION] « Comme le droit à la vie, à la liberté et à la sécurité de sa personne ne crée aucun droit de consommer de la marihuana, il n’y a pas lieu d’examiner la question des principes de justice fondamentale » (p. 295). M. Malmo-Levine a par la suite été déclaré coupable de l’infraction de possession de marihuana en vue d’en faire le trafic prévue au par. 4(2) de la Loi.

2. Caine, [1998] B.C.J. No. 885 (QL) (C.P.)

Une preuve abondante du préjudice que causerait la marihuana a été présentée à la juge Howard de la Cour provinciale. Nous nous pencherons plus loin sur les conclusions de fait soignées qu’elle a tirées de cette preuve. En définitive, la juge a statué qu’elle était liée par la décision rendue dans l’affaire *Malmo-Levine* selon laquelle la Loi ne porte pas atteinte à l’art. 7. M. Caine a donc été reconnu coupable de l’infraction de simple possession prévue par l’art. 3 de la Loi.

- B. *Cour d’appel de la Colombie-Britannique* (2000), 138 B.C.A.C. 218, 2000 BCCA 335

1. Le juge Braidwood

Le juge Braidwood, avec l’appui de la juge Rowles, a conclu que le [TRADUCTION] « principe du préjudice » était un principe de justice fondamentale au sens de l’art. 7 : [TRADUCTION] « [Le principe du préjudice] est un principe juridique concis. De plus, les gens raisonnables s’accordent généralement pour dire qu’il a un caractère vital pour notre système de justice. D’ailleurs, il est logique qu’on ne vous envoie pas en prison, à moins que vos actes ne soient susceptibles de causer préjudice à autrui » (par. 134).

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17 In the result, however, he judged that the deprivation of the appellants' liberty caused by the penal provisions of the NCA was in accordance with the harm principle, and did not violate s. 7: "It is for Parliament to determine what level of risk is acceptable and what level of risk requires action. The *Charter* only demands . . . a 'reasoned apprehension of harm' that is not [in]significant or trivial. The appellants have not convinced me that such harm is absent in this case" (para. 158). He therefore dismissed the appeals.

2. Prowse J.A. (dissenting)

18 Prowse J.A. disagreed that the threshold of harm justifying parliamentary intervention is harm that is "not insignificant or trivial". In her view, harm must be "serious" and "substantial" to survive a *Charter* challenge. She concluded that s. 3(1) of the NCA breached the appellants' s. 7 *Charter* rights in a manner inconsistent with a principle of fundamental justice. She would have adjourned the proceedings to permit counsel to make further submissions with respect to the justification of the breach under s. 1 of the *Charter*.

IV. Constitutional Questions

19 On October 19, 2001, the Chief Justice stated the following constitutional questions in the case of *R. v. Caine*:

1. Does prohibiting possession of Cannabis (marihuana) for personal use under s. 3(1) of the *Narcotic Control Act*, R.S.C. 1985, c. N-1, by reason of the inclusion of this substance in s. 3 of the Schedule to the Act (now s. 1, Schedule II, *Controlled Drugs and Substances Act*, S.C. 1996, c. 19), infringe s. 7 of the *Canadian Charter of Rights and Freedoms*?
2. If the answer to Question 1 is in the affirmative, is the infringement justified under s. 1 of the *Charter*?

En fin de compte, cependant, il a jugé que la privation de liberté causée aux appelants par l'application des dispositions pénales de la Loi respectait le principe du préjudice et ne portait pas atteinte à l'art. 7 : [TRADUCTION] « Il appartient au Parlement de déterminer le niveau de risque qui est acceptable et celui qui exige son intervention. La *Charte* requiert seulement [. . .] une "crainte raisonnée de préjudice" qui ne soit ni [in]signifiante ni négligeable. Les appelants ne m'ont pas convaincu de l'absence d'un tel préjudice en l'espèce » (par. 158). Il a en conséquence rejeté les appels.

2. La juge Prowse (dissidente)

La juge Prowse a exprimé son désaccord avec la conclusion que le critère du préjudice justifiant l'intervention du Parlement est celui d'un préjudice qui n'est [TRADUCTION] « ni insignifiant ni négligeable ». Selon elle, le préjudice doit être [TRADUCTION] « grave » et « important » pour qu'une disposition résiste à une contestation fondée sur la *Charte*. Elle a conclu que le par. 3(1) de la Loi portait atteinte, d'une manière incompatible avec un principe de justice fondamentale, aux droits garantis aux appelants par l'art. 7 de la *Charte*. Elle aurait ajourné l'audience pour permettre aux avocats de présenter des observations supplémentaires relativement à la justification de l'atteinte au regard de l'article premier de la *Charte*.

IV. Les questions constitutionnelles

Le 19 octobre 2001, la Juge en chef a formulé les questions constitutionnelles suivantes dans le pourvoi *R. c. Caine* :

1. Est-ce que l'interdiction d'avoir en sa possession du Cannabis (marihuana) aux fins de consommation personnelle — interdiction prévue au par. 3(1) de la *Loi sur les stupéfiants*, L.R.C. 1985, ch. N-1, du fait de la mention de cette substance à l'art. 3 de l'annexe de cette loi (maintenant l'art. 1 de l'annexe II de la *Loi réglementant certaines drogues et autres substances*, L.C. 1996, ch. 19) — porte atteinte à l'art. 7 de la *Charte canadienne des droits et libertés*?
2. Si la réponse à la question 1 est affirmative, l'atteinte est-elle justifiée au regard de l'article premier de la *Charte*?

3. Is the prohibition on the possession of Cannabis (marihuana) for personal use under s. 3(1) of the *Narcotic Control Act*, R.S.C. 1985, c. N-1, by reason of the inclusion of this substance in s. 3 of the Schedule to the Act (now s. 1, Schedule II, *Controlled Drugs and Substances Act*, S.C. 1996, c. 19), within the legislative competence of the Parliament of Canada as being a law enacted for the peace, order and good government of Canada pursuant to s. 91 of the *Constitution Act, 1867*; as being enacted pursuant to the criminal law power in s. 91(27) thereof; or otherwise?

In the *Malmo-Levine* appeal, additional constitutional questions were stated putting in issue the validity of the prohibition against possession for the purpose of trafficking in marihuana in light of s. 7 (fundamental justice) and s. 15 (equality rights) of the *Charter*.

V. Analysis

The controversy over the criminalization of the use of marihuana has raged in Canada for at least 30 years. In 1972, the Commission of Inquiry into the Non-Medical Use of Drugs (the “Le Dain Commission”), in its preliminary report entitled *Cannabis*, recommended that the prohibition against its use be removed from the *criminal law*. In 1974, the federal government introduced Bill S-19, which would have removed penal sanctions for possession of marihuana for a first offence and substituted a monetary fine in its place. The Bill, however, died on the Order Paper. At the beginning of the 32nd Parliament in 1980, the Throne Speech proclaimed:

It is time . . . to move cannabis offences to the Food and Drugs Act and remove the possibility of imprisonment for simple possession.

(*House of Commons Debates*, vol. I, 1st Sess., 32nd Parl., April 14, 1980, at p. 5)

The trial judge in *Caine* estimated that over 600,000 Canadians now have criminal records for cannabis-related offences, and that widespread use despite the criminal prohibition encourages

3. Est-ce que l’interdiction d’avoir en sa possession du Cannabis (marihuana) aux fins de consommation personnelle — interdiction prévue au par. 3(1) de la *Loi sur les stupéfiants*, L.R.C. 1985, ch. N-1, du fait de la mention de cette substance à l’art. 3 de l’annexe de cette loi (maintenant l’art. 1 de l’annexe II de la *Loi réglementant certaines drogues et autres substances*, L.C. 1996, ch. 19), — relève de la compétence législative du Parlement du Canada en tant que règle de droit édictée soit en vertu de l’art. 91 de la *Loi constitutionnelle de 1867* pour assurer la paix, l’ordre et le bon gouvernement du Canada, soit en vertu du pouvoir de légiférer sur le droit criminel prévu au par. 91(27) de la *Loi constitutionnelle de 1867*, soit en vertu d’un autre pouvoir?

Dans le pourvoi *Malmo-Levine*, la Cour a formulé d’autres questions constitutionnelles mettant en cause la validité de l’interdiction visant la possession de marihuana en vue d’en faire le trafic au regard des art. 7 (justice fondamentale) et 15 (droits à l’égalité) de la *Charte*.

V. L’analyse

La controverse entourant la criminalisation de la consommation de marihuana fait rage au Canada depuis au moins 30 ans. En 1972, la Commission d’enquête sur l’usage des drogues à des fins non médicales (la « Commission Le Dain »), dans son rapport provisoire intitulé *Le cannabis*, a recommandé que l’interdiction ne relève plus du droit *criminel*. En 1974, le gouvernement fédéral a présenté le projet de loi S-19, qui prévoyait, dans le cas d’une première infraction, la suppression des sanctions pénales et leur remplacement par une amende. Le projet de loi est cependant mort au Feuilleton. Au début de la 32^e législature, en 1980, le gouvernement a déclaré ceci dans le discours du Trône :

. . . le temps est aussi venu de faire relever de la Loi des aliments et drogues les infractions relatives au cannabis et de supprimer la peine d’emprisonnement dont est punissable la simple possession de cette drogue.

(*Débats de la Chambre des communes*, vol. I, 1^{re} sess., 32^e lég., 14 avril 1980, p. 5)

Dans l’affaire *Caine*, la juge du procès a estimé que plus de 600 000 Canadiens ont un casier judiciaire pour des infractions liées au cannabis et que l’usage largement répandu de cette substance,

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disrespect for the law. At the time of the hearing of the appeal in this Court, the government announced its intention of introducing a bill to eliminate the availability of imprisonment for simple possession. Bill C-38, as introduced, states that possession of amounts less than 15 grams of marihuana will render an individual “guilty of an offence punishable on summary conviction and liable to a fine” (s. 4(5.1)). Furthermore, the offence would be designated as a contravention, pursuant to the *Contraventions Act*, S.C. 1992, c. 47, with the effect that an individual convicted for such possession would not receive a criminal record.

malgré l’interdiction pénale, incite au non-respect de la loi. Au moment de l’audition du pourvoi par notre Cour, le gouvernement a annoncé son intention de déposer un projet de loi éliminant l’emprisonnement comme peine applicable pour la simple possession. Le projet de loi C-38 précise que la possession de moins de 15 grammes de marihuana rend « passible, sur déclaration de culpabilité par procédure sommaire, de l’amende maximale prévue » (par. 4(5.1)). En outre, l’infraction deviendrait une contravention, au sens de la *Loi sur les contraventions*, L.C. 1992, ch. 47, avec pour effet d’éviter à une personne déclarée coupable de telle possession d’avoir un casier judiciaire.

23 These reports and legislative initiatives were directed to crafting what was thought to be the best legislative response to the marihuana controversy. Whether the Bill should proceed, and if so in what form, is a matter of legislative policy for Parliament to decide. The question before us is purely a matter of law. Is the prohibition, including the availability of imprisonment for simple possession, beyond the powers of Parliament, either because it does not properly fall within Parliament’s legislative competence, or because the prohibition, and in particular the availability of imprisonment, violate the *Charter’s* guarantees of rights and freedoms?

Les rapports et les mesures législatives susmentionnés visaient à façonner ce que l’on croyait être la meilleure solution législative pour mettre fin à la controverse sur la marihuana. La question de savoir si le projet de loi mentionné précédemment doit continuer à suivre la filière législative et, dans l’affirmative, sous quelle forme, est une question de politique législative qu’il appartient au Parlement de prendre. La question que nous sommes appelés à trancher est une pure question de droit. L’interdiction, y compris la possibilité d’emprisonnement qu’entraîne l’infraction de simple possession, excède-t-elle les pouvoirs du Parlement, soit parce qu’elle déborde sa compétence législative, soit parce que l’interdiction et plus particulièrement la peine d’emprisonnement dont elle est assortie portent atteinte aux droits et libertés garantis par la *Charte*?

24 The legal issues arising on these appeals can be grouped under the following headings:

Les questions de droit que soulèvent les pourvois peuvent être regroupées sous les rubriques suivantes :

- A. Exclusion of Constitutional Fact Evidence at the Trial of Malmo-Levine
- B. The *Narcotic Control Act*
- C. Evidence of Harm
- D. Division of Powers
- E. Section 7 of the *Charter*
- F. Section 15 of the *Charter*

- A. L’exclusion de la preuve des faits constitutionnels au procès de M. Malmo-Levine
- B. La *Loi sur les stupéfiants*
- C. La preuve du préjudice
- D. Le partage des compétences
- E. L’article 7 de la *Charte*
- F. L’article 15 de la *Charte*

We turn, then, to the first issue.

A. *Exclusion of Constitutional Fact Evidence at the Trial of Malmo-Levine*

Curtis J. refused to admit expert evidence of legislative and constitutional facts relevant to the *Charter* challenge on the basis that, even if Malmo-Levine succeeded in establishing what he set out to establish, it would make no difference to the legal result. In the trial judge's view, "[t]here is no legal basis for hearing evidence in support of the defence challenge to the constitutionality of the marijuana laws; it is simply not relevant" (p. 296).

In our view, the evidence which Malmo-Levine wished to adduce, which was essentially the same as the evidence tendered in *Caine*, was relevant to his *Charter* challenge. His argument was clearly not frivolous. A trial judge is not required to listen to pointless, irrelevant or repetitive evidence that does not advance the work of the court, but here the proffered evidence was none of those things. Malmo-Levine was prepared to deal with serious matters in a serious way. Had the Crown been prepared to accept his evidentiary points, an admission by Crown counsel or an agreed Statement of Facts could have been filed to make unnecessary the hearing of *viva voce* evidence. In the absence of any such Crown admissions, we agree with the British Columbia Court of Appeal that in the circumstances of this case the trial judge erred in excluding this "legislative fact" evidence. In the *Caine* case, the trial judge took judicial notice of certain government reports and documents, and proceeded to hear *viva voce* expert evidence on the more debatable aspects of the marihuana controversy. This was the correct procedure.

While the courts apply the requirements of judicial notice less stringently to the admission of

Nous allons maintenant examiner la première question.

A. *L'exclusion de la preuve des faits constitutionnels au procès de M. Malmo-Levine*

Le juge Curtis a refusé d'admettre la preuve d'expert concernant les faits législatifs et constitutionnels que voulait présenter M. Malmo-Levine à l'égard de sa contestation fondée sur la *Charte* au motif que, même si ce dernier réussissait à prouver ce qu'il voulait établir, le résultat demeurerait le même sur le plan juridique. De l'avis du juge du procès, [TRADUCTION] « [i]l n'existe aucun fondement juridique justifiant d'autoriser la présentation des éléments de preuve invoqués à l'appui de la contestation par le défendeur de la constitutionnalité des dispositions sur la marihuana. Cette preuve n'est tout simplement pas pertinente » (p. 296).

Selon nous, la preuve que M. Malmo-Levine souhaitait présenter — et qui était essentiellement la même que celle produite dans *Caine* — était pertinente dans le cadre de sa contestation fondée sur la *Charte*. Sa prétention n'était manifestement pas frivole. Le juge qui préside un procès n'est pas obligé d'entendre une preuve inutile, non pertinente ou redondante qui ne fait pas progresser l'instance. Mais, en l'espèce, la preuve offerte n'était pas de cette nature. M. Malmo-Levine était prêt à débattre sérieusement de questions importantes. Si le ministère public avait été disposé à concéder les points que M. Malmo-Levine désirait prouver, une admission de son avocat ou un exposé conjoint des faits aurait pu être déposé afin de remplacer l'audition de témoignages de vive voix à cet égard. En l'absence de telles mesures, nous estimons, à l'instar de la Cour d'appel de la Colombie-Britannique, que le juge du procès a eu tort d'exclure cette preuve de « faits législatifs » dans les circonstances de l'espèce. Dans l'affaire *Caine*, la juge du procès a pris connaissance d'office de certains documents et rapports gouvernementaux et elle a entendu de vive voix des témoins experts sur les aspects plus litigieux de la controverse entourant la marihuana. C'était la bonne façon de faire.

Bien que les tribunaux appliquent les exigences relatives à la connaissance d'office moins

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legislative fact than to adjudicative fact (*Danson v. Ontario (Attorney General)*, [1990] 2 S.C.R. 1086, at p. 1099), courts should nevertheless proceed cautiously to take judicial notice even as “legislative facts” of matters that are reasonably open to dispute, particularly where they relate to an issue that could be dispositive: *R. v. Find*, [2001] 1 S.C.R. 863, 2001 SCC 32; *Public School Boards’ Assn. of Alberta v. Alberta (Attorney General)*, [2000] 1 S.C.R. 44, 2000 SCC 2. The evidence of harm, or the lack of it, was central to the argument raised by both Malmo-Levine and Caine. They regarded it as dispositive. Moreover, much of the evidence of “harm” was controversial, and needed to be tested by cross-examination.

strictement à l’égard des faits législatifs que des faits en litige (*Danson c. Ontario (Procureur général)*, [1990] 2 R.C.S. 1086, p. 1099), ils doivent néanmoins faire montre de prudence avant de prendre connaissance d’office, même en tant que « faits législatifs », de points raisonnablement discutables, particulièrement lorsque ceux-ci portent sur une question qui pourrait être décisive : *R. c. Find*, [2001] 1 R.C.S. 863, 2001 CSC 32; *Public School Boards’ Assn. of Alberta c. Alberta (Procureur général)*, [2000] 1 R.C.S. 44, 2000 CSC 2. La preuve de l’existence ou de l’inexistence d’un préjudice était un aspect central de l’argumentation de MM. Malmo-Levine et Caine. Ces derniers considéraient cet aspect comme déterminant. En outre, une bonne partie de la preuve du « préjudice » ne faisait pas l’unanimité et son bien-fondé devait être mis à l’épreuve par contre-interrogatoire.

29 Curtis J. was clearly unimpressed by what Malmo-Levine wished to establish. In some aspects, we have reached the same conclusion. However, with respect, the trial judge ought to have admitted the evidence despite his misgivings in the circumstances so as to permit Malmo-Levine to put forward a full record in the event of an appeal.

Le juge Curtis n’a manifestement pas été impressionné par ce que M. Malmo-Levine souhaitait établir. Nous sommes d’ailleurs arrivés à la même conclusion que lui sur certains points. Toutefois, avec égards pour l’opinion du juge Curtis, dans les circonstances, celui-ci aurait dû malgré ses réserves admettre cette preuve, afin de permettre à M. Malmo-Levine de constituer un dossier complet en prévision d’un éventuel appel.

30 The complications that would otherwise have attended the hearing of the appeal however were obviated by the parties’ agreement to treat the *Caine* evidence of legislative fact as equally applicable to Malmo-Levine’s appeal. In the result, we agree with the Court of Appeal that the trial judge’s error did not, in those circumstances, prejudice Malmo-Levine.

Le fait que les parties aient convenu de considérer que la preuve relative aux faits législatifs présentée dans l’affaire *Caine* s’appliquait également dans l’appel de M. Malmo-Levine a toutefois permis d’éviter les complications auxquelles l’audition de l’appel aurait autrement donné lieu. En conséquence, nous souscrivons à l’opinion de la Cour d’appel selon laquelle, dans les circonstances, l’erreur du juge du procès n’a pas causé préjudice à M. Malmo-Levine.

B. *The Narcotic Control Act*

B. *La Loi sur les stupéfiants*

1. History of the NCA

1. Historique de la Loi

31 The NCA is structured as an omnibus measure covering all controlled drugs including heroin, crack cocaine and opium. The first such Act was passed by Parliament in 1908 in the form of *An Act to prohibit the importation, manufacture and sale of Opium*

Conçue comme une mesure omnibus, la Loi s’appliquait à toutes les drogues contrôlées, notamment l’héroïne, le crack et l’opium. En 1908, une première loi a été adoptée pour réglementer l’usage des stupéfiants à des fins non thérapeutiques : *Loi*

for other than medicinal purposes, S.C. 1908, c. 50, which aimed to control the use of narcotics for non-medicinal purposes. In 1911, this statute was replaced by *The Opium and Drug Act*, S.C. 1911, c. 17, which added prohibitions with regards to cocaine, morphine and eucaïne. In 1923, Parliament enacted a consolidated *Opium and Narcotic Drug Act*, 1923, S.C. 1923, c. 22, which added cannabis to the list of prohibited drugs. There was no discussion or debate in the house as to why this drug was added. In 1932, a number of important amendments were made in the *Act to amend The Opium and Narcotic Drug Act*, 1929, S.C. 1932, c. 20, referring to both synthetic and natural drugs. By 1938, the Act prohibited over 15 scheduled drugs (S.C. 1938, c. 9) (see Senate Committee Report, vol. II, at pp. 256-58).

In 1954, the *Opium and Narcotic Drug Act* was amended, and the offence of possession was supplemented by a new offence: “possession . . . for the purpose of trafficking” (S.C. 1954, c. 38, s. 3). A reverse onus applied to this offence, meaning that those possessing large quantities of narcotics had to prove that they were *not* in possession for the purpose of trafficking (Senate Committee Report, vol. II, at p. 264). The Act contained much harsher penalties for trafficking than for possession, leading Braidwood J.A. to conclude that “Parliament’s primary purpose was to stamp out the drug traffic and punish the traffickers” (para. 81).

Less than a decade later, Parliament replaced the *Opium and Narcotic Drug Act* with the *Narcotic Control Act*, S.C. 1960-61, c. 35, which gave effect to Canada’s international commitments under the *Single Convention on Narcotic Drugs*, 1961, Can. T.S. 1964 No. 30. When debating the Bill, the Minister of National Health characterized marihuana as a gateway drug, stating that “[i]t . . . may well provide a stepping stone to addiction to heroin” (*House of Commons Debates*, vol. VI, 4th Sess., 24th Parl., June 7, 1961, at p. 5981). This strategy was to try to treat and cure the “evil” of marihuana by reducing the supply of drugs through stiff

prohibant l’importation, la fabrication et la vente de l’opium à toutes fins autres que celles de la médecine, S.C. 1908, ch. 50. En 1911, cette loi a été remplacée par la *Loi de l’opium et des drogues*, S.C. 1911, ch. 17, qui étendait l’interdiction à la cocaïne, à la morphine et à l’eucaïne. En 1923, le Parlement a édicté la *Loi de l’opium et des drogues narcotiques*, 1923, S.C. 1923, ch. 22, qui ajoutait le cannabis à la liste des drogues interdites. Aucun débat n’a eu lieu à la Chambre quant à la justification de cet ajout. En 1932, un certain nombre de modifications importantes ont été apportées à la *Loi modifiant la Loi de l’opium et des drogues narcotiques*, 1929, S.C. 1932, ch. 20, notamment pour y inscrire des drogues synthétiques et des drogues naturelles. En 1938, l’annexe de la loi faisait état de plus de 15 drogues interdites (S.C. 1938, ch. 9) (voir le Rapport du Comité sénatorial, vol. II, p. 272-275).

En 1954, la *Loi sur l’opium et les drogues narcotiques* a été modifiée et à la simple possession s’est ajoutée une nouvelle infraction, celle de « possession [d’]une drogue aux fins d’en faire le trafic » (S.C. 1954, ch. 38, art. 3). Dans le cas de cette infraction, la charge de la preuve était inversée, de sorte que les personnes trouvées en possession de grandes quantités de stupéfiants devaient établir que ce n’était *pas* pour en faire le trafic (Rapport du Comité sénatorial, vol. II, p. 282). La loi prévoyait des peines beaucoup plus sévères pour le trafic que pour la possession, ce qui a amené le juge Braidwood de la Cour d’appel à conclure que [TRADUCTION] « le principal objectif du Parlement était d’éliminer le trafic des stupéfiants et de punir les trafiquants » (par. 81).

Moins d’une décennie plus tard, la *Loi sur l’opium et les drogues narcotiques* a été remplacée par la *Loi sur les stupéfiants*, S.C. 1960-61, ch. 35, qui donnait effet aux engagements internationaux du Canada découlant de la *Convention unique sur les stupéfiants de 1961*, R.T. Can. 1964 n° 30. Pendant les débats relatifs au projet de loi, le ministre de la Santé nationale a qualifié la marihuana de drogue d’introduction, affirmant qu’elle pouvait fort bien « mener à l’accoutumance à l’héroïne » (*Débats de la Chambre des communes*, vol. VI, 4^e sess., 24^e lég., 7 juin 1961, p. 6194). La stratégie consistait à tenter de traiter et guérir les effets du « fléau » de la

penalties, and reducing the demand for drugs by providing treatment for existing addicts.

marihuana en diminuant l'offre de drogues par l'infliction de peines sévères et en réduisant la demande grâce au traitement des toxicomanes.

34 In 1997, the NCA and Parts III and IV of the *Food and Drugs Act* were repealed and replaced by the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 ("CDSA"). The new Act was designed to discharge Canada's more recent international obligations with regard to narcotics. It introduced a legislative framework for the import, export, distribution and use of substances scheduled under previous legislation (Senate Committee Report, vol. II, at p. 286). More than 150 substances now appear in the schedules to the CDSA.

En 1997, la Loi et les parties III et IV de la *Loi sur les aliments et drogues* ont été abrogées et remplacées par la *Loi réglementant certaines drogues et autres substances*, L.C. 1996, ch. 19 (« LRDS »). Cette nouvelle loi vise à permettre au Canada de s'acquitter des plus récentes obligations internationales qui lui incombent en matière de lutte contre les stupéfiants. Elle instaure un cadre légal régissant l'importation, l'exportation, la distribution et l'utilisation des substances figurant aux annexes des lois antérieures (Rapport du Comité sénatorial, vol. II, p. 305). Plus de 150 substances sont désormais énumérées dans les annexes de la LRDS.

2. Sanctions under the NCA

35 Since the enactment of the *Opium Act* in 1908, the sanctions for drug possession have been steadily decreasing. In 1929, the penalty for the offence of possession was a minimum of six months to a maximum of seven years or a fine of between \$200 and \$1,000, or both. It was also within the discretion of the court to sentence offenders to hard labour or a whipping: *The Opium and Narcotic Drug Act, 1929*, S.C. 1929, c. 49, s. 4. See, e.g., *R. v. Forbes* (1937), 69 C.C.C. 140 (B.C. Co. Ct.) (accused sentenced to 18 months of hard labour plus a \$200 fine for possession of marihuana).

2. Les sanctions prévues par la Loi

Depuis l'adoption de la *Loi sur l'opium* en 1908, on observe une diminution constante de la rigueur des sanctions infligées pour possession de drogue. En 1929, le délinquant était passible d'un emprisonnement d'au moins six mois et d'au plus sept ans, ainsi que d'une amende dont le montant allait de 200 \$ à 1 000 \$, ou de l'une de ces deux peines. Le tribunal avait également le pouvoir discrétionnaire de le condamner aux travaux forcés ou au fouet : *Loi de l'opium et des drogues narcotiques, 1929*, S.C. 1929, ch. 49, art. 4. Voir, par exemple, *R. c. Forbes* (1937), 69 C.C.C. 140 (C. cté C.-B.) (infliction d'une peine de 18 mois de travaux forcés et d'une amende de 200 \$ pour possession de marihuana).

36 With the amendment of the *Opium and Narcotic Drug Act* in 1954, penalties for offences involving trafficking increased. For simple possession however, the availability of hard labour was removed. The mandatory six-month prison sentence was repealed in 1961 when the *Narcotic Control Act* was enacted. However, the 1961 Act provided, under s. 17(1), that if the accused was a drug addict, the court could impose custody for treatment for an indeterminate period in lieu of another sentence.

Après la modification de la *Loi de l'opium et des drogues narcotiques* en 1954, la sévérité des peines prévues pour les infractions comportant trafic a été haussée. Cependant, le Parlement a écarté la condamnation aux travaux forcés pour simple possession. L'emprisonnement minimal de six mois a été supprimé en 1961 lors de l'adoption de la *Loi sur les stupéfiants*. Toutefois, la nouvelle loi disposait, au par. 17(1), que le tribunal pouvait condamner un toxicomane à la détention aux fins de traitement pour une période indéterminée, à l'exclusion de toute autre peine.

37 In 1969, possession was redesignated as a hybrid offence, and the penalty on summary conviction for

En 1969, l'infraction de possession est devenue une infraction mixte, le contrevenant étant dès lors

possession carried a maximum fine of \$1,000 or imprisonment for a term not exceeding six months or both for a first offence and, for a subsequent offence, a fine not exceeding \$2,000 or imprisonment for a term not exceeding one year or both: S.C. 1968-69, c. 41, s. 12. The penalties are heavier, of course, if the Crown proceeds by indictment. These provisions were still in effect when the NCA was repealed in 1996.

3. Statutory Framework of the NCA

Parliament did not attach the penalty of imprisonment directly to marihuana offences. Rather, the NCA states at s. 3(1) that “[e]xcept as authorized by this Act or the regulations, no person shall have a narcotic in his possession”. Narcotics are defined in the schedules to the NCA. Marihuana is a scheduled drug. The trial judge found that while marihuana is a psychoactive drug, it is not (medically speaking) a narcotic. It is deemed to be a “narcotic” only for the parliamentary purposes of the NCA schedule.

Various attacks were made on this statutory vehicle in the companion Ontario appeal, *R. v. Clay*, [2003] 3 S.C.R. 735, 2003 SCC 75, including allegations of overbreadth, and are considered further in our reasons for rejecting that appeal, released concurrently.

C. *Evidence of Harm*

The evidentiary issue at the core of the appellants’ constitutional challenge is the “harm principle”, and the contention that possession of marihuana for personal use is a “victimless crime”. The appellants say that even with respect to the user himself or herself there is no cogent evidence of “significant” or “non-trivial” harm.

passible, sur déclaration de culpabilité par procédure sommaire, pour une première infraction, d’une amende maximale de 1 000 \$ et d’un emprisonnement maximal de six mois, ou de l’une de ces peines, et, en cas de récidive, d’une amende maximale de 2 000 \$ et d’un emprisonnement maximal d’un an, ou de l’une de ces peines : S.C. 1968-69, ch. 41, art. 12. Les peines étaient évidemment plus sévères lorsque le ministère public optait pour la mise en accusation. Ces dispositions s’appliquaient toujours au moment de l’abrogation de la Loi en 1996.

3. Le cadre législatif de la Loi

Le Parlement n’a pas directement prévu de peines d’emprisonnement pour les infractions liées à la marihuana. La Loi dispose plutôt, au par. 3(1), que « [s]auf exception prévue par la présente loi ou ses règlements, il est interdit d’avoir un stupéfiant en sa possession ». Les substances considérées comme des stupéfiants sont énumérées aux annexes de la Loi. La marihuana y figure. Le juge du procès a conclu que, bien que la marihuana soit une drogue psychoactive, elle n’est pas (sur le plan médical) un stupéfiant. Elle est réputée être un « stupéfiant » uniquement pour les besoins de l’objectif législatif qui sous-tend l’annexe de la Loi.

Dans le pourvoi connexe *R. c. Clay*, [2003] 3 R.C.S. 735, 2003 CSC 75, affaire émanant de l’Ontario, cette mesure législative a fait l’objet de diverses attaques lui reprochant notamment d’avoir une portée excessive. Ces attaques sont analysées de manière approfondie dans les motifs que nous exposons pour rejeter ce pourvoi et qui sont déposés en même temps que les présents motifs.

C. *La preuve du préjudice*

L’argument d’inconstitutionnalité soulevé par les appelants s’appuie principalement sur une question de preuve — le « principe du préjudice » — et sur leur prétention que la possession de marihuana pour consommation personnelle est un « crime sans victime ». Les appelants soutiennent que, même en ce qui concerne le consommateur lui-même, il n’existe aucune preuve convaincante de l’existence d’un préjudice « important » ou « non négligeable ».

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Malmo-Levine, a self-styled “chronic user”, does not deny the existence of harm. The name of his organization, after all, is the “Harm Reduction Club”. In his factum, he acknowledges that “Cannabis misuse can cause harm”. In oral argument he said that

my purpose here was to try to shift the debate from whether the harms are trivial, insignificant, to whether the harms are mitigatable and reducible.

and

vulnerable groups, the chronic users, the mentally ill, the pregnant mothers, and the immature youth, are the ones that need harm reduction the most.

1. Admissions by the Appellants

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The appellants Malmo-Levine, Caine and Clay filed with the Court a Joint Statement of Legislative Facts in which they make the following limited admissions:

(i) Dependency

The appellants state that “[t]here appears to be little or no risk of physical addiction arising from cannabis use; however, a small percentage of users do seemingly develop problems with psychological dependence. . . . Psychological dependence is reportedly experienced by only 2% of all cannabis users”.

(ii) Driving, flying, or operating complex machinery

The appellants acknowledge that “[c]annabis may be contributing to accidents”. Note, as well, that the following is printed on the Harm Reduction Club’s Membership Card (run by Mr. Malmo-Levine): “I, [name], promise not to operate any heavy machinery while impaired on any marijuana”.

M. Malmo-Levine, qui se définit lui-même comme un « consommateur chronique », ne nie pas l’existence d’un préjudice. Après tout, son organisation s’appelle « Harm Reduction Club ». Dans son mémoire, il reconnaît que [TRADUCTION] « le mésusage du cannabis peut être préjudiciable ». Au cours des plaidoiries, il a dit ceci :

[TRADUCTION] [M]on but ici était de faire en sorte qu’on cesse de se demander si les méfaits sont négligeables ou insignifiants, mais plutôt s’il est possible de les atténuer et de les réduire.

et

ce sont les groupes vulnérables, les consommateurs chroniques, les malades mentaux, les femmes enceintes et les jeunes en croissance, qui ont le plus besoin de mesures de réduction du préjudice.

1. Les aveux des appelants

Les appelants Malmo-Levine, Caine et Clay ont déposé devant notre Cour un exposé conjoint des faits législatifs dans lequel ils font les aveux suivants :

(i) Dépendance

Les appelants affirment que [TRADUCTION] « [l]’usage du cannabis paraît ne créer que peu ou pas de risques de dépendance physique; toutefois, un faible pourcentage de consommateurs éprouveraient des problèmes de dépendance psychologique. [. . .] Seulement 2 % de l’ensemble des consommateurs de cannabis souffriraient de dépendance psychologique ».

(ii) Conduite d’un véhicule à moteur, pilotage d’un avion ou utilisation d’appareils complexes

Les appelants reconnaissent que [TRADUCTION] « [l]e cannabis peut être un facteur contribuant à des accidents ». Signalons également la mention suivante figurant sur la carte de membre du Harm Reduction Club (organisation dirigée par M. Malmo-Levine) : « Le soussigné, [nom], s’engage à ne pas faire fonctionner de matériel lourd lorsqu’il est sous l’effet de la marijuana ».

(iii) Damage to lungs

The appellants acknowledge that “Dr. Tashkin has recently demonstrated that chronic cannabis smoking will lead to chronic bronchial inflammation”.

(iv) Schizophrenia and psychosis

The appellants state that “[c]annabis has not been shown to cause psychoses or schizophrenia, although there is some question as to whether or not cannabis can modify the course of a pre-existing psychosis.”

(v) Amotivational syndrome

The appellants state that “diminished motivation may be a symptom of chronic intoxication but one which dissipates upon cessation of use”.

(vi) Effect on fetus/newborns

The appellants state that “[w]hile some tests have shown some impairment of memory, verbal ability and verbal expression of ideas in school age children, the changes were measurably small. More importantly, however, these minimal testing differences have not been linked to poor school performance in later years.”

(vii) Reproductive system

The appellants state that “[t]here may . . . be a brief or acute decrease of sex hormone level in the brain, but this level soon returns to normal even without the complete cessation of cannabis smoking”.

There is no doubt that Canadian society has become much more sceptical about the alleged harm caused by the use of marihuana since the days when Emily Murphy, an Edmonton magistrate, warned that persons under the influence of marihuana “los[e] all sense of moral responsibility. . . . are immune to pain . . . becom[ing] raving maniacs . . . liable to kill . . . using the most savage methods of cruelty” (*The Black Candle* (1922), at

(iii) Dommages pulmonaires

Les appelants reconnaissent que [TRADUCTION] « le Dr Tashkin a récemment démontré que le fait de fumer du cannabis de façon chronique entraîne une inflammation chronique des bronches ».

(iv) Schizophrénie et psychose

Les appelants soutiennent qu’[TRADUCTION] « [i]l n’a pas été prouvé que le cannabis cause des psychoses ou la schizophrénie, bien qu’on se demande s’il ne peut pas modifier l’évolution d’une psychose préexistante. »

(v) Syndrome amotivationnel

Les appelants affirment qu’[TRADUCTION] « une baisse de la motivation peut être un symptôme d’une intoxication chronique, mais ce symptôme disparaît lorsque la consommation cesse ».

(vi) Effet sur les fœtus ou les nouveau-nés

Selon les appelants : [TRADUCTION] « Bien que certains tests aient révélé une certaine altération de la mémoire, de la parole et de l’expression verbale des idées chez des enfants d’âge scolaire, les changements étaient relativement mineurs. Fait plus important toutefois soulignons qu’aucun lien n’a été établi entre ces écarts minimes observés lors des tests et un mauvais rendement scolaire au cours des années qui ont suivi. »

(vii) Appareil reproducteur

Les appelants avancent qu’[TRADUCTION] « [i]l peut y avoir une chute brève ou aiguë d’hormones sexuelles dans le cerveau, mais ce taux revient vite à la normale, même si la personne ne cesse pas complètement de fumer du cannabis ».

Il est certain que la société canadienne est devenue beaucoup plus sceptique à l’égard des méfaits de la marihuana qu’elle ne l’était à l’époque où Emily Murphy, magistrate d’Edmonton, affirmait qu’un individu se trouvant sous l’effet de la marihuana [TRADUCTION] « perdait tout sens de la responsabilité morale [. . .] était insensible à la souffrance [. . .] devenait un fou furieux [. . .] capable de tuer [. . .] en faisant preuve de la plus grande

pp. 332-33). However, to exonerate marihuana from such extreme forms of denunciation is not to say it is harmless.

2. The Le Dain Commission Report

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The Le Dain Commission, established in 1969 and reporting in 1972, recommended decriminalization of marihuana but nevertheless identified various concerns regarding its use, including the following four identified by the majority of commissioners as the major areas of social concern (at p. 268):

1. “the effect of cannabis on adolescent maturation;”
2. “the implications of cannabis use for the safe operation of motor vehicles and other machinery;”
3. “the possibility that the long-term heavy use of cannabis will result in a significant amount of mental deterioration and disorder;” and
4. “the role played by cannabis in the development and spread of multi-drug use.”

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Research and further studies in the intervening 30 years have caused reconsideration of some of these findings.

3. The Trial Judge’s Findings in *Caine*

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Howard Prov. Ct. J., in response to some of the more strident warnings of the harm allegedly caused by marihuana use, reviewed the extensive evidence before her court to put in perspective the potential harms associated with the use of marihuana, as presently understood, as follows (at para. 40):

1. the occasional to moderate use of marihuana by a healthy adult is not ordinarily harmful to health, even if used over a long period of time;
2. there is no conclusive evidence demonstrating any irreversible organic or mental damage to the user,

cruauté » (*The Black Candle* (1922), p. 332-333). Toutefois, reconnaître le caractère excessif de tels propos n’équivaut pas à dire que la marihuana est inoffensive.

2. Le Rapport de la Commission Le Dain

Créée en 1969, la Commission Le Dain a déposé son rapport en 1972. Elle a recommandé la décriminalisation de la marihuana, exprimant cependant diverses inquiétudes relativement à la consommation de cette substance. La majorité des commissaires a fait état de quatre domaines importants de préoccupation sociale (à la p. 270) :

1. « les effets du cannabis sur le développement des adolescents; »
2. « ses répercussions sur la conduite des véhicules et des machines; »
3. « la possibilité de détériorations et d’affections mentales engendrées par le cannabisme; »
4. « l’effet d’entraînement qui peut occasionner des polytoxicomanies. »

Au cours des 30 années qui se sont écoulées depuis, d’autres recherches et études ont remis en question certaines de ces conclusions.

3. Les conclusions de la juge du procès dans *Caine*

Relativement à certaines des mises en garde les plus virulentes contre le préjudice que causerait l’usage de la marihuana, la juge Howard de la Cour provinciale a étudié l’abondante preuve dont elle disposait afin de mettre en perspective les méfaits potentiels associés à la consommation de marihuana, eu égard aux données actuelles, et elle a tiré les conclusions suivantes (au par. 40) :

[TRADUCTION]

1. la consommation occasionnelle ou modérée de marihuana par un adulte bien portant n’a généralement pas d’effets néfastes pour sa santé, même si elle se poursuit pendant une longue période;
2. il n’y a aucune preuve concluante de dommages physiques ou mentaux irréversibles pour les usagers,

- except in relation to the lungs and then only to those of a chronic, heavy user such as a person who smokes at least 1 and probably 3-5 marihuana joints per day;
3. there is no evidence demonstrating irreversible, organic or mental damage from the use of marihuana by an ordinary healthy adult who uses occasionally or moderately;
 4. marihuana use does cause alteration of mental function and as such should not be used in conjunction with driving, flying or operating complex machinery;
 5. there is no evidence that marihuana use induces psychosis in ordinary healthy adults who use [marihuana] occasionally or moderately and, in relation to the heavy user, the evidence of marihuana psychosis appears to arise only in those having a predisposition towards such a mental illness;
 6. marihuana is not addictive;
 7. there is a concern over potential dependence in heavy users, but marihuana is not a highly reinforcing type of drug, like heroin or cocaine and consequently physical dependence is not a major problem; psychological dependence may be a problem for the chronic user;
 8. there is no causal relationship between marihuana use and criminality;
 9. there is no evidence that marihuana is a gateway drug and the vast majority of marihuana users do not go on to try hard drugs
 10. marihuana does not make people aggressive or violent, but on the contrary it tends to make them passive and quiet;
 11. there have been no deaths from the use of marihuana;
 12. there is no evidence of an amotivational syndrome, although chronic use of marihuana could decrease motivation, especially if such a user smokes so often as to be in a state of chronic intoxication;
 13. assuming current rates of consumption remain stable, the health related costs of marihuana use
- sauf pour ce qui est des poumons. On signale de tels dommages uniquement chez les usagers chroniques qui consomment de grandes quantités de marihuana, à savoir les personnes fumant au moins 1, et probablement 3 à 5 joints quotidiennement;
3. il n'y a aucune preuve que la consommation occasionnelle ou modérée de marihuana par un adulte en santé lui cause des dommages physiques ou mentaux irréversibles;
 4. la consommation de marihuana agit sur les fonctions mentales et, pour cette raison, une personne ne devrait pas en consommer lorsqu'elle conduit un véhicule à moteur, pilote un avion ou fait fonctionner un appareil complexe;
 5. il n'y a aucune preuve démontrant que la marihuana déclenche des psychoses chez les adultes en bonne santé qui n'en consomment qu'occasionnellement ou modérément; pour ce qui est des grands consommateurs, la preuve révèle que la psychose induite par la consommation de cannabis ne se manifeste que lorsque l'utilisateur présente une prédisposition à une telle maladie mentale;
 6. la marihuana ne crée pas de dépendance;
 7. l'effet potentiellement toxicomanogène de la marihuana chez les grands consommateurs est un sujet de préoccupation, mais comme elle n'est pas une drogue à effet très renforçateur comme l'héroïne ou la cocaïne, la dépendance physique n'est pas un problème important; la dépendance psychique peut être un problème dans le cas des consommateurs chroniques;
 8. il n'y a pas de lien de causalité entre la consommation de marihuana et la criminalité;
 9. il n'y a aucune preuve que la marihuana soit une drogue d'introduction et la grande majorité des consommateurs de marihuana n'essaient pas des drogues dures
 10. la marihuana ne rend pas les gens agressifs ou violents; bien au contraire, elle a tendance à les rendre passifs et calmes;
 11. il n'y a eu aucun décès attribuable à la consommation de marihuana;
 12. il n'y a aucune preuve de l'existence d'un syndrome amotivationnel, bien que la consommation chronique de marihuana puisse réduire la motivation, notamment si l'utilisateur en fume si souvent qu'il se trouve dans un état d'intoxication chronique;
 13. si l'on présume que les niveaux actuels de consommation restent stables, les coûts des soins de santé

are very, very small in comparison with those costs associated with tobacco and alcohol consumption.

liés à l'usage de la marihuana sont très très faibles si on les compare à ceux liés à la consommation du tabac et de l'alcool.

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Having concluded that the use of marihuana is not as harmful as is sometimes claimed, the trial judge went on to state in *Caine* that marihuana is not “a completely harmless drug for all individual users” (para. 42). She stated at paras. 121-22:

The evidence before me demonstrates that there is a reasonable basis for believing that the following health risks exist with [marihuana use].

There is a general risk of harm to the users of marihuana from the acute effects of the drug, but these adverse effects are rare and transient. Persons experiencing the acute effects of the drug will be less adept at driving, flying and other activities involving complex machinery. In this regard they represent a risk of harm to others in society. At current rates of use, accidents caused by users under the influence of marihuana cannot be said to be significant.

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Key to Howard Prov. Ct. J.'s findings was the identification of perhaps 50,000 chronic users, who cannot be identified in advance, but who pose both a risk to themselves and a potential cost to society at paras. 123-26:

There is also a risk that any individual who chooses to become a casual user, may end up being a chronic user of marihuana, or a member of one of the vulnerable persons identified in the materials. It is not possible to identify these persons in advance.

As to the chronic users of marihuana, there are health risks for such persons. The health problems are serious ones but they arise primarily from the act of smoking rather than from the active ingredients in marihuana. Approximately 5% of all marihuana users are chronic users. At current rates of use, this comes to approximately 50,000 persons. There is a risk that, upon legalization, rates of use will increase, and with that the absolute number of chronic users will increase.

Dans l'affaire *Caine*, après avoir conclu que la consommation de la marihuana n'est pas aussi nocive qu'on le prétend parfois, la juge du procès a ajouté que la marihuana n'est pas [TRADUCTION] « une drogue complètement inoffensive pour tous les usagers » (par. 42). Elle a affirmé ceci (aux par. 121-122) :

[TRADUCTION] La preuve qui m'a été soumise démontre l'existence de motifs raisonnables de croire que [la consommation de marihuana] comporte les risques suivants pour la santé.

Les effets aigus de la marihuana présentent un risque général pour les consommateurs de cette drogue, mais ces effets néfastes sont rares et passagers. Les personnes qui subissent ces effets aigus sont moins aptes à conduire un véhicule à moteur, à piloter un avion ou à exercer d'autres activités exigeant de faire fonctionner des appareils complexes. Ces personnes créent, de ce point de vue, un risque de préjudice pour les autres membres de la société. Eu égard aux niveaux actuels de consommation, on ne saurait affirmer que le nombre d'accidents causés par des personnes sous l'effet de la marihuana est important.

Un aspect fondamental des conclusions de la juge Howard est l'existence de quelque 50 000 usagers chroniques qu'il n'est pas possible d'identifier à l'avance, mais qui constituent un risque pour eux-mêmes et sont susceptibles d'engendrer des coûts pour la société (aux par. 123-126) :

[TRADUCTION] Il se peut également que la personne qui consomme occasionnellement de la marihuana devienne éventuellement un consommateur chronique ou fasse partie des personnes vulnérables mentionnées dans la documentation. Il est impossible d'identifier d'avance ces personnes.

Pour ce qui est des consommateurs chroniques de marihuana, ils courent des risques pour leur santé. Ces problèmes sont graves, mais ils découlent principalement du fait que la drogue est fumée, plutôt que des ingrédients actifs de celle-ci. Environ 5 % de tous les consommateurs de marihuana sont des consommateurs chroniques. Suivant les niveaux actuels de consommation, cela représente environ 50 000 personnes. La légalisation risque d'entraîner une augmentation des niveaux de consommation et, corollairement, du nombre absolu de consommateurs chroniques.

In addition, there are health risks for those vulnerable persons identified in the materials. There is no information before me to suggest how many people might fall into this group. Given that it includes young adolescents who may be more prone to becoming chronic users, I would not estimate this group to be min[u]scule.

All of the risks noted above carry with them a cost to society, both to the health care and welfare systems. At current rates of use, these costs are negligible compared to the costs associated with alcohol and drugs [*sic*]. There is a risk that, with legalization, user rates will increase and so will these costs. [Emphasis added.]

Over 20 years after the Le Dain Commission's Report, the Hall Report was released in Australia. The trial judge noted in *Caine* that "[t]here was general agreement among the witnesses who appeared before me (save perhaps for Dr. Morgan) that the conclusions contained in the Hall Report were sound . . . based on the scientific information available at this time" (par. 48). The 1994 Hall Report found the following to be "chronic effects":

[T]he major *probable* adverse effects [from chronic use] appear to be:

- respiratory diseases associated with smoking as the method of administration, such as chronic bronchitis, and the occurrence of histopathological changes that may be precursors to the development of malignancy;
- development of a cannabis dependence syndrome, characterized by an inability to abstain from or to control cannabis use;
- subtle forms of cognitive impairment, most particularly of attention and memory, which persist while the user remains chronically intoxicated, and may or may not be reversible after prolonged abstinence from cannabis.

[T]he major *possible* adverse effects [from chronic use that is, effects] which remain to be confirmed by further research [are]:

De plus, il existe également des risques pour la santé des personnes vulnérables mentionnées dans la documentation. On ne m'a fourni aucune information indiquant combien de personnes sont susceptibles d'entrer dans cette catégorie. Étant donné qu'il s'agit notamment de jeunes adolescents, personnes peut-être plus disposées à devenir des consommateurs chroniques, je ne crois pas qu'il s'agisse d'un groupe minuscule.

Tous les risques susmentionnés entraînent des coûts pour la société, tant pour le système de soins de santé que pour le régime d'aide sociale. Compte tenu des niveaux actuels de consommation, ces coûts sont négligeables si on les compare à ceux liés à l'alcool et aux drogues (*sic*). La légalisation risque d'entraîner une augmentation du nombre d'utilisateurs et, en conséquence, de ces coûts. [Nous soulignons.]

Plus de 20 ans après le dépôt du rapport de la Commission Le Dain, le rapport Hall a été déposé en Australie. Dans l'affaire *Caine*, la juge du procès a signalé que [TRADUCTION] « [L]es témoins qui ont comparu devant moi (à l'exception peut-être du D^r Morgan) s'accordaient pour dire que les conclusions du rapport Hall étaient valables [. . .], compte tenu des données scientifiques disponibles à l'époque » (par. 48). Les auteurs du rapport Hall, publié en 1994, ont considéré les effets suivants comme des « effets chroniques » :

[TRADUCTION] [L]es principaux effets néfastes *probables* [de la consommation chronique] semblent être les suivants :

- troubles respiratoires liés au fait que la substance est fumée, par exemple bronchite chronique et apparition de changements histopathologiques qui peuvent être des signes précurseurs du développement de tumeurs malignes;
- développement du syndrome de dépendance au cannabis, qui se caractérise par l'incapacité de s'abstenir d'en consommer ou de limiter sa consommation;
- formes subtiles d'affaiblissement des facultés cognitives, plus particulièrement manque d'attention et pertes de mémoire, qui persistent quand le consommateur reste intoxiqué de manière chronique et qui peuvent être réversibles ou non après une abstinence prolongée.

[L]es principaux effets néfastes *possibles* [de la consommation chronique c'est-à-dire les effets] qui restent à être confirmés par des recherches additionnelles [sont les suivants] :

- an increased risk of developing cancers of the aerodigestive tract, i.e. oral cavity, pharynx, and oesophagus;
- an increased risk of leukemia among offspring exposed while in utero;
- a decline in occupational performance marked by underachievement in adults in occupations requiring high level cognitive skills, and impaired educational attainment in adolescents;
- birth defects occurring among children of women who used cannabis during their pregnancies.

(W. Hall, N. Solowij and J. Lemon, *National Drug Strategy: The health and psychological consequences of cannabis use* (1994) (the “Hall Report”), at p. ix (emphasis in original))

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In 2001, a revised version of the Hall Report was released. Its conclusions are similar to the 1994 Report except that the cognitive impairment probability was demoted to a possibility, the cancer risk (from smoking marihuana) was promoted from a possibility to a probability and the risks of leukemia and birth defects were no longer listed.

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The trial judge noted that the 1994 Hall Report identified three traditional “high risk groups” (at para. 46):

- (1) Adolescents with a history of poor school performance . . .
- (2) Women of childbearing age . . .; and
- (3) Persons with pre-existing diseases such as cardiovascular diseases, respiratory diseases, schizophrenia or other drug dependencies . . .

The inclusion of “women of childbearing age” may have to be reconsidered in light of more recent studies casting doubt on marihuana as a potential source of birth defects. However, given the immense importance of potential birth defects for all concerned, and the widely recognized need for further

- risque accru de cancers des voies aérodigestives, c’est-à-dire la cavité buccale, le pharynx et l’œsophage;
- risque accru de leucémie pour les enfants qui ont été exposés à la drogue pendant qu’ils étaient encore dans l’utérus de leur mère;
- baisse du rendement professionnel marquée par une improductivité chez les adultes dont les activités requièrent l’application d’habiletés intellectuelles poussées et par des résultats scolaires médiocres chez les adolescents;
- anomalies congénitales chez les enfants dont la mère a consommé du cannabis pendant la grossesse.

(W. Hall, N. Solowij et J. Lemon, *National Drug Strategy : The health and psychological consequences of cannabis use* (1994) (le « rapport Hall »), p. ix (en italique dans l’original))

Une version révisée du rapport Hall a été publiée en 2001. Les conclusions de cette version sont similaires à celles de 1994, si ce n’est que la probabilité d’affaiblissement des facultés cognitives est devenue une simple possibilité, le risque de cancer (associé à l’inhalation de marihuana) a été élevé au rang des probabilités et les risques de leucémie et d’anomalies congénitales ne sont plus signalés.

La juge du procès a souligné que le rapport Hall de 1994 faisait état de trois groupes traditionnels « à risque élevé » (au par. 46) :

[TRADUCTION]

- (1) Les adolescents aux résultats scolaires médiocres [. . .];
- (2) Les femmes en âge de procréer [. . .];
- (3) Les personnes qui souffrent d’affections préexistantes comme des maladies cardiovasculaires, des troubles respiratoires, la schizophrénie ou d’autres toxicomanies . . .

Le bien-fondé de l’inclusion des « femmes en âge de procréer » pourrait devoir être réexaminé à la lumière d’études plus récentes selon lesquelles la marihuana pourrait ne pas causer d’anomalies congénitales. Toutefois, vu l’importance considérable de ce risque pour tous les intéressés et la

research, we have to accept that on this point as on many others “the jury is still out”.

The trial judge noted, at para. 46, that the findings of the 1994 Hall Report were similar (except for the leukemia and birth defects concerns) to a report entitled *Cannabis: a health perspective and research agenda* (1997), published a few years later by the World Health Organization, Division of Mental Health and Prevention of Substance Abuse, which contained the following statement about the “acute health effects”, i.e., the effects experienced by users during and for a period following the use of marihuana (at p. 30):

Acute health effects of cannabis use

The acute effects of cannabis use have been recognized for many years, and recent studies have confirmed and extended earlier findings. These may be summarized as follows:

- cannabis impairs cognitive development (capabilities of learning), including associative processes; free recall of previously learned items is often impaired when cannabis is used both during learning and recall periods;
- cannabis impairs psychomotor performance in a wide variety of tasks, such as motor coordination, divided attention, and operative tasks of many types; human performance on complex machinery can be impaired for as long as 24 hours after smoking as little as 20mg of THC in cannabis; there is an increased risk of motor vehicle accidents among persons who drive when intoxicated by cannabis.

The chronic and therapeutic effects of marihuana use were also listed by the World Health Organization and are set out in the Appendix.

nécessité généralement reconnue de poursuivre les recherches, nous devons accepter que, sur ce point, comme sur bien d’autres, « on ne peut pas encore se prononcer ».

La juge du procès a signalé, au par. 46, que les conclusions du rapport Hall de 1994 étaient similaires (sauf pour les inquiétudes touchant la leucémie et les anomalies congénitales) à celles d’un rapport publié quelques années plus tard par la Division de la santé mentale et de la prévention des toxicomanies de l’Organisation mondiale de la santé (*Cannabis : a health perspective and research agenda* (1997)), dont l’extrait suivant porte sur les [TRADUCTION] « effets aigus [...] sur la santé », c’est-à-dire les effets ressentis par l’usager pendant la consommation de la marihuana et durant une certaine période par la suite (à la p. 30) :

[TRADUCTION]

Effets aigus de la consommation du cannabis sur la santé

Les effets aigus de la consommation du cannabis sont reconnus depuis de nombreuses années et des études récentes sont venues confirmer et compléter les constatations antérieures. Ces effets peuvent être résumés ainsi :

- le cannabis nuit au développement cognitif (capacités d’apprentissage), y compris les processus associatifs; le rappel libre, au cours duquel des éléments mémorisés doivent être évoqués, est souvent perturbé lorsqu’il y a consommation de cannabis pendant les périodes d’apprentissage et de rappel;
- le cannabis nuit à la performance psychomotrice dans une grande variété de tâches, comme la coordination motrice, l’attention partagée et différentes tâches d’exécution; la performance humaine nécessaire au fonctionnement de machines complexes peut être altérée pendant une période pouvant aller jusqu’à 24 heures après que l’intéressé a fumé du cannabis contenant aussi peu que 20 mg de THC; les personnes qui conduisent sous l’effet du cannabis courent un plus grand risque d’accidents de la route.

L’Organisation mondiale de la santé a également dressé la liste des effets chroniques et thérapeutiques de la consommation de marihuana, liste qui est reproduite à l’annexe des présents motifs.

4. Parliamentary Reports

54 Our attention was drawn by the parties to a number of parliamentary reports issued since the decision of the courts below, of which we may and do take judicial notice.

55 In September 2002, the Senate Special Committee on Illegal Drugs concluded that “the state of knowledge supports the belief that, for the vast majority of recreational users, cannabis use presents no harmful consequences for physical, psychological or social well-being in either the short or the long term” (vol. I, at p. 165).

56 At the same time, the Senate Committee acknowledged potential harm to a minority of users, including the vulnerable groups identified by the Hall Report and reported by the trial judge (vol. I, at pp. 166-67):

The Committee feels that, because of its potential effects on the endogenous cannabinoid system and cognitive and psychosocial functions, any use in those under age 16 is at-risk use;

Our estimation would suggest that approximately 50,000 youths fall in this category.

. . . .

Heavy use of smoked cannabis can have certain negative consequences for physical health, in particular for the respiratory system (chronic bronchitis, cancer of the upper respiratory tract).

Heavy use of cannabis can result in negative psychological consequences for users, in particular impaired concentration and learning and, in rare cases and with people already predisposed, psychotic and schizophrenic episodes.

Heavy use of cannabis can result in consequences for a user’s social well-being, in particular their occupational and social situation and their ability to perform tasks.

Heavy use of cannabis can result in dependence requiring treatment; however, dependence caused by cannabis is

4. Les rapports parlementaires

Les parties ont porté à notre attention un certain nombre de rapports qui ont été présentés au Parlement depuis le prononcé des décisions attaquées et dont nous pouvons et devons prendre connaissance d’office.

En septembre 2002, le Comité spécial du Sénat sur les drogues illicites a conclu que « l’état des connaissances permet de penser que, pour la vaste majorité des usagers récréatifs, la consommation de cannabis ne présente pas des conséquences néfastes sur leur santé physique, psychologique ou sociale à court ou à long terme » (vol. I, p. 176).

Le Comité sénatorial a en même temps reconnu que la consommation de cette substance pouvait être dommageable pour une minorité d’usagers, notamment les personnes vulnérables mentionnées dans le rapport Hall et par la juge du procès (vol. I, p. 177-178) :

Le Comité est d’avis qu’en raison de ses effets potentiels sur le système cannabinoïde endogène et les fonctions cognitives et psychosociales, toute consommation chez les jeunes de moins de 16 ans est une consommation à risque.

Sur la base de nos estimations, ce seraient environ 50 000 jeunes.

. . . .

L’usage excessif de cannabis fumé peut avoir certaines conséquences négatives sur la santé physique, notamment sur le système respiratoire (bronchites chroniques, cancer des voies respiratoires supérieures).

L’usage excessif de cannabis peut entraîner des conséquences psychologiques négatives sur les usagers, notamment des difficultés de concentration et d’apprentissage, ou, dans des cas rares et chez des personnes déjà prédisposées, déclencher des épisodes psychotiques ou schizophréniques.

L’usage excessif de cannabis peut entraîner des conséquences sur la santé sociale des usagers, notamment leur insertion professionnelle et sociale et leur capacité à accomplir des tâches.

L’usage excessif de cannabis peut entraîner une dépendance qui demandera un traitement; toutefois, la

less severe and less frequent tha[n] dependence on other psychotropic substances, including alcohol and tobacco.

Echoing many other studies and reports, the Senate Committee underlined the need for further research, e.g., with respect to the potential impact of marihuana use on some psychiatric disorders (vol. I, at p. 151):

As it is, most scientific reports come to the same conclusion: more research is needed, with more rigorous protocols, allowing in particular for comparison with other populations and other substances.

In December 2002, the House of Commons Special Committee on Non-Medical Use of Drugs reported on the therapeutic benefits and potential adverse effects to some users of marihuana, and recommended that possession of marihuana be dealt with by a scheme of “ticketing, except where the offence is committed in the presence of specified aggravating circumstances”, such as impaired driving (*Policy for the New Millennium: Working Together to Redefine Canada’s Drug Strategy* (2002), at p. 130).

On May 27, 2003, the Minister of Justice introduced Bill C-38 which would eliminate the potential of imprisonment following a conviction for possession of no more than 15 grams of marihuana.

The Senate and House of Commons Committee Reports are consistent with the conclusions reached by the courts in British Columbia that, while marihuana is not a “harmless” drug, nevertheless the degree and extent of harm associated with its use is subject to continuing controversy, as is the wisdom of the present legislative scheme.

We have been shown no reason to interfere with these findings of fact. It seems clear that the use of marihuana has less serious and permanent effects than was once claimed, but its psychoactive and

dépendance induite par le cannabis est moins sévère et moins fréquente que la dépendance à d’autres substances psychoactives y compris l’alcool et le tabac.

Faisant écho à bon nombre d’autres rapports et études, le Comité sénatorial a mis en relief la nécessité de poursuivre les recherches, notamment en ce qui concerne les répercussions potentielles de la consommation de marihuana sur certains troubles psychiatriques (vol. I, p. 161) :

En l’état, la plupart des rapports scientifiques s’entendent pour conclure qu’il convient de mener davantage de recherche, avec des protocoles plus rigoureux, permettant notamment la comparaison avec d’autres populations et d’autres substances.

En décembre 2002, le Comité spécial de la Chambre des communes sur la consommation non médicale de drogues ou médicaments a déposé un rapport sur les avantages thérapeutiques et les possibles effets néfastes de la marihuana sur certains consommateurs de cette substance et a recommandé que la possession de marihuana donne lieu « à la délivrance d’une contravention sauf en cas de circonstances aggravantes », comme la conduite avec les facultés affaiblies (*Politique pour le nouveau millénaire : Redéfinir ensemble la stratégie canadienne antidrogue* (2002), p. 144).

Le 27 mai 2003, le ministre de la Justice a présenté le projet de loi C-38, qui prévoit la suppression de l’emprisonnement comme peine susceptible d’être infligée aux personnes reconnues coupables d’avoir eu en leur possession 15 grammes ou moins de marihuana.

Les rapports des comités du Sénat et de la Chambre des communes vont dans le sens des conclusions des tribunaux de la Colombie-Britannique selon lesquelles, bien que la marihuana ne soit pas une drogue « inoffensive », le degré et l’étendue du préjudice associé à sa consommation demeurent une question controversée, tout comme le bien-fondé du cadre législatif actuel.

Nous ne voyons aucune raison de remettre en question ces conclusions de fait. Il paraît clair que la consommation de marihuana a moins d’effets graves et permanents qu’on ne l’a déjà prétendu,

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health effects can be harmful, and in the case of members of vulnerable groups the harm may be serious and substantial.

62 We turn, now, to the legal arguments raised by the parties.

D. *Division of Powers*

63 The appellant Caine contends that Parliament has no power to criminalize the possession of marihuana for personal use under either the residuary power of peace, order and good government (“POGG”) or the criminal law power.

1. The Purpose of the NCA

64 The appellant Caine further argues that the Crown is resorting impermissibly to a “shifting purpose” in its effort to salvage the marihuana prohibition. He contends that the legislative origins of the prohibition on cannabis had nothing to do with legitimate claims that cannabis was injurious to public health but was based on racism against oriental drug users and irrational, unproven and unfounded fears. In light of changed thinking and greater knowledge, the alleged legislative facts underlying this original purpose have been refuted. The prohibition has thus ceased to be *intra vires*. As pointed out in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 335:

Purpose is a function of the intent of those who drafted and enacted the legislation at the time, and not of any shifting variable.

65 We need not review the law on this point because the argument was rejected on the facts by Braidwood J.A., who reviewed the legislative history in detail and concluded that the prohibition on simple possession of marihuana always “had more than one rationale. It was always meant to prevent the harm to society caused by drug addiction, such as the petty thefts that occur to raise funds to buy drugs” (para. 96). The post-1954 laws further

mais ses effets psychoactifs et ses effets sur la santé peuvent être néfastes et, dans le cas des personnes vulnérables, le préjudice peut être grave et important.

Nous allons maintenant examiner les arguments juridiques des parties.

D. *Le partage des compétences*

L’appelant Caine soutient que le Parlement n’a pas compétence pour criminaliser la possession de marihuana aux fins de consommation personnelle, que ce soit en vertu de son pouvoir résiduel de faire des lois pour « la paix, l’ordre et le bon gouvernement » ou celui de légiférer en matière de droit criminel.

1. L’objet de la Loi

L’appelant Caine prétend en outre que le ministère public invoque à tort un « objet changeant » dans l’espoir de maintenir la validité de l’interdiction visant la marihuana. Il prétend que, à l’origine, la prohibition du cannabis ne reposait sur aucune allégation légitime que le cannabis serait préjudiciable à la santé publique, mais plutôt sur une attitude raciste à l’endroit des consommateurs orientaux, ainsi que sur des craintes irrationnelles, non démontrées et injustifiées. À la lumière de l’évolution des mentalités et des connaissances, les faits législatifs à la base de l’objectif initial auraient été réfutés. L’interdiction aurait donc cessé d’être *intra vires*. Comme l’a souligné notre Cour dans l’arrêt *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295, p. 335 :

L’objet d’une loi est fonction de l’intention de ceux qui l’ont rédigée et adoptée à l’époque, et non pas d’un facteur variable quelconque.

Il n’est pas nécessaire que nous examinions le droit applicable en la matière, puisque cet argument a, au regard des faits, été rejeté par le juge Braidwood de la Cour d’appel, qui a procédé à une analyse détaillée de l’historique de la Loi et conclu que l’interdiction visant la simple possession de marihuana avait toujours eu [TRADUCTION] « plus d’un fondement. Elle a toujours visé à empêcher que la dépendance aux drogues ne cause préjudice

evolved this general purpose with a larger plan to treat and “cure” drug addicts to eliminate the “market” for drug traffickers in Canada. We accept this analysis. Thus, although there was no explanation given during the parliamentary debates as to why cannabis (marihuana) was added to the NCA in 1923, the evidence supports the conclusion of Braidwood J.A. that a major purpose of the prohibition has been, since its enactment and continued thereafter, to be to protect health and public safety. This purpose did not change when the treatment provisions were added to the NCA in 1961. The purpose and character of the legislation remained the same, but new means were added to advance the original objectives of health and public safety. In these circumstances, it cannot be said that the Crown’s argument is flawed by reliance on an impermissibly “shifting” purpose.

2. Legislative Jurisdiction with Respect to Narcotics

We turn next to the issue as to whether the NCA falls under Parliament’s residuary jurisdiction for POGG, or whether it is an exercise of the criminal law power under s. 91(27) of the *Constitution Act, 1867*, or whether, as the appellants contend, it falls within neither head of federal jurisdiction and is *ultra vires*.

(a) *Peace, Order and Good Government*

Almost 25 years ago, a majority of this Court upheld the constitutional validity of the NCA under Parliament’s residual authority to legislate for POGG: *R. v. Hauser*, [1979] 1 S.C.R. 984. Pigeon J., for the majority, took the view that the NCA “is essentially legislation adopted to deal with a genuinely new problem which did not exist at the time of

à la société, qu’on pense par exemple aux larcins commis dans le but de se procurer l’argent nécessaire pour acheter des drogues » (par. 96). Les dispositions législatives postérieures à 1954 ont poursuivi cet objectif général en faisant une place plus grande au traitement et à la « guérison » des toxicomanes, en vue d’éliminer le « marché » que servent les trafiquants de drogues au Canada. Nous acceptons cette analyse. En conséquence, bien qu’aucune explication n’ait été donnée pendant les débats à la Chambre des communes pour justifier l’ajout du cannabis (marihuana) à la liste des substances interdites par la Loi en 1923, la preuve appuie la conclusion du juge Braidwood selon laquelle l’un des objectifs principaux de l’interdiction — depuis son adoption et par la suite — est la protection de la sécurité publique et de la santé. Cet objectif est demeuré lors de l’ajout à la Loi, en 1961, des dispositions concernant les traitements. L’objet et le caractère de la Loi sont restés les mêmes, mais de nouveaux moyens s’y sont greffés pour réaliser l’objectif initial de protection de la sécurité publique et de la santé. Vu ces circonstances, il est impossible d’affirmer que l’argument du ministère public est défectueux du fait qu’il s’appuierait à tort sur le critère de l’objet « changeant ».

2. Le pouvoir de légiférer sur les stupéfiants

Nous allons maintenant examiner la question de savoir si la Loi résulte de l’exercice par le Parlement soit de son pouvoir résiduel de faire des lois pour la paix, l’ordre et le bon gouvernement, soit du pouvoir que lui reconnaît le par. 91(27) de la *Loi constitutionnelle de 1867* de légiférer en matière de droit criminel, ou si, comme le prétendent les appelants, elle ne relève d’aucun de ces chefs de compétence fédérale et est en conséquence *ultra vires*.

a) *Paix, ordre et bon gouvernement*

Il y a de cela presque 25 ans, dans une décision rendue à la majorité, notre Cour a confirmé la constitutionnalité de la Loi sur le fondement du pouvoir résiduel du Parlement de faire des lois pour la paix, l’ordre et le bon gouvernement du Canada : *R. c. Hauser*, [1979] 1 R.C.S. 984. S’exprimant pour la majorité, le juge Pigeon a dit que la Loi visait

Confederation and clearly cannot be put in the class of ‘Matters of a merely local or private nature’” (p. 1000). Accordingly, Pigeon J. reasoned, the subject matter of the NCA is similar to other new developments such as aviation and radio communication. Dickson J., as he then was, dissented on this point, finding that the NCA should be considered as a matter of federal criminal power, relying on the Court’s earlier decision in *Industrial Acceptance Corp. v. The Queen*, [1953] 2 S.C.R. 273, which had upheld the *Opium and Narcotic Drug Act, 1929*, under the federal criminal power.

« essentiellement un problème récent qui n’existait pas à l’époque de la Confédération et n’entr[ait] manifestement pas dans la catégorie des “Matières d’une nature purement locale ou privée” » (p. 1000). Il a donc considéré que l’objet de la Loi s’apparentait à d’autres innovations telles l’aviation et la radio-communication. Le juge Dickson (plus tard Juge en chef) a exprimé sa dissidence sur ce point, estimant que la Loi devait être considérée comme relevant du pouvoir du fédéral de légiférer en matière de droit criminel. Au soutien de cette conclusion, il a invoqué l’arrêt *Industrial Acceptance Corp. c. The Queen*, [1953] 2 R.C.S. 273, dans lequel notre Cour avait confirmé la constitutionnalité de la *Loi de l’opium et des drogues narcotiques, 1929*, en tant qu’exercice valide de ce chef de compétence fédérale.

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The dissenting judgment of Dickson J. in *Hauser* focussed in part on whether the federal Crown had the authority to prosecute crimes (see, e.g., at p. 1011). Some commentators have speculated that the Court strained to locate the law within the POGG power because the Court was deeply divided on this issue: see, e.g., P. W. Hogg, *Constitutional Law of Canada* (2002 student ed.), at p. 438. To the extent that such considerations were a factor in the thinking of the majority, the authority of the federal Attorney General to prosecute offences created under the criminal law power has since been affirmed in *Attorney General of Canada v. Canadian National Transportation, Ltd.*, [1983] 2 S.C.R. 206 (federal power to prosecute crimes under the *Combines Investigation Act*, R.S.C. 1970, c. C-23, ss. 15(2) and 32(1)(c)), and *R. v. Wetmore*, [1983] 2 S.C.R. 284 (federal power to prosecute under the *Food and Drugs Act*, R.S.C. 1970, c. F-27, ss. 8, 9 and 26). See also *R. v. S. (S.)*, [1990] 2 S.C.R. 254, at p. 283 (Parliament has jurisdiction to delegate powers to provincial officials to prosecute offences under the *Young Offenders Act*, S.C. 1980-81-82-83, c. 110, s. 4).

Dans son opinion dissidente dans l’arrêt *Hauser*, le juge Dickson s’est notamment demandé si la Couronne fédérale avait le pouvoir d’intenter des poursuites pénales (voir, par exemple, p. 1011). Certains commentateurs ont avancé l’hypothèse que, parce qu’elle était profondément divisée sur la question, la Cour s’était efforcée de valider la Loi au titre de la compétence relative à la paix, à l’ordre et au bon gouvernement (voir, par exemple, P. W. Hogg, *Constitutional Law of Canada* (éd. pour étudiants 2002), p. 438). Dans la mesure où ces considérations ont joué dans la décision des juges majoritaires, le pouvoir du procureur général fédéral d’engager des poursuites pour des infractions créées en vertu de la compétence fédérale relative au droit criminel a été confirmé dans *Procureur général du Canada c. Transports Nationaux du Canada, Ltée*, [1983] 2 R.C.S. 206 (pouvoir du fédéral d’intenter des poursuites en vertu de la *Loi relative aux enquêtes sur les coalitions*, S.R.C. 1970, ch. C-23, par. 15(2) et al. 32(1)(c)), et *R. c. Wetmore*, [1983] 2 R.C.S. 284 (pouvoir du fédéral d’engager des poursuites en vertu de la *Loi des aliments et drogues*, S.R.C. 1970, ch. F-27, art. 8, 9 et 26). Voir également *R. c. S. (S.)*, [1990] 2 R.C.S. 254, p. 283 (le législateur fédéral a compétence pour déléguer à des fonctionnaires provinciaux le pouvoir d’engager des poursuites relativement aux infractions prévues par la *Loi sur les jeunes contrevenants*, S.C. 1980-81-82-83, ch. 110, art. 4).

In *Labatt Breweries of Canada Ltd. v. Attorney General of Canada*, [1980] 1 S.C.R. 914, at pp. 944-45, the Court outlined three instances in which the federal residual power applies:

- (i) the existence of a national emergency;
- (ii) with respect to a subject matter which did not exist at the time of Confederation and is clearly not in a class of matters of a merely local or private nature;
- (iii) where the subject matter “goes beyond local or provincial concern and must, from its inherent nature, be the concern of the Dominion as a whole”.

It is not contended that the use of marihuana rises to the level of a national emergency. As to the second category, if, as we conclude *infra*, the NCA is a valid exercise of the criminal law power, it would not be consistent with that conclusion to uphold it under the branch of POGG that deals with “new” legislative subject matter not otherwise allocated. To that extent we disagree with the view taken by the majority in *Hauser, supra*.

These observations leave only the third category as a potential source of authority under POGG. The Attorney General of Canada contends that the control of narcotics is a legislative subject matter that “goes beyond local or provincial concern and must, from its inherent nature, be the concern of the Dominion as a whole”. He puts his position as follows:

The importation, manufacture, distribution, and use of psychoactive substances are matters having an impact on the country as a whole, and which can only be dealt with on an integrated national basis. Additionally, the international aspects are such that these matters cannot be effectively addressed at the local level.

Dans *Brasseries Labatt du Canada Ltée c. Procureur général du Canada*, [1980] 1 R.C.S. 914, p. 944-945, notre Cour a fait état de trois situations qui relèvent du pouvoir résiduel du législateur fédéral :

- (i) l’existence d’une situation d’urgence nationale;
- (ii) la matière n’existait pas à l’époque de la Confédération et ne peut manifestement pas être placée dans la catégorie des sujets de nature purement locale ou privée; et
- (iii) la matière « dépasse les préoccupations ou les intérêts locaux ou provinciaux et doit par sa nature même constituer une préoccupation pour le Dominion dans son ensemble ».

Aucune des parties ne prétend que le niveau de consommation de marihuana constitue une situation d’urgence nationale. Pour ce qui est de la deuxième possibilité, si, conformément à la conclusion à laquelle nous arrivons plus loin, la Loi résulte d’une application légitime par le fédéral de sa compétence relative au droit criminel, il serait contraire à cette conclusion de confirmer la validité de la Loi sur le fondement du volet du pouvoir résiduel de légiférer, soit celui concernant les champs de compétence législative « nouveaux », non attribués. Dans cette mesure, nous sommes en désaccord avec le point de vue exprimé par les juges majoritaires dans l’arrêt *Hauser*, précité.

Compte tenu des observations qui précèdent, seul le troisième volet du pouvoir résiduel pourrait encore être invoqué comme fondement potentiel de la Loi. Le procureur général du Canada fait valoir que la réglementation des stupéfiants est un objectif législatif qui « dépasse les préoccupations ou les intérêts locaux ou provinciaux et doit par sa nature même constituer une préoccupation pour le Dominion dans son ensemble ». Voici comment il formule son point de vue :

[TRADUCTION] L’importation, la fabrication, la distribution et l’utilisation de psychotropes ont, dans l’ensemble du pays, des répercussions auxquelles l’on ne peut s’attaquer que de manière intégrée à l’échelle nationale. En outre, vu la dimension internationale du problème, la prise de mesures locales ne saurait être efficace.

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We do not exclude the possibility that the NCA might be justifiable under the “national concern” branch on the rationale adopted in *R. v. Crown Zellerbach Canada Ltd.*, [1988] 1 S.C.R. 401, at p. 432, where we held that concerted action amongst provincial and federal entities, each acting within their respective spheres of legislative jurisdiction, was essential to deal with Canada’s international obligations regarding the environment. In our view, however, the Court should decline in this case to revisit Parliament’s residual authority to deal with drugs in general (or marihuana in particular) under the POGG power. If, as is presently one of the options under consideration, Parliament removes marihuana entirely from the criminal law framework, Parliament’s continuing legislative authority to deal with marihuana use on a purely regulatory basis might well be questioned. The Court would undoubtedly have more ample legislative facts and submissions in such a case than we have in this appeal. Our conclusion that the present prohibition against the use of marihuana can be supported under the criminal law power makes it unnecessary to deal with the Attorney General’s alternative position under the POGG power, and we leave this question open for another day.

(b) *The Criminal Law Power*

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The federal criminal law power is “plenary in nature” and has been broadly construed:

A crime is an act which the law, with appropriate penal sanctions, forbids; but as prohibitions are not enacted in a vacuum, we can properly look for some evil or injurious or undesirable effect upon the public against which the law is directed. That effect may be in relation to social, economic or political interests; and the legislature has had in mind to suppress the evil or to safeguard the interest threatened.

(*Reference re Validity of Section 5(a) of the Dairy Industry Act*, [1949] S.C.R. 1 (the “*Margarine Reference*”), at p. 49)

Nous n’excluons pas la possibilité que la Loi puisse être justifiable par application du volet « intérêt national » du raisonnement adopté dans *R. c. Crown Zellerbach Canada Ltd.*, [1988] 1 R.C.S. 401, p. 432, où la Cour a jugé qu’il était essentiel, pour que le Canada puisse s’acquitter de ses obligations internationales en matière d’environnement, que les provinces et le fédéral agissent de façon concertée, chacun à l’intérieur de ses champs respectifs de compétence législative. À notre avis, cependant, la Cour doit refuser en l’espèce de réexaminer la question de la compétence fédérale sur les drogues en général (ou la marihuana en particulier) découlant du pouvoir résiduel de faire des lois pour la paix, l’ordre et le bon gouvernement. Si le Parlement retient l’une des options actuellement envisagées et soustrait entièrement la marihuana à l’application du droit criminel, son pouvoir de légiférer sur la consommation de la marihuana dans le seul but de la régir pourrait bien être remis en question. Dans un tel cas, il serait immanquablement présenté à notre Cour une plus grande quantité de faits législatifs et d’observations que les éléments dont nous disposons en l’espèce. Notre conclusion selon laquelle l’interdiction actuelle visant la consommation de la marihuana peut s’appuyer sur la compétence relative au droit criminel rend inutile l’examen de l’autre prétention du procureur général, où il invoque le pouvoir résiduel de faire des lois pour la paix, l’ordre et le bon gouvernement. Cette question devra donc être tranchée à une autre occasion.

b) *La compétence relative au droit criminel*

La compétence du fédéral en matière criminel comporte « la plénitude des pouvoirs » à cet égard et a été interprétée de manière généreuse :

[TRADUCTION] Un crime est un acte que la loi défend en y attachant des sanctions pénales appropriées; mais comme les interdictions ne sont pas promulguées en vase clos, nous pouvons à bon droit rechercher le mal ou l’effet nuisible ou indésirable pour le public qui est visé par la loi. Cet effet peut viser des intérêts sociaux, économiques ou politiques; et le législateur a eu en vue la suppression du mal ou la sauvegarde des intérêts menacés.

(*Reference re Validity of Section 5(a) of the Dairy Industry Act*, [1949] R.C.S. 1 (le « *Renvoi sur la margarine* »), p. 49)

In the present case the “evil or injurious or undesirable effect” is the harm attributed to the non-medical use of marihuana.

For a law to be classified as a criminal law, it must possess three prerequisites: a valid criminal law purpose backed by a prohibition and a penalty (*Reference re Firearms Act (Can.)*, [2000] 1 S.C.R. 783, 2000 SCC 31, at para. 27). The criminal power extends to those laws that are designed to promote public peace, safety, order, health or other legitimate public purpose. In *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, it was held that some legitimate public purpose must underlie the prohibition. In *Labatt Breweries, supra*, in holding that a health hazard may ground a criminal prohibition, Estey J. stated the potential purposes of the criminal law rather broadly as including “public peace, order, security, health and morality” (p. 933). Of course Parliament cannot use its authority improperly, e.g. colourably, to invade areas of provincial competence: *Scowby v. Glendinning*, [1986] 2 S.C.R. 226, at p. 237.

In various instances members of this Court have upheld the constitutionality of the NCA on the basis of the criminal power: *Industrial Acceptance Corp., supra*; *Hauser, supra*, per Dickson J., dissenting on this point, at p. 1060; and *Schneider v. The Queen*, [1982] 2 S.C.R. 112, per Laskin C.J., at p. 115. Other courts interpreting the *Opium Act* and its successors have also reached this conclusion. See, e.g., *Dufresne v. The King* (1912), 5 D.L.R. 501 (Que. K.B.), and *Ex p. Wakabayashi*, [1928] 3 D.L.R. 226 (B.C.S.C.).

The purpose of the NCA fits within the criminal law power, which includes the protection of vulnerable groups: *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, at p. 595. See also *R. v. Morgentaler*, [1988] 1 S.C.R. 30, at pp. 74-75, in which s. 251 of the *Criminal Code* prohibiting abortions except in therapeutic

Dans la présente affaire, « le mal ou l’effet nuisible ou indésirable » pour le public est le préjudice imputé à la consommation de marihuana à des fins non thérapeutiques.

Pour qu’une loi puisse être considérée comme relevant du droit criminel, elle doit comporter les trois éléments suivants : un objet valide de droit criminel assorti d’une interdiction et d’une sanction (*Renvoi relatif à la Loi sur les armes à feu (Can.)*, [2000] 1 R.C.S. 783, 2000 CSC 31, par. 27). Le droit criminel englobe les lois favorisant la paix, la sécurité, l’ordre ou la santé publics et tout autre objectif public légitime. Dans l’arrêt *RJR-MacDonald Inc. c. Canada (Procureur général)*, [1995] 3 R.C.S. 199, notre Cour a jugé que l’interdiction devait reposer sur un objectif public légitime. Dans *Brasseries Labatt*, précité, estimant qu’un risque pour la santé pouvait justifier une interdiction de nature pénale, le juge Estey a énoncé assez largement les objectifs que peut viser le droit criminel, notamment « l’ordre, la sécurité, la santé et les bonnes mœurs publics » (p. 933). Le Parlement ne peut évidemment pas exercer son pouvoir de manière illégitime, par exemple de façon déguisée, pour empiéter sur un champ de compétence provinciale : *Scowby c. Glendinning*, [1986] 2 R.C.S. 226, p. 237.

Dans de nombreuses affaires, notre Cour a confirmé la constitutionnalité de la Loi au regard du pouvoir de légiférer en matière de droit criminel : *Industrial Acceptance Corp.*, précité; *Hauser*, précité, le juge Dickson, dissident sur ce point, p. 1060; et *Schneider c. La Reine*, [1982] 2 R.C.S. 112, le juge en chef Laskin, p. 115. D’autres tribunaux appelés à interpréter la *Loi de l’opium* et les lois qui lui ont succédé sont également arrivés à cette conclusion. Voir, par exemple, *Dufresne c. The King* (1912), 5 D.L.R. 501 (B.R. Qué.), et *Ex p. Wakabayashi*, [1928] 3 D.L.R. 226 (C.S.C.-B.).

L’objectif de la Loi correspond au chef de compétence relatif au droit criminel, lequel vise notamment la protection des groupes vulnérables : *Rodriguez c. Colombie-Britannique (Procureur général)*, [1993] 3 R.C.S. 519, p. 595. Voir également l’arrêt *R. c. Morgentaler*, [1988] 1 R.C.S. 30, p. 74-75, où notre Cour a jugé que l’art. 251 du

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

Code criminel — qui interdisait l’avortement sauf à des fins thérapeutiques — poursuivait un objectif valable, celui de protéger la vie et la santé des femmes enceintes, quoiqu’il n’ait pas satisfait à d’autres égards à l’analyse fondée sur l’article premier. Relativement à des questions sensiblement analogues soulevées en vertu de la *Charte*, notre Cour a également conclu, en application de l’article premier, que la protection de groupes vulnérables était un objectif valable justifiant l’exercice par le fédéral de sa compétence en matière de droit criminel. Dans *R. c. Sharpe*, [2001] 1 R.C.S. 45, 2001 CSC 2, nous avons confirmé la constitutionnalité du par. 163.1(4) du *Code criminel*, qui interdit la possession de pornographie juvénile, en signalant qu’une atteinte à la liberté d’expression visant à prévenir un préjudice menaçant des membres vulnérables de la société constitue une mesure valide. De même, dans *R. c. Butler*, [1992] 1 R.C.S. 452, p. 497, notre Cour a conclu que « l’interdiction de l’obscénité dans un texte législatif constitue un objectif valide qui justifie une certaine atteinte au droit à la liberté d’expression ». Ce faisant, nous avons souligné les répercussions de l’exploitation des femmes et des enfants dans les publications et les films, phénomène qui peut dans certaines circonstances conduire à une « victimisation abjecte et servile ». Dans *R. c. Keegstra*, [1995] 2 R.C.S. 381, nous avons conclu que les limites apportées à la liberté d’expression par la disposition du *Code criminel* relative à la propagande haineuse étaient justifiées au regard de l’article premier, en raison du risque d’agression contre des minorités.

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The protection of vulnerable groups from self-inflicted harms does not, as Caine argues, amount to no more than “legal moralism”. Morality has traditionally been identified as a legitimate concern of the criminal law (*Labatt Breweries*, *supra*, at p. 933) although today this does not include mere “conventional standards of propriety” but must be understood as referring to societal values beyond the simply prurient or prudish: *Butler*, *supra*, at p. 498; *R. v. Murdock* (2003), 11 C.R. (6th) 43 (Ont. C.A.), at para. 32. The protection of the chronic users identified by the trial judge, and adolescents who may not yet have become chronic users, but who have the potential to do so,

Contrairement aux prétentions de M. Caine, la protection de groupes vulnérables contre les préjudices que leurs membres sont susceptibles de s’infliger à eux-mêmes n’équivaut pas seulement, à du [TRADUCTION] « moralisme juridique ». Les bonnes mœurs sont depuis toujours considérées comme une préoccupation légitime du droit criminel (*Brasseries Labatt*, précité, p. 933), bien que, de nos jours, cette notion ne vise pas de simples « normes de bienséance traditionnelles », mais s’entend des valeurs sociétales dépassant les attitudes pudiques ou prudes : *Butler*, précité, p. 498; *R. c. Murdock* (2003), 11 C.R. (6th) 43 (C.A. Ont.), par. 32. La protection des consommateurs

is a valid criminal law objective. In *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213, the Court held at para. 131 that “Parliament has for long exercised extensive control over such matters as food and drugs by prohibitions grounded in the criminal law power”. See also *Berryland Canning Co. v. The Queen*, [1974] 1 F.C. 91 (T.D.), at pp. 94-95; *Standard Sausage Co. v. Lee* (1933), 60 C.C.C. 265 (B.C.C.A.), supplemented by addendum at (1934), 61 C.C.C. 95. In our view, the control of a “psychoactive drug” that “causes alteration of mental function” clearly raises issues of public health and safety, both for the user as well as for those in the broader society affected by his or her conduct.

The use of marihuana is therefore a proper subject matter for the exercise of the criminal law power. *Butler* held, at p. 504, that if there is a reasoned apprehension of harm Parliament is entitled to act, and in our view Parliament is also entitled to act on reasoned apprehension of harm even if on some points “the jury is still out”. In light of the concurrent findings of “harm” in the courts below, we therefore confirm that the NCA in general, and the scheduling of marihuana in particular, properly fall within Parliament’s legislative competence under s. 91(27) of the *Constitution Act, 1867*.

Prior to the enactment of the *Charter* in 1982, that finding, which validates the exercise of the criminal law power, would have ended the appellants’ challenge. Now, of course, Parliament must not only find legislative authority within the *Constitution Act, 1867*, but it must exercise that authority subject to the individual rights and freedoms guaranteed by the *Charter*.

chroniques mentionnés par la juge du procès, ainsi que des adolescents qui ne sont pas encore des consommateurs chroniques mais sont susceptibles de le devenir, est un objectif valable du droit criminel. Dans *R. c. Hydro-Québec*, [1997] 3 R.C.S. 213, notre Cour a jugé, au par. 131, que « le Parlement exerce depuis longtemps un vaste contrôle sur des matières comme les aliments et drogues au moyen d’interdictions fondées sur la compétence en matière de droit criminel ». Voir également *Berryland Canning Co. c. La Reine*, [1974] 1 C.F. 91 (1^{re} inst.), p. 94-95; ainsi que l’arrêt *Standard Sausage Co. c. Lee* (1933), 60 C.C.C. 265 (C.A.C.-B.), qui a été complété par des motifs additionnels publiés à (1934), 61 C.C.C. 95. À notre avis, la réglementation d’une [TRADUCTION] « drogue psychoactive » qui « agit sur les fonctions mentales » soulève manifestement des questions de santé et de sécurité publiques, tant en ce qui concerne le consommateur lui-même que les personnes dans la société qui sont touchées par son comportement.

La consommation de marihuana peut donc à juste titre faire l’objet de mesures édictées en vertu de la compétence relative au droit criminel. Dans l’arrêt *Butler*, p. 504, notre Cour a conclu que le Parlement peut agir sur le fondement d’une crainte raisonnée de préjudice et, à notre avis, il peut également intervenir sur le fondement d’une crainte raisonnée de préjudice même si, à l’égard de certains aspects de la question, « la situation n’est pas encore nette ». Au vu des conclusions concordantes des juridictions inférieures sur la question du « préjudice », nous confirmons que la Loi en général et l’inscription de la marihuana à l’annexe en particulier, ressortissent à la compétence législative reconnue au Parlement par le par. 91(27) de la *Loi constitutionnelle de 1867*.

Avant l’adoption de la *Charte* en 1982, cette conclusion, qui valide l’exercice de la compétence relative au droit criminel, aurait suffi pour débouter les appelants. Dorénavant, évidemment, lorsque le Parlement légifère, il doit non seulement avoir le pouvoir de le faire en vertu de la *Loi constitutionnelle de 1867* mais également exercer ce pouvoir en tenant compte des droits et des libertés que la *Charte* garantit à chacun.

80 We therefore turn to the appellants' *Charter* arguments.

E. *Section 7 of the Charter*

81 The appellant Malmo-Levine argues that smoking marihuana is integral to his preferred lifestyle, and that the criminalization of marihuana in both its possession and trafficking aspects is an unacceptable infringement of his personal liberty.

82 The appellant Caine, on the other hand, takes aim at the potential for imprisonment for conviction of possession of marihuana, and argues that imprisonment for such an offence is not in accordance with the principles of fundamental justice. If the penalty falls, he says, the substantive offence must fall with it.

83 These "liberty" interests are, of course, very different. We propose therefore first to identify the s. 7 "interest" properly at stake, then secondly to discuss the applicable principles of fundamental justice. Thirdly we will examine whether the deprivation of the s. 7 interest thus identified is in accordance with the principles of fundamental justice relevant to these appeals. As will be seen, we find no s. 7 infringement. It will therefore not be necessary to move to s. 1 to determine if an infringement would be justified in a free and democratic society.

1. The Interests at Stake

84 We say at once that the availability of imprisonment for the offence of simple possession is sufficient to trigger s. 7 scrutiny: *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486. However, Malmo-Levine's position (which is supported by the intervenor British Columbia Civil Liberties Association) requires us to address whether broader considerations of personal autonomy, short of imprisonment, are also sufficient to invoke s. 7 protection. The appellant Caine, whose factum talks of

Nous allons maintenant examiner les arguments des appelants fondés sur la *Charte*.

E. *L'article 7 de la Charte*

L'appelant Malmo-Levine soutient que fumer de la marihuana fait partie intégrante du mode de vie qu'il privilégie et que la criminalisation de la possession et du trafic de la marihuana constitue une atteinte inadmissible à sa liberté personnelle.

Pour sa part, l'appelant Caine attaque la menace d'emprisonnement que fait peser une déclaration de culpabilité pour possession de marihuana et plaide qu'une telle peine n'est pas conforme aux principes de justice fondamentale. Si la peine est invalidée, l'infraction doit l'être aussi, dit-il.

Ces atteintes à la « liberté » sont évidemment très différentes. Nous nous proposons donc de déterminer d'abord quel « droit » garanti par l'art. 7 est en jeu, puis d'examiner les principes de justice fondamentale applicables. Enfin, nous nous demanderons si la privation du droit garanti par l'art. 7 qui aura été identifié est conforme aux principes de justice fondamentale pertinents dans les présents pourvois. Comme nous l'expliquons plus loin, nous estimons qu'il n'a pas été porté atteinte aux droits garantis par l'art. 7. Il ne sera donc pas nécessaire de faire l'analyse requise par l'article premier lorsqu'il y a atteinte et de se demander s'il s'agit d'une atteinte dont la justification peut se démontrer dans le cadre d'une société libre et démocratique.

1. Les droits en jeu

Nous affirmons d'emblée que la possibilité d'emprisonnement pour simple possession de marihuana suffit pour justifier un examen fondé sur l'art. 7 : *Renvoi : Motor Vehicle Act de la C.-B.*, [1985] 2 R.C.S. 486. Toutefois, la thèse de M. Malmo-Levine (que défend également l'intervenante British Columbia Civil Liberties Association) nous contraint à décider si des considérations d'autonomie personnelle plus générales, moins graves que l'emprisonnement, permettent également d'invoquer la

the “fun” or “social” use of cannabis, writes, at para. 30:

It is submitted that a decision whether or not to possess and consume Cannabis (marijuana), even if potentially harmful to the user, is analogous to the decision by an individual as to what food to eat or not eat and whether or not to eat fatty foods, and as such is a decision of fundamental personal importance involving a choice made by the individual involving that individual's personal autonomy.

In *Morgentaler*, *supra*, Wilson J. suggested that liberty “grants the individual a degree of autonomy in making decisions of fundamental personal importance”, “without interference from the state” (p. 166). Liberty accordingly means more than freedom from physical restraint. It includes “the right to an irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference”: *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844, at para. 66; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, at para. 80. This is true only to the extent that such matters “can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence”: *Godbout*, *supra*, at para. 66. See also *Blencoe v. British Columbia (Human Rights Commission)*, [2000] 2 S.C.R. 307, 2000 SCC 44, at para. 54; *Buhlers v. British Columbia (Superintendent of Motor Vehicles)* (1999), 170 D.L.R. (4th) 344 (B.C.C.A.), at para. 109; *Horsefield v. Ontario (Registrar of Motor Vehicles)* (1999), 44 O.R. (3d) 73 (C.A.).

While we accept Malmo-Levine's statement that smoking marihuana is central to his lifestyle, the Constitution cannot be stretched to afford protection to whatever activity an individual chooses to define as central to his or her lifestyle. One individual chooses to smoke marihuana; another has an obsessive interest in golf; a third is addicted to gambling.

protection de l'art. 7. L'appelant Caine, qui parle dans son mémoire de consommation [TRADUCTION] « récréative » ou « sociale » de cannabis, écrit ce qui suit, au par. 30 :

[TRADUCTION] On prétend que la décision d'avoir du cannabis (de la marihuana) en sa possession ou d'en consommer, même si cela peut être préjudiciable au consommateur, est analogue à la décision de manger certains aliments plutôt que d'autres, de manger ou non des aliments gras; il s'agit en conséquence d'une décision d'importance personnelle fondamentale comportant un choix de l'intéressé, qui touche à son autonomie personnelle.

Dans l'arrêt *Morgentaler*, précité, p. 166, la juge Wilson a émis l'opinion que le droit à la liberté « confère à l'individu une marge d'autonomie dans la prise de décisions d'importance fondamentale pour sa personne », « sans intervention de l'État ». En conséquence, la liberté n'est pas que l'absence de contraintes physiques. Elle s'entend aussi du « droit à une sphère irréductible d'autonomie personnelle où les individus peuvent prendre des décisions intrinsèquement privées sans intervention de l'État » : *Godbout c. Longueuil (Ville)*, [1997] 3 R.C.S. 844, par. 66; *B. (R.) c. Children's Aid Society of Metropolitan Toronto*, [1995] 1 R.C.S. 315, par. 80. Cette affirmation ne vaut que dans la mesure où les sujets en cause « peuvent à juste titre être qualifiés de fondamentalement ou d'essentiellement personnels et qui impliquent, par leur nature même, des choix fondamentaux participant de l'essence même de ce que signifie la jouissance de la dignité et de l'indépendance individuelles » : *Godbout*, précité, par. 66. Voir également *Blencoe c. Colombie-Britannique (Human Rights Commission)*, [2000] 2 R.C.S. 307, 2000 CSC 44, par. 54; *Buhlers c. British Columbia (Superintendent of Motor Vehicles)* (1999), 170 D.L.R. (4th) 344 (C.A.C.-B.), par. 109; *Horsefield c. Ontario (Registrar of Motor Vehicles)* (1999), 44 O.R. (3d) 73 (C.A.).

Bien que nous soyons prêts à admettre que fumer de la marihuana constitue pour M. Malmo-Levine un aspect central de son mode de vie, la portée de la Constitution ne saurait être élargie pour protéger toute activité qu'une personne choisit de définir comme essentielle à son mode de vie. Il y a des personnes qui choisissent de fumer de la

The appellant Caine invokes a taste for fatty foods. A society that extended constitutional protection to any and all such lifestyles would be ungovernable. Lifestyle choices of this order are not, we think, “basic choices going to the core of what it means to enjoy individual dignity and independence” (*Godbout, supra*, at para. 66).

marihuana, alors que certaines sont obsédées par le golf et d’autres s’adonnent compulsivement aux jeux de hasard. L’appelant Caine parle même d’un goût pour les aliments gras. Une société qui étendrait la protection de sa Constitution à de telles préférences personnelles serait ingouvernable. Selon nous, de telles décisions concernant le mode de vie ne sont pas « des choix fondamentaux participant de l’essence même de ce que signifie la jouissance de la dignité et de l’indépendance individuelles » (*Godbout*, précité, par. 66).

87 In our view, with respect, Malmo-Levine’s desire to build a lifestyle around the recreational use of marihuana does not attract *Charter* protection. There is no free-standing constitutional right to smoke “pot” for recreational purposes.

En toute déférence, nous estimons que la décision de M. Malmo-Levine de centrer son mode de vie sur la consommation récréative de marihuana ne bénéficie pas de la protection de la *Charte*. Il n’existe pas en soi de droit constitutionnel de fumer du « pot » à des fins récréatives.

88 The appellants also invoke their s. 7 interest in “security of the person”. In *Morgentaler, supra*, Dickson C.J. accepted that “serious state-imposed psychological stress” (p. 56 (emphasis added)) would suffice to infringe this interest. The appellants, however, contend that use of marihuana is non-addictive. Prohibition would not therefore lead to a level of stress that is constitutionally cognizable. A very different issue would arise if the marihuana was required for medical purposes, but neither appellant uses marihuana for such a purpose.

Les appelants invoquent aussi le droit à la « sécurité de [leur] personne » que leur garantit l’art. 7. Dans l’arrêt *Morgentaler*, précité, p. 56, le juge en chef Dickson a reconnu que « la tension psychologique grave causée par l’État » (nous soulignons) suffit pour qu’il y ait atteinte à ce droit. Toutefois, comme les appelants soutiennent que la consommation de marihuana ne crée pas de dépendance, l’interdiction frappant cette substance ne pourrait donc pas avoir pour effet de créer un niveau de tension faisant intervenir un droit constitutionnel. La question serait très différente si les appelants fumaient de la marihuana à des fins thérapeutiques, mais ce n’est le cas d’aucun d’eux.

89 The availability of imprisonment is a different matter. We have no doubt that the risk of being sent to jail engages the appellants’ liberty interest. Accordingly, it is necessary to move to the next stage of the s. 7 analysis to determine what are the relevant principles of fundamental justice and whether this risk of deprivation of liberty is in accordance with the principles of fundamental justice.

Il en va autrement de la possibilité d’emprisonnement. Il ne fait aucun doute à notre avis que le risque que courent les appelants d’être envoyés en prison met en jeu leur droit à la liberté. Par conséquent, il est nécessaire de passer à l’étape suivante de l’analyse fondée sur l’art. 7 et de se demander quels sont les principes de justice fondamentale pertinents et si ce risque de privation de liberté est conforme à ces principes.

2. Principles of Fundamental Justice

2. Les principes de justice fondamentale

90 The appellants accept that Parliament may act to avoid harm to others without violating

Les appelants reconnaissent que le Parlement peut prendre des mesures pour éviter que des

principles of fundamental justice. They focus on the alleged absence of such harm, and contend that it is a denial of fundamental justice to deprive them of their liberty where such denial does not enhance a legitimate interest of the state. To hold otherwise, they say, would require the courts to endorse the arbitrary or irrational use of the criminal law power, contrary to the principles of fundamental justice. As Sopinka J. stated in *Rodriguez, supra*, at p. 594:

Where the deprivation of the right in question does little or nothing to enhance the state's interest (whatever it may be), it seems to me that a breach of fundamental justice will be made out, as the individual's rights will have been deprived for no valid purpose.

The appellants' s. 7 arguments have several branches predicated on the requirement of harm. First, they argue that the only permissible target of the criminal law is harm to others; in their view, the criminal law cannot prohibit conduct that harms only the accused. Second, they argue that, in any event, marihuana is not a harmful substance, so that the prohibition of simple possession is arbitrary or irrational. Third, they argue that the criminalization of cannabis possession has adverse consequences, both for those users who are charged and convicted and, because of the disrespect engendered by the law, for the administration of justice generally, that are wholly disproportionate to the societal interests sought to be served by the prohibition. Finally, they submit that the criminalization of cannabis possession is discriminatory and unfair, in light of Parliament's failure to criminalize the possession and use of alcohol and tobacco.

personnes subissent un préjudice, sans pour autant porter atteinte aux principes de justice fondamentale. Ils plaident l'absence de préjudice et prétendent que le fait de les priver de leur liberté constitue une négation de leur droit à la justice fondamentale, négation qui ne favorise pas un intérêt légitime de l'État. Selon eux, toute autre conclusion exigerait des tribunaux qu'ils avalisent l'exercice arbitraire ou irrationnel de la compétence relative au droit criminel, en contravention des principes de justice fondamentale. Comme l'a dit le juge Sopinka dans l'arrêt *Rodriguez*, précité, p. 594 :

Lorsque la restriction du droit en cause ne fait que peu ou rien pour promouvoir l'intérêt de l'État (quel qu'il puisse être), il me semble qu'une violation de la justice fondamentale sera établie puisque la restriction du droit du particulier n'aura servi aucune fin valable.

Les arguments avancés par les appelants sur le fondement de l'art. 7 comportent plusieurs volets qui supposent l'exigence d'un préjudice. Premièrement, les appelants affirment que la seule raison susceptible de justifier une mesure législative de nature criminelle est la prévention d'un préjudice à autrui; selon eux, le droit criminel ne peut interdire un comportement qui ne cause préjudice qu'à son auteur. Deuxièmement, ils avancent que, de toute manière, la marihuana n'est pas une substance nocive et que, en conséquence, le fait d'interdire la simple possession de cette substance est une mesure arbitraire ou irrationnelle. Troisièmement, ils soutiennent que la criminalisation de la possession de cannabis a, tant sur les consommateurs qui sont accusés et reconnus coupables de l'infraction en question que sur l'administration de la justice en général — à cause de la déconsidération de la loi qu'engendre cette mesure — des effets néfastes qui sont tout à fait disproportionnés aux intérêts sociétaux que l'interdiction est censée favoriser. Enfin, ils affirment que la décision du Parlement de criminaliser la possession de cannabis constitue une mesure discriminatoire et inéquitable, étant donné que celui-ci ne criminalise pas la possession et la consommation d'alcool et de tabac.

92 The appellant Malmo-Levine further submits that any harm-based analysis should focus on the healthy user who engages in harm-reduction strategies. He argues that the Court of Appeal erred “when they characterized the harms that may come with cannabis use as inherent, instead of a product of mis-cultivation, mis-distribution and mis-use” (Malmo-Levine’s factum, at para. 2).

93 We will deal first with a number of preliminary points raised by the appellants.

(a) *The Propriety of Balancing Societal and Individual Interests in Section 7*

94 The appellant Caine submits that the British Columbia Court of Appeal erred in importing into s. 7 a number of societal interests that have nothing to do with the “principles of fundamental justice” but that he says should be considered, if at all, under a s. 1 justification. In other words, he argues that societal interests are not relevant to defining the right granted under s. 7 but only to determining whether a limit on that right is a reasonable one prescribed by law as can be demonstrably justified in a free and democratic society.

95 Braidwood J.A. considered that “the operative principle of fundamental justice” in these cases is the harm principle (see para. 159). However, having concluded that the prohibition against simple possession complies with the harm principle, he went on to consider a second question — “whether the NCA strikes the ‘right balance’ between the rights of the individual and the interests of the State” (para. 160). As authority for this approach, reference was made to *Cunningham v. Canada*, [1993] 2 S.C.R. 143; *Thomson Newspapers Ltd. v. Canada* (*Director of Investigation and Research, Restrictive*

L’appellant Malmo-Levine prétend en outre que toute analyse axée sur le préjudice doit s’attacher aux consommateurs qui sont en bonne santé et prennent des mesures pour réduire le préjudice. Il ajoute que la Cour d’appel a commis une erreur [TRADUCTION] « en qualifiant d’intrinsèques les effets préjudiciables susceptibles de découler de la consommation de cannabis, au lieu de les considérer comme le résultat de méthodes inadéquates de culture, de distribution et de consommation » (mémoire de Malmo-Levine, par. 2).

Nous examinerons tout d’abord un certain nombre de points préliminaires soulevés par les appelants.

a) *Le bien-fondé de la pondération des intérêts de la société et des droits de l’individu dans l’analyse requise par l’art. 7*

L’appellant Caine plaide que la Cour d’appel de la Colombie-Britannique a eu tort de tenir compte, dans l’analyse fondée sur l’art. 7, d’un certain nombre d’intérêts sociétaux qui n’ont aucun rapport avec les « principes de justice fondamentale », et qui, à son avis, ne devraient être pris en considération, si tant est qu’ils doivent l’être, que pour justifier une atteinte conformément à l’article premier. En d’autres mots, il soutient que les intérêts sociétaux ne sont pas pertinents pour définir le droit garanti à l’art. 7, mais seulement pour décider si le droit est restreint par une règle de droit dans des limites qui sont raisonnables et dont la justification peut se démontrer dans une société libre et démocratique.

Le juge Braidwood de la Cour d’appel a estimé que, en l’espèce, le [TRADUCTION] « principe de justice fondamentale applicable » était le principe du préjudice (voir le par. 159). Cependant, après avoir conclu que l’interdiction de la simple possession était conforme au principe du préjudice, il s’est penché sur une deuxième question, celle de savoir [TRADUCTION] « si la *Loi sur les stupéfiants* établit un “juste équilibre” entre les droits de l’individu et les intérêts de l’État » (par. 160). Les arrêts suivants ont été mentionnés au soutien de cette approche : *Cunningham c. Canada*,

Trade Practices Commission), [1990] 1 S.C.R. 425, at p. 539, *per* La Forest J.; and *Rodriguez, supra*, at pp. 592-93, *per* Sopinka J. Prowse J.A., in dissent, engaged in a similar balancing exercise.

We do not think that these authorities should be taken as suggesting that courts engage in a free-standing inquiry under s. 7 into whether a particular legislative measure “strikes the right balance” between individual and societal interests in general, or that achieving the right balance is itself an overarching principle of fundamental justice. Such a general undertaking to balance individual and societal interests, *independent of any identified principle of fundamental justice*, would entirely collapse the s. 1 inquiry into s. 7. The procedural implications of such a collapse are significant. Counsel for the appellant Caine, for example, urges that the appellants having identified a threat to the liberty or security of the person, the evidentiary onus should switch at once to the Crown *within* s. 7 “to provide evidence of the significant harm that it relies upon to justify the use of criminal sanctions” (Caine’s factum, at para. 24).

We do not agree. In *R. v. Mills*, [1999] 3 S.C.R. 668, a majority of this Court pointed out that, despite certain similarities between the balancing of interests in ss. 7 and 1, there are important differences. Firstly, the issue under s. 7 is the delineation of the boundaries of the rights and principles in question whereas under s. 1 the question is whether an infringement may be justified (para. 66). Secondly, it was affirmed that under s. 7 it is the claimant who bears the onus of proof throughout. It is only if an infringement of s. 7 is established that the onus switches to the Crown to justify the infringement under s. 1. Thirdly, the range of interests to be taken into account under s. 1 is

[1993] 2 R.C.S. 143; *Thomson Newspapers Ltd. c. Canada (Directeur des enquêtes et recherches, Commission sur les pratiques restrictives du commerce)*, [1990] 1 R.C.S. 425, p. 539, le juge La Forest; *Rodriguez*, précité, p. 592-593, le juge Sopinka. La juge Prowse a procédé à une pondération similaire dans ses motifs de dissidence.

Nous ne croyons pas que ces arrêts indiquent que les tribunaux doivent, en vertu de l’art. 7, se livrer à un examen distinct pour décider si une mesure législative donnée établit un « juste équilibre » entre les droits de l’individu et les intérêts de la société en général, ou que l’établissement d’un juste équilibre constitue en soi un principe de justice fondamentale dominant. Une telle démarche générale de mise en balance des droits individuels et des intérêts sociétaux, *sans égard à un principe de justice fondamentale déterminé*, intègre entièrement l’examen que commande l’article premier à l’analyse fondée sur l’art. 7. Les conséquences procédurales d’une telle « fusion » sont considérables. Par exemple, selon l’avocat de l’appelant Caine, comme les appelants ont établi l’existence d’une menace à leur liberté ou à la sécurité de leur personne, la charge de la preuve est immédiatement inversée et il incombe alors au ministère public, *dans l’analyse fondée sur l’art. 7*, [TRADUCTION] « de faire la preuve du préjudice important qu’il invoque pour justifier le recours à des sanctions pénales » (mémoire de Caine, par. 24).

Nous ne sommes pas d’accord. Dans *R. c. Mills*, [1999] 3 R.C.S. 668, les juges majoritaires de notre Cour ont souligné que, malgré certaines similitudes entre la pondération des droits et intérêts faite dans l’application de l’art. 7 et celle faite dans l’application de l’article premier, ces pondérations présentent néanmoins des différences importantes. Premièrement, la question qui se pose en vertu de l’art. 7 est celle de la délimitation des droits et des principes en cause tandis que la question qui se pose en vertu de l’article premier est de savoir si une atteinte peut être justifiée (par. 66). Deuxièmement, il a été jugé que, dans l’application de l’art. 7, la charge de la preuve appartient au demandeur à

much broader than those relevant to s. 7. The Court said in *Mills*, at para. 67:

Because of these differences, the nature of the issues and interests to be balanced is not the same under the two sections. As Lamer J. (as he then was) stated in *Re B.C. Motor Vehicle Act*, *supra*, at p. 503: “the principles of fundamental justice are to be found in the basic tenets of our legal system”. In contrast, s. 1 is concerned with the values underlying a free and democratic society, which are broader in nature. In *R. v. Oakes*, [1986] 1 S.C.R. 103, Dickson C.J. stated, at p. 136, that these values and principles “embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society”. In *R. v. Keegstra*, [1990] 3 S.C.R. 697, at p. 737, Dickson C.J. described such values and principles as “numerous, covering the guarantees enumerated in the *Charter* and more”.

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The balancing of individual and societal interests within s. 7 is only relevant when elucidating a particular principle of fundamental justice. As Sopinka J. explained in *Rodriguez*, *supra*, “in arriving at these principles [of fundamental justice], a balancing of the interest of the state and the individual is required” (pp. 592-93 (emphasis added)). Once the principle of fundamental justice has been elucidated, however, it is not within the ambit of s. 7 to bring into account such “societal interests” as health care costs. Those considerations will be looked at, if at all, under s. 1. As Lamer C.J. commented in *R. v. Swain*, [1991] 1 S.C.R. 933, at p. 977:

It is not appropriate for the state to thwart the exercise of the accused’s right by attempting to bring societal

toutes les étapes de l’analyse. Ce n’est que si une atteinte à l’art. 7 est établie qu’il incombe au ministère public de la justifier conformément à l’article premier. Troisièmement, l’éventail des intérêts à prendre en considération pour l’application de l’article premier est beaucoup plus large que pour l’art. 7. Dans l’arrêt *Mills*, notre Cour a dit ceci, au par. 67 :

À cause de ces différences, la nature des questions et des intérêts qui doivent être évalués n’est pas la même pour les deux articles. Comme le juge Lamer (maintenant Juge en chef) l’a dit dans le *Renvoi relatif à la Motor Vehicle Act de la C.-B.*, précité, à la p. 503, « les principes de justice fondamentale se trouvent dans les préceptes fondamentaux de notre système juridique ». Par contre, l’article premier touche les valeurs qui sous-tendent une société libre et démocratique, qui sont plus larges par nature. Dans l’arrêt *R. c. Oakes*, [1986] 1 R.C.S. 103, le juge en chef Dickson a affirmé, à la p. 136, que ces valeurs et ces principes « comprennent [. . .] le respect de la dignité inhérente de l’être humain, la promotion de la justice et de l’égalité sociales, l’acceptation d’une grande diversité de croyances, le respect de chaque culture et de chaque groupe et la foi dans les institutions sociales et politiques qui favorisent la participation des particuliers et des groupes dans la société ». Dans l’arrêt *R. c. Keegstra*, [1990] 3 R.C.S. 697, à la p. 737, le juge en chef Dickson a décrit ces valeurs et principes comme étant « nombreux, englobant les garanties énumérées dans la *Charte* et plus encore ».

La pondération des droits individuels et des intérêts sociétaux dans l’analyse fondée sur l’art. 7 n’est pertinente que pour préciser un principe de justice fondamentale en particulier. Comme l’a expliqué le juge Sopinka dans l’arrêt *Rodriguez*, précité, « pour établir ces principes [de justice fondamentale], il est nécessaire de pondérer les intérêts de l’État et ceux de l’individu » (p. 592-593 (nous soulignons)). Cependant, une fois précisé le principe de justice fondamentale en cause, la prise en compte d’« intérêts sociétaux » tels les coûts des soins de santé ne fait plus partie de l’analyse fondée sur l’art. 7. Ces considérations seront examinées, si tant est qu’elles le sont, dans l’application de l’article premier. Comme l’a fait observer le juge en chef Lamer dans *R. c. Swain*, [1991] 1 R.C.S. 933, p. 977 :

Il n’est pas acceptable que l’État puisse contrecarrer l’exercice du droit de l’accusé en tentant de faire jouer

interests into the principles of fundamental justice and to thereby limit an accused's s. 7 rights. Societal interests are to be dealt with under s. 1 of the *Charter*, where the Crown has the burden of proving that the impugned law is demonstrably justified in a free and democratic society.

The principles of fundamental justice asserted by the appellants include the contentions that their conduct should only be the subject of criminal sanction to the extent it harms others, that the state cannot infringe their interests in an arbitrary or irrational manner, or impose criminal sanctions that are disproportionate to the importance of the state interest sought to be protected. Implicit in each of these principles is, of course, the recognition that the appellants do not live in isolation but are part of a larger society. The delineation of the principles of fundamental justice must inevitably take into account the social nature of our collective existence. To that limited extent, societal values play a role in the delineation of the boundaries of the rights and principles in question.

(b) *Malmo-Levine's "Harm Reduction" Argument*

We wish to be clear that we do not accept Malmo-Levine's argument that Parliament should proceed on the assumption that users will use marijuana "responsibly". We accept his point that careful use can *mitigate* the harmful effects, but it is open to Parliament to proceed on the more reasonable assumption that psychoactive drugs will to some extent be misused. Indeed, the evidence indicates the existence of both use and misuse by chronic users and by vulnerable groups who cause harm to themselves.

(c) *Malmo-Levine's Pleasure Principle*

Malmo-Levine's related argument, that the pleasure of a large number of people should not be curtailed because of (he says) relatively minor

les intérêts de la société dans l'application des principes de justice fondamentale, et restreindre ainsi les droits reconnus à l'accusé par l'art. 7. Les intérêts de la société doivent entrer en ligne de compte dans l'application de l'article premier de la *Charte*, lorsqu'il incombe au ministère public de démontrer que la justification de la règle de droit attaquée peut se démontrer dans le cadre d'une société libre et démocratique.

Selon les appelants, les principes de justice fondamentale emportent que leur comportement ne doit les exposer à une sanction pénale que dans la mesure où il cause préjudice à autrui et que l'État ne peut porter atteinte à leurs droits d'une manière arbitraire ou irrationnelle, ni leur infliger une sanction pénale disproportionnée à l'importance de l'intérêt général en cause. Il va de soi qu'en énonçant chacun de ces principes les appelants reconnaissent implicitement qu'ils ne vivent pas en vase clos et font partie d'une société plus large. Dans la détermination des principes de justice fondamentale, il faut nécessairement prendre en considération la nature sociale de notre existence collective. Ce n'est que dans cette mesure que les valeurs sociétales jouent un rôle dans la définition de la portée des droits et des principes en question.

b) *L'argument de M. Malmo-Levine fondé sur la « réduction du préjudice »*

Nous tenons à préciser que nous n'acceptons pas la prétention de M. Malmo-Levine selon laquelle le Parlement doit supposer que la marijuana sera consommée « de manière responsable ». Nous admettons son argument qu'une consommation prudente peut *atténuer* les effets préjudiciables, mais il est loisible au Parlement de présumer, plus raisonnablement, que les drogues psychoactives seront jusqu'à un certain point utilisées sans discernement. D'ailleurs, la preuve révèle qu'il y a à la fois usage et mésusage par les consommateurs chroniques et par les membres de groupes vulnérables qui se font du tort à eux-mêmes.

c) *Le principe du plaisir invoqué par M. Malmo-Levine*

L'argument connexe de M. Malmo-Levine — à savoir que le plaisir du plus grand nombre ne devrait pas être compromis à cause (selon lui) d'un

harm to a minority, is similarly misplaced under s. 7. Utilitarian arguments that urge a cost-benefit calculation of alleged benefit to the many versus alleged harm to the few, to the extent such arguments are relevant under the *Charter*, belong in s. 1. The appellants must first of all establish a violation of their s. 7 rights. Only if they are able to do so is the government then required to show that the purported limitation is demonstrably justified in a free and democratic society.

(d) *The “Harm Principle”*

102 The appellants contend that unless the state can establish that the use of marihuana is harmful to others, the prohibition against simple possession cannot comply with s. 7. Our colleague Arbour J. accepts this proposition as correct to the extent that “the state resorts to imprisonment” (para. 244). Accordingly, a closer look at the alleged “harm principle” is called for.

103 We should be clear about the direction of the appellants’ argument. It is agreed by all parties that the *existence* of harm, especially harm to others, is a state interest sufficient to ground the exercise of the criminal law power. The appellants’ contention, however, is that the *absence* of demonstrated harm to others deprives Parliament of the power to impose criminal liability. That is what they call the “harm principle”.

104 We think it right to state at the outset that we do not agree that the “harm principle” plays the *essential* role assigned to it by the appellants in testing the criminal law against the requirements of the *Charter*. Further, with respect to our colleague’s focus on the availability (if not the imposition) of imprisonment for the simple possession of marihuana, we think the punishment debate is more appropriately addressed under s. 12 of the *Charter* (“cruel and unusual

préjudice relativement peu important subi par une minorité — n’a pas non plus sa place dans l’analyse fondée sur l’art. 7. Dans la mesure où ils sont pertinents pour l’application de la *Charte*, relèvent alors de l’analyse fondée sur l’article premier les arguments utilitaires commandant une analyse coûts-bénéfices des avantages dont jouirait la majorité par rapport aux inconvénients que subirait la minorité. Les appelants doivent tout d’abord établir qu’il a été porté atteinte aux droits que leur garantit l’art. 7. Ce n’est que s’ils y parviennent qu’il incombe ensuite à l’État de montrer qu’il s’agit d’une restriction dont la justification peut se démontrer dans le cadre d’une société libre et démocratique.

d) *Le « principe du préjudice »*

Les appelants font valoir que l’interdiction visant l’usage de la marihuana ne peut être conforme à l’art. 7 que si l’État peut prouver que la simple possession de cette substance est préjudiciable à autrui. Notre collègue la juge Arbour considère cette prétention comme fondée dans la mesure où « l’État a recours à l’emprisonnement » (par. 244). En conséquence, un examen plus approfondi du « principe du préjudice » ainsi invoqué s’impose.

Il est important de bien saisir le sens de l’argument des appelants. Toutes les parties conviennent que l’*existence* d’un préjudice, particulièrement un préjudice à autrui, constitue pour l’État un intérêt suffisant le justifiant d’exercer son pouvoir de légiférer en matière de droit criminel. De prétendre les appelants, toutefois, l’*absence* de préjudice à autrui prive le Parlement du pouvoir d’imputer quelque responsabilité criminelle que ce soit. Voilà ce que les appelants entendent par « principe du préjudice ».

Il nous paraît toutefois opportun de préciser d’entrée de jeu que nous ne croyons pas que le « principe du préjudice » joue le rôle *essentiel* que lui attribuent les appelants dans l’appréciation des règles de droit criminel au regard des exigences de la *Charte*. De plus, en ce qui concerne l’accent que met notre collègue sur la possibilité d’emprisonnement (sinon la condamnation à cette peine) pour l’infraction de simple possession de marihuana, nous estimons

treatment or punishment”), rather than under s. 7, although clearly it has implications for both s. 7 and s. 1, as will shortly be discussed.

The British Columbia Court of Appeal also dealt with this case on the premise that the harm principle was a controlling principle under s. 7 of the *Charter*. It is therefore appropriate that we deal with it in some detail.

(i) History and Definition of the Harm Principle

What is the “harm principle”? The appellants rely, in particular, on the writings of the liberal theorist, J. S. Mill, who attempted to establish clear boundaries for the permissible intrusion of the state into private life:

The object of this Essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion. That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. . . . The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign. [Emphasis added.]

(J. S. Mill, *On Liberty and Considerations on Representative Government* (1946), at pp. 8-9)

Thus Mill’s principle has two essential features. First, it rejects paternalism — that is, the prohibition of conduct that harms only the actor. Second, it excludes what could be called “moral harm”. Mill was of the view that such moral claims are insufficient to justify use of the criminal law. Rather, he

qu’il est plus opportun de débattre la question de la peine au regard de l’art. 12 de la *Charte* (« traitements ou peines cruels et inusités ») que de l’art. 7, bien que cette question intéresse manifestement l’art. 7 et l’article premier, comme nous l’expliquons un peu plus loin.

La Cour d’appel de la Colombie-Britannique a elle aussi examiné l’affaire en tenant pour acquis que le principe du préjudice est un principe dominant pour l’application de l’art. 7 de la *Charte*. Il convient donc que nous examinions ce principe plus en détail.

(i) Historique et définition du principe du préjudice

Qu’est-ce que le « principe du préjudice »? Les appelants s’appuient en particulier sur les écrits du théoricien libéral J. S. Mill, qui a tenté d’établir clairement les limites de l’ingérence légitime de l’État dans la vie privée :

L’objet de cet essai est de poser un principe très simple, fondé à régler absolument les rapports de la société et de l’individu dans tout ce qui est contrainte ou contrôle, que les moyens utilisés soient la force physique par le biais de sanctions pénales ou la contrainte morale exercée par l’opinion publique. Ce principe veut que les hommes ne soient autorisés, individuellement ou collectivement, à entraver la liberté d’action de quiconque que pour assurer leur propre protection. La seule raison légitime que puisse avoir une communauté pour user de la force contre un de ses membres est de l’empêcher de nuire aux autres. Contraindre quiconque pour son propre bien, physique ou moral, ne constitue pas une justification suffisante. [. . .] Le seul aspect de la conduite d’un individu qui soit du ressort de la société est celui qui concerne les autres. Mais pour ce qui ne concerne que lui, son indépendance est, de droit, absolue. Sur lui-même, sur son corps et son esprit, l’individu est souverain. [Nous soulignons.]

(J. S. Mill, *De la liberté* (1990), trad. L. Lenglet, p. 74-75)

Le principe dégagé par Mill comporte donc deux caractéristiques essentielles. Premièrement, il rejette le paternalisme — c’est-à-dire l’interdiction d’un comportement qui ne cause préjudice qu’à son auteur. Deuxièmement, il exclut ce que l’on pourrait appeler le « préjudice moral ». Selon Mill, de telles

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required clear and tangible harm to the rights and interests of others.

atteintes morales ne sauraient justifier le recours au droit criminel. Il doit plutôt y avoir une atteinte claire et tangible aux droits et intérêts d'autrui.

108 At the same time, Mill acknowledged an exception to his requirement of harm “to others” for vulnerable groups. He wrote that “this doctrine is meant to apply to human beings in the maturity of their faculties. . . . Those who are still in a state to require being taken care of by others, must be protected against their own actions as well as against external injury” (p. 9).

En même temps, Mill reconnaît la nécessité d'établir, au profit des personnes vulnérables, une exception à sa condition requérant l'existence d'un préjudice « à autrui ». Il a écrit ceci, à la p. 75, « cette doctrine n'entend s'appliquer qu'aux êtres humains dans la maturité de leurs facultés. [. . .] Ceux qui sont encore dépendants des soins d'autrui doivent être protégés contre leurs propres actions aussi bien que contre les risques extérieurs ».

109 Mill's statement has the virtues of insight and clarity but he was advocating certain general philosophical principles, not interpreting a constitutional document. Moreover, even his philosophical supporters have tended to agree that justification for state intervention cannot be reduced to a single factor — harm — but is a much more complex matter. One of Mill's most distinguished supporters, Professor H. L. A. Hart, wrote:

L'exposé de Mill est à la fois clair et pénétrant, mais il convient de signaler que ce dernier défendait alors certains principes philosophiques généraux, il n'interprétait pas un texte constitutionnel. Qui plus est, même ceux qui souscrivent à sa philosophie tendent à reconnaître que la justification de l'intervention de l'État ne peut se réduire à un seul facteur — le préjudice — et que la question est beaucoup plus complexe. L'un des plus éminents, le professeur H. L. A. Hart, a écrit ceci :

Mill's formulation of the liberal point of view may well be too simple. The grounds for interfering with human liberty are more various than the single criterion of 'harm to others' suggests: cruelty to animals or organizing prostitution for gain do not, as Mill himself saw, fall easily under the description of harm to others. Conversely, even where there is harm to others in the most literal sense, there may well be other principles limiting the extent to which harmful activities should be repressed by law. So there are multiple criteria, not a single criterion, determining when human liberty may be restricted. [Emphasis added.]

[TRADUCTION] La formulation du point de vue libéral par Mill pourrait bien être trop simple. Les raisons d'empêcher sur la liberté des gens sont beaucoup plus variées que ce que suggère le critère du « préjudice à autrui » : la notion de préjudice à autrui ne s'applique pas facilement, comme l'a constaté Mill lui-même, à la cruauté envers les animaux ou à l'organisation de la prostitution à des fins lucratives. À l'inverse, même lorsqu'un préjudice est causé à autrui au sens le plus littéral de ce terme, d'autres principes peuvent fort bien restreindre la mesure dans laquelle une activité préjudiciable doit être réprimée par la loi. En conséquence, de multiples critères, et non un seul, permettent de déterminer s'il est permis de restreindre la liberté des gens. [Nous soulignons.]

(H. L. A. Hart, “Immorality and Treason”, originally appearing in *The Listener* (July 30, 1959), at pp. 162-63, reprinted in *Morality and the Law* (1971), 49, at p. 51)

(H. L. A. Hart, « Immorality and Treason », publié initialement dans *The Listener* (30 juillet 1959), p. 162-163, publié à nouveau dans *Morality and the Law* (1971), 49, p. 51)

To the same effect, see Professor J. Feinberg, *The Moral Limits of the Criminal Law* (1984), vol. 1: *Harm to Others*, at p. 12; vol. 4: *Harmless Wrongdoing*, at p. 323.

Dans le même sens, voir Professeur J. Feinberg, *The Moral Limits of the Criminal Law* (1984), vol. 1, *Harm to Others*, p. 12; vol. 4, *Harmless Wrongdoing*, p. 323.

(ii) Is the Harm Principle a Principle of Fundamental Justice?

The appellants submit that the harm principle is a principle of fundamental justice for the purposes of s. 7 that operates to place limits on the type of conduct the state may criminalize. This limitation exists independently of the division of powers under ss. 91 and 92 of the *Constitution Act, 1867*. In other words, the appellants contend that there is a double threshold. Even if the Crown is able to establish that the creation of a particular criminal offence is a valid exercise of the criminal law power, there is a second level of constraint on the type of conduct that can be made criminal by virtue of s. 7 of the *Charter*.

We agree that there is a form of “double threshold”, in that the *Charter* imposes requirements that are separate from those imposed by ss. 91 and 92 of the *Constitution Act, 1867*. However, we do not agree with the attempted elevation of the harm principle to a principle of fundamental justice. That is, in our view the harm principle is not the constitutional standard for what conduct may or may not be the subject of the criminal law for the purposes of s. 7.

In *Re B.C. Motor Vehicle Act*, *supra*, Lamer J. (as he then was) explained that the principles of fundamental justice lie in “the basic tenets of our legal system. They do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardian of the justice system” (p. 503). This Court provided further guidance as to what constitutes a principle of fundamental justice for the purposes of s. 7, in *Rodriguez*, *supra*, per Sopinka J. (at pp. 590-91 and 607):

A mere common law rule does not suffice to constitute a principle of fundamental justice, rather, as the term implies, principles upon which there is some consensus that they are vital or fundamental to our societal notion of justice are required. Principles of fundamental justice must not, however, be so broad as to be no more than vague generalizations about what our society considers to be ethical or moral. They must be capable of being identified with some precision and applied to situations

(ii) Le principe du préjudice est-il un principe de justice fondamentale?

Les appelants prétendent que, pour l’application de l’art. 7, le principe du préjudice est un principe de justice fondamentale qui a pour effet de limiter le type de comportement que l’État peut criminaliser. Cette restriction existe indépendamment du partage des compétences établi aux art. 91 et 92 de la *Loi constitutionnelle de 1867*. En d’autres mots, les appelants plaident l’existence d’une double exigence. Même si le ministère public peut prouver qu’en créant une infraction criminelle donnée le Parlement a validement exercé son pouvoir de légiférer en matière de droit criminel, l’art. 7 de la *Charte* ajoute une deuxième exigence quant au type de comportement susceptible d’être criminalisé.

Nous admettons qu’il existe une sorte de « double exigence », en ce que la *Charte* impose des exigences distinctes de celles découlant des art. 91 et 92 de la *Loi constitutionnelle de 1867*. Nous refusons cependant d’élever le principe du préjudice au rang de principe de justice fondamentale. À notre avis, le principe du préjudice ne constitue pas la norme constitutionnelle applicable pour déterminer, au regard de l’art. 7, si un comportement peut ou non être criminalisé.

Dans le *Renvoi : Motor Vehicle Act de la C.-B.*, précité, le juge Lamer (plus tard Juge en chef) a expliqué que les principes de justice fondamentale se trouvent dans « les préceptes fondamentaux de notre système juridique. Ils relèvent non pas du domaine de l’ordre public en général, mais du pouvoir inhérent de l’appareil judiciaire en tant que gardien du système judiciaire » (p. 503). Dans l’arrêt *Rodriguez*, précité, le juge Sopinka a précisé d’ailleurs en quoi consistent les principes de justice fondamentale visés à l’art. 7 (aux p. 590-591 et 607) :

Une simple règle de common law ne suffit pas pour former un principe de justice fondamentale. Au contraire, comme l’expression l’implique, les principes doivent être le fruit d’un certain consensus quant à leur caractère primordial ou fondamental dans la notion de justice de notre société. Les principes de justice fondamentale ne doivent toutefois pas être généraux au point d’être réduits à de vagues généralisations sur ce que notre société estime juste ou moral. Ils doivent pouvoir être identifiés avec

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in a manner which yields an understandable result. They must also, in my view, be legal principles.

une certaine précision et appliqués à diverses situations d'une manière qui engendre un résultat compréhensible. Ils doivent également, à mon avis, être des principes juridiques.

. . .

. . .

While the principles of fundamental justice are concerned with more than process, reference must be made to principles which are “fundamental” in the sense that they would have general acceptance among reasonable people. [Emphasis added.]

Si les principes de justice fondamentale ne s'appliquent pas seulement au processus, il faut se référer aux principes qui sont « fondamentaux » en ce sens qu'ils seraient généralement acceptés parmi des personnes raisonnables. [Nous soulignons.]

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The requirement of “general acceptance among reasonable people” enhances the legitimacy of judicial review of state action, and ensures that the values against which state action is measured are not just fundamental “in the eye of the beholder only”: *Rodriguez*, at pp. 607 and 590 (emphasis in original). In short, for a rule or principle to constitute a principle of fundamental justice for the purposes of s. 7, it must be a legal principle about which there is significant societal consensus that it is fundamental to the way in which the legal system ought fairly to operate, and it must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person.

La condition requérant que les principes soient « généralement acceptés parmi des personnes raisonnables » accroît la légitimité du contrôle judiciaire d'une mesure de l'État et fait en sorte que les valeurs au regard desquelles la mesure de l'État est appréciée ne sont pas fondamentales « aux yeux de l'intéressé seulement » : *Rodriguez*, p. 607 et 590 (souligné dans l'original). En résumé, pour qu'une règle ou un principe constitue un principe de justice fondamentale au sens de l'art. 7, il doit s'agir d'un principe juridique à l'égard duquel il existe un consensus substantiel dans la société sur le fait qu'il est essentiel au bon fonctionnement du système de justice, et ce principe doit être défini avec suffisamment de précision pour constituer une norme fonctionnelle permettant d'évaluer l'atteinte à la vie, à la liberté ou à la sécurité de la personne.

a. *Is the Harm Principle a Legal Principle?*

a. *Le principe du préjudice est-il un principe juridique?*

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In our view, the “harm principle” is better characterized as a description of an important state interest rather than a normative “legal” principle. Be that as it may, even if the harm principle could be characterized as a legal principle, we do not think that it meets the other requirements, as explained below.

À notre avis, le « principe du préjudice » est moins un principe « juridique » normatif qu'un critère permettant de définir un intérêt important de l'État. Quoi qu'il en soit, même si le principe du préjudice pouvait être qualifié de principe juridique, nous ne croyons pas qu'il satisferait aux autres conditions, comme nous l'expliquons ci-après.

b. *There Is No Sufficient Consensus that the Harm Principle Is Vital or Fundamental to Our Societal Notion of Criminal Justice*

b. *Absence d'un consensus suffisant quant au caractère primordial ou fondamental du principe du préjudice dans la notion de justice pénale au sein de notre société*

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Contrary to the appellants' assertion, we do not think there is a consensus that the harm principle is the sole justification for criminal prohibition. There

Contrairement à ce que prétendent les appelants, nous ne pensons pas qu'il y a consensus sur le fait que le principe du préjudice est la seule

is no doubt that our case law and academic commentary are full of statements about the criminal law being aimed at conduct that “affects the public”, or that constitutes “a wrong against the public welfare”, or is “injurious to the public”, or that “affects the community”. No doubt, as stated, the *presence* of harm to others may justify legislative action under the criminal law power. However, we do not think that the *absence* of proven harm creates the unqualified barrier to legislative action that the appellants suggest. On the contrary, the state may sometimes be justified in criminalizing conduct that is either not harmful (in the sense contemplated by the harm principle), or that causes harm only to the accused.

The appellants cite in aid of their position the observation of Sopinka J., writing for the majority in *Butler, supra*, that “[t]he objective of maintaining conventional standards of propriety, independently of any harm to society, is no longer justified in light of the values of individual liberty which underlie the *Charter*” (p. 498). However, Sopinka J. went on to clarify that it is open to Parliament to legislate “on the basis of some fundamental conception of morality for the purposes of safeguarding the values which are integral to a free and democratic society” (p. 493 (emphasis added)).

Several instances of crimes that do not cause harm to others are found in the *Criminal Code*, R.S.C. 1985, c. C-46. Cannibalism is an offence (s. 182) that does not harm another sentient being, but that is nevertheless prohibited on the basis of fundamental social and ethical considerations. Bestiality (s. 160) and cruelty to animals (s. 446) are examples of crimes that rest on their offensiveness to deeply held social values rather than on Mill’s “harm principle”.

A duel fought by consenting adults is an example of a crime where the victim is no less culpable

justification possible d’une interdiction en droit criminel. Il ne fait aucun doute que la jurisprudence et la doctrine canadiennes regorgent d’énoncés disant que le droit criminel s’intéresse aux comportements qui « nuisent au public », qui constituent « un mal compromettant le bien-être public », qui sont « préjudiciables au public » ou qui « perturbent la collectivité ». Certes, l’*existence* d’un préjudice causé à autrui peut justifier le Parlement de légiférer en vertu de sa compétence en matière de droit criminel. Toutefois, nous ne croyons pas que l’*absence* de preuve de préjudice fait totalement obstacle à l’adoption d’une mesure législative comme le suggèrent les appelants. Au contraire, il peut parfois arriver que l’État soit justifié de criminaliser un comportement qui soit n’est pas préjudiciable (au sens envisagé par le principe du préjudice) soit ne cause préjudice qu’à l’accusé.

Au soutien de leur thèse, les appelants citent l’observation suivante formulée par le juge Sopinka, au nom des juges majoritaires dans l’arrêt *Butler*, précité, p. 498 : « [l]’objectif de maintenir des normes de bienséance traditionnelles, indépendamment du préjudice causé à la société, n’est plus justifié compte tenu des valeurs relatives à la liberté individuelle qui sous-tendent la *Charte* ». Cependant, le juge Sopinka a par ailleurs précisé que le Parlement pouvait légiférer « en se fondant sur une certaine conception fondamentale de la moralité aux fins de protéger les valeurs qui font partie intégrante d’une société libre et démocratique » (p. 493 (nous soulignons)).

Le *Code criminel*, L.R.C. 1985, ch. C-46, établit plusieurs crimes qui ne causent pas préjudice à autrui. Le cannibalisme (art. 182) est un acte qui ne cause pas de préjudice à un autre être doué de sensation, mais qui est néanmoins interdit pour des considérations sociales et morales fondamentales. La bestialité (art. 160) et la cruauté envers les animaux (art. 446) sont des exemples de comportements criminalisés non pas à cause du « principe du préjudice » de Mill, mais plutôt parce qu’ils portent atteinte à des valeurs profondément enracinées dans notre société.

Un duel opposant deux adultes consentants est un exemple de crime où la victime de l’infraction

than the perpetrator, and there is no harm that is not consented to, but the prohibition (s. 71 of the *Code*) is nevertheless integral to our ideas of civilized society. See also *R. v. Jobidon*, [1991] 2 S.C.R. 714. Similarly, in *R. v. F. (R.P.)* (1996), 105 C.C.C. (3d) 435, the Nova Scotia Court of Appeal upheld the prohibition of incest under s. 155 of the *Criminal Code* despite a *Charter* challenge by five consenting adults. In none of these instances of consenting adults does the criminal law conform to Mill's expression of the harm principle that "[o]ver himself, over his own body and mind, the individual is sovereign", as referenced earlier at para. 106.

n'est pas moins coupable que l'auteur de celle-ci et où il y a eu consentement au préjudice, mais la prohibition de ce comportement (art. 71 du *Code*) fait néanmoins partie intégrante de notre conception d'une société civilisée. Voir également *R. c. Jobidon*, [1991] 2 R.C.S. 714. De même, dans *R. c. F. (R.P.)* (1996), 105 C.C.C. (3d) 435, la Cour d'appel de la Nouvelle-Écosse a maintenu l'interdiction visant l'inceste que prévoit l'art. 155 du *Code criminel*, à l'issue d'une contestation sur le fondement de la *Charte* par cinq adultes consentants. Dans aucun de ces cas mettant en cause des adultes consentants la règle de droit criminel ne satisfait au principe du préjudice formulé par Mill, savoir que « [s]ur lui-même, sur son corps et son esprit, l'individu est souverain », cité précédemment au par. 106.

119 Various jurists and commentators are said by the appellants to have endorsed the idea that harm is required, but we think that these sources, read in context, do not support the "harm principle" as defined by the appellants.

De prétendre les appelants, divers juristes et commentateurs souscrivent à l'idée que l'existence d'un préjudice doit être établie. Nous pensons toutefois que, considérées dans le contexte qui leur est propre, ces sources n'appuient pas le « principe du préjudice » au sens où l'entendent les appelants.

120 One source relied on by the appellants — the writings of Sir James Fitzjames Stephen — illustrates this point. Reference was made to Stephen's statement that the criminal law

Une source invoquée par les appelants — les écrits de Sir James Fitzjames Stephen — illustre ce que nous venons de dire. Les appelants se sont référés à l'énoncé de Stephen selon lequel le droit criminel

must be confined within narrow limits, and can be applied only to definite overt acts or omissions capable of being distinctly proved, which acts or omissions inflict definite evils, either on specific persons or on the community at large.

[TRADUCTION] doit être étroitement délimité et n'être appliqué qu'à des actions ou omissions précises et manifestes susceptibles de preuve nette, actes ou omissions engendrant des maux précis pour des personnes données ou pour la collectivité en général.

(J. F. Stephen, *A History of the Criminal Law of England* (1883), vol. II, at pp. 78-79)

(J. F. Stephen, *A History of the Criminal Law of England* (1883), vol. II, p. 78-79)

121 However, Stephen himself was a prominent critic of Mill's harm principle. He believed that "immoral" behaviour *can* be a proper subject for the criminal law. Clearly, his reference to "evils" inflicted on the community includes the idea of moral harm, which Mill specifically excluded from the scope of his "harm principle". Stephen thus supported a much larger view of the legitimate purposes of the criminal law than is permitted by the appellants' argument.

Cependant, Stephen a lui-même critiqué ouvertement le principe du préjudice de Mill. Il estimait qu'un comportement « immoral » *peut* légitimement être criminalisé. Manifestement, lorsqu'il parle des « maux » infligés à la collectivité, il vise aussi les préjudices moraux, que Mill exclut expressément de sa notion de « principe du préjudice ». Stephen préconisait donc une interprétation beaucoup plus large des objets légitimes du droit criminel que celle que permet l'argumentation des appelants.

The appellants also rely on a 1982 report by the Law Reform Commission of Canada entitled *The Criminal Law in Canadian Society* which concludes, at p. 45, that the criminal law “ought to be reserved for reacting to conduct that is seriously harmful”. This seems, on its face, to support the harm principle. However, the report goes on to state, at p. 45, that such harm

may be caused or threatened to the collective safety or integrity of society through the infliction of direct damage or the undermining of what the Law Reform Commission terms fundamental or essential values — those values or interests necessary for social life to be carried on, or for the maintenance of the kind of society cherished by Canadians. [Emphasis added.]

Such a definition of “harm” is clearly contrary to Mill’s harm principle as endorsed by the appellants.

c. *Nor Is There Any Consensus that the Distinction Between Harm to Others and Harm to Self Is of Controlling Importance*

Our colleague Arbour J. takes the view that when the state wishes to make imprisonment available as a sanction for criminal conduct, it must be able to show the potential of such conduct to cause harm to others (para. 244). With respect, we do not think there is any such principle anchored in our law. As this Court noted in *Rodriguez, supra*, attempted suicide was an offence under Canadian criminal law (found in the original *Code* at s. 238) until its repeal by S.C. 1972, c. 13, s. 16. Sopinka J. emphasized, at p. 597, that

the decriminalization of attempted suicide cannot be said to represent a consensus by Parliament or by Canadians in general that the autonomy interest of those wishing to kill themselves is paramount to the state interest in protecting the life of its citizens.

Les appelants invoquent en outre un rapport publié en 1982 par la Commission de réforme du droit du Canada et intitulé *Le droit pénal dans la société canadienne*, dans lequel la Commission conclut, à la p. 53, que le droit pénal « doit être réservé au comportement qui est hautement nuisible ». De prime abord, cette conclusion semble étayer le principe du préjudice. Cependant, la Commission poursuit, à la p. 53, en précisant que le préjudice

peut être aussi le fait de causer ou de menacer de causer un tort à la sécurité de la collectivité ou à l’intégrité de la société par des dommages directs ou en sapant ce que la Commission de réforme du droit qualifie de valeurs fondamentales — ces valeurs ou intérêts qui sont nécessaires à la vie sociale ou qui servent de fondement au genre de société que veulent les Canadiens. [Nous soulignons.]

Cette définition du « préjudice » va clairement à l’encontre du principe du préjudice énoncé par Mill et défendu par les appelants.

c. *L’absence de consensus quant à l’importance déterminante de la distinction entre le préjudice à autrui et le préjudice à soi-même*

Notre collègue la juge Arbour est d’avis que, dans les cas où l’État veut rendre passible d’emprisonnement l’auteur d’un comportement criminel donné, il doit être en mesure d’établir que ce comportement est susceptible de causer préjudice à autrui (par. 244). En toute déférence, nous ne croyons pas qu’il existe un tel principe dans notre droit. Comme l’a signalé notre Cour dans l’arrêt *Rodriguez*, précité, la tentative de suicide a constitué une infraction en droit criminel canadien (qui était prévue à l’art. 238 du *Code* original) jusqu’à son abrogation par S.C. 1972, ch. 13, art. 16. À la page 597 de cet arrêt, le juge Sopinka a souligné le point suivant :

... on ne peut dire que la décriminalisation de la tentative de suicide traduit un consensus, chez le législateur ou au sein de la population canadienne en général, selon lequel le droit à l’autonomie de ceux qui souhaitent se tuer l’emporte sur l’intérêt qu’a l’État à protéger la vie de ses citoyens.

The offence of attempted suicide was removed from the *Criminal Code* because Parliament came to prefer other ways of addressing the problem of suicide. In that case, as here, there was an important distinction between constitutional competence, which is for the courts to decide, and the wisdom of a particular measure, which, within its constitutional sphere, is up to Parliament.

L'infraction de tentative de suicide a été supprimée dans le *Code criminel*, parce que le Parlement en est venu à préférer d'autres moyens de lutter contre le problème du suicide. Dans cette affaire tout comme en l'espèce, une distinction importante devait être faite entre la validité d'une mesure législative au regard de la Constitution, question sur laquelle il appartient aux tribunaux de statuer, et l'opportunité d'une telle mesure, question qui ressortit au Parlement, pour autant que la mesure relève de ses attributions constitutionnelles.

124 Putting aside, for the moment, the proper approach to the appropriateness of imprisonment (which, as stated, we think should be addressed under s. 12 rather than s. 7), we do not accept the proposition that there is a general prohibition against the criminalization of harm to self. Canada continues to have paternalistic laws. Requirements that people wear seatbelts and motorcycle helmets are designed to “save people from themselves”. There is no consensus that this sort of legislation offends our societal notions of justice. Whether a jail sentence is an appropriate penalty for such an offence is another question. However, the objection in that aspect goes to the validity of an assigned punishment — it does not go to the validity of prohibiting the underlying conduct.

Abstraction faite, pour l'instant, de l'analyse qui s'impose pour statuer sur le caractère approprié de l'emprisonnement (et qui, nous l'avons dit, devrait se faire au regard de l'art. 12 plutôt que de l'art. 7), nous rejetons la notion d'un interdit général sur la criminalisation des comportements causant préjudice à leur auteur. Le Canada possède encore des lois paternalistes. Le port obligatoire de la ceinture pour les automobilistes et du casque protecteur pour les motocyclistes vise à « protéger les citoyens malgré eux ». Il n'existe pas de consensus selon lequel ce genre de mesures heurterait notre conception de la justice en tant que société. Le caractère convenable de l'emprisonnement comme peine applicable à l'égard d'une telle infraction est une tout autre question. Toutefois, c'est la validité de la peine prévue — et non l'interdiction du comportement visé — qui est contestée.

125 A recent discussion policy paper from the Law Commission of Canada entitled *What is a Crime? Challenges and Alternatives* (2003) highlights the difficulties in distinguishing between harm to others and harm to self. It notes that “in a society that recognizes the interdependency of its citizens, such as universally contributing to healthcare or educational needs, harm to oneself is often borne collectively” (p. 17).

Un document de discussion intitulé *Qu'est-ce qu'un crime? Des défis et des choix*, publié en 2003 par la Commission du droit du Canada, met en évidence la difficulté de différencier les notions de préjudice à autrui et de préjudice à soi-même. On dit que, « dans une société qui reconnaît l'interdépendance de ses citoyennes et citoyens, notamment par la contribution de tous aux besoins en matière de santé ou d'éducation, c'est souvent la collectivité qui porte le fardeau du préjudice qu'on se cause à soi-même » (p. 18).

126 In short, there is no consensus that tangible harm to others is a necessary precondition to the creation of a criminal law offence.

En bref, il n'existe pas de consensus voulant qu'un préjudice tangible à autrui soit un préalable à la création d'une infraction criminelle.

- d. *The Harm Principle Is Not a Manageable Standard Against Which to Measure Deprivation of Life, Liberty or Security of the Person*

Even those who agree with the “harm principle” as a regulator of the criminal law frequently disagree about what it means and what offences will meet or offend the harm principle. In the absence of any agreed definition of “harm” for this purpose, allegations and counter-allegations of non-trivial harm can be marshalled on every side of virtually every criminal law issue, as one author explains:

The harm principle is effectively collapsing under the weight of its own success. Claims of harm have become so pervasive that the harm principle has become meaningless: the harm principle no longer serves the function of a *critical principle* because non-trivial harm arguments permeate the debate. Today, the issue is no longer *whether* a moral offense causes harm, but rather what type and what amount of harms the challenged conduct causes, and how the harms compare. On those issues, the harm principle is silent. [Emphasis in original.]

(B. E. Harcourt, “The Collapse of the Harm Principle” (1999), 90 *J. Crim. L. & Criminology* 109, at p. 113)

Professor Harcourt goes on to point out that it is the “hidden normative dimensions . . . [that] do the work in the harm principle, not the abstract, simple notion of harm” (p. 185). In other words, the existence of harm (however defined) does no more than open a gateway to the debate; it does not give any precise guidance about its resolution.

Harm, as interpreted in the jurisprudence, can take a multitude of forms, including economic, physical and social (e.g., injury and/or offence to fundamental societal values). In the present appeal, for example, the respondents put forward a list of “harms” which they attribute to marihuana use.

- d. *Le principe du préjudice ne constitue pas une norme fonctionnelle permettant d'évaluer l'atteinte à la vie, à la liberté ou à la sécurité de la personne*

Même les tenants du « principe du préjudice » comme facteur de régulation du droit criminel sont fréquemment en désaccord sur sa définition et sur la nature des infractions qui respectent ce principe. Comme l'explique un auteur, vu l'absence de définition généralement reconnue de la notion de « préjudice », des allégations et contre-allégations invoquant l'existence ou l'absence de préjudice non négligeable peuvent être formulées de part et d'autre en ce qui concerne pratiquement toute question de droit pénal :

[TRADUCTION] Le principe du préjudice croule en effet sous le poids de sa popularité. Les prétentions relatives au préjudice sont devenues courantes au point de vider le principe du préjudice de tout sens : celui-ci a cessé de jouer un rôle décisif du fait que les arguments évoquant un préjudice non négligeable sont omniprésents. De nos jours, la question n'est plus *de savoir* si une atteinte morale cause un préjudice, mais plutôt quel type et quel degré de préjudice le comportement reproché cause, et comment se comparent les préjudices. Le principe du préjudice n'offre aucune réponse à ces questions. [En italique dans l'original.]

(B. E. Harcourt, « The Collapse of the Harm Principle » (1999), 90 *J. Crim. L. & Criminology* 109, p. 113)

Le professeur Harcourt ajoute que ce sont [TRADUCTION] « les dimensions normatives cachées [. . .] qui sont déterminantes dans le principe du préjudice, et non la simple notion abstraite de préjudice » (p. 185). En d'autres termes, l'existence d'un préjudice (quelle qu'en soit la définition) ne fait que lancer le débat, sans fournir d'indications précises sur la façon de le trancher.

Selon la jurisprudence, le préjudice peut revêtir une multitude de formes. Il peut s'agir notamment d'un préjudice économique, physique ou social (par exemple une atteinte aux valeurs fondamentales de la société). Dans le présent pourvoi, à titre d'exemple, les intimés énumèrent les « préjudices » qu'ils

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The appellants put forward a list of “harms” which they attribute to marihuana prohibition. Neither side gives much credence to the “harms” listed by the other. Each claims the “net” result to be in its favour.

129 In the result, we do not believe that the content of the “harm” principle as described by Mill and advocated by the appellants provides a manageable standard under which to review criminal or other laws under s. 7 of the *Charter*. Parliament, we think, is entitled to act under the criminal law power in the protection of legitimate state interests other than the avoidance of harm to others, subject to *Charter* limits such as the rules against arbitrariness, irrationality and gross disproportionality, discussed below.

(iii) “Avoidance of Harm” Is Nevertheless a Valid State Interest

130 While we do not agree with the courts below that the “harm principle” is a principle of fundamental justice, there is nevertheless a state interest in the avoidance of harm to those subject to its laws which may justify parliamentary action.

131 In other words, avoidance of harm is a “state interest” within the rule against arbitrary or irrational state conduct mentioned in *Rodriguez, supra*, at p. 594, previously cited, that:

Where the deprivation of the right in question does little or nothing to enhance the state’s interest (whatever it may be), it seems to me that a breach of fundamental justice will be made out, as the individual’s rights will have been deprived for no valid purpose. [Emphasis added.]

132 The conclusion that the state has a particular interest in acting to protect vulnerable groups is also consistent with *Charter* jurisprudence affirming the state’s power to intervene to protect children whose lives are in jeopardy and to promote their

associent à la consommation de marihuana, alors que les appelants dressent la liste des « préjudices » qu’ils imputent à l’interdiction de la marihuana. Chaque partie accorde peu de valeur aux « préjudices » invoqués par l’autre, plaidant plutôt que le résultat « net » lui est favorable.

Par conséquent, nous ne croyons pas que, de par sa teneur, le principe du « préjudice » décrit par Mill et invoqué par les appelants constitue une norme fonctionnelle permettant de contrôler la validité d’une disposition — pénale ou autre — au regard de l’art. 7 de la *Charte*. Nous estimons que le Parlement peut, en application de sa compétence en matière de droit criminel, faire des lois pour protéger les intérêts légitimes de l’État, et non pas seulement pour prévenir un préjudice à autrui, dans la mesure où il respecte les limites fixées par la *Charte*, notamment celles visant les mesures législatives arbitraires, irrationnelles ou exagérément disproportionnées et qui sont examinées plus loin.

(iii) La « prévention des préjudices » constitue néanmoins un objectif légitime de l’État

Bien que nous ne partagions pas l’opinion des juridictions inférieures selon laquelle le « principe du préjudice » est un principe de justice fondamentale, il n’en demeure pas moins que l’intérêt qu’a l’État à prévenir les préjudices aux personnes assujetties à ses lois peut le justifier de légiférer.

En d’autres mots, la prévention des préjudices est un « intérêt de l’État » au sens de la règle qui interdit à l’État de prendre des mesures arbitraires ou irrationnelles, règle mentionnée dans *Rodriguez*, p. 594, et citée plus tôt en l’espèce :

Lorsque la restriction du droit en cause ne fait que peu ou rien pour promouvoir l’intérêt de l’État (quel qu’il puisse être), il me semble qu’une violation de la justice fondamentale sera établie puisque la restriction du droit du particulier n’aura servi aucune fin valable. [Nous soulignons.]

La conclusion que l’État a un intérêt particulier à protéger les groupes vulnérables est également compatible avec les décisions relatives à la *Charte* qui confirment le pouvoir de l’État d’intervenir pour protéger les enfants dont la vie est menacée et

well-being: *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, at para. 70; *B. (R.)*, *supra*, at para. 88 (*per* La Forest J.).

We do not agree with Prowse J.A. that harm must be shown to the court's satisfaction to be "serious" and "substantial" before Parliament can impose a prohibition. Once it is demonstrated, as it has been here, that the harm is not *de minimis*, or in the words of Braidwood J.A., the harm is "not [in]significant or trivial", the precise weighing and calculation of the nature and extent of the harm is Parliament's job. Members of Parliament are elected to make these sorts of decisions, and have access to a broader range of information, more points of view, and a more flexible investigative process than courts do. A "serious and substantial" standard of review would involve the courts in micromanagement of Parliament's agenda. The relevant constitutional control is not micromanagement but the general principle that the parliamentary response must not be grossly disproportionate to the state interest sought to be protected, as will be discussed.

Having said that, our understanding of the view taken of the facts by the courts below is that while the risk of harm to the great majority of users can be characterized at the lower level of "neither trivial nor insignificant", the risk of harm to members of the vulnerable groups reaches the higher level of "serious and substantial". This distinction simply underlines the difficulties of a court attempting to quantify "harm" beyond a *de minimis* standard.

(iv) In Light of the State Interest Thus Identified, the Prohibition Is Neither Arbitrary nor Irrational

A criminal law that is shown to be arbitrary or irrational will infringe s. 7: *R. v. Arkel*, [1990] 2 S.C.R.

pour favoriser leur bien-être : *Nouveau-Brunswick (Ministre de la Santé et des Services communautaires) c. G. (J.)*, [1999] 3 R.C.S. 46, par. 70; et *B. (R.)*, précité, par. 88 (le juge La Forest).

Nous ne souscrivons pas à l'opinion de la juge Prowse de la Cour d'appel selon laquelle le Parlement ne peut imposer une interdiction que s'il est en mesure de convaincre le tribunal de l'existence d'un préjudice [TRADUCTION] « grave » et « important ». Une fois qu'il est prouvé, comme en l'espèce, que le préjudice n'est pas minime ou, pour reprendre les termes employés par le juge Braidwood, de la Cour d'appel, qu'il n'est [TRADUCTION] « ni [in]signifiant ni négligeable », l'appréciation et la détermination exactes de la nature et de l'étendue du préjudice relève du Parlement. Les députés sont élus pour prendre de telles décisions et ils ont accès à un plus large éventail de données, à un plus grand nombre de points de vue et à des moyens d'enquête plus souples que les tribunaux. L'application par ces derniers d'une norme de contrôle fondée sur le caractère « grave et important » du préjudice les amènerait à micro-gérer les travaux du Parlement. Le mécanisme de contrôle constitutionnel pertinent n'est pas la microgestion, mais bien l'application du principe général voulant que la mesure législative ne doive pas être exagérément disproportionnée à l'intérêt de l'État qu'elle est censée protéger, comme nous l'expliquerons plus loin.

Cela dit, il nous semble que les juridictions inférieures ont considéré que, eu égard aux faits de l'espèce, le risque de préjudice pour la grande majorité des consommateurs se situe à la limite inférieure des préjudices « qui ne sont ni négligeables ni insignifiants » alors que le risque de préjudice pour les personnes vulnérables rejoint la limite supérieure des préjudices « graves et importants ». Cette distinction fait tout simplement ressortir les difficultés que doit surmonter le tribunal qui tente de mesurer un « préjudice » plus que mineur.

(iv) Au vu de l'intérêt de l'État ainsi défini, l'interdiction n'est ni arbitraire ni irrationnelle

Une disposition de droit criminel qui est jugée arbitraire ou irrationnelle porte atteinte à l'art. 7 :

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695, at p. 704; *R. v. Hamon* (1993), 85 C.C.C. (3d) 490 (Que. C.A.), at p. 492. Our colleagues LeBel and Deschamps JJ. consider the marihuana prohibition to be disproportionate to the societal problems at issue, and, thus arbitrary. This, we think, puts the threshold of judicial intervention too low. LeBel J. writes that “it cannot be denied that marihuana can cause problems of varying nature and severity to some people or to groups of them” (para. 280). That being the case, we think the *Charter* allows Parliament a broad, though certainly not unlimited, legislative capacity to respond. Marihuana is a psychoactive drug whose “use causes alteration of mental function” according to the trial judge. This alteration creates a potential harm to others when the user engages in “driving, flying and other activities involving complex machinery”. Chronic users may suffer “serious” health problems. Vulnerable groups are at particular risk, including adolescents with a history of poor school performance, pregnant women and persons with pre-existing diseases such as cardiovascular diseases, respiratory diseases, schizophrenia or other drug dependencies. These findings of fact disclose a sufficient state interest to support Parliament’s intervention should Parliament decide that it is wise to continue to do so, subject to a constitutional standard of *gross* disproportionality, discussed below.

R. c. Arkell, [1990] 2 R.C.S. 695, p. 704; *R. c. Hamon* (1993), 85 C.C.C. (3d) 490 (C.A. Qué.), p. 492. Nos collègues les juges LeBel et Deschamps estiment que l’interdiction de la marihuana est disproportionnée aux problèmes sociétaux concernés et qu’elle est, de ce fait, arbitraire. Nous croyons que cette conclusion a pour effet de placer trop bas le seuil à partir duquel les tribunaux sont fondés à intervenir. Le juge LeBel écrit qu’« il est indéniable que la marihuana peut causer à certaines personnes ou à certains groupes des problèmes de nature et de gravité variables » (par. 280). Cela étant, nous estimons que la *Charte* confère au Parlement une grande latitude — qui n’est évidemment pas illimitée — quant aux mesures législatives qu’il peut adopter à l’égard de ces problèmes. Selon le juge du procès, la marihuana est une drogue psychoactive dont [TRADUCTION] « la consommation agit sur les fonctions mentales ». Cette action crée un risque pour autrui lorsque le consommateur [TRADUCTION] « condui[t] un véhicule à moteur, pilot[e] un avion ou exerc[e] d’autres activités exigeant de faire fonctionner des appareils complexes ». Les consommateurs chroniques peuvent éprouver de « graves » problèmes de santé. Les groupes vulnérables sont particulièrement à risque, notamment les adolescents qui ont déjà des résultats scolaires médiocres, les femmes enceintes et les personnes qui souffrent d’affections préexistantes comme des maladies cardiovasculaires, des troubles respiratoires, la schizophrénie ou d’autres toxicomanies. Ces conclusions de fait révèlent l’existence d’un intérêt de l’État suffisant pour justifier la mesure législative si le Parlement juge opportun de la maintenir, pourvu qu’elle respecte la norme constitutionnelle de la disproportion *exagérée* dont il est question ci-après.

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The criminalization of possession is a statement of society’s collective disapproval of the use of a psychoactive drug such as marihuana (*Morgentaler*, *supra*, at p. 70), and, through Parliament, the continuing view that its use should be deterred. The prohibition is not arbitrary but is rationally connected to a reasonable apprehension of harm. In particular, criminalization seeks to take marihuana out of the hands of users and potential users, so as to prevent the associated harm and to eliminate the market for traffickers. In light of these findings of fact it cannot

La criminalisation de la possession est l’expression de la désapprobation collective de notre société pour la consommation d’une drogue psychoactive telle la marihuana (*Morgentaler*, précité, p. 70) et, par l’entremise du Parlement, de l’opinion persistante que la consommation de cette substance doit être découragée. L’interdiction n’a pas un caractère arbitraire, mais est rationnellement liée à une crainte raisonnable de préjudice. Plus particulièrement, la criminalisation de la marihuana vise à priver de cette substance les consommateurs actuels et potentiels,

be said that the prohibition on marihuana possession is arbitrary or irrational, although the wisdom of the prohibition and its related penalties is always open to reconsideration by Parliament itself.

It is true that Parliament can and has directly addressed some of the potential harmful conduct elsewhere in the *Criminal Code*. Section 253, for example, prohibits driving while impaired. One type of legal control to prevent harm does not logically oust other potential forms of legal control, subject as always to the limitation of gross disproportionality discussed below.

The appellants also contend that Parliament's failure to criminalize the consumption of alcohol and tobacco, while criminalizing the use of marihuana (which the appellants say is, if anything, *less* harmful) shows the arbitrariness of the law. It is clear that the consumption of alcohol and tobacco can be harmful. Moreover in some respects the harm is of a type comparable to that caused by marihuana consumption. Much of the bronchial harm associated with marihuana, for instance, comes from the smoking aspect rather than its intoxicating properties.

However, if Parliament is otherwise acting within its jurisdiction by enacting a prohibition on the use of marihuana, it does not lose that jurisdiction just because there are other substances whose health and safety effects could arguably justify similar legislative treatment. To hold otherwise would involve the courts in not only defining the outer limits of the legislative action allowed by the Constitution but also in ordering Parliament's priorities within those limits. That is not the role of the courts under our constitutional arrangements.

de façon à prévenir le préjudice associé à sa consommation et à éliminer le marché de la marihuana pour les trafiquants. Vu ces conclusions de fait, il est impossible d'affirmer que l'interdiction visant la possession de marihuana est arbitraire ou irrationnelle, bien qu'il soit toujours loisible au Parlement de reconsidérer l'opportunité de l'interdiction et des peines dont elle est assortie.

Il est vrai que le Parlement peut (comme il l'a d'ailleurs fait) s'attaquer directement à certains des comportements susceptibles d'être préjudiciables en créant d'autres infractions dans le *Code criminel*. L'article 253, par exemple, interdit la conduite avec les facultés affaiblies. Le recours à une mesure législative donnée pour prévenir un préjudice n'exclut pas logiquement le recours à d'autres mesures du genre, sous réserve toujours du respect du critère de la disproportion exagérée, qui est examiné plus loin.

Les appelants soutiennent également que le fait que le Parlement n'a pas criminalisé la consommation d'alcool et de tabac, alors qu'il a criminalisé celle de la marihuana (substance pourtant *moins* nocive selon eux) témoigne du caractère arbitraire des dispositions contestées. Il est clair que la consommation d'alcool et de tabac peut être préjudiciable. En outre, ce préjudice est, à certains égards, comparable à celui causé par la marihuana. Par exemple, les dommages causés aux bronches par la consommation de marihuana sont en grande partie imputables au fait que celle-ci est fumée plutôt qu'aux propriétés intoxicantes de cette substance.

Toutefois, si le Parlement respecte les limites de sa compétence lorsqu'il édicte une disposition interdisant la consommation de marihuana, il ne perd pas le pouvoir de le faire du seul fait qu'il existe d'autres substances dont les effets sur la santé et la sécurité pourraient justifier des mesures législatives similaires. Conclure différemment amènerait les tribunaux non seulement à fixer les limites de l'action législative autorisée par la Constitution, mais aussi à établir les priorités du Parlement à l'intérieur de ces limites. Ce n'est pas le rôle que leur confie la Constitution.

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140 Parliament may, as a matter of constitutional law, determine what is *not* criminal as well as what is. The choice to use the criminal law in a particular context does not require its use in any other: *RJR-MacDonald*, *supra*, at para. 50. Parliament's decision to move in one area of public health and safety without at the same time moving in other areas is not, on that account alone, arbitrary or irrational.

(v) The Allegation of Disproportionality

141 Having rejected the appellants' contention that Parliament is without authority to criminalize conduct unless it causes harm to others, as well as their claim that criminalization of marihuana is arbitrary and irrational, we proceed to the next level of their argument, namely that even if it is not arbitrary and irrational, criminalization is nevertheless disproportionate to any threat posed by marihuana use.

142 In *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1, at para. 47, the Court accepted that the means taken to achieve an objective can be so disproportionate to the desired end so as to offend the principles of fundamental justice:

Determining whether deportation to torture violates the principles of fundamental justice requires us to balance [under s. 7] Canada's interest in combatting terrorism and the Convention refugee's interest in not being deported to torture. Canada has a legitimate and compelling interest in combatting terrorism. But it is also committed to fundamental justice. The notion of proportionality is fundamental to our constitutional system. Thus we must ask whether the government's proposed response is reasonable in relation to the threat. In the past, we have held that some responses are so extreme that they are *per se* disproportionate to any legitimate government interest: see *Burns*, *supra*. We must ask whether deporting a refugee to torture would be such a response. [Emphasis added.]

See also *United States v. Burns*, [2001] 1 S.C.R. 283, 2001 SCC 7, at para. 78.

Suivant notre droit constitutionnel, le Parlement peut décider de ce qui est criminel et de ce qui *ne* l'est *pas*. Le choix de recourir au droit criminel dans un contexte donné n'oblige pas à y recourir dans un autre : *RJR-MacDonald*, précité, par. 50. La décision du Parlement d'intervenir dans un domaine intéressant la santé et la sécurité publiques et pas dans un autre n'est pas, de ce seul fait, arbitraire ou irrationnelle.

(v) L'argument fondé sur la disproportion

Après avoir rejeté la prétention des appelants que le Parlement peut seulement criminaliser les comportements préjudiciables à autrui, de même que celle selon laquelle la criminalisation de la marihuana est une mesure arbitraire et irrationnelle, nous allons maintenant examiner le volet suivant de leur argumentation, à savoir que, même si la criminalisation n'a pas un caractère arbitraire et irrationnel, elle est néanmoins disproportionnée à tout risque associé à la consommation de marihuana.

Dans l'arrêt *Suresh c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [2002] 1 R.C.S. 3, 2002 CSC 1, par. 47, notre Cour a reconnu qu'il peut arriver que les mesures prises pour réaliser un objectif soient si disproportionnées au résultat recherché qu'elles contreviennent aux principes de justice fondamentale :

Pour décider si une expulsion impliquant un risque de torture viole les principes de justice fondamentale, il faut mettre en balance [suivant l'art. 7] l'intérêt du Canada à combattre le terrorisme d'une part, et le droit d'un réfugié au sens de la Convention de ne pas être expulsé vers un pays où il risque la torture d'autre part. Le Canada a un intérêt à la fois légitime et impérieux à lutter contre le terrorisme. Mais notre pays adhère également aux principes de justice fondamentale. La notion de proportionnalité est un aspect fondamental de notre régime constitutionnel. Par conséquent, nous devons nous demander si la mesure projetée par le gouvernement est raisonnable par rapport à la menace. Dans le passé, notre Cour a jugé que certaines mesures étaient à ce point extrêmes qu'elles étaient en soi disproportionnées à tout intérêt légitime du gouvernement : voir *Burns*, précité. Nous devons nous demander si une expulsion impliquant un risque de torture constitue une telle mesure. [Nous soulignons.]

Voir également *États-Unis c. Burns*, [2001] 1 R.C.S. 283, 2001 CSC 7, par. 78.

In short, after it is determined that Parliament acted pursuant to a legitimate state interest, the question can still be posed under s. 7 whether the government's legislative measures in response to the use of marihuana were, in the language of *Suresh*, "so extreme that they are *per se* disproportionate to any legitimate government interest" (para. 47 (emphasis added)). As we explain below, the applicable standard is one of *gross* disproportionality, the proof of which rests on the claimant.

The aspect of proportionality of interest to the appellants is the alleged lack of proportionality between the contribution of the marihuana prohibition to public health and safety (the appellants say the prohibition is so ineffective that it contributes little) and the adverse effects on persons subject to the prohibition, including those who are charged and convicted of the offence (the appellants say the adverse effects are severe and lasting). The relevant effects include those that relate to the life, liberty or security of an individual, and that are the product of the state action complained of.

We have already rejected Mr. Malmo-Levine's "pleasure principle" on the basis that depriving the general user of the freedom to smoke "pot" is not the violation of a freestanding constitutional right. We turn now to the effects of the criminalization of marihuana possession on accused persons.

3. The Availability of Imprisonment

Although this issue belongs to the s. 7 analysis, we wish to highlight its importance here to address our disagreement with Arbour J., for whom the availability of imprisonment is the controlling consideration (paras. 216, 244, 256 and 257).

Our colleague writes at para. 257:

While the cases referred to by my colleagues clearly illustrate the state's interest in the protection of vulnerable groups from others who might harm them, they are

Pour résumer, une fois qu'il est établi que le Parlement a agi sur le fondement d'un intérêt légitime de l'État, il est encore possible de se demander, au regard de l'art. 7, si les mesures législatives adoptées à l'égard de la consommation de la marihuana étaient, pour reprendre les termes employés dans *Suresh*, « à ce point extrêmes qu'elles étaient en soi disproportionnées à tout intérêt légitime du gouvernement » (par. 47 (nous soulignons)). Comme nous l'expliquons plus loin, le critère applicable est celui de la disproportion *exagérée*, dont la preuve incombe au demandeur.

L'aspect de la notion de proportionnalité qui intéresse les appelants est, selon eux, l'absence de proportionnalité qu'il y aurait entre l'apport de l'interdiction de la marihuana à la santé et à la sécurité publiques (l'interdiction étant selon eux si inefficace que cet apport est minime) et ses effets préjudiciables pour les personnes touchées par l'interdiction, y compris celles accusées et reconnues coupables de l'infraction (les appelants affirment que ces effets sont graves et durables). Les effets pertinents sont notamment ceux qui touchent à la vie, à la liberté ou à la sécurité de la personne et qui sont la conséquence de la mesure reprochée à l'État.

Nous avons rejeté plus tôt le « principe du plaisir » invoqué par M. Malmo-Levine. En effet, priver le consommateur ordinaire de la liberté de fumer du « pot » ne porte pas atteinte à un droit constitutionnel autonome. Examinons maintenant les conséquences de la criminalisation de la possession de marihuana pour les personnes accusées de cette infraction.

3. La possibilité d'emprisonnement

Bien que la question relève de l'analyse fondée sur l'art. 7, nous tenons à en souligner l'importance pour exprimer notre désaccord avec la juge Arbour, qui considère la possibilité d'emprisonnement comme le facteur décisif (par. 216, 244, 256 et 257).

Notre collègue dit ce qui suit au par. 257 :

Bien que les arrêts invoqués par mes collègues montrent clairement que l'État a intérêt à protéger les groupes vulnérables contre les personnes qui pourraient causer

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far from suggesting that it is the vulnerable ones who should be sent to jail for their self-protection. Implicit in my colleagues' argument is that the state would be justified in threatening with imprisonment adolescents with a history of poor school performance, women of child-bearing age and persons with pre-existing diseases such as cardiovascular diseases, respiratory diseases, schizophrenia and other drug dependencies, who are at particular risk of harming themselves by using marihuana. I do not think that an exception to the harm principle is justified to allow the state to threaten with imprisonment vulnerable people in order to prevent them from harming themselves.

148 We disagree with our colleague's view that it is unconstitutional for the state to attempt to deter vulnerable people from self-harm by criminalization of the harmful conduct backed up, where appropriate, by the "threat" of imprisonment. We disagree with the premise that vulnerable people of the sort she describes are in fact threatened with jail, or that imposition of a jail term in the circumstances she envisages would be upheld as a fit sentence or a constitutional sentence.

149 A finding that a particular form of penalty violates s. 12 may call for a constitutional remedy in relation to the penalty, but leave intact the criminalization of the conduct, which may still be constitutionally punishable by an alternative form of penalty.

150 Braidwood J.A., too, rested his analysis on the availability of imprisonment. He found that "it is common sense that you don't go to jail unless there is a potential that your activities will cause harm to others" (para. 134). The appellant in *Clay*, *supra*, released concurrently, similarly argued at para. 25 of his factum that "[w]hile a reasonable apprehension of a 'not insignificant' or 'not trivial' harm may suffice to justify a regulatory prohibition on the personal and private consumption of a substance, it is not constitutionally adequate for justifying the use of incarceration and the imposition of a criminal record to deter such consumption" (emphasis added). We agree with the observation that the

préjudice à ces groupes, ces décisions sont loin de suggérer qu'on envoie les personnes vulnérables en prison pour assurer leur propre protection. La proposition de mes collègues sous-entend que l'État serait justifié de menacer d'emprisonnement les adolescents ayant des résultats scolaires médiocres, les femmes en âge de procréer et les personnes souffrant de maladies préexistantes — par exemple des troubles cardiovasculaires, des problèmes respiratoires, la schizophrénie et d'autres toxicomanies —, autant de personnes qui risquent plus particulièrement de se faire du tort en consommant de la marihuana. Je ne pense pas qu'il soit justifié de déroger au principe du préjudice et de permettre à l'État de menacer d'emprisonnement des personnes vulnérables afin de les empêcher de se causer préjudice à elles-mêmes.

Nous ne partageons pas l'opinion de notre collègue selon laquelle l'État agit inconstitutionnellement lorsqu'il tente de dissuader des personnes vulnérables de se causer préjudice à elles-mêmes en criminalisant le comportement préjudiciable et en assortissant l'infraction de la « menace » d'emprisonnement, peine applicable dans les cas opportuns. Nous sommes en désaccord avec la prémisse que les catégories de personnes vulnérables qu'elle décrit sont en fait menacées d'emprisonnement ou que l'incarcération dans les circonstances qu'elle envisage serait considérée comme une peine appropriée ou une peine constitutionnellement valide.

Le fait de conclure qu'une peine donnée viole l'art. 12 peut exiger une réparation constitutionnelle liée à la peine sans pour autant remettre en cause la criminalisation du comportement, lequel peut encore, constitutionnellement, être punissable par un autre type de peine.

Le juge Braidwood de la Cour d'appel a lui aussi fondé son analyse sur la possibilité d'emprisonnement. Il a conclu qu'[TRADUCTION] « il est logique qu'on ne vous envoie pas en prison, à moins que vos actes ne soient susceptibles de causer préjudice à autrui » (par. 134). Dans l'arrêt *Clay*, précité, arrêt rendu simultanément, l'appelant a présenté un argument au même effet au par. 25 de son mémoire, faisant valoir que, [TRADUCTION] « [b]ien qu'une crainte raisonnable de subir un préjudice "non insignifiant" ou "non négligeable" puisse suffire, dans un cadre réglementaire, pour justifier d'interdire la consommation personnelle et privée d'une substance, elle n'est pas suffisante, sur le plan

operative concept here is the use of incarceration, not the availability of incarceration.

In addition to the possible penalty of imprisonment, the appellants highlight a number of other consequences of being charged and convicted for possession of marihuana, including the effects of having a criminal record, the cost of mounting a defence, and the potential adverse impact on education and job prospects (even prior to trial, and whether or not a conviction results). They submit that these harms to the individual accused are disproportionate to any societal interest served by the (largely ineffective) suppression of marihuana use.

As the appellants' principal argument on this branch of the case relates to the availability of imprisonment, we will turn first to that issue.

(a) *No Mandatory Minimum Sentence*

Possession of marihuana carries no minimum sentence. However, the general framework of the NCA permits imprisonment, and marihuana is one of the scheduled drugs. The prescription of sentencing options by Parliament reflects its view of the seriousness of the offence, and is ordinarily taken into consideration by the sentencing judge.

Imprisonment is imposed by the courts for simple possession only in exceptional circumstances. Our colleague Arbour J. writes, as mentioned earlier, about threatening with jail underachieving school age adolescents, women of childbearing age and the mentally afflicted, but the cases show that this analysis rests on a faulty premise. In most possession cases, offenders (whether vulnerable or not) receive discharges or conditional sentences. This is particularly true where the amounts of marihuana involved are small and for recreational uses,

constitutionnel, pour justifier le recours à l'incarcération et l'établissement d'un casier judiciaire pour décourager ce genre de consommation » (nous soulignons). Nous souscrivons à l'observation selon laquelle le concept clé en l'espèce est le recours à l'incarcération, et non la possibilité d'incarcération.

Outre la possibilité d'emprisonnement, les appelants soulignent un certain nombre de conséquences additionnelles découlant du fait d'être accusé et déclaré coupable de possession de marihuana, dont l'existence d'un casier judiciaire, les coûts liés à la présentation d'une défense et les possibles effets préjudiciables du point de vue des études et des perspectives d'emploi (même avant le procès, puis au terme de celui-ci, qu'il aboutisse ou non à une déclaration de culpabilité). Ils avancent que ces préjudices causés à l'accusé sont disproportionnés à tout intérêt sociétal favorisé par l'interdiction (par ailleurs largement inefficace) visant la consommation de marihuana.

Étant donné que l'argument principal des appelants sur cet aspect du pourvoi porte sur la possibilité d'emprisonnement, nous allons d'abord examiner cette question.

a) *L'absence de peine minimale obligatoire*

La possession de marihuana n'expose le délinquant à aucune peine minimale. Cependant, le cadre général de la Loi permet l'emprisonnement et la marihuana est l'une des drogues figurant à l'annexe. La faculté que donne le Parlement de choisir entre diverses peines reflète sa perception de la gravité de l'infraction et est généralement prise en compte par le juge appelé à déterminer la peine.

Ce n'est que dans des circonstances exceptionnelles que les tribunaux infligent l'emprisonnement pour simple possession de marihuana. Comme nous l'avons mentionné précédemment, notre collègue la juge Arbour parle de la menace d'emprisonnement qui pèserait sur les adolescents sous-performants à l'école, les femmes en âge de procréer et les personnes atteintes de troubles mentaux, mais la jurisprudence révèle que cette analyse s'appuie sur une prémisse erronée. Dans la plupart des affaires de possession, le délinquant (qu'il s'agisse

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where the usual sentence is a conditional discharge. See, e.g., C. C. Ruby and D. L. Martin, *Criminal Sentencing Digest* (loose-leaf), 30§320, at p. 1251; *R. v. Fleming* (1992), 21 W.A.C. 79 (B.C.C.A.); *R. v. Culley* (1977), 36 C.C.C. (2d) 433 (Ont. C.A.).

ou non d'une personne vulnérable) fait l'objet d'une absolution ou d'une peine d'emprisonnement avec sursis. Cela se produit particulièrement lorsqu'il est question d'une petite quantité de marihuana à des fins récréatives, auquel cas l'absolution sous condition est la peine habituellement infligée. Voir, par exemple, C. C. Ruby et D. L. Martin, *Criminal Sentencing Digest* (feuilles mobiles), 30§320, p. 1251; *R. c. Fleming* (1992), 21 W.A.C. 79 (C.A.C.-B.); *R. c. Culley* (1977), 36 C.C.C. (2d) 433 (C.A. Ont.).

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The reality is this. There is no impediment (such as a mandatory minimum sentence) to a trial judge imposing a fit sentence after a conviction for simple possession of marihuana. The “availability” of imprisonment in respect of the scheduled drugs under the NCA is part of a statutory framework for dealing with drugs generally and is not specifically directed at marihuana. The case law discloses that it is only in the presence of aggravating circumstances, not likely to be present in the situation of the “vulnerable persons” referred to by our colleague, where a court has been persuaded that imprisonment for simple possession of marihuana was, in the particular case, a fit sentence.

La réalité est la suivante. Aucun obstacle (telle une peine minimale obligatoire) n'empêche le juge du procès d'infliger une peine appropriée à la personne déclarée coupable de simple possession de marihuana. La « possibilité » d'emprisonnement pour possession d'une drogue figurant à l'annexe de la Loi fait partie intégrante du cadre législatif applicable aux drogues en général et non pas seulement à la marihuana en particulier. L'examen de la jurisprudence révèle que ce n'est qu'en présence de circonstances aggravantes — circonstances peu susceptibles d'être présentes dans le cas des « personnes vulnérables » dont fait mention notre collègue — que le tribunal a estimé, dans l'affaire dont il était saisi, qu'une peine d'emprisonnement constituait une peine appropriée à l'égard de l'infraction de simple possession de marihuana.

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In *R. v. Dauphinee* (1984), 62 N.S.R. (2d) 156 (S.C. App. Div.), a three-month sentence of imprisonment for simple possession of one ounce of marihuana was upheld on appeal because the offender had five prior narcotics possession offences and the trial judge noted that the accused showed no signs of amending his conduct. Prison sentences are also occasionally handed out where an individual has been sentenced for a more serious drug offence. See, e.g., *R. v. Witter*, [1997] O.J. No. 2248 (QL) (Gen. Div.) (six-month sentence for possession of marihuana to be served concurrently with three-year sentence for trafficking in cocaine; accused had nine prior narcotics convictions); *R. v. Coady* (1994), 24 W.C.B. (2d) 459 (Nfld. S.C.T.D.) (sentenced to 14 days' imprisonment for possession of 70 grams of marihuana to be served concurrently with nine-

Dans l'arrêt *R. c. Dauphinee* (1984), 62 N.S.R. (2d) 156 (C.S. Div. app.), une peine de trois mois d'emprisonnement pour simple possession d'une once de marihuana a été confirmée en appel parce que le contrevenant avait déjà été déclaré coupable de cinq infractions de possession de stupéfiants et que, selon le juge du procès, l'accusé ne manifestait aucune intention de s'amender. Il arrive également qu'une peine d'emprisonnement soit infligée lorsque l'individu a déjà été condamné pour une infraction plus grave en matière de drogue. Voir, par exemple, *R. c. Witter*, [1997] O.J. No. 2248 (QL) (Div. gén.) (six mois d'emprisonnement pour possession de marihuana à purger concurremment avec une peine de trois ans pour trafic de cocaïne, l'accusé ayant déjà été déclaré coupable à neuf reprises d'infractions touchant les stupéfiants);

month sentence for possession of hashish with intent to traffic); *R. v. Richards* (1989), 88 N.S.R. (2d) 425 (S.C. App. Div.) (four-month sentence for possession of 113.5 grams of marihuana to be served concurrently with a sentence of one year for possession of 15 grams of cocaine, plus one year's probation; respondent had six prior narcotics-related convictions; the court noted his behaviour endangered the safety of his family and no leniency was warranted in light of his recidivism). In addition, some incarcerations associated with possession offences result from the failure to pay fines, or where the Crown has agreed to permit a plea bargain for a lesser included offence. See B. A. MacFarlane, R. J. Frater and C. Proulx, *Drug Offences in Canada* (3rd ed. (loose-leaf)), at p. 29-20.

It is no doubt true that in an earlier era judges may have resorted to imprisonment more frequently than would be considered acceptable under the *Charter*, but the argument here is a post-*Charter* argument. It asks whether the marihuana prohibition *can* be — and is *required* to be — applied consistently with the *Charter*. In our view, the answer to both questions is yes.

First, as mentioned above, we believe that the issue of punishment should be approached in light of s. 12 of the *Charter* (which protects against “cruel and unusual treatment or punishment”), and, in that regard, the constitutional standard is one of gross disproportionality. Second, in our opinion, the lack of any mandatory minimum sentence together with the existence of well-established sentencing principles mean that the mere availability of imprisonment on a marihuana charge cannot, without more, violate the principle against gross disproportionality.

R. c. Coady (1994), 24 W.C.B. (2d) 459 (C.S.T.-N. 1^{re} inst.) (14 jours d'emprisonnement pour possession de 70 grammes de marihuana à purger concurremment avec une peine de neuf mois pour possession de hachisch en vue d'en faire le trafic); *R. c. Richards* (1989), 88 N.S.R. (2d) 425 (C.S. Div. app.) (quatre mois d'emprisonnement pour possession de 113,5 grammes de marihuana à purger concurremment avec une peine d'un an pour possession de 15 grammes de cocaïne, plus une année de probation; l'accusé avait déjà été reconnu coupable de six infractions liées aux stupéfiants; la cour a signalé que son comportement compromettait la sécurité de sa famille et qu'aucune clémence n'était justifiée étant donné la récidive). En outre, dans certains cas, l'emprisonnement pour possession de stupéfiants résulte soit du défaut du délinquant de payer l'amende, soit de l'inscription d'un plaidoyer de culpabilité pour une infraction moindre et incluse à l'issue de négociations avec le ministère public. Voir B. A. MacFarlane, R. J. Frater et C. Proulx, *Drug Offences in Canada* (3^e éd. (feuilles mobiles)), p. 29-20.

Il est sans doute vrai que, à une autre époque, les juges ont pu infliger l'emprisonnement plus fréquemment que ce qui serait considéré acceptable aujourd'hui compte tenu de la *Charte*, mais l'argument formulé en l'espèce vise la période postérieure à l'adoption de celle-ci. La question posée est la suivante : L'interdiction de la marihuana *peut-elle* — et *doit-elle* — être appliquée en conformité avec la *Charte*? À notre sens, il faut répondre par l'affirmative aux deux volets de la question.

Premièrement, nous le répétons, la question de la sanction doit selon nous être examinée au regard de l'art. 12 de la *Charte* (qui protège chacun contre « tous traitements ou peines cruels et inusités ») et, dans de tels cas, la norme constitutionnelle applicable est celle de la disproportion exagérée. Deuxièmement, nous sommes d'avis que l'absence de peine minimale obligatoire et l'existence de principes de détermination de la peine bien établis signifient que la possibilité d'emprisonnement pour une infraction liée à la marihuana ne saurait à elle seule constituer une mesure dont la disproportion est exagérée.

(b) *The Section 12 Standard — Gross Disproportionality*

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The standard set out in s. 12 of the *Charter* sheds light on the requirements of s. 7. As Lamer J. explained in *Re B.C. Motor Vehicle Act*, *supra*, ss. 8 to 14 of the *Charter* may be seen as specific illustrations of the principles of fundamental justice in s. 7. While proportionality “is the essence of a s. 12 analysis” (*R. v. Morrisey*, [2000] 2 S.C.R. 90, 2000 SCC 39, at para. 44), the constitutional standard is gross disproportionality. As the majority explained in *Morrisey* (at para. 26) :

Where a punishment is merely disproportionate, no remedy can be found under s. 12. Rather, the court must be satisfied that the punishment imposed is grossly disproportionate for the offender, such that Canadians would find the punishment abhorrent or intolerable. [First emphasis added; second emphasis in original.]

See *R. v. Smith*, [1987] 1 S.C.R. 1045, *per* Lamer J., at p. 1072:

The test for review under s. 12 of the *Charter* is one of gross disproportionality, because it is aimed at punishments that are more than merely excessive. We should be careful not to stigmatize every disproportionate or excessive sentence as being a constitutional violation, and should leave to the usual sentencing appeal process the task of reviewing the fitness of a sentence. [Emphasis added.]

See also *Steele v. Mountain Institution*, [1990] 2 S.C.R. 1385, at p. 1417: “The test for determining whether a sentence is disproportionately long is very properly stringent and demanding. A lesser test would tend to trivialize the *Charter*”. See also *R. v. Latimer*, [2001] 1 S.C.R. 3, 2001 SCC 1, at para. 77.

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Is there then a principle of fundamental justice embedded in s. 7 that would give rise to a constitutional remedy against a punishment that does not infringe s. 12? We do not think so. To find that gross and excessive disproportionality of punishment is required under s. 12 but a lesser degree of

b) *La norme d'application de l'art. 12 — la disproportion exagérée*

La norme énoncée à l'art. 12 de la *Charte* aide à saisir les exigences prévues par l'art. 7. Comme l'a expliqué le juge Lamer dans le *Renvoi : Motor Vehicle Act de la C.-B.*, précité, les art. 8 à 14 de la *Charte* peuvent être considérés comme des exemples précis des principes de justice fondamentale visés à l'art. 7. Bien que la proportionnalité « constitue l'essence même de l'analyse fondée sur l'art. 12 » (*R. c. Morrisey*, [2000] 2 R.C.S. 90, 2000 CSC 39, par. 44), la norme constitutionnelle est celle de la disproportion exagérée. Dans cet arrêt, les juges majoritaires ont donné les explications suivantes, au par. 26 :

Lorsque la peine est simplement disproportionnée, aucune réparation ne peut être accordée en vertu de l'art. 12. Le tribunal doit plutôt être convaincu que la peine qui a été infligée est exagérément disproportionnée en ce qui concerne ce délinquant, au point où les Canadiens et Canadiennes considéreraient cette peine odieuse ou intolérable. [Premier soulignement ajouté; deuxième soulignement dans l'original.]

Voir *R. c. Smith*, [1987] 1 R.C.S. 1045, le juge Lamer, p. 1072 :

Le critère applicable à l'examen en vertu de l'art. 12 de la *Charte* est celui de la disproportion exagérée, étant donné qu'il vise les peines qui sont plus que simplement excessives. Il faut éviter de considérer que toute peine disproportionnée ou excessive est contraire à la Constitution et laisser au processus normal d'appel en matière de sentence la tâche d'examiner la justesse d'une peine. [Nous soulignons.]

Voir aussi *Steele c. Établissement Mountain*, [1990] 2 R.C.S. 1385, p. 1417 : « Le critère qui sert à déterminer si une peine est beaucoup trop longue est à bon droit strict et exigeant. Un critère moindre tendrait à banaliser la *Charte* »; voir également *R. c. Latimer*, [2001] 1 R.C.S. 3, 2001 CSC 1, par. 77.

En conséquence, existe-t-il un principe de justice fondamentale consacré à l'art. 7 qui donnerait droit à une réparation constitutionnelle lorsqu'une peine ne contrevient pas à l'art. 12? Nous ne le croyons pas. Conclure qu'une disproportion exagérée et excessive est requise pour qu'une peine porte

proportionality suffices under s. 7 would render incoherent the scheme of interconnected “legal rights” set out in ss. 7 to 14 of the *Charter* by attributing contradictory standards to ss. 12 and 7 in relation to the same subject matter. Such a result, in our view, would be unacceptable.

Accordingly, even if we were persuaded by our colleague Arbour J. that punishment should be considered under s. 7 instead of s. 12, the result would remain the same. In both cases, the constitutional standard is gross disproportionality. In neither case is the standard met.

Further, even if the penalty of imprisonment were found to violate the gross disproportionality standard, the constitutional remedy would have to address the range of available penalties rather than the decriminalization of the underlying conduct of marihuana possession.

(c) *Proportionality in Sentencing*

At this point, we turn from the *Charter* to the *Criminal Code*, in which Parliament has made the idea of proportionality central to the principles of sentencing. Section 718.1 of the *Criminal Code* provides that “[a] sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.” The importance of proportionality in punishment has been discussed on several occasions by this Court. See, for instance, *R. v. Proulx*, [2000] 1 S.C.R. 61, 2000 SCC 5, at para. 82, where Lamer C.J., writing for the Court, referred to “the fundamental principle of sentencing, which provides that a sentence must be proportional to the gravity of the offence and the degree of responsibility of the offender”. See also *R. v. Wust*, [2000] 1 S.C.R. 455, 2000 SCC 18, at para. 18; *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 40; and *Re B.C. Motor Vehicle Act*, *supra*, per Wilson J. (concurring), at p. 533.

The requirement of proportionality in sentencing undermines rather than advances the appellants’ argument. There is no need to turn to the *Charter* for relief against an unfit sentence. If imprisonment

atteinte à l’art. 12, mais qu’un degré de disproportion moindre suffit pour qu’il y ait atteinte à l’art. 7 rendrait incohérent l’ensemble des « garanties juridiques » interreliées énoncées aux art. 7 à 14 de la *Charte* en assignant aux art. 12 et 7 des normes contradictoires pour une même question. Un tel résultat serait selon nous inacceptable.

Par conséquent, même si notre collègue la juge Arbour nous convainquait que la peine doit être examinée au regard de l’art. 7 et non de l’art. 12, le résultat serait le même. Dans les deux cas, la norme constitutionnelle applicable est la disproportion exagérée et, dans les deux cas, on n’y a pas satisfait.

Qui plus est, même si l’emprisonnement était jugé une peine disproportionnée exagérée, la réparation constitutionnelle devrait être déterminée en choisissant parmi la gamme des peines applicables, et non en envisageant la décriminalisation de la possession de marihuana.

c) *La proportionnalité de la peine*

À ce stade-ci, nous délaissions la *Charte* pour nous attacher au *Code criminel*, dans lequel le Parlement a indiqué que la notion de proportionnalité est l’élément central des principes de détermination de la peine. L’article 718.1 du *Code criminel* énonce que « [l]a peine est proportionnelle à la gravité de l’infraction et au degré de responsabilité du délinquant. » Notre Cour a examiné à plusieurs occasions l’importance de la proportionnalité de la peine. Voir, par exemple, *R. c. Proulx*, [2000] 1 R.C.S. 61, 2000 CSC 5, par. 82, où le juge en chef Lamer, s’exprimant pour la Cour, a fait état du « principe fondamental de détermination de la peine suivant lequel la peine doit être proportionnelle à la gravité de l’infraction et au degré de responsabilité du délinquant ». Voir aussi *R. c. Wust*, [2000] 1 R.C.S. 455, 2000 CSC 18, par. 18; *R. c. M. (C.A.)*, [1996] 1 R.C.S. 500, par. 40; et *Renvoi : Motor Vehicle Act de la C.-B.*, précité, la juge Wilson (motifs concourants), p. 533.

L’exigence de proportionnalité de la peine a davantage pour effet d’affaiblir la thèse des appelants que de l’étayer. Point n’est besoin d’invoquer la *Charte* pour obtenir réparation à l’encontre d’une

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is not a fit sentence in a particular case it will not be imposed, and if imposed, it will be reversed on appeal.

165 There is no plausible threat, express or implied, to imprison accused persons — including vulnerable ones — for whom imprisonment is not a fit sentence.

166 On another branch of the imprisonment argument, our colleague Arbour J. argues that it is unconstitutional for the state to attempt to prevent the general population, under threat of imprisonment, from engaging in conduct that is harmless to them, on the basis that other, more vulnerable persons may harm themselves if they engage in it (para. 258). In our view, with respect, this proposition is too broadly stated. In the present context, as previously noted, the evidence shows that it is not possible generally to distinguish in advance the general population from its more vulnerable members. Chronic users emerge from unexpected sources. If our colleague is correct, the impossibility of precise identification of “chronic users” in advance would incapacitate Parliament from taking any action at all to help those in need of its protection, a proposition we do not accept. Further, we do not agree with our colleague that it is a straightforward matter to distinguish between harm to self and harm to others. We noted earlier the recent comment of the Law Commission of Canada that “in a society that recognizes the interdependency of its citizens, such as universally contributing to healthcare or educational needs, harm to oneself is often borne collectively” (p. 17).

167 We agree with the appellants that imprisonment would ordinarily be an unfit sentence for a conviction on simple possession of marihuana. We

peine inappropriée. Lorsque, dans un cas donné, une peine d’emprisonnement n’est pas indiquée, elle ne sera pas infligée, et, si elle l’est, elle sera annulée en appel.

Il ne pèse aucune menace plausible d’emprisonnement, expresse ou tacite, sur un accusé — y compris une personne vulnérable — pour qui une telle mesure ne serait pas une peine appropriée.

Dans un autre volet de l’argumentation fondé sur la possibilité d’emprisonnement, notre collègue la juge Arbour avance que l’État agit de manière inconstitutionnelle en tentant d’empêcher les justiciables en général, sous menace d’emprisonnement, d’adopter un comportement qui ne leur est pas préjudiciable, pour le motif que d’autres personnes plus vulnérables pourraient se causer préjudice à elles-mêmes si elles adoptaient ce comportement (par. 258). En toute déférence, nous estimons que cette proposition est énoncée de façon trop générale. Dans la présente affaire, comme nous l’avons signalé plus tôt, la preuve révèle qu’il n’est généralement pas possible d’identifier à l’avance les personnes plus vulnérables au sein de l’ensemble de la population. Les consommateurs chroniques peuvent en effet présenter des profils inattendus. Si notre collègue voit juste, l’impossibilité d’identifier à l’avance avec certitude les « consommateurs chroniques » aurait pour effet d’empêcher le Parlement de prendre quelque mesure que ce soit pour venir en aide à ceux qui ont besoin de sa protection, conclusion que nous n’acceptons pas. De plus, nous ne partageons pas l’opinion de notre collègue selon laquelle il est facile de distinguer entre le préjudice à soi-même et le préjudice à autrui. Nous avons fait état plus tôt du commentaire suivant, formulé récemment par la Commission du droit du Canada : « dans une société qui reconnaît l’interdépendance de ses citoyennes et citoyens, notamment par la contribution de tous aux besoins en matière de santé ou d’éducation, c’est souvent la collectivité qui porte le fardeau du préjudice qu’on se cause à soi-même » (p. 18).

Nous partageons l’avis des appelants que l’emprisonnement constitue habituellement une peine inappropriée pour l’infraction de simple possession

disagree, however, that this observation gives rise to a finding of unconstitutionality. Rather, it gives rise, in appropriate circumstances, to an ordinary sentence appeal.

In the result, where there is no minimum mandatory sentence, the mere availability of imprisonment on a charge of marihuana possession does not violate the s. 7 principle against gross disproportionality. There are circumstances, as noted, where imprisonment would constitute a fit sentence.

4. A More General Principle of Disproportionality

As stated, the proportionality argument made by the appellants is broader than the mere disproportionality of penalty. They are correct to point out that interaction by an accused with the criminal justice system brings with it a number of consequences, not least among them the possibility of a criminal record. We agree that the proportionality principle of fundamental justice recognized in *Burns* and *Suresh* is not exhausted by its manifestation in s. 12. The content of s. 7 is not limited to the sum of ss. 8 to 14 of the *Charter*. See, for instance, *R. v. Hebert*, [1990] 2 S.C.R. 151; *Thomson Newspapers*, *supra*. We thus accept that the principle against gross disproportionality under s. 7 is broader than the requirements of s. 12 and is not limited to a consideration of the penalty attaching to conviction. Nevertheless the standard under s. 7, as under s. 12, remains one of *gross* disproportionality. In other words, if the use of the criminal law were shown by the appellants to be grossly disproportionate in its effects on accused persons, when considered in light of the objective of protecting them from the harm caused by marihuana use, the prohibition would be contrary to fundamental justice and s. 7 of the *Charter*.

In this respect, the appellants urge three factors. Firstly, they point to the adverse consequences to the individual accused other than imprisonment.

de marihuana, mais nous n'admettons pas que ceci emporte une conclusion d'inconstitutionnalité. Dans les cas appropriés, une telle situation justifie plutôt un recours en appel visant la justesse de la peine.

Par conséquent, en l'absence de peine minimale obligatoire, le seul fait de la possibilité d'infliction d'une peine d'emprisonnement pour l'infraction de possession de marihuana ne viole pas le principe de la disproportion exagérée prévu par l'art. 7. Comme nous l'avons indiqué, il est des circonstances où l'emprisonnement constitue une peine appropriée.

4. Un principe plus général de disproportion

Nous le répétons, l'argument relatif à la proportionnalité présenté par les appelants ne vise pas seulement la disproportion de la peine. Les appelants signalent avec raison que la personne aux prises avec le système de justice pénale s'expose à un certain nombre de conséquences, dont la possibilité d'avoir un casier judiciaire n'est pas la moindre. Nous reconnaissons que le principe de la proportionnalité, principe de justice fondamentale reconnu par notre Cour dans *Burns* et *Suresh*, ne se résume pas à son expression à l'art. 12. Le contenu de l'art. 7 n'est pas uniquement la somme des art. 8 à 14 de la *Charte*. Voir, par exemple, *R. c. Hebert*, [1990] 2 R.C.S. 151; *Thomson Newspapers*, précité. En conséquence, nous admettons que le principe de la disproportion exagérée prévu par l'art. 7 est plus large que les exigences découlant de l'art. 12 et ne se limite pas seulement à l'examen de la peine applicable en cas de déclaration de culpabilité. Néanmoins, la norme applicable pour l'analyse fondée sur l'art. 7, tout comme pour celle fondée sur l'art. 12, demeure la disproportion *exagérée*. En d'autres termes, si les appelants établissaient que le recours au droit criminel a sur les accusés des effets exagérément disproportionnés compte tenu de l'objectif de protection contre le préjudice causé par la consommation de marihuana, l'interdiction serait contraire à la justice fondamentale ainsi qu'à l'art. 7 de la *Charte*.

À cet égard, les appelants invoquent trois facteurs. Premièrement, ils soulignent les autres conséquences fâcheuses auxquelles l'accusé est exposé

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Secondly, they suggest that the relative ineffectiveness of the ban shows that the prohibition only marginally advances the interest of the state, and that this should facilitate a judicial finding of gross disproportionality. Thirdly, and more generally, the appellants state that the salutary effects of the law are vastly outweighed by the deleterious effects.

171 We address these three aspects of the appellants' disproportionality argument in turn.

(a) *The Consequences to the Individual Other Than Imprisonment*

172 In addition to the possibility of imprisonment, the appellants refer to harms flowing from having a criminal record. At para. 26 of their Joint Statement of Legislative Facts, they state:

The impact of criminal convictions on the futures of young Canadians has historically been identified as one of the most serious social harms generated by the criminal prohibition of cannabis. Upon being charged, tremendous costs are incurred during the pre-trial period, costs which tend to have a much more dramatic impact on young people. Most of the young people charged with cannabis offences are on the low end of the socio-economic scale and, thus, for them the financial burden is particularly onerous. Once a person is found guilty of a cannabis charge, s/he must confront the additional adverse effects associated with having a criminal record for such an offence.

There is no doubt that having a criminal record has serious consequences. The legislative policy embodied in the NCA is that a conviction for the possession of marihuana *should* have serious consequences. Therein lies the deterrent effect of the prohibition. The wisdom of this policy is, as mentioned, under review by Parliament. It appears that this review has been prompted, in part, by a recognition of the significant effects of being involved in the criminal justice system. For instance, background information from Health Canada states:

en plus de l'emprisonnement. Deuxièmement, ils affirment que l'inefficacité relative de l'interdiction montre que celle-ci sert peu l'intérêt de l'État et que cette situation devrait inciter à conclure qu'il y a disproportion exagérée. Troisièmement, sur un plan plus général, les appelants plaident que les effets préjudiciables des dispositions contestées dépassent largement leurs effets bénéfiques.

Nous allons examiner successivement ces trois volets de l'argument des appelants fondé sur la disproportion.

a) *Les conséquences autres que l'emprisonnement*

En plus de la possibilité d'emprisonnement, les appelants font état des conséquences préjudiciables découlant de l'existence d'un casier judiciaire. Voici ce qu'ils disent au par. 26 de leur exposé conjoint des faits législatifs :

[TRADUCTION] Les répercussions d'une déclaration de culpabilité sur les perspectives d'avenir des jeunes Canadiens sont depuis toujours considérées comme l'un des préjudices sociaux les plus graves causés par la criminalisation du cannabis. Dès le dépôt des accusations, des frais considérables sont faits durant la période qui précède le procès, situation qui tend à être beaucoup plus grave pour les jeunes. En effet, la plupart des jeunes qui sont accusés d'infractions liées au cannabis se situent au bas de l'échelle socio-économique et, de ce fait, la charge financière est particulièrement lourde pour eux. Une fois déclarée coupable d'une infraction liée au cannabis, la personne subit les effets préjudiciables additionnels découlant du fait d'avoir un casier judiciaire pour une telle infraction.

Il est certain que l'existence d'un casier criminel a de graves conséquences. D'ailleurs, selon la politique législative qu'exprime la Loi, une déclaration de culpabilité pour possession de marihuana *est censée* avoir de graves conséquences. C'est en cela que réside l'effet dissuasif de l'interdiction. Comme nous l'avons signalé, le Parlement est à réexaminer l'à-propos de cette politique, examen qui résulterait en partie de la reconnaissance des répercussions importantes d'une accusation au pénal. À titre d'exemple, un document d'information de Santé Canada donne les précisions suivantes :

[B]eing prosecuted and convicted in a criminal court bears a stigma that can have far-reaching consequences in an individual's life in such areas as job choices, travel and education. Participating in the criminal court process can also involve personal upheaval.

(Health Canada, "Information: Cannabis Reform Bill", May 2003)

However, the question before us is not whether Parliament *should* change its policy but whether it is *required* by the Constitution to do so. As Dickson C.J. commented in *Reference re ss. 193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 S.C.R. 1123, at p. 1142: "The issue is not whether the legislative scheme is frustrating or unwise but whether the scheme offends the basic tenets of our legal system."

On this branch of the case the Court can only ask whether the effects on the accused are so grossly disproportionate that they render the prohibition contrary to s. 7 of the *Charter*. Once it is determined that Parliament acted pursuant to a valid state interest in attempting to suppress the use for recreational purposes of a particular psychoactive drug, and given the findings of harm flowing from marihuana use, already discussed, we do not think that the consequences in this case trigger a finding of gross disproportionality. Firstly, the consequences are largely the product of deliberate disobedience to the law of the land. In his factum, Malmo-Levine speaks of "mass civil disobedience". He writes (at para. 10):

The glaring hypocrisy of the war on "some" drugs, and the obvious effectiveness of cannabis will ensure users are never going to back down, and that we intend to outgrow the "low-functioning" stigma foisted upon us and assume our rightful place as the "mellow and imaginative" section of society.

Le fait d'être poursuivie et condamnée par un tribunal pénal stigmatise la personne et peut avoir des conséquences profondes sur sa vie dans des domaines tels que les choix d'emploi, les voyages et l'éducation. Participer à des procédures pénales peut aussi provoquer des bouleversements personnels.

(Santé Canada, « Information : Projet de loi sur la réforme concernant le cannabis », mai 2003)

Cependant, la question que nous sommes appelés à trancher n'est pas de savoir si le Parlement *devrait* modifier sa politique, mais bien s'il est *tenu* par la Constitution de le faire. Comme l'a fait observer le juge en chef Dickson dans le *Renvoi relatif à l'art. 193 et à l'al. 195.1(1)(c) du Code criminel (Man.)*, [1990] 1 R.C.S. 1123, p. 1142 : « La question n'est pas de savoir si le régime législatif est insatisfaisant ou peu judicieux mais si le régime porte atteinte aux préceptes fondamentaux de notre système juridique. »

En ce qui concerne ce volet de l'analyse, la Cour peut seulement se demander si les effets sur l'accusé sont si exagérément disproportionnés qu'ils rendent l'interdiction contraire à l'art. 7 de la *Charte*. Comme il a été jugé que le Parlement s'est fondé sur un intérêt légitime de l'État pour tenter de mettre fin à la consommation récréative d'une drogue psychoactive donnée et compte tenu des constatations exposées précédemment sur le préjudice causé par la consommation de marihuana, nous ne croyons pas que, en l'espèce, les conséquences commandent de conclure qu'il y a disproportion exagérée. Premièrement, ces conséquences sont en grande partie le fruit d'une désobéissance délibérée à la loi du pays. Dans son mémoire, au par. 10, M. Malmo-Levine parle de [TRADUCTION] « désobéissance civile massive » :

[TRADUCTION] L'hypocrisie scandaleuse de la guerre contre « certaines » drogues de même que les effets bénéfiques évidents du cannabis inciteront toujours les consommateurs à poursuivre leur lutte, et nous entendons nous débarrasser du stigmate de gens « fonctionnant au ralenti » qu'on nous inflige et prendre notre place légitime en tant que segment de la société formé des citoyens « posés et imaginatifs ».

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This may be so, but evaluation of adverse effects has to take the nature of this political confrontation into account. Secondly, if the court imposes a sentence on conviction that is no more than a fit sentence, which it is required to do, the other adverse consequences are really associated with the criminal justice system in general rather than this offence in particular. In any system of criminal law there will be prosecutions that turn out to be unfounded, publicity that is unfairly adverse, costs associated with a successful defence, lingering and perhaps unfair consequences attached to a conviction for a relatively minor offence by other jurisdictions, and so on. These effects are serious but they are part of the social and individual costs of having a criminal justice system. Whenever Parliament exercises its criminal law power, such costs will arise. To suggest that such “inherent” costs are fatal to the exercise of the power is to overshoot the function of s. 7.

Il est possible que ce soit le cas, mais l'évaluation des effets préjudiciables doit tenir compte de la nature de cet affrontement politique. Deuxièmement, si le tribunal inflige à la personne déclarée coupable une peine qui n'est rien d'autre qu'appropriée, ce qu'il est tenu de faire, les autres conséquences préjudiciables sont en fait liées au système de justice pénale en général plutôt qu'à cette infraction en particulier. Dans tout système de droit pénal, il arrive qu'une poursuite se révèle non fondée, que la publicité qui l'entoure soit injustement préjudiciable, qu'une défense fructueuse occasionne des frais, qu'une déclaration de culpabilité pour une infraction relativement mineure ait des conséquences persistantes et peut-être injustes dans d'autres ressorts, et ainsi de suite. Il s'agit de conséquences graves, mais elles font partie des coûts sociaux et personnels qu'entraîne le fait de posséder un système de justice pénale. Chaque fois que le Parlement exerce sa compétence en matière de droit criminel, de tels coûts en résultent. Prétendre que ces coûts « intrinsèques » invalident l'exercice de cette compétence a pour effet d'exagérer le rôle de l'art. 7.

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We agree that the effects on an accused person of the criminalization of marihuana possession are serious. They are the legitimate subject of public controversy. They will undoubtedly be addressed in parliamentary debate. Applying a standard of gross disproportionality however, it is our view that the effects on accused persons of the present law, including the potential of imprisonment, fall within the broad latitude within which the Constitution permits legislative action.

(b) *Ineffectiveness of the Prohibition of Marihuana*

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The appellants next argue that the adverse effects on accused persons of the prohibition on possession are grossly disproportionate to any legitimate state interest because the prohibition is simply ineffective. It contributes virtually nothing to advancing the state interest in preventing the use of marihuana. Reliance is placed in this regard on the view of the trial judge in *Caine* who

Nous reconnaissons que la criminalisation de la possession de marihuana a des effets graves sur les personnes accusées de cette infraction. Ces effets sont légitimement à l'origine d'une controverse au sein de la population et ils feront sans aucun doute l'objet d'un débat parlementaire. À notre avis, toutefois, si l'on applique la norme de la disproportion exagérée, les effets sur les accusés des dispositions actuelles, y compris la possibilité d'emprisonnement, n'excèdent pas la vaste latitude que la Constitution accorde au Parlement.

b) *L'inefficacité de l'interdiction de la marihuana*

Les appelants plaident par ailleurs que les effets préjudiciables sur les accusés de l'interdiction visant la possession sont exagérément disproportionnés à tout intérêt légitime de l'État, puisque l'interdiction est tout simplement inefficace. Elle ne contribue pratiquement pas à la réalisation de l'objectif de l'État, qui est d'empêcher la consommation de marihuana.

stated: “Thus, in Canada, it would appear that the variations in consumption rates noted above (in particular, the decline in consumption since 1969) have occurred with no apparent statistical relationship to any increase or decrease in the severity of the law or its application” (para. 57). Also, at para. 62: “It is a fair and common sense conclusion that marihuana consumption would increase upon legalization, thereby leading to an increase in the absolute number of chronic users and vulnerable persons adversely affected by the drug. However, it is impossible to conclude, from the evidence before me, whether this increase would be substantial, moderate, or negligible.”

This Court has exercised caution in accepting arguments about the alleged ineffectiveness of legal measures: see *Reference re Firearms Act (Can.)*, *supra*, where the Court held that “[t]he efficacy of a law, or lack thereof, is not relevant to Parliament’s ability to enact it under the division of powers analysis” (para. 57). While somewhat different considerations come into play under a *Charter* analysis, it remains important that some deference be accorded to Parliament in assessing the utility of its chosen responses to perceived social ills.

Questions about which types of measures and associated sanctions are best able to deter conduct that Parliament considers undesirable is a matter of legitimate ongoing debate. The so-called “ineffectiveness” is simply another way of characterizing the refusal of people in the appellants’ position to comply with the law. It is difficult to see how that refusal can be elevated to a constitutional argument against validity based on the invocation of fundamental principles of justice. Indeed, it would be inconsistent with the rule of law to allow compliance with a criminal prohibition to be determined by each individual’s personal discretion and taste.

Ils invoquent à cet égard l’opinion de la juge du procès dans l’affaire *Caine* : [TRADUCTION] « En conséquence, il semble que, au Canada, les variations des taux de consommation susmentionnées (en particulier la baisse observée depuis 1969) n’aient pas de relations statistiques avec quelque renforcement ou atténuation de la sévérité de la loi ou de son application » (par. 57). La juge ajoute ceci, au par. 62 : [TRADUCTION] « Il est logique et raisonnable de conclure que la légalisation ferait augmenter la consommation de marihuana et, en conséquence, le nombre absolu de consommateurs chroniques et de personnes vulnérables subissant les effets dommageables de la drogue. Cependant, la preuve dont je dispose ne permet pas de conclure que cette augmentation serait substantielle, modérée ou négligeable. »

Notre Cour fait montre de prudence dans l’acceptation d’arguments fondés sur la prétendue inefficacité d’une mesure législative : voir le *Renvoi relatif à la Loi sur les armes à feu (Can.)*, précité, où elle a jugé que « [l]’efficacité ou le manque d’efficacité d’une loi n’est pas pertinent pour déterminer si le Parlement a le pouvoir de l’adopter en vertu de l’analyse relative au partage des pouvoirs » (par. 57). Bien que des considérations quelque peu différentes jouent dans le cadre d’une analyse fondée sur la *Charte*, il demeure important de faire preuve d’une certaine déférence à l’endroit du Parlement dans l’appréciation de l’utilité des mesures qu’il choisit pour remédier à ce qu’il considère comme des maux sociaux.

Il est légitime qu’on continue de s’interroger sur les mesures et sanctions les plus susceptibles de décourager un comportement que le Parlement juge indésirable. La prétendue « inefficacité » est simplement une autre façon de désigner le refus des gens dans la situation des appelants de respecter la loi. Il est difficile de voir comment, en invoquant les principes de justice fondamentale, on pourrait faire de ce refus un argument d’inconstitutionnalité. De fait, il serait contraire à la primauté du droit de permettre que le respect d’une interdiction de nature pénale soit laissé à la discrétion de chacun, en fonction de ses goûts personnels.

(c) *The Balance of Salutory and Deleterious Effects*

c) *La pondération des effets bénéfiques et des effets préjudiciables*

179 Finally, the appellants say that the prohibition is disproportionate to the state's interest because its negative consequences are grossly disproportionate to its positive features, if any.

Enfin, les appelants affirment que l'interdiction est disproportionnée à l'intérêt de l'État, du fait que ses conséquences préjudiciables sont exagérément disproportionnées à ses effets bénéfiques, s'il en est.

180 In this connection, Braidwood J.A. reproduced a summary of the evidence of harm to society resulting from the prohibition itself including disrespect for the law among those who disagree with it; distrust of health and educational authorities who have "promoted false and exaggerated allegations about marihuana"; lack of communication between youth and their elders about the use of marihuana; risks from involvement with criminals and hard-drug users; lack of governmental control over drug quality; "the creation of a lawless sub-culture"; financial costs associated with enforcing the law; and "the inability to engage in meaningful research into the properties, effects and dangers of the drug, because possession of the drug is unlawful" (para. 28).

À cet égard, le juge Braidwood de la Cour d'appel a reproduit un résumé de la preuve du préjudice causé à la société par l'interdiction. Ce résumé fait notamment état des éléments suivants : inobservation de la loi par ceux qui la désapprouvent; méfiance envers les autorités scolaires et sanitaires, qui ont [TRADUCTION] « défendu des affirmations erronées et exagérées au sujet de la marihuana »; manque de communication entre les jeunes et leurs aînés au sujet de la consommation de la marihuana; risques découlant de la fréquentation de criminels et d'adeptes des drogues dures; absence de contrôle par le gouvernement de la qualité de la drogue; [TRADUCTION] « création d'une sous-culture anarchique »; coût d'application de la loi; [TRADUCTION] « incapacité d'effectuer des recherches sérieuses sur les propriétés, les effets et les risques de la drogue, du fait qu'il est illégal d'en avoir en sa possession » (par. 28).

181 In effect, the exercise undertaken by Braidwood J.A. was to balance the law's salutary and deleterious effects. In our view, with respect, that is a function that is more properly reserved for s. 1. These are the types of social and economic harms that generally have no place in s. 7.

Dans les faits, le juge Braidwood a procédé à la pondération des effets bénéfiques et des effets préjudiciables de la Loi. En toute déférence, nous estimons qu'une telle démarche relève davantage de l'application de l'article premier. Il s'agit là de préjudices sociaux et économiques qui n'ont généralement pas leur place dans l'analyse fondée sur l'art. 7.

182 The appellants were correct to criticize the government's attempted wholesale importation of "societal interests" from s. 1 to s. 7 to try to support the constitutional validity of the prohibition. In our view, the appellants should equally be stopped from importing the "salutary/deleterious" effects balance from s. 1 in order to try to justify the opposite conclusion.

Les appelants ont avec raison dénoncé la tentative de l'État d'importer en bloc dans l'analyse fondée sur l'art. 7 les « intérêts sociétaux » visés à l'article premier, dans le but d'étayer la constitutionnalité de l'interdiction. Selon nous, il faut également empêcher les appelants d'essayer de justifier la thèse opposée en important dans l'analyse fondée sur l'art. 7 la pondération des effets « bénéfiques et préjudiciables » faite dans l'analyse fondée sur l'article premier.

As, in our view, the appellants have not established an infringement of s. 7, there is no need to call on the government for a s. 1 justification.

F. *Section 15 of the Charter*

The appellant Malmo-Levine makes the additional argument that the criminalization of marihuana constitutes a breach of s. 15 of the *Charter*. He posits that marihuana users have a “substance orientation” which is a personal characteristic analogous to other s. 15 grounds such as sexual orientation: *Vriend v. Alberta*, [1998] 1 S.C.R. 493. He further submits that s. 15 is meant to protect individuals who have experienced persecution for activities that are not inherently harmful to society, and in the appellant Malmo-Levine’s view, cannabis use is simply “harmless hedonis[m]”.

A taste for marihuana is not a “personal characteristic” in the sense required to trigger s. 15 protection: *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143. As Malmo-Levine argues elsewhere, it is a lifestyle choice. It bears no analogy with the personal characteristics listed in s. 15, namely race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability. It would trivialize this list to say that “pot” smoking is analogous to gender or religion as a “deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal costs”: *Egan v. Canada*, [1995] 2 S.C.R. 513, at para. 5; *Vriend*, *supra*, at para. 90. Malmo-Levine’s equality claim therefore fails at the first hurdle of the requirements set out in *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497. The true focus of s. 15 is “to remedy or prevent discrimination against groups subject to stereotyping, historical disadvantage and political and social prejudice in Canadian society”: *Swain*, *supra*, at p. 992, *per* Lamer C.J.; and *Rodriguez*, *supra*, at p. 616. To uphold Malmo-Levine’s argument for recreational choice (or lifestyle protection) on the basis of s. 15

Comme, à notre avis, les appelants n’ont pas établi l’existence d’une atteinte aux droits garantis par l’art. 7, il n’est pas nécessaire de demander à l’État de procéder à la justification requise par l’article premier.

F. *L’article 15 de la Charte*

L’appelant Malmo-Levine fait valoir en outre que la criminalisation de la marihuana porte atteinte à l’art. 15 de la *Charte*. Il soutient que les consommateurs de marihuana ont une [TRADUCTION] « orientation liée à une substance » qui constituerait une caractéristique personnelle analogue aux autres motifs énumérés à l’art. 15, par exemple l’orientation sexuelle : *Vriend c. Alberta*, [1998] 1 R.C.S. 493. Il prétend également que l’art. 15 vise à protéger les personnes qui ont été victimes de persécution pour des activités qui ne sont pas en soi dommageables à la société et, à son avis, la consommation de cannabis est simplement une [TRADUCTION] « pratique hédoniste inoffensive ».

Le goût pour la marihuana ne constitue pas une « caractéristique personnelle » emportant l’application de la garantie prévue à l’art. 15 : *Andrews c. Law Society of British Columbia*, [1989] 1 R.C.S. 143. Comme le dit par ailleurs M. Malmo-Levine lui-même, il s’agit d’un choix de mode de vie. Il n’y a pas d’analogie avec les caractéristiques personnelles énumérées à l’art. 15, soit la race, l’origine nationale ou ethnique, la couleur, la religion, le sexe, l’âge ou les déficiences mentales ou physiques. Ce serait banaliser cette énumération que de considérer que la consommation de « pot » est analogue au sexe ou à la religion en ce qu’elle constituerait une « caractéristique profondément personnelle qui est soit immuable, soit susceptible de n’être modifiée qu’à un prix personnel inacceptable » : *Egan c. Canada*, [1995] 2 R.C.S. 513, par. 5; *Vriend*, précité, par. 90. L’argument de M. Malmo-Levine fondé sur le droit à l’égalité ne satisfait pas à la première des exigences énoncées dans *Law c. Canada (Ministre de l’Emploi et de l’Immigration)*, [1999] 1 R.C.S. 497. L’objet véritable de l’art. 15 est de « corriger ou empêcher la discrimination contre des groupes victimes de stéréotypes, de désavantages

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of the *Charter* would simply be to create a parody of a noble purpose.

historiques ou de préjugés politiques ou sociaux dans la société canadienne » : *Swain*, précité, p. 992, le juge en chef Lamer; *Rodriguez*, précité, p. 616. Accueillir l'argument de M. Malmo-Levine et étendre la protection de l'art. 15 de la *Charte* à une activité récréative (ou à un mode de vie) équivaldrait tout bonnement à dénaturer ce noble objectif.

VI. Conclusion

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186 For these reasons, it is our view that the *Charter* challenges must fail and that the appeals should be dismissed.

Pour ces motifs, nous sommes d'avis que les contestations fondées sur la *Charte* ne sauraient être accueillies et que les pourvois doivent être rejetés.

187 The constitutional questions in the *Malmo-Levine* appeal should therefore be answered as follows:

Les questions constitutionnelles énoncées dans le pourvoi *Malmo-Levine* doivent en conséquence recevoir les réponses suivantes :

1. Does prohibiting possession of Cannabis (marihuana) for the purpose of trafficking under s. 4(2) of the *Narcotic Control Act*, R.S.C. 1985, c. N-1, by reason of the inclusion of this substance in s. 3 of the Schedule to the Act (now s. 1, Schedule II, *Controlled Drugs and Substances Act*, S.C. 1996, c. 19), infringe s. 7 of the *Canadian Charter of Rights and Freedoms*?

1. Est-ce que l'interdiction d'avoir en sa possession du Cannabis (marihuana) en vue d'en faire le trafic que prévoit le par. 4(2) de la *Loi sur les stupéfiants*, L.R.C. 1985, ch. N-1, du fait de la mention de cette substance à l'art. 3 de l'annexe de cette loi (maintenant l'art. 1 de l'annexe II de la *Loi réglementant certaines drogues et autres substances*, L.C. 1996, ch. 19), porte atteinte à l'art. 7 de la *Charte canadienne des droits et libertés*?

Answer: No.

Réponse : Non.

2. If the answer to Question 1 is in the affirmative, is the infringement justified under s. 1 of the *Charter*?

2. Si la réponse à la question 1 est affirmative, l'atteinte est-elle justifiée au regard de l'article premier de la *Charte*?

Answer: It is unnecessary to answer this question.

Réponse : Il n'est pas nécessaire de répondre à cette question.

3. Does prohibiting possession of Cannabis (marihuana) for the purpose of trafficking under s. 4(2) of the *Narcotic Control Act*, R.S.C. 1985, c. N-1, by reason of the inclusion of this substance in s. 3 of the Schedule to the Act (now s. 1, Schedule II, *Controlled Drugs and Substances Act*, S.C. 1996, c. 19), infringe s. 15(1) of the *Charter* by discriminating against a certain group of persons on the basis of their substance orientation, occupation orientation, or both?

3. Est-ce que l'interdiction d'avoir en sa possession du Cannabis (marihuana) en vue d'en faire le trafic que prévoit le par. 4(2) de la *Loi sur les stupéfiants*, L.R.C. 1985, ch. N-1, du fait de la mention de cette substance à l'art. 3 de l'annexe de cette loi (maintenant l'art. 1 de l'annexe II de la *Loi réglementant certaines drogues et autres substances*, L.C. 1996, ch. 19), porte atteinte au par. 15(1) de la *Charte* en traitant un certain groupe de personnes de façon discriminatoire sur le fondement de leur orientation sous l'angle de la substance concernée, de leur orientation sous l'angle de leur occupation ou de leur orientation sous ces deux aspects?

Answer: No.

Réponse : Non.

4. If the answer to Question 3 is in the affirmative, is the infringement justified under s. 1 of the *Charter*?

Answer: It is unnecessary to answer this question.

The constitutional questions in the *Caine* appeal should be answered as follows:

1. Does prohibiting possession of Cannabis (marihuana) for personal use under s. 3(1) of the *Narcotic Control Act*, R.S.C. 1985, c. N-1, by reason of the inclusion of this substance in s. 3 of the Schedule to the Act (now s. 1, Schedule II, *Controlled Drugs and Substances Act*, S.C. 1996, c. 19), infringe s. 7 of the *Canadian Charter of Rights and Freedoms*?

Answer: No.

2. If the answer to Question 1 is in the affirmative, is the infringement justified under s. 1 of the *Charter*?

Answer: It is unnecessary to answer this question.

3. Is the prohibition on the possession of Cannabis (marihuana) for personal use under s. 3(1) of the *Narcotic Control Act*, R.S.C. 1985, c. N-1, by reason of the inclusion of this substance in s. 3 of the Schedule to the Act (now s. 1, Schedule II, *Controlled Drugs and Substances Act*, S.C. 1996, c. 19), within the legislative competence of the Parliament of Canada as being a law enacted for the peace, order and good government of Canada pursuant to s. 91 of the *Constitution Act, 1867*; as being enacted pursuant to the criminal law power in s. 91(27) thereof; or otherwise?

Answer: Yes.

The following are the reasons delivered by

ARBOUR J. (dissenting in *Caine*) — The appeal of the appellant *Caine* calls into question the constitutionality of the provisions prohibiting possession of cannabis (marihuana) for personal use. The provisions are attacked on the ground that they

4. Si la réponse à la question 3 est affirmative, l'atteinte est-elle justifiée au regard de l'article premier de la *Charte*?

Réponse : Il n'est pas nécessaire de répondre à cette question.

Les questions constitutionnelles énoncées dans le pourvoi *Caine* doivent recevoir les réponses suivantes :

1. Est-ce que l'interdiction d'avoir en sa possession du Cannabis (marihuana) aux fins de consommation personnelle — interdiction prévue au par. 3(1) de la *Loi sur les stupéfiants*, L.R.C. 1985, ch. N-1, du fait de la mention de cette substance à l'art. 3 de l'annexe de cette loi (maintenant l'art. 1 de l'annexe II de la *Loi réglementant certaines drogues et autres substances*, L.C. 1996, ch. 19) — porte atteinte à l'art. 7 de la *Charte canadienne des droits et libertés*?

Réponse : Non.

2. Si la réponse à la question 1 est affirmative, l'atteinte est-elle justifiée au regard de l'article premier de la *Charte*?

Réponse : Il n'est pas nécessaire de répondre à cette question.

3. Est-ce que l'interdiction d'avoir en sa possession du Cannabis (marihuana) aux fins de consommation personnelle — interdiction prévue au par. 3(1) de la *Loi sur les stupéfiants*, L.R.C. 1985, ch. N-1, du fait de la mention de cette substance à l'art. 3 de l'annexe de cette loi (maintenant l'art. 1 de l'annexe II de la *Loi réglementant certaines drogues et autres substances*, L.C. 1996, ch. 19) — relève de la compétence législative du Parlement du Canada en tant que règle de droit édictée soit en vertu de l'art. 91 de la *Loi constitutionnelle de 1867* pour assurer la paix, l'ordre et le bon gouvernement du Canada, soit en vertu du pouvoir de légiférer sur le droit criminel prévu au par. 91(27) de la *Loi constitutionnelle de 1867*, soit en vertu d'un autre pouvoir?

Réponse : Oui.

Version française des motifs rendus par

LA JUGE ARBOUR (dissidente dans *Caine*) — Dans son pourvoi, l'appelant *Caine* attaque la constitutionnalité des dispositions interdisant la possession de cannabis (marihuana) aux fins de consommation personnelle. Il plaide qu'elles ne

are not within the legislative competence of the Parliament of Canada and that they infringe s. 7 of the *Canadian Charter of Rights and Freedoms*. In addition to challenging the prohibition on simple possession, the appellant Malmo-Levine also challenges the prohibition of possession of marihuana for the purpose of trafficking on the ground that it infringes ss. 7 and 15 of the *Charter*. The case of the appellant Clay (*R. v. Clay*, [2003] 3 S.C.R. 735, 2003 SCC 75), on appeal from the decision of the Court of Appeal for Ontario ((2000), 49 O.R. (3d) 577), was heard together with the cases of the appellants Caine and Malmo-Levine, on appeal from the decision of the Court of Appeal of British Columbia ((2000), 138 B.C.A.C. 218, 2000 BCCA 335). The *Clay* appeal raises issues identical to the *Caine* appeal and is based on similar findings of fact. Therefore, I will address all three appeals in these reasons and refer to the findings of the courts below in Ontario and in British Columbia.

relèvent pas de la compétence législative du Parlement du Canada et qu'elles contreviennent à l'art. 7 de la *Charte canadienne des droits et libertés*. Pour sa part, en plus de la prohibition visant la possession simple, l'appellant Malmo-Levine conteste en outre l'interdiction ayant trait à la possession de marihuana en vue d'en faire le trafic, soutenant qu'elle viole les art. 7 et 15 de la *Charte*. Le pourvoi de l'appellant Clay (*R. c. Clay*, [2003] 3 R.C.S. 735, 2003 CSC 75), qui interjette appel de l'arrêt de la Cour d'appel de l'Ontario ((2000), 49 O.R. (3d) 577), a été entendu en même temps que celui des appelants Caine et Malmo-Levine, qui font appel de la décision de la Cour d'appel de la Colombie-Britannique les concernant ((2000), 138 B.C.A.C. 218, 2000 BCCA 335). Le pourvoi *Clay* soulève des questions identiques à celles du pourvoi *Caine* et repose sur des conclusions de fait similaires. Par conséquent, je vais examiner ces trois pourvois dans les présents motifs et me reporter aux conclusions tirées par les juridictions inférieures en Ontario et en Colombie-Britannique.

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We are asked to address, directly for the first time, whether the *Charter* requires that harm to others or to society be an essential element of an offence punishable by imprisonment. In a landmark 1985 case, Lamer J. (as he then was) said: "A law that has the potential to convict a person who has not really done anything wrong offends the principles of fundamental justice and, if imprisonment is available as a penalty, such a law then violates a person's right to liberty under s. 7 of the *Charter*" (*Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at p. 492 ("*Motor Vehicle Reference*"). In my view, a "person who has not really done anything wrong" is a person whose conduct caused little or no reasoned risk of harm or whose harmful conduct was not his or her fault. Therefore, for the reasons that follow, I am of the view that s. 7 of the *Charter* requires not only that some minimal mental element be an essential element of any offence punishable by imprisonment, but also that the prohibited act be harmful or pose a risk of harm to others. A law that has the potential to convict a person whose conduct causes little or no reasoned risk of harm to others offends the principles of fundamental justice and, if imprisonment is available as a penalty, such a law then

Pour la première fois, la Cour est directement appelée à se demander si la *Charte* a pour effet d'exiger, comme élément constitutif essentiel d'une infraction punissable par l'emprisonnement, la preuve d'un préjudice pour d'autres personnes ou pour la société. Dans un arrêt historique datant de 1985, le juge Lamer (plus tard Juge en chef) a dit : « Une loi qui permet de déclarer coupable une personne qui n'a véritablement rien fait de mal viole les principes de justice fondamentale et, si elle prévoit une peine d'emprisonnement, une telle loi viole le droit à la liberté garanti par l'art. 7 de la *Charte* » (*Renvoi : Motor Vehicle Act de la C.-B.*, [1985] 2 R.C.S. 486, p. 492 (« *Renvoi relatif à la Motor Vehicle Act* »)). À mon avis, une « personne qui n'a véritablement rien fait de mal » est une personne dont le comportement n'a créé que peu ou pas de risques véritables de préjudice, ou qui n'est pas responsable de son comportement préjudiciable. Par conséquent, pour les motifs qui suivent, j'estime que l'art. 7 de la *Charte* requiert non seulement que toute infraction punissable par l'emprisonnement comporte un élément moral minimal, mais aussi que l'acte prohibé soit préjudiciable ou présente un risque de préjudice pour d'autres personnes. Une

violates a person's right to liberty under s. 7 of the *Charter*. Imprisonment can only be used to punish blameworthy conduct that is harmful to others.

I. The Facts and the Proceedings

My colleagues Justices Gonthier and Binnie have referred to the salient facts. The adjudicative facts of each case are not in dispute and my colleagues have aptly summarized them. I propose to simply highlight what I consider essential to the disposition of these appeals, most of which is contained in the findings of fact of the trial judges with respect to the harms associated with marihuana use. My colleagues have also referred to recent studies and recent parliamentary reports on the effects of the use of marihuana. The conclusions and recommendations in these new documents are similar to those presented to the trial judges and in my view they add nothing to the full factual record upon which both the trial judges and the courts of appeal in these cases founded their conclusions. In light of this, I do not think that we need to come to our own assessment of the facts. Rather, we should defer to the trial courts absent a patent and overriding error on their part. I am content to rely entirely on the findings of fact below as I see nothing in the new materials introduced before us that suggests that these findings were in error.

The findings of fact made by the trial judges in *Caine* and *Clay* are similar in all respects (they are set out in full in para. 40 of the reasons for judgment of Howard Prov. Ct. J. in the *Caine* appeal, and in para. 25 of the reasons for judgment of McCart J. in the *Clay* appeal). In *Clay*, McCart J. made the following findings of fact, which were accepted by

loi qui permet de déclarer coupable une personne dont le comportement ne crée que peu ou pas de risques véritables de préjudice pour d'autres personnes viole les principes de justice fondamentale et, si elle prévoit une peine d'emprisonnement, elle viole le droit à la liberté garanti par l'art. 7 de la *Charte*. On ne peut recourir à l'emprisonnement que pour punir un comportement blâmable qui est préjudiciable à d'autres personnes.

I. Les faits et la procédure

Mes collègues les juges Gonthier et Binnie ont exposé les faits pertinents. Les faits en litige dans chaque affaire ne sont pas contestés et mes collègues les ont habilement résumés. Je me propose simplement de dégager les éléments que je considère essentiels pour trancher les présents pourvois et qui, pour la plupart, figurent dans les conclusions de fait tirées par les juges de première instance relativement aux méfaits de la consommation de marihuana. Mes collègues ont également fait état de rapports parlementaires et d'études publiés récemment sur les effets de la consommation de marihuana. Les conclusions et recommandations formulées dans ces documents récents sont similaires à celles qui ont été présentées aux juges de première instance et, selon moi, n'ajoutent rien aux dossiers factuels complets sur lesquels ces juges et les cours d'appel ont appuyé leurs conclusions dans ces affaires. Voilà pourquoi il n'est pas nécessaire à mon avis que nous procédions à notre propre évaluation des faits. En l'absence d'erreur flagrante et dominante des tribunaux de première instance, nous devons plutôt nous en remettre à leur appréciation des faits. Je vais donc m'appuyer entièrement sur les conclusions de fait des juridictions inférieures, puisque je ne vois rien dans les nouveaux documents déposés devant nous qui tende à indiquer que ces conclusions étaient erronées.

Les conclusions de fait tirées par les juges de première instance dans les affaires *Caine* et *Clay* sont à tous égards similaires (elles sont exposées en détail au par. 40 des motifs de la juge Howard de la Cour provinciale dans *Caine*, ainsi qu'au par. 25 de l'arrêt de la Cour d'appel dans *Clay*, le juge McCart). Dans *Clay*, le juge McCart a tiré les conclusions

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Rosenberg J.A. at the Court of Appeal for Ontario (at para. 10):

1. Consumption of marijuana is relatively harmless compared to the so-called hard drugs and including tobacco and alcohol;
2. There exists no hard evidence demonstrating any irreversible organic or mental damage from the consumption of marijuana;
3. That cannabis does cause alteration of mental functions and as such, it would not be prudent to drive a car while intoxicated;
4. There is no hard evidence that cannabis consumption induces psychoses;
5. Cannabis is not an addictive substance;
6. Marijuana is not criminogenic in that there is no evidence of a causal relationship between cannabis use and criminality;
7. That the consumption of marijuana probably does not lead to “hard drug” use for the vast majority of marijuana consumers, although there appears to be a statistical relationship between the use of marijuana and a variety of other psychoactive drugs;
8. Marijuana does not make people more aggressive or violent;
9. There have been no recorded deaths from the consumption of marijuana;
10. There is no evidence that marijuana causes amotivational syndrome;
11. Less than 1% of marijuana consumers are daily users;
12. Consumption in so-called “de-criminalized states” does not increase out of proportion to states where there is no de-criminalization;
13. Health related costs of cannabis use are negligible when compared to the costs attributable to tobacco and alcohol consumption.

de fait suivantes qui ont été acceptées par le juge Rosenberg de la Cour d’appel de l’Ontario (au par. 10) :

[TRADUCTION]

1. La consommation de marihuana est relativement peu dommageable si on la compare à la consommation de drogues dites dures, ainsi qu’au tabac et à l’alcool.
2. Il n’existe aucune preuve tangible que la consommation de marihuana cause des dommages physiques ou mentaux irréversibles.
3. Le cannabis agit sur les fonctions mentales et, pour cette raison, il ne serait pas prudent de prendre le volant après en avoir consommé.
4. Il n’y a aucune preuve tangible que la consommation de cannabis déclenche des psychoses.
5. Le cannabis n’est pas une substance créant une dépendance.
6. La marihuana n’est pas criminogène, en ce sens qu’il n’y a aucune preuve établissant un lien de causalité entre la consommation de cannabis et la criminalité.
7. Pour la vaste majorité des usagers, le fait de consommer de la marihuana ne les amène probablement pas à essayer des « drogues dures », bien qu’il semble exister des liens statistiques entre la consommation de marihuana et celle de diverses autres drogues psychotropes.
8. La marihuana ne rend pas les gens plus agressifs ou plus violents.
9. Aucun décès n’a été attribué à la consommation de marihuana.
10. Il n’y a aucune preuve que la marihuana cause le syndrome amotivationnel.
11. Moins de 1 % des consommateurs de marihuana en consomment quotidiennement.
12. La consommation dans les pays dits « pays de décriminalisation » n’augmente pas de façon démesurée par rapport à la consommation dans ceux où il n’y a pas de décriminalisation.
13. Les coûts des soins de santé liés à la consommation de cannabis sont négligeables quand on les compare à ceux imputables à la consommation du tabac et de l’alcool.

After having thus established what harms are not associated with marihuana use, McCart J. found, at paras. 26-27:

Having said all of this, there was also general consensus among the experts who testified that the consumption of marijuana is not completely harmless. While marijuana may not cause schizophrenia, it may trigger it. Bronchial pulmonary damage is at risk of occurring with heavy use. However, to be fair, there is also general agreement among the experts who testified that moderate use of marijuana causes no physical or psychological harm. Field studies in Greece, Costa Rica and Jamaica generally supported the idea that marijuana was a relatively safe drug — not totally free from potential harm, but unlikely to create serious harm for most individual users or society.

The Le Dain Commission found at least four major grounds for social concern: the probably harmful effect of cannabis on the maturing process in adolescence; the implications for safe driving arising from impairment of cognitive functions and psycho motor abilities, from the additive interaction of cannabis and alcohol and from the difficulties of recognizing or detecting cannabis intoxication; the possibility, suggested by reports in other countries and clinical observations on this continent, that the long term, heavy use of cannabis may result in a significant amount of mental deterioration and disorder; and the role played by cannabis in the development and spread of multi-drug use by stimulating a desire for drug experience and lowering inhibitions about drug experimentation. This report went on to state that it did not yet know enough about cannabis to speak with assurance as to what constitutes moderate as opposed to excessive use.

In *Caine*, Howard Prov. Ct. J. found as follows with respect to what harms are not associated with marihuana use (at para. 40):

1. the occasional to moderate use of marihuana by a healthy adult is not ordinarily harmful to health, even if used over a long period of time;

Après avoir ainsi établi quels sont les problèmes qui ne sont pas liés à la consommation de marihuana, le juge McCart a dit ceci, aux par. 26-27 :

[TRADUCTION] Cela dit, les experts qui ont témoigné s'accordaient généralement pour dire que la consommation de marihuana n'est pas complètement inoffensive. Bien que la marihuana ne puisse causer la schizophrénie, elle peut la déclencher. La consommation excessive de cette substance peut être à l'origine de troubles broncho-pulmonaires. Il faut toutefois admettre que les experts qui ont témoigné ont aussi généralement reconnu qu'une consommation modérée de marihuana n'entraîne aucun trouble physique ou psychique. Des études sur le terrain en Grèce, au Costa Rica et en Jamaïque permettent de façon générale de penser que la marihuana est une drogue relativement inoffensive — qui sans être totalement sans danger, est néanmoins peu susceptible d'avoir des effets néfastes graves pour la plupart des personnes qui en consomment ou pour la société.

La Commission Le Dain a relevé quatre aspects principaux constituant des sources de préoccupation pour la société : l'effet probablement dommageable du cannabis sur le développement des adolescents; les dangers de la route résultant de l'altération des fonctions cognitives et facultés psychomotrices sous la double influence du cannabis et de l'alcool, aggravés par les difficultés de dépistage de l'ivresse cannabique; selon des rapports publiés à l'étranger et des observations cliniques effectuées sur le continent nord-américain, une grande consommation de cannabis à long terme pourrait entraîner d'importantes détériorations des facultés mentales et des troubles mentaux sérieux; le rôle du cannabis dans le développement de polytoxicomanies et la propagation de ce phénomène, du fait que sa consommation stimule le désir d'expérimenter d'autres drogues et réduit les inhibitions à cet égard. Le rapport ajoute que nous n'avons pas encore une connaissance suffisante du cannabis pour être en mesure de dire avec certitude en quoi consiste un usage modéré et un usage excessif.

Dans l'affaire *Caine*, la juge Howard a tiré les conclusions suivantes relativement aux effets néfastes qui ne sont pas liés à l'usage de marihuana (au par. 40) :

[TRADUCTION]

1. la consommation occasionnelle ou modérée de marihuana par un adulte bien portant n'a généralement pas d'effets néfastes pour sa santé, même si elle se poursuit pendant une longue période;

2. there is no conclusive evidence demonstrating any irreversible organic or mental damage to the user, except in relation to the lungs and then only to those of a chronic, heavy user such as a person who smokes at least 1 and probably 3-5 marihuana joints per day;
3. there is no evidence demonstrating irreversible, organic or mental damage from the use of marihuana by an ordinary healthy adult who uses occasionally or moderately;
4. marihuana use does cause alteration of mental function and as such should not be used in conjunction with driving, flying or operating complex machinery;
5. there is no evidence that marihuana use induces psychosis in ordinary healthy adults who use [marihuana] occasionally or moderately and, in relation to the heavy user, the evidence of marihuana psychosis appears to arise only in those having a predisposition towards such a mental illness;
6. marihuana is not addictive;
7. there is a concern over potential dependence in heavy users, but marihuana is not a highly reinforcing type of drug, like heroin or cocaine and consequently physical dependence is not a major problem; psychological dependence may be a problem for the chronic user;
8. there is no causal relationship between marihuana use and criminality;
9. there is no evidence that marihuana is a gateway drug and the vast majority of marihuana users do not go on to try hard drugs; recent animal studies involving the release of dopamine and the release of cortico releasing factor when under stress do not support the gateway theory;
10. marihuana does not make people aggressive or violent, but on the contrary it tends to make them passive and quiet;
11. there have been no deaths from the use of marihuana;
2. il n'y a aucune preuve concluante de dommages physiques ou mentaux irréversibles pour les usagers, sauf pour ce qui est des poumons. On signale de tels dommages uniquement chez les usagers chroniques qui consomment de grandes quantités de marihuana, à savoir les personnes fumant au moins 1, et probablement 3 à 5 joints quotidiennement;
3. il n'y a aucune preuve que la consommation occasionnelle ou modérée de marihuana par un adulte en santé lui cause des dommages physiques ou mentaux irréversibles;
4. la consommation de marihuana agit sur les fonctions mentales et, pour cette raison, une personne ne devrait pas en consommer lorsqu'elle conduit un véhicule à moteur, pilote un avion ou fait fonctionner un appareil complexe;
5. il n'y a aucune preuve démontrant que la marihuana déclenche des psychoses chez les adultes en bonne santé qui n'en consomment qu'occasionnellement ou modérément; pour ce qui est des grands consommateurs, la preuve révèle que la psychose induite par la consommation de cannabis ne se manifeste que lorsque l'utilisateur présente une prédisposition à une telle maladie mentale;
6. la marihuana ne crée pas de dépendance;
7. l'effet potentiellement toxicomanogène de la marihuana chez les grands consommateurs est un sujet de préoccupation, mais comme elle n'est pas une drogue à effet très renforçateur comme l'héroïne ou la cocaïne, la dépendance physique n'est pas un problème important; la dépendance psychique peut être un problème dans le cas des consommateurs chroniques;
8. il n'y a pas de lien de causalité entre la consommation de marihuana et la criminalité;
9. il n'y a aucune preuve que la marihuana soit une drogue d'introduction et la grande majorité des consommateurs de marihuana n'essaient pas des drogues dures; des études expérimentales effectuées récemment avec des animaux et portant sur la libération de dopamine et de corticolibérine (*cortico releasing factor*) en situations de stress ne corroborent pas la théorie selon laquelle la marihuana est une drogue d'introduction;
10. la marihuana ne rend pas les gens agressifs ou violents; bien au contraire, elle a tendance à les rendre passifs et calmes;
11. il n'y a eu aucun décès attribuable à la consommation de marihuana;

12. there is no evidence of an amotivational syndrome, although chronic use of marihuana could decrease motivation, especially if such a user smokes so often as to be in a state of chronic intoxication;
13. assuming current rates of consumption remain stable, the health related costs of marihuana use are very, very small in comparison with those costs associated with tobacco and alcohol consumption.

The trial judge mentioned that these findings were consistent with, *inter alia*, the findings of the Commission of Inquiry into the Non-Medical Use of Drugs, chaired by Gerald Le Dain (later Le Dain J. of this Court). After almost four years of public hearings and research, the majority of the commissioners concluded that simple possession of marihuana should not be a criminal offence. The Commission made the following findings with respect to the harms that are not associated with marihuana use:

1. cannabis is not a “narcotic”;
2. few acute physiological effects have been detected from current use in Canada;
3. few users (less than one percent) of cannabis move on to use harder and more dangerous drugs;
4. there is no scientific evidence indicating that cannabis use is responsible for other forms of criminal behaviour;
5. at present levels of use, the risks or harms from consumption of cannabis are much less serious than the risks or harms from alcohol use; and
6. the short term physical effects of cannabis are relatively insignificant and there is no evidence of serious long term physical effects.

(*Cannabis: A Report of the Commission of Inquiry into the Non-Medical Use of Drugs* (1972), at pp. 265-310)

12. il n’y a aucune preuve de l’existence d’un syndrome amotivationnel, bien que la consommation chronique de cannabis puisse réduire la motivation, notamment si l’usager en fume si souvent qu’il se trouve dans un état d’intoxication chronique;
13. si l’on présume que les niveaux actuels de consommation restent stables, les coûts des soins de santé liés à l’usage de la marihuana sont très très faibles si on les compare à ceux liés à la consommation du tabac et de l’alcool.

La juge de première instance a dit que ces conclusions concordaient notamment avec celles de la Commission d’enquête sur l’usage des drogues à des fins non médicales présidée par Gerald Le Dain (plus tard juge à la Cour suprême du Canada). Au terme de presque quatre années d’audiences publiques et de recherches, la majorité des commissaires ont conclu que la simple possession de marihuana ne devrait pas constituer une infraction criminelle. La Commission a tiré les conclusions suivantes au sujet des méfaits qui ne sont pas liés à l’usage de marihuana :

1. le cannabis n’est pas un « stupéfiant »;
2. l’usage actuel du cannabis au Canada révèle peu d’effets physiques aigus;
3. peu de consommateurs de cannabis (moins de un pour cent) deviennent des consommateurs de drogues plus dures et plus dangereuses;
4. il n’a pas été démontré scientifiquement que l’usage du cannabis est la cause d’autres comportements criminels;
5. eu égard aux niveaux actuels de consommation, les risques d’effets néfastes du cannabis sont moindres que ceux découlant de la consommation d’alcool;
6. les effets à court terme du cannabis sur l’organisme sont relativement minimes et il n’a pas été démontré que cette drogue pouvait avoir des effets physiques durables.

(*Le cannabis : Rapport de la Commission d’enquête sur l’usage des drogues à des fins non médicales* (1972), p. 267-311)

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Howard Prov. Ct. J. added, however, that marihuana is not a “completely harmless drug for all individual users” (para. 42). She first discussed the health risks for the user and summarized her findings as follows (at para. 39):

On the question of whether individual marihuana users face any health risks, the distinction between “low/occasional/moderate users” and “chronic users” is of considerable importance. Quite simply, the risk of harm from the use of marihuana depends upon which group one is talking about. All of the witnesses from whom I have heard, including Dr. Kalant, appear to agree that there is no evidence to sug[g]est that low/occasional/moderate users assume any significant health risks from smoking marihuana, so long as they are healthy adults and do not fall into one of the vulnerable groups, namely immature youths, pregnant women and the mentally ill. On the other hand, for the chronic user, there is a significant health risk although, this is primarily from the process of smoking, rather than from the chemical make-up of the drug.

Howard Prov. Ct. J. again referred, at para. 42, to the findings of the Le Dain Commission, this time with respect to the harm that may be occasioned by marihuana use. These findings were also referred to in *Clay*, at para. 27, and reproduced above, but I repeat them here for convenience:

1. “the probably harmful effect of cannabis on the maturing process in adolescence;”
2. “the implications for safe driving arising from impairment of cognitive functions and psycho motor abilities . . .;”
3. “the possibility, suggested by reports in other countries and clinical observations on this continent, that the long term, heavy use of cannabis may result in a significant amount of mental deterioration and disorder;” and
4. “the role played by cannabis in the development and spread of multi-drug use by stimulating

La juge Howard a toutefois ajouté que la marihuana n’est pas [TRADUCTION] « une drogue complètement inoffensive pour tous les usagers » (par. 42). Elle a d’abord examiné les risques que présente la marihuana pour la santé de l’usager et elle a résumé ses conclusions de la manière suivante (au par. 39) :

[TRADUCTION] Pour ce qui est de savoir si les personnes qui consomment de la marihuana courent des risques pour leur santé, la distinction entre la « consommation faible, occasionnelle ou modérée » et la « consommation chronique » est très importante. En bref, les risques que présente l’usage de la marihuana varient selon le groupe concerné. Tous les témoins que j’ai entendus, y compris le D^r Kalant, semblent s’entendre pour dire que rien n’indique que les personnes qui n’en font qu’une consommation faible, occasionnelle ou modérée courent des risques importants pour leur santé dans la mesure où il s’agit d’adultes bien portants et n’appartenant pas à l’un des groupes vulnérables, à savoir les jeunes consommateurs, les femmes enceintes et les personnes atteintes de maladies mentales. Par contre, pour ceux qui en font une consommation chronique, les risques pour la santé sont importants, quoiqu’ils découlent principalement du fait que la drogue est fumée, plutôt que de la composition chimique de celle-ci.

Au paragraphe 42 de ses motifs, la juge Howard s’est de nouveau reportée aux conclusions de la Commission Le Dain, en ce qui a trait cette fois aux méfaits qui peuvent découler de l’usage de la marihuana. Ces conclusions, qui sont reproduites ci-dessus, ont également été mentionnées dans *Clay*, par. 27. Je vais néanmoins les répéter une fois de plus, par souci de commodité :

1. « l’effet probablement dommageable du cannabis sur le développement des adolescents; »
2. « les dangers de la route résultant de l’altération des fonctions cognitives et facultés psychomotrices . . . ; »
3. « selon des rapports publiés à l’étranger et des observations cliniques effectuées sur le continent nord-américain, une grande consommation de cannabis à long terme pourrait entraîner d’importantes détériorations des facultés mentales et des troubles mentaux sérieux; »
4. « le rôle du cannabis dans le développement de polytoxicomanies et la propagation de ce

a desire for drug experience and lowering inhibitions about drug experimentation.”

Howard Prov. Ct. J. also referred to the Hall Report (W. Hall, N. Solowij and J. Lemon, *National Drug Strategy: The health and psychological consequences of cannabis use* (1994), and summarized its conclusions with regard to the “[a]cute effects” of marihuana use, that is, the adverse effects that might occur while actually under the influence (at para. 44):

Taken as a whole, the findings suggest that: (1) naive users should be careful and if they choose to smoke should do so with experienced users and in an appropriate setting, (2) no one should be studying, writing an exam, or engaging in other complex mental activities while in a state of intoxication induced by cannabis (or alcohol, for that matter); (3) pregnant women should not smoke cannabis (of course, they should not be smoking tobacco or drinking alcohol either); (4) the mentally ill or those with a family history of mental illness should not use cannabis; and (5) as with alcohol, no one should drive, fly or operate complex machinery while under the influence of marihuana.

As to the “chronic effects”, that is, the adverse effects that might occur from the chronic use of cannabis (daily use over many years), the Hall Report notes that there is still considerable “uncertainty” and Howard Prov. Ct. J. summarized its findings as follows, at paras. 45-46:

The “major probable adverse effects” from chronic use appear to be:

- respiratory diseases associated with smoking as the method of administration, such as chronic bronchitis, and the occurrence of histo[pa]th[o]logical changes that may be precursors to the development of malignancy;
- development of a cannabis dependence syndrome, characterized by an inability to abstain from or to control cannabis use;

phénomène, du fait que sa consommation stimule le désir d’expérimenter d’autres drogues et réduit les inhibitions à cet égard. »

La juge Howard a également fait état du rapport Hall (W. Hall, N. Solowij et J. Lemon, *National Drug Strategy : The health and psychological consequences of cannabis use* (1994)), dont elle a résumé les conclusions sur les [TRADUCTION] « [e]ffets aigus » de l’usage de la marihuana, c’est-à-dire les conséquences néfastes susceptibles de se produire pendant que la personne est sous l’effet de cette substance (au par. 44) :

[TRADUCTION] Considérées globalement, voici ce qui ressort des conclusions : (1) les consommateurs inexpérimentés devraient faire montre de prudence et, s’ils choisissent de fumer du cannabis, ils devraient le faire en compagnie de consommateurs expérimentés et dans un lieu approprié; (2) nul ne devrait étudier, se présenter à un examen ou se livrer à d’autres activités intellectuelles complexes dans l’état d’intoxication provoqué par le cannabis (ou d’ailleurs par l’alcool); (3) les femmes enceintes ne devraient pas fumer de cannabis (et ne devraient évidemment pas fumer la cigarette ni boire de l’alcool); (4) les personnes atteintes de maladies mentales ou celles possédant des antécédents familiaux à cet égard ne devraient pas consommer du cannabis; (5) comme c’est le cas pour l’alcool, nul ne devrait conduire un véhicule à moteur, piloter un avion ou faire fonctionner un appareil complexe lorsque ses facultés sont affaiblies par la marihuana.

Pour ce qui est des « effets chroniques », c’est-à-dire les effets néfastes que peut entraîner la consommation à long terme de cannabis (usage quotidien pendant de nombreuses années), le rapport Hall précise qu’il existe encore beaucoup d’[TRADUCTION] « incertitude » à cet égard; la juge Howard a résumé ainsi les conclusions du rapport (aux par. 45-46) :

[TRADUCTION] Les « principaux effets néfastes probables » de la consommation chronique semblent être les suivants :

- troubles respiratoires liés au fait que la substance est fumée, par exemple bronchite chronique et apparition de changements histopathologiques qui peuvent être des signes précurseurs du développement de tumeurs malignes;
- développement du syndrome de dépendance au cannabis, qui se caractérise par l’incapacité de s’abstenir d’en consommer ou de limiter sa consommation;

- subtle forms of cognitive impairment, most particularly of attention and memory, which persist while the user remains chronically intoxicated, and may or may not be reversible after prolonged abstinence from cannabis.

The “major possible adverse effects” from chronic use (that is, effects which remain to be confirmed by further research) are:

- an increased risk of developing cancers of the aerodigestive tract, i.e. oral cavity, pharynx, and oesophagus;
- an increased risk of leukaemia among offspring exposed while in utero; (since disproved)
- a decline in occupational performance marked by underachievement in adults in occupations requiring high level cognitive skills, and impaired educational attainment in adolescents;
- birth defects occurring among children of women who used cannabis during pregnancies. (since disproved)

Both Dr. Kalant and Dr. Connolly agreed that research since the publication of the Hall Report (1994) has failed to reveal any foundation for the above-noted concerns regarding (1) leukaemia among off-spring, and (2) birth defects among children of women who used marihuana during pregnancy. These concerns would no longer be considered as “risks” in the scientific community.

Finally, the Hall Report identifies three traditional “high risk groups”:

- (1) Adolescents with a history of poor school performance whose educational achievements may be further limited by cognitive impairments if chronically intoxicated, or who start using cannabis at an early age (there being a concern that such youths are at higher risk of becoming chronic users of cannabis as well as other drugs);
- (2) Women of childbearing age, because of the concern with the effects of smoking cannabis while pregnant; and
- (3) Persons with pre-existing diseases such as cardiovascular diseases, respiratory diseases, schizophrenia or

- formes subtiles d’affaiblissement des facultés cognitives, plus particulièrement manque d’attention et pertes de mémoire, qui persistent quand le consommateur reste intoxiqué de manière chronique et qui peuvent être réversibles ou non après une abstinence prolongée.

Les « principaux effets néfastes possibles » de la consommation chronique (c’est-à-dire les effets qui restent à être confirmés par des recherches additionnelles) sont les suivants :

- risque accru de cancers des voies aérodigestives, c’est-à-dire la cavité buccale, le pharynx et l’œsophage;
- risque accru de leucémie pour les enfants qui ont été exposés à la drogue pendant qu’ils étaient encore dans l’utérus de leur mère (la preuve du contraire a été apportée depuis);
- baisse du rendement professionnel marquée par une improductivité chez les adultes dont les activités requièrent l’application d’habiletés intellectuelles poussées et par des résultats scolaires médiocres chez les adolescents;
- anomalies congénitales chez les enfants dont la mère a consommé du cannabis pendant la grossesse (la preuve du contraire a été apportée depuis).

Les D^{rs} Kalant et Connolly ont reconnu que les recherches effectuées depuis la publication du rapport Hall (1994) n’ont pas démontré le bien-fondé des inquiétudes concernant (1) la leucémie chez les descendants et (2) les anomalies congénitales chez les enfants des femmes ayant consommé de la marihuana pendant la grossesse. Ces problèmes ne seraient désormais plus considérés comme des « risques » dans les milieux scientifiques.

Enfin, le rapport Hall identifie les trois groupes traditionnels « à risque élevé » :

- (1) Les adolescents aux résultats scolaires médiocres dont la réussite scolaire peut être compromise davantage par des déficiences cognitives, en cas d’intoxication chronique, ou ceux qui commencent à consommer du cannabis lorsqu’ils sont très jeunes (on s’inquiète des risques accrus que ces jeunes deviennent des consommateurs chroniques de cannabis et d’autres drogues).
- (2) Les femmes en âge de procréer en raison des effets de la consommation de cannabis pendant la grossesse.
- (3) Les personnes qui souffrent d’affections préexistantes comme des maladies cardiovasculaires, des

other drug dependencies, all of whom may face a risk of precipitating or exacerbating the symptoms of their d[is]eases.

On the basis of this evidence, Howard Prov. Ct. J. concluded as follows with respect to the health risks to the user occasioned by marihuana use (at para. 48):

There was general agreement among the witnesses who appeared before me (save perhaps for Dr. Morgan) that the conclusions contained in the Hall Report were sound (except for the references to leukemia and birth defects), based on the scientific information available at this time. It should be noted that, apart from the “acute effects”, which are rare and transient, none of the above reports raise any significant concerns about the well-being of a healthy adult who is a low/occasional/moderate user of marihuana.

Howard Prov. Ct. J. then discussed the risk of harm to others or to society as a whole. She concluded that the only possible harm to individual members of society is related to the fact that an “individual who is in a state of intoxication induced by marihuana poses a risk to the health and safety of others should he or she drive, fly or operate complex machinery” (para. 49). However, Howard Prov. Ct. J. noted that while the state had a legitimate interest in protecting members of society from such conduct, s. 253(a) of the *Criminal Code*, R.S.C. 1985, ch. C-46, already achieves this purpose. With respect to harm to society as a whole, Howard Prov. Ct. J., at paras. 51-52, concluded that

[t]he current widespread use of marihuana does not appear to have had any significant impact on the health care system of this province and, more importantly, it has not been perceived by our health care officials as a significant health concern, either provincially or nationally. . . .

The evidence establishes that any health care concerns (including financial concerns) associated with marihuana use in this country are minor compared to the social, criminal and financial costs associated with the use of alcohol or tobacc[o].

troubles respiratoires, la schizophrénie ou d’autres toxicomanies, du fait que la consommation du cannabis risque de précipiter la manifestation des symptômes de leurs maladies ou de les exacerber.

S’appuyant sur ces éléments de preuve, la juge Howard a tiré les conclusions suivantes au sujet des risques que présente la marihuana pour la santé de ceux qui en consomment (au par. 48) :

[TRADUCTION] Les témoins qui ont comparu devant moi (à l’exception peut-être du Dr Morgan) s’accordaient pour dire que les conclusions du rapport Hall étaient valables (sauf pour ce qui est des mentions concernant la leucémie et les anomalies congénitales) compte tenu des données scientifiques disponibles à l’époque. Il convient de souligner que, exception faite des données sur les « effets aigus », qui sont rares et passagers, aucun des rapports susmentionnés ne fait état d’inquiétudes importantes au sujet du bien-être d’adultes en santé ne faisant qu’une consommation faible, occasionnelle ou modérée de marihuana.

La juge Howard a ensuite examiné la question du risque de préjudice pour d’autres personnes et pour l’ensemble de la société. Elle a conclu que le seul préjudice possible pour d’autres membres de la société est lié au fait qu’une [TRADUCTION] « personne en état d’intoxication après avoir consommé de la marihuana présente un risque pour la santé et la sécurité d’autres personnes si elle conduit un véhicule à moteur, pilote un avion ou fait fonctionner un appareil complexe » (par. 49). La juge Howard a toutefois souligné que, bien qu’il soit légitime pour l’État de protéger les membres de la société contre un tel comportement, l’al. 253a) du *Code criminel*, L.R.C. 1985, ch. C-46, atteint déjà cet objectif. Quant au préjudice pour l’ensemble de la société, la juge de première instance a tiré la conclusion suivante (aux par. 51-52) :

[TRADUCTION] L’usage répandu qui est fait actuellement de la marihuana ne semble pas avoir d’effets importants sur le régime de soins de santé de la province et, facteur plus important, il n’est pas considéré par les autorités sanitaires comme un problème de santé important à l’échelle provinciale ou nationale. . . .

La preuve montre que les inquiétudes relatives aux soins de santé (y compris les inquiétudes financières) que suscite l’usage de la marihuana dans notre pays sont mineures par rapport aux coûts d’ordre social, criminel et financier liés à la consommation d’alcool et de tabac.

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Finally, Howard Prov. Ct. J. considered the harm caused by the prohibition of marihuana, which she summarized as follows, at para. 63:

1. countless Canadians, mostly adolescents and young adults, are being prosecuted in the “criminal” courts, subjected to the threat of (if not actual) imprisonment, and branded with criminal records for engaging [in] an activity that is remark[a]bly benign (estimates suggest that over 600,000 Canadians now have criminal records for cannabis related offences); meanwhile others are free to consume society’s drugs of choice, alcohol and tobacco, even though these drugs are known killers;
2. disrespect for the law by upwards of one million persons who are prepared to engage in this activity, notwithstanding the legal prohibition;
3. distrust, by users, of health and educational authorities who, in the past, have promoted false and exaggerated allegations about marihuana; the risk is that marihuana users, especially the young, will no longer listen, even to the truth;
4. lack of open communication between young persons and their elders about their use of the drug or any problems they are experiencing with it, given that it is illegal;
5. the risk that our young people will be associating with actual criminals and hard drug users who are the primary suppliers of the drug;
6. the lack of governmental control over the quality of the drug on the market, given that it is available only on the black market;
7. the creation of a lawless sub-culture whose only reason for being is to grow, import and distribute a drug which is not available through lawful means;
8. the enormous financial costs associated with enforcement of the law; and
9. the inability to engage in meaningful research into the properties, effects and dangers of the drug, because possession of the drug is unlawful.

Enfin, la juge Howard a examiné et résumé ainsi, au par. 63, le préjudice causé par l’interdiction relative à la marihuana :

[TRADUCTION]

1. Existence d’un nombre incalculable de Canadiens, en majorité des adolescents et des jeunes adultes, qui sont poursuivis devant les cours « criminelles », sont menacés d’emprisonnement (lorsqu’ils ne sont pas effectivement emprisonnés) et traînent ensuite un casier judiciaire pour s’être livrés à une activité complètement inoffensive (on estime que plus de 600 000 Canadiens possèdent maintenant un casier judiciaire pour des infractions liées au cannabis); pendant ce temps, d’autres citoyens sont libres de consommer les drogues préférées de la société, l’alcool et le tabac, même si l’on sait qu’elles sont meurtrières.
2. Inobservation de la loi par plus d’un million de personnes qui sont prêtes à se livrer à cette activité, et ce bien que la loi l’interdise.
3. Méfiance des usagers à l’égard des autorités scolaires et sanitaires qui, dans le passé, ont défendu des affirmations erronées et exagérées au sujet de la marihuana, situation entraînant le risque que les consommateurs de marihuana, les jeunes en particulier, fassent la sourde oreille, même dans les cas où ce qu’on leur dit est vrai.
4. Manque de communication franche entre les jeunes et leurs aînés au sujet de la consommation de marihuana par les premiers ou des problèmes qu’ils vivent à cet égard, du fait que l’usage de cette drogue est illégal.
5. Risque que les jeunes s’associent avec de véritables criminels et des consommateurs de drogues dures qui sont les principaux fournisseurs de la drogue.
6. Absence de contrôle par le gouvernement de la qualité de la drogue, étant donné que celle-ci n’est vendue que sur le marché noir.
7. Création d’une sous-culture anarchique dont la seule raison d’être est la culture, l’importation et la distribution d’une drogue qu’il est impossible de se procurer par des voies légales.
8. Énormes coûts financiers liés à l’application de la loi.
9. Incapacité d’effectuer des recherches sérieuses sur les propriétés, les effets et les dangers de la drogue, du fait qu’il est illégal d’en avoir en sa possession.

We have to analyse the constitutional questions raised in these appeals on the basis of these facts. Although criminalization of marihuana is a sensitive political issue and raises many social policy considerations, our analysis is circumscribed by the findings of fact of the trial judges, which are well supported by an extensive record. These findings are the basis upon which we must decide whether, or to what extent, Parliament may criminalize under threat of imprisonment possession of marihuana for personal use and, alternatively, for the purpose of trafficking. We must determine whether, on the basis of these facts, constitutional requirements are met, with respect to both the division of powers issue and the *Charter* considerations. These cases are not about whether Parliament should or should not prohibit or regulate possession of marihuana, whether the law is fair or unfair to marihuana users, or whether the legislation is effective in reducing the harm occasioned by marihuana use. These cases ask us to determine the limits imposed by the *Charter* upon Parliament to use imprisonment as a sanction for prohibited conduct.

II. Analysis

Parliament has full legislative power with respect to the criminal law, including the determination of the essential elements of any given crime. Prior to the enactment of the *Charter*, Parliament could prohibit any act and impose any penal consequences for infringing the prohibition, provided only that the prohibition served “a public purpose which can support it as being in relation to criminal law” (*Reference re Validity of Section 5(a) of the Dairy Industry Act*, [1949] S.C.R. 1 (“*Margarine Reference*”), p. 50; appeal to the Privy Council dismissed, [1951] A.C. 179). Once the legislation was found to have met this test, the courts had virtually no role in reviewing the substance of the legislation. However, with the entrenchment of the *Charter* in the Constitution, courts must now consider not only the *vires* of legislation, but also the compliance of legislation with the guarantees of the *Charter*

C’est à la lumière de ces faits que nous devons analyser les questions constitutionnelles soulevées dans les présents pourvois. Bien que la criminalisation de la marihuana soit une question politique délicate et qu’elle soulève de nombreuses considérations d’ordre social, les conclusions de fait des juges de première instance, qui sont bien étayées par un dossier détaillé, viennent circonscrire le cadre de notre analyse. C’est à partir de ces conclusions que nous devons décider si le Parlement peut criminaliser et rendre passible d’emprisonnement — et, dans l’affirmative, dans quelle mesure — la possession de marihuana aux fins de consommation personnelle ou aux fins de trafic. Nous devons décider si, compte tenu de ces faits, les exigences constitutionnelles ont été respectées au regard du partage des compétences et de considérations fondées sur la *Charte*. Les affaires dont nous avons été saisis ne portent pas sur la question de savoir si le Parlement doit interdire ou réglementer la possession de marihuana, si la loi est juste ou injuste à l’égard des consommateurs de marihuana ou encore si elle permet de réduire le préjudice découlant de l’usage de cette substance. Nous sommes plutôt appelés à déterminer les limites que la *Charte* impose au Parlement lorsqu’il a recours à l’emprisonnement pour punir le comportement qu’il prohibe.

II. Analyse

Le Parlement possède la plénitude du pouvoir de légiférer en matière de droit criminel, y compris pour établir les éléments constitutifs essentiels de tout crime. Avant l’édiction de la *Charte*, le Parlement pouvait interdire n’importe quel acte et imposer n’importe quelles conséquences pénales pour manquement à cette interdiction, pourvu seulement que celle-ci vise [TRADUCTION] « un intérêt public qui [pouvait] lui donner un fondement la rattachant au droit criminel » (*Reference re Validity of Section 5(a) of the Dairy Industry Act*, [1949] R.C.S. 1 (« *Renvoi sur la margarine* »), p. 50; appel au Conseil privé rejeté, [1951] A.C. 179). Une fois que le tribunal avait jugé que la mesure législative respectait ce critère, il n’avait pratiquement plus aucun rôle à jouer dans l’examen de cette mesure. Toutefois, depuis l’ajout de la *Charte* à la Constitution, les tribunaux doivent désormais non seulement se

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(*R. v. Vaillancourt*, [1987] 2 S.C.R. 636, at p. 651; *Motor Vehicle Reference*, *supra*, at pp. 496-97, *per* Lamer J., at p. 525, *per* Wilson J.).

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In assessing *Charter* compliance, courts are to look both to the purpose and to the effect of the legislation (*R. v. Smith*, [1987] 1 S.C.R. 1045, at p. 1071, *per* Lamer J.). As Dickson J. (as he then was) said, speaking for the majority of this Court in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at p. 334, “if a law with a valid purpose interferes by its impact, with rights or freedoms, a litigant could still argue the effects of the legislation as a means to defeat its applicability and possibly its validity”. Thus, as Lamer J. said in *Smith*, *supra*, at p. 1071:

... even though the pursuit of a constitutionally invalid purpose will result in the invalidity of the impugned legislation irrespective of its effects, a valid purpose does not end the constitutional inquiry. The means chosen by Parliament to achieve that valid purpose may result in effects which deprive Canadians of their rights guaranteed under the *Charter*. In such a case it would then be incumbent upon the authorities to demonstrate under s. 1 that the importance of that valid purpose is such that, irrespective of the effect of the legislation, it is a reasonable limit in a free and democratic society.

Hence, in the cases before this Court, even if Parliament has the legislative power to prohibit and sanction possession of marihuana, i.e. if there is a legitimate legislative purpose falling under a federal head of power, the means chosen by Parliament to achieve this purpose, for example the type of sanction chosen to enforce the prohibition, may infringe the rights to life, liberty or security of the appellants in a manner that is not in accordance with the principles of fundamental justice, as protected by s. 7 of the *Charter*.

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These cases concern whether the provisions prohibiting possession of marihuana for personal use and, alternatively, for the purpose of

demandeur si la loi est *intra vires*, mais aussi déterminer si elle respecte les garanties prévues par la *Charte* (*R. c. Vaillancourt*, [1987] 2 R.C.S. 636, p. 651; *Renvoi relatif à la Motor Vehicle Act*, précité, p. 496-497, le juge Lamer, p. 525, la juge Wilson).

Les tribunaux appelés à contrôler la conformité d’une mesure législative avec la *Charte* doivent examiner à la fois l’objet de cette mesure et ses effets (*R. c. Smith*, [1987] 1 R.C.S. 1045, p. 1071, le juge Lamer). Comme l’a dit le juge Dickson (plus tard Juge en chef) au nom de la majorité de la Cour dans l’arrêt *R. c. Big M Drug Mart Ltd.*, [1985] 1 R.C.S. 295, p. 334, « si, de par ses répercussions, une loi qui a un objet valable porte atteinte à des droits et libertés, il serait encore possible à un plaideur de tirer argument de ses effets pour la faire déclarer inapplicable, voire même invalide ». Ainsi, comme l’a dit le juge Lamer dans l’arrêt *Smith*, précité, p. 1071 :

... même si la poursuite d’un objectif inconstitutionnel entraîne l’invalidité de la loi attaquée, indépendamment de ses effets, un objectif régulier ne met pas un terme à l’analyse constitutionnelle. Les moyens choisis par le législateur pour atteindre cet objectif régulier peuvent avoir des effets qui privent les Canadiens des droits que leur garantit la *Charte*. Dans un tel cas, il incombe aux autorités de démontrer, en vertu de l’article premier, que l’importance de cet objectif régulier est telle que, indépendamment de l’effet de la loi, il s’agit d’une limite raisonnable apportée dans le cadre d’une société libre et démocratique.

Par conséquent, dans les présents pourvois, même si le Parlement a le pouvoir de légiférer pour interdire et sanctionner la possession de marihuana, c’est-à-dire s’il existe un objectif législatif légitime relevant d’un chef de compétence fédérale, il est possible que les moyens retenus par le législateur pour réaliser cet objectif — par exemple le type de sanction choisi pour faire respecter l’interdiction — portent atteinte aux droits à la vie, à la liberté ou à la sécurité des appelants d’une manière qui ne soit pas conforme aux principes de justice fondamentale protégés par l’art. 7 de la *Charte*.

Dans les affaires qui nous occupent, il s’agit de décider si les dispositions interdisant la possession de marihuana aux fins de consommation personnelle

trafficking, are within the constitutional legislative power of the Parliament of Canada, either under its general peace, order and good government power (“POGG power”), or under s. 91(27) of the *Constitution Act, 1867* pursuant to its criminal law power. These cases also concern whether the impugned provisions are contrary to s. 7 of the *Charter*. Much confusion has permeated the debate before us and in the courts below regarding these two related but distinct limits imposed upon Parliament’s legislative power. Much of the debate thus far has indeed surrounded whether Parliament could “criminalize” possession of marihuana. This issue must be decided according to the division of powers principles, and is but one aspect of the constitutional challenge before us. The *Charter* imposes additional constraints on Parliament when it chooses to provide for deprivation of liberty. I will analyse these two limits on legislative power in turn and endeavour to distinguish the thresholds to be met, as they are in my view distinct and serve different purposes.

A. *The Division of Powers Issue*

The appellants Clay and Caine challenge the prohibition against possession of marihuana as being beyond the authority of Parliament under the *Constitution Act, 1867*. My colleagues Gonthier and Binnie JJ. have concluded that the impugned provisions fall under the criminal law head of power. For that reason, they conclude that it is not necessary to revisit the correctness of the conclusion in *R. v. Hauser*, [1979] 1 S.C.R. 984, with respect to Parliament’s residual authority to deal with drugs in general or marihuana in particular under the POGG power. I am in general agreement with the conclusion reached by my colleagues and I will only make a few comments, which will inform the *Charter* analysis.

et, dans l’autre cas, aux fins de trafic, relèvent de la compétence législative du Parlement du Canada soit en vertu de son pouvoir général d’assurer « la paix, l’ordre et le bon gouvernement », soit en vertu de son pouvoir de légiférer sur le droit criminel prévu au par. 91(27) de la *Loi constitutionnelle de 1867*. Il faut également se demander si les dispositions contestées contreviennent à l’art. 7 de la *Charte*. Ces deux limites connexes mais distinctes assujettissant le pouvoir législatif du Parlement ont suscité beaucoup de confusion au cours des débats devant nous et devant les juridictions inférieures. De fait, une bonne partie du débat a jusqu’ici porté sur la question de savoir si le Parlement pouvait « criminaliser » la possession de marihuana. Cette question, qui doit être tranchée conformément aux principes régissant le partage des compétences, ne constitue que l’un des aspects de la contestation constitutionnelle dont nous sommes saisis. La *Charte* a pour effet d’assujettir le Parlement au respect de certaines limites additionnelles lorsqu’il choisit d’établir une peine privative de liberté. Je vais analyser chacune de ces deux limites restreignant le pouvoir de légiférer et m’efforcer de différencier les critères à respecter, puisque, à mon avis, il s’agit effectivement de limites distinctes visant des fins différentes.

A. *La question du partage des compétences*

Les appelants Clay et Caine contestent l’interdiction relative à la possession de marihuana, affirmant qu’elle outrepassse la compétence reconnue au Parlement par la *Loi constitutionnelle de 1867*. Mes collègues les juges Gonthier et Binnie concluent que les dispositions contestées relèvent du chef de compétence concernant le droit criminel. Pour cette raison, ils estiment qu’il n’est pas nécessaire de réexaminer la justesse de la conclusion tirée dans l’arrêt *R. c. Hauser*, [1979] 1 R.C.S. 984, en ce qui concerne le pouvoir résiduel du Parlement de légiférer sur les drogues en général ou sur la marihuana en particulier en vertu de sa compétence touchant à la paix, à l’ordre et au bon gouvernement. Je souscris pour l’essentiel à la conclusion de mes collègues et je vais me contenter de faire quelques commentaires qui sous-tendront mon analyse fondée sur la *Charte*.

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As mentioned above, legislation which properly falls under one of the federal heads of power will pass the division of powers challenge, but may still be found to infringe on a right or freedom protected by the *Charter*. With regard to the federal criminal law power, under s. 91(27) of the *Constitution Act, 1867*, Parliament has been accorded the power to make criminal law in the widest sense (see, *inter alia*, *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 28; *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213, at para. 118; *Reference re Firearms Act (Can.)*, [2000] 1 S.C.R. 783, 2000 SCC 31, at paras. 28-31). It is entirely within Parliament's discretion to determine what evil it wishes to suppress by penal prohibition and what threatened interest it thereby wishes to safeguard. Apart from the *Charter*, the only qualification attached to Parliament's plenary power over criminal law is that it cannot be employed colourably. Like other legislative powers, the criminal law power does not permit Parliament, simply by legislating in the proper form, colourably to invade areas of exclusively provincial legislative competence. To determine whether such a colourable attempt is made, we must determine whether a legitimate public purpose underlies the criminal prohibition (*Scowby v. Glendinning*, [1986] 2 S.C.R. 226, at p. 237; *Hydro-Québec*, *supra*, at para. 121).

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In the *Margarine Reference*, *supra*, Rand J. drew attention, at pp. 49-50, to the need to identify the evil or injurious effect at which a penal prohibition was directed and explained that a prohibition is not criminal unless it serves "a public purpose which can support it as being in relation to criminal law". Further, he explained that the "ordinary though not exclusive ends" served by the criminal law are "[p]ublic peace, order, security, health, [and] morality" (emphasis added).

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The main objective of the impugned legislation here is protection from the possible adverse health consequences of marihuana use. The objective of

Comme je l'ai mentionné précédemment, une mesure législative qui peut être rattachée à un chef de compétence fédérale résistera à une contestation fondée sur le partage des compétences, mais il est néanmoins possible que le tribunal juge qu'elle porte atteinte à un droit ou à une liberté garanti par la *Charte*. En vertu de la compétence qui lui est reconnue à l'égard du droit criminel par le par. 91(27) de la *Loi constitutionnelle de 1867*, le Parlement est habilité à faire des lois régissant le droit criminel au sens le plus large du terme (voir, notamment, *RJR-MacDonald Inc. c. Canada (Procureur général)*, [1995] 3 R.C.S. 199, par. 28; *R. c. Hydro-Québec*, [1997] 3 R.C.S. 213, par. 118; *Renvoi relatif à la Loi sur les armes à feu (Can.)*, [2000] 1 R.C.S. 783, 2000 CSC 31, par. 28-31). Le Parlement a entière discrétion pour décider des maux qu'il désire réprimer au moyen d'une interdiction pénale et quel intérêt menacé il souhaite ainsi protéger. Outre la *Charte*, le seul tempérament dont est assorti le pouvoir du Parlement en matière de droit criminel est le fait qu'il ne peut pas être utilisé de façon déguisée. Comme les autres pouvoirs législatifs, il n'autorise pas le Parlement à empiéter, au moyen d'une loi par ailleurs valide, sur des domaines de compétence législative provinciale exclusive. Pour décider si on est en présence d'une telle tentative d'empiétement, nous devons déterminer si l'interdiction criminelle repose sur un objectif public légitime (*Scowby c. Glendinning*, [1986] 2 R.C.S. 226, p. 237; *Hydro-Québec*, précité, par. 121).

Dans le *Renvoi sur la margarine*, précité, p. 49-50, le juge Rand a insisté sur la nécessité d'identifier le mal ou l'effet nuisible que vise l'interdiction criminelle et il a expliqué qu'une interdiction ne possède un caractère criminel que si elle tend à la réalisation [TRADUCTION] « d'un intérêt public qui peut lui donner un fondement la rattachant au droit criminel ». Il a en outre expliqué que les « buts habituels, bien que non exclusifs » que sert le droit criminel sont « [l]a paix publique, l'ordre, la sécurité, la santé [et] la moralité » (je souligne).

L'objet principal de la loi contestée en l'espèce est la protection contre les possibles effets néfastes pour la santé de l'usage de cette substance. L'objectif

the state in prohibiting marihuana has been summarized by Rosenberg J.A. in *Clay's* companion case *R. v. Parker* (2000), 146 C.C.C. (3d) 193 (Ont. C.A.), at para. 143:

First, the state has an interest in protecting against the harmful effects of use of that drug. Those include bronchial pulmonary harm to humans; psychomotor impairment from marihuana use leading to a risk of automobile accidents and no simple screening device for detection; possible precipitation of relapse in persons with schizophrenia; possible negative effects on immune system; possible long-term negative cognitive effects in children whose mothers used marihuana while pregnant; possible long-term negative cognitive effects in long-term users; and some evidence that some heavy users may develop a dependency. The other objectives are: to satisfy Canada's international treaty obligations and to control the domestic and international trade in illicit drugs.

Jurisdiction over health is shared between Parliament and the provincial legislatures; their respective competence depends on the pith and substance of the particular measure at issue.

In *RJR-MacDonald*, *supra*, the issue was whether Parliament could validly employ its criminal law power to prohibit tobacco manufacturers from advertising their products to Canadians, and to increase public awareness concerning the hazards of tobacco use. La Forest J., at para. 32, concluded that the detrimental health effects of tobacco are both dramatic and substantial and that Parliament could validly employ the criminal law:

Given the “amorphous” nature of health as a constitutional matter, and the resulting fact that Parliament and the provincial legislatures may both validly legislate in this area, it is important to emphasize once again the plenary nature of the criminal law power. In the *Margarine Reference*, *supra*, at pp. 49-50, Rand J. made it clear that the protection of “health” is one of the “ordinary ends”

que poursuit l'État en interdisant l'usage de la marihuana a été résumé ainsi par le juge Rosenberg, dans l'arrêt *R. c. Parker* (2000), 146 C.C.C. (3d) 193 (C.A. Ont.), par. 143, affaire connexe à l'affaire *Clay* :

[TRADUCTION] Tout d'abord, l'État a intérêt à protéger la population contre les effets néfastes de la consommation de cette drogue. Il s'agit notamment des affections broncho-pulmonaires chez les humains; l'affaiblissement des facultés psychomotrices causé par la consommation de la marihuana, qui entraîne des risques d'accidents d'automobiles et qu'aucun mécanisme simple ne permet de détecter; le déclenchement possible de rechutes chez les personnes souffrant de schizophrénie; les effets néfastes pour le système immunitaire; les effets néfastes à long terme sur les capacités cognitives des enfants dont les mères ont consommé de la marihuana pendant la grossesse; les possibles effets négatifs à long terme sur les capacités cognitives des consommateurs chroniques et certaines preuves indiquant que les grands consommateurs peuvent développer une dépendance. Les autres objectifs sont les suivants : le respect des obligations découlant des traités internationaux auxquels le Canada est partie et la lutte contre le commerce intérieur et international des drogues illicites.

Tant les législatures provinciales que le Parlement ont compétence pour légiférer en matière de santé; leur compétence respective dépend du caractère véritable de la mesure en cause.

Dans l'arrêt *RJR-MacDonald*, précité, il s'agissait de décider si le Parlement pouvait valablement invoquer sa compétence sur le droit criminel pour interdire aux fabricants de produits du tabac de faire de la publicité sur leurs produits auprès des Canadiens et pour sensibiliser davantage ces derniers aux méfaits de cette substance. Au paragraphe 32, le juge La Forest a conclu que les effets néfastes de l'usage du tabac sur la santé sont à la fois graves et importants et que le Parlement pouvait valablement invoquer sa compétence sur le droit criminel :

Vu que la santé comme matière constitutionnelle présente un caractère « informel » et qu'il s'ensuit que tant le Parlement que les législatures provinciales peuvent valablement légiférer dans ce domaine, il importe de faire ressortir de nouveau la nature plénière de la compétence en matière de droit criminel. Dans le *Renvoi sur la margarine*, précité, aux pp. 49 et 50, le juge Rand établit

served by the criminal law, and that the criminal law power may validly be used to safeguard the public from any “injurious or undesirable effect”. The scope of the federal power to create criminal legislation with respect to health matters is broad, and is circumscribed only by the requirements that the legislation must contain a prohibition accompanied by a penal sanction and must be directed at a legitimate public health evil. If a given piece of federal legislation contains these features, and if that legislation is not otherwise a “colourable” intrusion upon provincial jurisdiction, then it is valid as criminal law; see *Scowby*, *supra*, at pp. 237-38. [Emphasis added.]

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The respondent argues that there is no baseline or threshold level of harm that must be reached before the criminal law power can be invoked. The Crown argues, citing *R. v. Hinchey*, [1996] 3 S.C.R. 1128, at para. 29, and *Hydro-Québec*, *supra*, at para. 121, that the recognition of a *Charter* principle precluding Parliament from criminalizing conduct unless it can demonstrate a potential for serious or substantial harm would be inconsistent with the well-established constitutional principle that the criminal law can be used to enact legislation to address social, political, or economic interests or “some legitimate public purpose”. The respondent submits that even though there would be a rational basis for a statutory or regulatory prohibition, a “harm principle” would call for judicial review of what are essentially policy decisions. The submissions of the Attorney General of Ontario (“AGO”) are similar on this respect. The AGO argues that whether a criminal offence is reviewed by way of a *vires* analysis under the division of powers doctrine, or by way of a “harm principle” within the ambit of s. 7, the result will necessarily be the same. The AGO argues that the “harm principle”, at least as it has been formulated by Braidwood and Rosenberg J.J.A., does no more than reiterate the threshold test for Parliament’s exercise of its criminal law jurisdiction. The AGO further submits that Lamer J.’s analysis in *Motor Vehicle Reference* should not apply to a consideration of the *actus reus* of the offence. The AGO states that consideration of the *actus reus* is precluded because “the decision to criminalize specific types

clairement que la protection de la « santé » constitue un des « buts habituels » du droit criminel, et que la compétence en matière de droit criminel peut valablement être exercée pour protéger le public contre un « effet nuisible ou indésirable ». Le fédéral possède une vaste compétence pour ce qui est de l’adoption de lois en matière criminelle relativement à des questions de santé, et cette compétence n’est circonscrite que par les exigences voulant qu’elles comportent une interdiction accompagnée d’une sanction pénale, et qu’elles visent un mal légitime pour la santé publique. Si une loi fédérale donnée possède ces caractéristiques et ne constitue pas par ailleurs un empiètement « spécieux » sur la compétence provinciale, c’est alors une loi valide en matière criminelle; voir *Scowby*, précité, aux pp. 237 et 238. [Je souligne.]

L’intimée soutient que le législateur n’a pas à établir quelque niveau ou seuil de préjudice que ce soit avant d’être autorisé à invoquer sa compétence sur le droit criminel. Se référant aux arrêts *R. c. Hinchey*, [1996] 3 R.C.S. 1128, par. 29, et *Hydro-Québec*, précité, par. 121, le ministère public plaide que le fait de reconnaître que la *Charte* a pour effet d’empêcher le Parlement de criminaliser un comportement à moins qu’il ne puisse démontrer l’existence d’un risque de préjudice grave ou important serait incompatible avec le principe constitutionnel bien établi suivant lequel le droit criminel peut être utilisé pour édicter des lois visant des intérêts sociaux, politiques ou économiques ou [TRADUCTION] « un objectif public légitime ». L’intimée prétend que, même dans les cas où une interdiction d’origine légale ou réglementaire possède un fondement logique, l’application du « principe du préjudice » assujettirait au pouvoir de contrôle des tribunaux des mesures qui constituent essentiellement des décisions de politique générale. Le procureur général de l’Ontario a présenté des observations similaires sur ce point. Selon lui, que l’on contrôle la constitutionnalité d’une infraction criminelle par une analyse de sa validité au regard de la doctrine du partage des compétences ou par l’application d’un « principe du préjudice » au regard de l’art. 7, le résultat sera nécessairement le même. Il plaide que le « principe du préjudice », du moins tel qu’il a été formulé par les juges Braidwood et Rosenberg, ne fait que réaffirmer le critère préalable que doit respecter le Parlement avant d’être autorisé à exercer son pouvoir de légiférer en matière de droit criminel. Le procureur général de l’Ontario soutient en outre

of conduct belongs wholly to Parliament” (AGO’s factum, at para. 12).

It is not the courts’ function to reassess the wisdom of validly enacted legislation. As L’Heureux-Dubé J. said in *Hinchey*, *supra*, at para. 34, “the judiciary should not rewrite [legislation] to suit its own particular conception of what type of conduct can be considered criminal”. And further, at para. 36: “If Parliament chooses to criminalize conduct which, notwithstanding *Charter* scrutiny, appears to be outside of what a judge considers ‘criminal’, there must be a sense of deference to the legislated authority which has specifically written in these elements.”

Although courts cannot question the wisdom of legislation, they must assess its constitutionality. There is, as such, no constitutional threshold of harm required for legislative action under the criminal law power. There had been uncertainties in the past in this regard, as some would have required “significant, grave and serious risk of harm to public health, morality, safety or security” before a prohibition could fall within the purview of the criminal law power (see, e.g., *RJR-MacDonald*, *supra*, at paras. 199-202, *per* Major J.). It is now established that as long as the legislation is directed at a legitimate public health evil and contains a prohibition accompanied by a penal sanction, and provided that it is not otherwise a “colourable” intrusion upon provincial jurisdiction, Parliament has, under s. 91(27) of the *Constitution Act, 1867*, discretion to determine the extent of the harm it considers sufficient for legislative action (*RJR-MacDonald*, *supra*, at para. 32; *Reference re Firearms Act (Can.)*, *supra*, at para. 27). Obviously, however, where Parliament relies on the protection of health as its legitimate public

que l’analyse faite par le juge Lamer dans le *Renvoi relatif à la Motor Vehicle Act* ne saurait s’appliquer à l’examen de l’élément matériel (*actus reus*) de l’infraction. Il avance que cet examen ne peut être fait parce que [TRADUCTION] « la décision de criminaliser certains comportements relève entièrement du Parlement » (mémoire du procureur général de l’Ontario, par. 12).

Il n’appartient pas aux tribunaux de se prononcer sur la sagesse de mesures législatives valablement adoptées. Comme l’a dit la juge L’Heureux-Dubé dans l’arrêt *Hinchey*, précité, par. 34, « les tribunaux ne devraient pas récrire [les lois] pour [les] rendre conforme[s] à leur propre conception des catégories de comportements qui peuvent être considérés comme criminels ». Elle a ajouté ceci, au par. 36 : « Si le législateur choisit de rendre criminel un comportement qui, malgré un examen en vertu de la *Charte*, ne semble pas faire partie des comportements qu’un juge considère comme “criminels”, il faut faire preuve de retenue à l’égard de l’autorité législative qui a expressément inclus ces éléments. »

Bien que les tribunaux ne puissent remettre en question la sagesse des lois, ils doivent cependant évaluer la constitutionnalité de celles-ci. La Constitution ne requiert pas en soi l’existence d’un préjudice minimal pour justifier l’exercice du pouvoir de légiférer en matière de droit criminel. Il y a eu, dans le passé, un certain flottement à cet égard, car certains auraient subordonné la validité d’une prohibition fondée sur la compétence relative au droit criminel à l’existence d’un « risque de préjudice grave et important pour la santé du public, sa moralité ou sa sécurité » (voir, par exemple, *RJR-MacDonald*, précité, par. 199-202, le juge Major). Il est désormais établi que si la loi vise un mal légitime pour la santé publique, comporte une interdiction assortie d’une sanction pénale et ne constitue pas par ailleurs un empiétement déguisé sur un chef de compétence provinciale, le Parlement possède, en vertu du par. 91(27) de la *Loi constitutionnelle de 1867*, le pouvoir discrétionnaire de déterminer l’étendue du préjudice qu’il juge suffisant pour justifier une mesure législative (*RJR-MacDonald*, précité, par. 32; *Renvoi relatif à la*

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purpose, it has to demonstrate the “injurious or undesirable effect” from which it seeks to safeguard the public. This will likely be done by demonstrating the harm to the health of individuals or the public associated with the prohibited conduct. While there is no constitutional threshold level of harm required before Parliament may use its broad criminal law power, conduct with little or no threat of harm is unlikely to qualify as a “public health evil”.

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In *Hydro-Québec*, *supra*, at para. 120, La Forest J. came to a similar conclusion for the majority of this Court with regard to the mental element dimension of a criminal offence. He held:

... under s. 91(27) of the *Constitution Act, 1867*, it is also within the discretion of Parliament to determine the extent of blameworthiness that it wishes to attach to a criminal prohibition. ... This flows from the fact that Parliament has been accorded plenary power to make criminal law in the widest sense. This power is, of course, subject to the “fundamental justice” requirements of s. 7 of the *Canadian Charter of Rights and Freedoms*, which may dictate a higher level of *mens rea* for serious or “true” crimes ...

Just as Parliament may determine the nature of the mental element pertaining to different crimes, it may determine the nature of the “evil or injurious effect” from which it wishes to protect the public. However, while Parliament has the power to define the elements of a crime, the courts have the mandate to review that definition to ensure that it complies with the *Charter* (see, e.g., *Vaillancourt*, *supra*, at p. 652). As I will discuss below, the “fundamental justice” requirements of s. 7 of the *Charter* may, where imprisonment is available as a punishment, call for an “evil or injurious effect” of a certain nature or degree.

Loi sur les armes à feu (Can.), précité, par. 27). De toute évidence, toutefois, lorsque le Parlement invoque la protection de la santé comme objectif public légitime, il doit démontrer l’« effet nuisible ou indésirable » contre lequel il souhaite protéger la population. Il pourra vraisemblablement le faire en démontrant que le préjudice pour la santé de certaines personnes ou du public en général est lié au comportement prohibé. Bien que la Constitution n’ait pas pour effet de requérir la preuve d’un préjudice minimal avant que le Parlement puisse utiliser son vaste pouvoir législatif en matière de droit criminel, un comportement ne présentant que peu ou pas de risques de préjudice est peu susceptible d’être considéré comme un « mal [...] pour la santé publique ».

Dans l’arrêt *Hydro-Québec*, précité, par. 120, s’exprimant pour les juges majoritaires de la Cour, le juge La Forest a tiré une conclusion au même effet en ce qui a trait à l’élément moral d’une infraction criminelle. Il a dit ceci :

... aux termes du par. 91(27) de la *Loi constitutionnelle de 1867*, il relève également du pouvoir discrétionnaire du Parlement de déterminer le degré de culpabilité qu’il souhaite attacher à une interdiction criminelle. [...] Cela découle du fait que le Parlement a été investi du plein pouvoir d’adopter des règles de droit criminel au sens le plus large du terme. Ce pouvoir est assujéti, naturellement, aux exigences de la « justice fondamentale » prescrites à l’art. 7 de la *Charte canadienne des droits et libertés*, qui peuvent dicter un degré plus élevé de *mens rea* dans le cas des crimes graves ou « proprement dits » ...

Tout comme le Parlement peut déterminer la nature de l’élément moral relatif à divers crimes, il peut déterminer la nature du « mal » ou l’« effet nuisible » contre lesquels il souhaite protéger le public. Cependant, quoique le Parlement ait la faculté de définir les éléments constitutifs d’un crime, les tribunaux ont pour mission de contrôler cette définition pour s’assurer qu’elle est conforme à la *Charte* (voir, par exemple, *Vaillancourt*, précité, p. 652). Comme je vais l’expliquer plus loin, dans les cas où l’emprisonnement est une des sanctions prévues, les principes de « justice fondamentale » de l’art. 7 de la *Charte* peuvent avoir pour effet d’exiger l’existence d’un « mal ou [d’un] effet nuisible » d’une certaine nature et d’un certain degré.

The concerns raised by the respondent and the AGO reflect the wrong focus in the courts below as to whether Parliament could “criminalize” possession of marihuana. Indeed, Howard Prov. Ct. J. in *Caine*, in considering the “harm principle”, wrote as follows, at paras. 117-20:

In my view, the proposals that the criminal law be used only to protect against conduct that involves demonstrable harm to another individual or other individuals or to society as a whole or against conduct that is seriously harmful or substantially harmful to society are not “principles of fundamental justice”. The case authorities are to the contrary. . . .

In fact, our Supreme Court has consistently granted Parliament “a broad discretion in proscribing conduct as criminal and in determining proper punishment”. *R. v. Hinchey* (1996), 111 C.C.C. (3d) 353 at 369-70. The principles applicable to Parliament’s law-making powers in the criminal sphere make clear that Parliament has a broad scope of authority to “criminalize” conduct in order to address any social, political or economic interests. . . .

If there was any doubt of how this principle might be applied in the present context, it was resolved when the Supreme Court of Canada indicated, in *RJR-MacDonald Inc. v. Canada*, (*supra*) that Parliament may legislate under the criminal law power to protect Canadians from harmful drugs. . . .

The correct position is, in my view, that which is set out in *Butler*, (*supra*) at 165. To paraphrase in terms that are applicable to the case before me: Parliament may enact penal legislation prohibiting use of a drug, when it has a reasonable basis for concluding that there is a risk of harm to the health of the user, or a risk of harm to society as a whole. [Emphasis added.]

With respect, the trial judge confused the tests developed by this Court in division of power jurisprudence, which are used to determine whether Parliament has validly used its criminal power in a manner that is not a colourable intrusion upon provincial competences, with the *Charter* constraints imposed upon Parliament when otherwise valid

Les inquiétudes exprimées par l’intimée et par le procureur général de l’Ontario reflètent l’importance que les juridictions inférieures ont à tort accordée à la question de savoir si le Parlement pouvait « criminaliser » la possession de marihuana. De fait, la juge Howard a écrit ce qui suit aux par. 117-120 de l’affaire *Caine*, dans son examen du « principe du préjudice » :

[TRADUCTION] À mon avis, la proposition de ne recourir au droit criminel que pour prévenir un comportement qui cause effectivement préjudice à une ou plusieurs autres personnes ou à l’ensemble de la société ou un comportement qui cause un préjudice grave ou important à la société ne sont pas des « principes de justice fondamentale ». La jurisprudence indique le contraire. . .

En fait, la Cour suprême a constamment reconnu au Parlement « une compétence discrétionnaire étendue pour interdire certains comportements considérés comme criminels et pour déterminer quelle doit être la sanction appropriée ». *R. c. Hinchey* (1996), 111 C.C.C. (3d) 353, p. 369 et 370. Les principes applicables au pouvoir du Parlement de légiférer en matière criminelle indiquent clairement qu’il jouit d’une large compétence lui permettant de « criminaliser » des comportements afin de tenir compte d’intérêts sociaux, politiques ou économiques. . .

S’il existait des doutes quant à la manière dont ce principe pourrait être appliqué dans le présent contexte, ils ont été dissipés lorsque la Cour suprême du Canada a indiqué, dans l’arrêt *RJR-MacDonald Inc. c. Canada*, précité, que le Parlement peut, en vertu de sa compétence en matière de droit criminel, légiférer pour protéger les Canadiens contre les drogues nocives. . .

À mon avis, la position appropriée est celle qui a été énoncée dans l’arrêt *Butler*, précité, p. 165. Je vais l’exprimer en des termes applicables à l’affaire dont je suis saisie : le Parlement peut adopter des lois à caractère pénal pour interdire l’usage d’une drogue lorsqu’il a des motifs raisonnables de conclure à l’existence d’un risque de préjudice pour la santé de l’usager ou d’un risque de préjudice pour l’ensemble de la société. [Je souligne.]

En toute déférence, j’estime que la juge de première instance a confondu, d’une part, les critères élaborés par la Cour dans ses arrêts sur le partage des pouvoirs et utilisés pour déterminer si le Parlement a validement exercé sa compétence en droit criminel d’une manière qui ne constitue pas un empiétement déguisé sur des compétences provinciales, et,

criminal legislation is alleged to infringe on rights protected by the *Charter*. In my respectful view, the same confusion appears in Braidwood J.A.'s analysis.

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After a thorough review of the common law, leading treatises on the criminal law, law reform commission reports, Canadian federalism cases (addressing the federal criminal law power), and *Charter* jurisprudence, Braidwood J.A. came to the conclusion that the harm principle is indeed a principle of fundamental justice within the meaning of s. 7. After having concluded as to the existence of this principle, Braidwood J.A. set “the appropriate threshold for criminal sanctions” (para. 139) and determined that “[t]he degree of harm must be neither insignificant nor trivial” (para. 138). In determining the appropriate threshold, Braidwood J.A. explained that he had to consider the “relationship, and parallels, between the Criminal Law power of Parliament pursuant to s. 91(27) of the *Constitution Act, 1867* and the test to be applied pursuant to s. 7 of the *Charter*” (para. 139). Braidwood J.A. was thus apparently concerned with affording Parliament the deference it is owed in legislating in criminal matters while at the same time give meaning to the harm principle, because, as he put it: “it is common sense that you don’t go to jail unless there is a potential that your activities will cause harm to others” (para. 134). This tension led him to conclude, at paras. 158-60:

In conclusion, the deprivation of the appellants’ liberty caused by the presence of penal provisions in the *NCA* is in accordance with the harm principle. I agree that the evidence shows that the risk posed by marihuana is not large. Yet, it need not be large in order for Parliament to act. It is for Parliament to determine what level of risk is acceptable and what level of risk requires action. The *Charter* only demands that a “reasoned apprehension of harm” that is not [in]significant or trivial. The appellants have not convinced me that such harm is absent in this case.

d’autre part, les contraintes que la *Charte* impose au Parlement et dont les tribunaux doivent contrôler le respect lorsqu’il est plaidé qu’une loi pénale par ailleurs valide porte atteinte aux droits garantis par la *Charte*. À mon humble avis, la même confusion est présente dans l’analyse du juge Braidwood.

Après un examen approfondi de la common law, des ouvrages faisant autorité en droit criminel, de rapports émanant de commissions de réforme du droit, des arrêts sur le fédéralisme canadien (portant sur la compétence fédérale en matière de droit criminel) et de la jurisprudence relative à la *Charte*, le juge Braidwood a estimé que le principe du préjudice est effectivement un principe de justice fondamentale au sens de l’art. 7. Après avoir conclu à l’existence de ce principe, le juge Braidwood a fixé [TRADUCTION] « le seuil approprié justifiant l’édiction de sanctions pénales » (par. 139) en précisant que [TRADUCTION] « [l]e préjudice ne doit être ni insignifiant ni négligeable » (par. 138). Il a expliqué que, pour fixer le seuil approprié, il avait dû s’interroger sur [TRADUCTION] « les liens et les parallèles entre le pouvoir reconnu au Parlement sur le droit criminel par le par. 91(27) de la *Loi constitutionnelle de 1867*, d’une part, et le critère qui doit être utilisé pour l’application de l’art. 7 de la *Charte*, d’autre part » (par. 139). Il semble que le juge Braidwood voulait ainsi faire montre envers le Parlement de la déférence à laquelle ce dernier a droit lorsqu’il légifère sur le droit criminel, et par la même occasion donner un sens au principe du préjudice parce que, ainsi qu’il l’a dit, [TRADUCTION] « il est logique qu’on ne vous envoie pas en prison, à moins que vos actes ne soient susceptibles de causer préjudice à autrui » (par. 134). Ce tiraillement l’a amené à conclure ainsi, aux par. 158-160 :

[TRADUCTION] En conclusion, la privation de liberté qu’entraînent pour les appelants les dispositions pénales de la *Loi sur les stupéfiants* respecte le principe du préjudice. Je reconnais que la preuve montre que le risque présenté par la marihuana n’est pas élevé. Cependant, il n’est pas nécessaire qu’il le soit pour que le Parlement prenne des mesures. Il appartient au Parlement de déterminer le niveau de risque qui est acceptable et celui qui exige son intervention. La *Charte* requiert seulement [...] une « crainte raisonnée de préjudice » qui ne soit ni [in]signifiante ni négligeable. Les appelants ne m’ont pas convaincu de l’absence d’un tel préjudice en l’espèce.

Therefore, I find that the legal prohibition against the possession of marihuana does not offend the operative principle of fundamental justice in this case.

Determining whether the *NCA* strikes the “right balance” between the rights of the individual and the interests of the State is more difficult. In the end, I have decided that such matters are best left to Parliament. . . . I do not feel it is the role of this court to strike down the prohibition on the non-medical use of marihuana possession at this time. [Emphasis added.]

With respect, Braidwood J.A. wrongly focused his analysis on Parliament’s power to criminalize possession of marihuana. As I briefly mentioned above, and as my colleagues Gonthier and Binnie JJ. have also reviewed, the principles regarding the scope of Parliament’s criminal law power are now well established and harm may not be the sole basis upon which criminal law may be used. Parliament may have the power to prohibit certain conduct, be it under its criminal law power or otherwise, but it must respect minimum *Charter* requirements before it resorts to imprisonment as a sanction. In other words, the harm principle as a principle of fundamental justice operates to prevent restriction of liberty under s. 7 of the *Charter* and not as a constraint inherent in Parliament’s criminal law power.

The focus must therefore be on the use of imprisonment as a sanction attaching to a prohibited conduct. This becomes obvious upon consideration of the various sources of legislative power under which Parliament may prohibit and sanction certain activities or behaviours. To situate the harm principle within the principles regarding the criminal law power of Parliament would in fact exclude the applicability of this principle of fundamental justice to other prohibitions enforceable by imprisonment and, of course, to the enforcement of provincial statutes. For example, as my colleagues explained, the residual POGG power has application in only three situations: (i) a national emergency; (ii) the federal

Par conséquent, je considère que l’interdiction légale de posséder de la marihuana ne contrevient pas au principe de justice fondamentale applicable en l’espèce.

Il est plus difficile de déterminer si la *Loi sur les stupéfiants* établit un « juste équilibre » entre les droits de l’individu et les intérêts de l’État. En fin de compte, j’ai décidé qu’il était préférable de laisser ces questions à l’appréciation du Parlement. [. . .] Je ne crois pas que ce soit le rôle de la cour d’annuler à ce moment-ci l’interdiction relative à la possession de marihuana pour usage non médical. [Je souligne.]

En toute déférence, j’estime que le juge Braidwood a eu tort de centrer son analyse sur le pouvoir du Parlement de criminaliser la possession de marihuana. Comme je l’ai expliqué brièvement plus tôt, et comme mes collègues les juges Gonthier et Binnie l’ont eux aussi indiqué, les principes concernant l’étendue de la compétence du Parlement en matière criminelle sont désormais bien établis et l’existence d’un préjudice ne saurait être le seul fondement justifiant le recours au droit criminel. Le Parlement dispose peut-être du pouvoir d’interdire certains comportements, que ce soit en vertu de sa compétence sur le droit criminel ou en vertu d’un autre pouvoir, mais il doit respecter les exigences minimales établies par la *Charte* avant de recourir à l’emprisonnement comme sanction. En d’autres mots, en tant que principe de justice fondamentale, le principe du préjudice a pour effet d’empêcher la restriction du droit à la liberté garanti par l’art. 7 de la *Charte* mais il ne constitue pas une limite inhérente au pouvoir du Parlement de légiférer en matière criminelle.

Il faut donc s’attacher à la question du recours à l’emprisonnement comme sanction du comportement prohibé. Cette démarche ressort clairement de l’examen des diverses sources de pouvoir législatif en vertu desquelles le Parlement peut interdire et sanctionner certaines activités ou certains comportements. Classer le principe du préjudice parmi les principes touchant à la compétence du Parlement sur le droit criminel exclurait en fait l’applicabilité de ce principe de justice fondamentale aux autres interdictions dont l’inobservation est punissable par l’emprisonnement et, évidemment, au contrôle des lois provinciales. Par exemple, comme l’ont expliqué mes collègues, le pouvoir résiduel concernant la

competence arose because the subject matter did not exist at the time of Confederation and clearly cannot be put into the class of matters of merely local or private nature; and (iii) where the subject matter “goes beyond local or provincial concern or interest and must, from its inherent nature, be the concern of the Dominion as a whole” (*Labatt Breweries of Canada Ltd. v. Attorney General of Canada*, [1980] 1 S.C.R. 914). The determination of whether the impugned legislation meets these criteria thus focuses on characteristics of the legislation that have nothing to do with those falling under the criminal law power, such as the necessity to identify an evil or injurious effect at which the prohibition is directed and a valid criminal law purpose. Needless to say, no harm, be it to identifiable others, to society as a whole, or to self, is required, or even relevant to the determination of whether legislation falls under the POGG power. The harm principle as applied by the courts below would thus be inapplicable to prohibitions enacted under the POGG power, or any other non-criminal fields of federal competence.

paix, l’ordre et le bon gouvernement ne s’applique que dans trois situations : (i) il existe une urgence nationale; (ii) le fédéral a compétence parce que la matière n’existait pas à l’époque de la Confédération et qu’elle ne relève pas de la catégorie des sujets de nature purement locale ou privée; (iii) la matière « dépasse [...] les intérêts locaux ou provinciaux et doit par sa nature même constituer une préoccupation pour le Dominion dans son ensemble » (*Brasseries Labatt du Canada Ltée c. Procureur général du Canada*, [1980] 1 R.C.S. 914). L’analyse permettant de décider si la loi contestée respecte ces critères porte donc essentiellement sur les caractéristiques de celle-ci qui n’ont rien à voir avec celles des lois relevant du pouvoir de légiférer sur le droit criminel, telle la nécessité de reconnaître le mal ou l’effet nuisible visé par l’interdiction et un objectif valide en droit criminel. Il va sans dire qu’aucun préjudice — que ce soit à l’intéressé lui-même, à d’autres personnes identifiables ou à la société en général — n’est requis ni même pertinent pour juger si la loi relève du pouvoir relatif à la paix, à l’ordre et au bon gouvernement. Le principe du préjudice, tel qu’il a été appliqué par les juridictions inférieures, serait donc inapplicable aux interdictions édictées en vertu de ce pouvoir ou de tout autre chef de compétence fédérale ne touchant pas au droit criminel.

217 The use of imprisonment, be it for a criminal offence, a prohibition enacted under the POGG power, or for any other offence created as a means of enforcement of non-criminal legislation, including provincial offences, must be subject to the same *Charter* requirements. The comments of Lamer C.J., in *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154, at p. 189, are equally applicable here:

In my view, whether this offence (or the Act generally) is better characterized as “criminal” or “regulatory” is not the issue. The focus of the analysis in *Re B.C. Motor Vehicle Act* and *Vaillancourt* was on the use of imprisonment to enforce the prohibition of certain behaviour or activity. A person whose liberty has been restricted by way of imprisonment has lost no less liberty because he

La décision de recourir à l’emprisonnement, que ce soit à l’égard d’une infraction criminelle, d’une interdiction édictée en vertu du pouvoir relatif à la paix, à l’ordre et au bon gouvernement ou de quelque autre infraction créée pour faire respecter une loi à caractère non criminel, y compris les infractions provinciales, doit respecter les exigences établies par la *Charte* évoquées plus haut. Les commentaires du juge en chef Lamer dans l’arrêt *R. c. Wholesale Travel Group Inc.*, [1991] 3 R.C.S. 154, p. 189, s’appliquent également en l’espèce :

À mon avis, la question n’est pas de savoir si cette infraction (ou la Loi en général) doit être qualifiée de « pénale » ou de « réglementaire ». Dans le *Renvoi : Motor Vehicle Act de la C.-B.* et l’arrêt *Vaillancourt*, l’analyse portait avant tout sur le recours à l’emprisonnement pour faire respecter l’interdiction de certains actes ou activités. La personne privée de sa liberté

or she is being punished for the commission of a regulatory offence as opposed to a criminal offence. Jail is jail, whatever the reason for it. In my view, it is the fact that the state has resorted to the restriction of liberty through imprisonment for enforcement purposes which is determinative of the principles of fundamental justice. [Emphasis in original.]

Similarly here, it is the fact that the state has resorted to the restriction of liberty through imprisonment for enforcement purposes which calls into play the harm principle as a principle of fundamental justice. I note here that the question is not whether imprisonment is used frequently or only in the rarest cases. The mere availability of imprisonment dictates the constitutional test to be applied (*Motor Vehicle Reference*, *supra*, at p. 515).

According to my colleagues' conclusion, the impugned legislation is within Parliament's legislative powers. For my purposes, once it is determined that the legislation falls within one of Parliament's constitutional heads of power, it does not matter whether the legislation falls under the criminal law power or otherwise. The key is indeed whether the approach taken by Parliament to enforce the prohibition of possession of marijuana is in accordance with the prescriptions of the *Charter*. This case is therefore an opportunity for this Court to evaluate the principles developed in *Motor Vehicle Reference* with respect to the *actus reus* of the offence.

B. *The Charter Issues*

The appellants Caine and Clay assert that the prohibition of possession of marijuana infringes s. 7 of the *Charter*. The s. 7 analysis requires the appellants to demonstrate a deprivation of liberty that is not in accordance with the principles of fundamental justice. Indeed, as *per* Iacobucci J. in *R. v. White*, [1999] 2 S.C.R. 417, at para. 38, the s. 7 analysis involves three stages:

The first question to be resolved is whether there exists a real or imminent deprivation of life, liberty, security of the

par l'emprisonnement n'est pas privée de moins de liberté parce qu'elle a été punie en raison de la perpétration d'une infraction réglementaire et non d'un crime. L'emprisonnement, c'est l'emprisonnement, peu importe la raison. À mon sens, c'est le fait que l'État a infligé une peine privative de liberté, en l'occurrence l'emprisonnement, pour faire respecter la loi qui est décisif du point de vue des principes de justice fondamentale. [Souligné dans l'original.]

De même, dans la présente affaire, c'est le fait que l'État a choisi de restreindre la liberté par l'emprisonnement pour faire respecter la loi qui fait intervenir le principe du préjudice en tant que principe de justice fondamentale. Je souligne ici qu'il ne s'agit pas de déterminer si l'emprisonnement est infligé fréquemment ou seulement dans des cas rarissimes. Le seul fait que la peine existe dicte le critère constitutionnel à appliquer (*Renvoi relatif à la Motor Vehicle Act*, précité, p. 515).

Selon la conclusion de mes collègues, la mesure législative contestée relève des pouvoirs législatifs du Parlement. Pour les besoins des présents motifs, une fois qu'il a été jugé que la mesure correspond à un chef de compétence fédérale prévu par la Constitution, il importe peu de savoir si elle relève du pouvoir du Parlement en matière de droit criminel. Il s'agit plutôt fondamentalement de se demander si les moyens choisis par celui-ci pour faire respecter l'interdiction visant la possession de marijuana sont conformes aux exigences établies par la *Charte*. La présente affaire offre donc une occasion à la Cour d'évaluer les principes formulés dans le *Renvoi relatif à la Motor Vehicle Act* à l'égard de l'élément matériel de l'infraction.

B. *Les questions touchant à la Charte*

Les appelants Caine et Clay affirment que l'interdiction visant la possession de marijuana contrevient à l'art. 7 de la *Charte*. Dans l'analyse fondée sur cet article, les appelants doivent démontrer que la privation de liberté n'est pas conforme aux principes de justice fondamentale. En fait, comme le précise le juge Iacobucci dans l'arrêt *R. c. White*, [1999] 2 R.C.S. 417, par. 38, l'analyse fondée sur l'art. 7 comporte trois étapes :

La première question à résoudre est s'il y a privation réelle ou imminente de la vie, de la liberté, de la sécurité

person, or a combination of these interests. The second stage involves identifying and defining the relevant principle or principles of fundamental justice. Finally, it must be determined whether the deprivation has occurred in accordance with the relevant principle

I will now consider each of these three stages. I note that the analysis will concentrate on the challenge of the provisions prohibiting simple possession of marihuana. At the end of the analysis I will address Malmo-Levine's challenge to the prohibition of possession of marihuana for the purpose of trafficking.

(1) Deprivation of Life, Liberty, or Security of the Person

220 The respondent concedes, as the lower courts found, that the possibility of imprisonment under s. 3(1) of the *Narcotic Control Act*, R.S.C. 1985, c. N-1, engages the s. 7 liberty interest of the appellants. This is consistent with this Court's past holdings: *Motor Vehicle Reference*, *supra*, at p. 515; *R. v. Heywood*, [1994] 3 S.C.R. 761, at p. 789.

221 The appellants also argue that the right to use marihuana in the privacy of one's home is a fundamental aspect of personal autonomy and dignity. On this issue, I am in complete agreement with my colleagues Gonthier and Binnie JJ. Neither the widest view on liberty, as expressed by La Forest J., writing for himself, L'Heureux-Dubé, Gonthier and McLachlin JJ. on this issue, in *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315, at para. 80, nor the interpretation of security as including a right to personal autonomy, cover the recreational use of marihuana, even in the privacy of one's home. This use does not qualify as a matter of fundamental importance so as to engage the liberty and security interests under s. 7 of the *Charter*. Put another way:

. . . the autonomy protected by the s. 7 right to liberty encompasses only those matters that can properly be characterized as fundamentally or inherently personal

de la personne ou d'une combinaison de ces trois droits. La deuxième étape consiste à identifier et à qualifier le ou les principes de justice fondamentale pertinents. Enfin, il faut déterminer si la privation s'est produite conformément aux principes pertinents

Je vais maintenant examiner chacune de ces trois étapes. Je signale que mon analyse portera essentiellement sur la contestation des dispositions interdisant la simple possession de marihuana. À la fin de mon analyse, j'examinerai la contestation par M. Malmo-Levine de l'interdiction visant la possession de marihuana en vue d'en faire le trafic.

(1) Atteinte à la vie, à la liberté ou à la sécurité de la personne

L'intimée concède, conformément à la conclusion à cet effet des juridictions inférieures, que la peine d'emprisonnement prévue par le par. 3(1) de la *Loi sur les stupéfiants*, L.R.C. 1985, ch. N-1, met en cause le droit à la liberté garanti aux appelants par l'art. 7. Cette conclusion est conforme aux décisions antérieures de la Cour : *Renvoi relatif à la Motor Vehicle Act*, précité, p. 515; *R. c. Heywood*, [1994] 3 R.C.S. 761, p. 789.

Les appelants soutiennent aussi que le droit d'une personne de consommer de la marihuana dans l'intimité de son foyer constitue un aspect fondamental de l'autonomie et de la dignité de la personne. Sur ce point, je suis entièrement d'accord avec mes collègues les juges Gonthier et Binnie. Ni l'interprétation la plus large de la liberté, qu'a exprimée le juge La Forest en son propre nom et au nom des juges L'Heureux-Dubé, Gonthier et McLachlin dans l'arrêt *B. (R.) c. Children's Aid Society of Metropolitan Toronto*, [1995] 1 R.C.S. 315, par. 80, ni l'interprétation selon laquelle le droit à la sécurité inclue le droit à l'autonomie personnelle ne visent la consommation de marihuana à des fins récréatives, même dans l'intimité du foyer. Cet usage ne constitue pas une question d'importance fondamentale qui mettrait en jeu le droit à la liberté et à la sécurité garanti par l'art. 7 de la *Charte*. En d'autres mots :

. . . l'autonomie protégée par le droit à la liberté garanti par l'art. 7 ne comprend que les sujets qui peuvent à juste titre être qualifiés de fondamentalement ou

such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence.

(*Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844, at para. 66)

The threat of imprisonment clearly engages the s. 7 liberty interest of the appellants; since no one has addressed whether sanctions other than imprisonment could engage the right to liberty or security of the person, I will limit my analysis to the threat of imprisonment. Thus, I need not address here, given the scope of my analysis and the nature of this appeal, whether the imposition of a fine for simple possession of marihuana, or imprisonment as an alternative to the non-payment of a fine, or imposition of a criminal record *simpliciter*, engage the right to security or liberty of the person. Those issues were not addressed by the courts below and it would be both unwise and unnecessary to address them here. As the threat of imprisonment clearly engages the s. 7 liberty interest of the appellants, it is necessary to determine the relevant principles of fundamental justice, to which I now turn.

(2) The Relevant Principles of Fundamental Justice

The primary principle of fundamental justice put forth by the appellants is the alleged “harm principle”. The British Columbia Court of Appeal in *Caine* recognized the existence of a harm principle as a principle of fundamental justice, although the majority and the minority had different views on which threshold of harm was required by this principle. Rosenberg J.A. of the Court of Appeal for Ontario in *Clay* did not decide the issue but was ready to accept for the purposes of the case at bar that the harm principle was a principle of fundamental justice. The appellants also submit other principles of fundamental justice which they say are applicable to the cases at bar, namely the principle

d’essentiellement personnels et qui impliquent, par leur nature même, des choix fondamentaux participant de l’essence même de ce que signifie la jouissance de la dignité et de l’indépendance individuelles.

(*Godbout c. Longueuil (Ville)*, [1997] 3 R.C.S. 844, par. 66)

La menace d’emprisonnement fait clairement intervenir le droit à la liberté garanti aux appelants par l’art. 7. Étant donné que personne n’a abordé la question de savoir si d’autres sanctions que l’emprisonnement pourraient mettre en cause le droit à la liberté ou à la sécurité de la personne, je vais limiter mon analyse à la menace d’emprisonnement. En conséquence, vu le cadre de mon analyse et la nature du présent pourvoi, je n’ai pas à me demander si, dans le cas de l’infraction de simple possession de marihuana, l’infliction d’une amende, l’infliction d’une peine d’emprisonnement en cas de non-paiement de cette amende ou le seul fait de l’établissement d’un casier judiciaire mettent en jeu le droit à la sécurité ou à la liberté de la personne. Ces questions n’ont pas été examinées par les juridictions inférieures et il serait à la fois inopportun et inutile de le faire maintenant. Comme la menace d’emprisonnement soulève manifestement le droit à la liberté garanti aux appelants par l’art. 7, il est essentiel de dégager les principes de justice fondamentale pertinents, tâche à laquelle je vais maintenant m’appliquer.

(2) Les principes de justice fondamentale pertinents

Les appelants invoquent en premier lieu le « principe du préjudice » qui, selon eux, constituerait un principe de justice fondamentale. Dans l’arrêt *Caine*, la Cour d’appel de la Colombie-Britannique a reconnu que ce principe est un principe de justice fondamentale, quoique les juges majoritaires et les juges minoritaires aient eu des conceptions divergentes quant au préjudice minimal requis par un tel principe. Dans l’arrêt *Clay*, le juge Rosenberg de la Cour d’appel de l’Ontario ne s’est pas prononcé sur cette question, mais il était disposé à reconnaître, pour les besoins de l’affaire dont il était saisi, que le principe du préjudice était un principe de justice fondamentale. Les appelants ont plaidé d’autres

of restraint, the principle precluding irrationality and arbitrariness in the legislative scheme and the principle of overbreadth (see para. 31 of the appellant Caine's factum).

224 Principles of fundamental justice have been defined as follows by Sopinka J. in *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, at pp. 590-91:

Principles of fundamental justice must not, however, be so broad as to be no more than vague generalizations about what our society considers to be ethical or moral. They must be capable of being identified with some precision and applied to situations in a manner which yields an understandable result. They must also, in my view, be legal principles. The now familiar words of Lamer J. in *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486, at pp. 512-13, are as follows:

Consequently, the principles of fundamental justice are to be found in the basic tenets and principles, not only of our judicial process, but also of the other components of our legal system.

. . .

Whether any given principle may be said to be a principle of fundamental justice within the meaning of s. 7 will rest upon an analysis of the nature, sources, *rationale* and essential role of that principle within the judicial process and in our legal system, as it evolves.

225 As I mentioned earlier, in determining which principles of fundamental justice are at play here and in assessing their content and their scope, the focus must remain on the choice made by the state to resort to imprisonment to enforce the prohibition of possession of marihuana for personal use and alternatively, of possession of marihuana for the purpose of trafficking (*Wholesale Travel Group Inc.*, *supra*, at p. 189, *per* Lamer C.J.).

(a) *Harm Principle*

226 As Lamer J. recalled in *Motor Vehicle Reference*, *supra*, at p. 513, "[i]t has from time immemorial

principes de justice fondamentale qui, selon eux, s'appliquent à la présente espèce, à savoir le principe de la modération, le principe interdisant les lois irrationnelles et arbitraires et le principe de la portée excessive (voir le par. 31 du mémoire de l'appellant Caine).

Le juge Sopinka a défini ainsi les principes de justice fondamentale dans l'arrêt *Rodriguez c. Colombie-Britannique (Procureur général)*, [1993] 3 R.C.S. 519, p. 591 :

Les principes de justice fondamentale ne doivent toutefois pas être généraux au point d'être réduits à de vagues généralisations sur ce que notre société estime juste ou moral. Ils doivent pouvoir être identifiés avec une certaine précision et appliqués à diverses situations d'une manière qui engendre un résultat compréhensible. Ils doivent également, à mon avis, être des principes juridiques. Le juge Lamer a tenu ces propos maintenant bien connus, dans le *Renvoi : Motor Vehicle Act de la C.-B.*, [1985] 2 R.C.S. 486, aux pp. 512 et 513 :

En conséquence, les principes de justice fondamentale se trouvent dans les préceptes fondamentaux non seulement de notre processus judiciaire, mais aussi des autres composantes de notre système juridique.

. . .

La question de savoir si un principe donné peut être considéré comme un principe de justice fondamentale au sens de l'art. 7 dépendra de l'analyse de la nature, des sources, de la raison d'être et du rôle essentiel de ce principe dans le processus judiciaire et dans notre système juridique à l'époque en cause.

Comme je l'ai dit précédemment, afin de dégager les principes de justice fondamentale en cause dans la présente affaire et de déterminer leur portée et leur contenu, il faut s'attacher à la décision de l'État de recourir à l'emprisonnement pour faire respecter l'interdiction visant la possession de marihuana aux fins de consommation personnelle ou aux fins de trafic (*Wholesale Travel Group Inc.*, précité, p. 189, le juge en chef Lamer).

a) *Le principe du préjudice*

Comme l'a rappelé le juge Lamer dans le *Renvoi relatif à la Motor Vehicle Act*, précité, p. 513,

been part of our system of laws that the innocent not be punished.” This fundamental principle is at the core of his introductory remarks, at p. 492:

A law that has the potential to convict a person who has not really done anything wrong offends the principles of fundamental justice and, if imprisonment is available as a penalty, such a law then violates a person’s right to liberty under s. 7 of the *Charter of Rights and Freedoms*

In other words, absolute liability and imprisonment cannot be combined.

Since this landmark decision, courts have been “empowered, indeed required, to measure the content of legislation’ against the principles of fundamental justice contained in s. 7 of the *Charter*, and specifically, to ensure that the morally innocent not be punished” (*R. v. Creighton*, [1993] 3 S.C.R. 3, at p. 17).

It is a fundamental substantive principle of criminal law that there should be no criminal responsibility without an act or omission accompanied by some sort of fault. The Latin phrase is *actus non facit reum, nisi mens sit rea* or “[t]he intent and the [a]ct must both concur to constitute the crime” (*Fowler v. Padget* (1798), 7 T.R. 509, 101 E.R. 1103 (K.B.), at p. 1106; see K. Roach, *Criminal Law* (2nd ed. 2000), at p. 8; D. Stuart, *Canadian Criminal Law: A Treatise* (4th ed. 2001), at p. 359; G. Côté-Harper, P. Rainville and J. Turgeon, *Traité de droit pénal canadien* (4th ed. rev. 1998), at pp. 263-64; J. C. Smith and B. Hogan, *Criminal Law: Cases and Materials* (7th ed. 1999), at p. 27; A. P. Simester and G. R. Sullivan, *Criminal Law: Theory and Doctrine* (2000), at p. 21). Legal causation, which seeks to link the prohibited consequences to a culpable act of the accused, also reflects the fundamental principle that the morally innocent should not be punished (see *R. v. Nette*, [2001] 3 S.C.R. 488, 2001 SCC 78, at para. 45). In determining whether legal causation is established, the inquiry is directed at the question of whether the accused person should be held criminally responsible for the consequences that occurred from his or her conduct. As I said in *Nette*, *supra*, at para. 47, “[w]hile causation is a distinct issue from

« [d]epuis des temps immémoriaux, il est de principe dans notre système juridique qu’un innocent ne doit pas être puni. » Ce principe fondamental constitue la pierre angulaire de ses remarques introductives à la p. 492 :

Une loi qui permet de déclarer coupable une personne qui n’a véritablement rien fait de mal viole les principes de justice fondamentale et, si elle prévoit une peine d’emprisonnement, une telle loi viole le droit à la liberté garanti par l’art. 7 de la *Charte canadienne des droits et libertés*

En d’autres termes, la responsabilité absolue et la peine d’emprisonnement ne peuvent être combinées.

Depuis cet arrêt de principe, les tribunaux ont « “le pouvoir et même le devoir d’apprécier le contenu de la loi” en fonction des principes de justice fondamentale évoqués à l’art. 7 de la *Charte* et, en particulier, de voir à ce que les personnes moralement innocentes n’encourent aucune sanction » (*R. c. Creighton*, [1993] 3 R.C.S. 3, p. 17).

Selon un principe fondamental du droit criminel, il ne saurait y avoir responsabilité criminelle en l’absence d’une action ou omission accompagnée d’une faute. La maxime latine applicable est *actus non facit reum, nisi mens sit rea* ou « [u]n acte ne rend pas une personne coupable à moins que son intention ne soit coupable » (*Fowler c. Padget* (1798), 7 T.R. 509, 101 E.R. 1103 (K.B.), p. 1106; voir K. Roach, *Criminal Law* (2^e éd. 2000), p. 8; D. Stuart, *Canadian Criminal Law : A Treatise* (4^e éd. 2001), p. 359; G. Côté-Harper, P. Rainville et J. Turgeon, *Traité de droit pénal canadien* (4^e éd. rév. 1998), p. 263-264; J. C. Smith et B. Hogan, *Criminal Law : Cases and Materials* (7^e éd. 1999), p. 27; A. P. Simester et G. R. Sullivan, *Criminal Law : Theory and Doctrine* (2000), p. 21). La causalité juridique, qui vise à rattacher les conséquences prohibées à un acte coupable de l’accusé, reflète également le principe fondamental selon lequel les personnes moralement innocentes ne doivent pas être punies (voir *R. c. Nette*, [2001] 3 R.C.S. 488, 2001 CSC 78, par. 45). Pour décider si la causalité juridique a été établie, il faut se demander si l’accusé doit être tenu criminellement responsable des conséquences ayant résulté de sa conduite. Comme je l’ai dit dans l’arrêt *Nette*, précité, par. 47, « [b]ien que la causalité soit

mens rea, the proper standard of causation expresses an element of fault that is in law sufficient, in addition to the requisite mental element, to base criminal responsibility.” This inquiry seeks in fact to determine whether blame can be attributed to the accused and is illustrative of criminal law’s preoccupation that both the physical and mental elements of an offence coincide to reflect the blameworthiness attached to the offence and the offender.

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In order to determine whether the principle developed in the *Motor Vehicle Reference* may apply to ground an element of fault in the *actus reus*, it is instructive to examine the interaction between the mental and physical elements of an offence and to review how the Court has applied that principle with respect to the *mens rea*. As Lamer J. explained in *Vaillancourt*, *supra*, at p. 652:

In effect, *Re B.C. Motor Vehicle Act* acknowledges that, whenever the state resorts to the restriction of liberty, such as imprisonment, to assist in the enforcement of a law, even, as in *Re B.C. Motor Vehicle Act*, a mere provincial regulatory offence, there is, as a principle of fundamental justice, a minimum mental state which is an essential element of the offence. . . . *Re B.C. Motor Vehicle Act* did not decide what level of *mens rea* was constitutionally required for each type of offence, but inferentially decided that even for a mere provincial regulatory offence at least negligence was required, in that at least a defence of due diligence must always be open to an accused who risks imprisonment upon conviction. [Emphasis in original.]

Further, Lamer J. explained, at p. 653, that

whatever the minimum *mens rea* for the act or the result may be, there are, though very few in number, certain crimes where, because of the special nature of the stigma attached to a conviction therefor or the available penalties, the principles of fundamental justice require a *mens rea* reflecting the particular nature of that crime. Such is theft, where, in my view, a conviction requires proof of some dishonesty. Murder is another such offence.

une question distincte de la *mens rea*, le critère de causalité approprié comporte un élément de faute qui, outre l’élément moral requis, est suffisant en droit pour conclure à la responsabilité criminelle. » Cette analyse, qui consiste à décider si l’accusé peut être blâmé, illustre bien le souci du droit criminel de s’assurer que les éléments matériel et moral d’une infraction coïncident pour refléter le caractère blâmable associé à l’infraction et au délinquant.

Afin de déterminer si l’application du principe élaboré dans le *Renvoi relatif à la Motor Vehicle Act* permet de dégager un élément de faute dans l’*actus reus*, il est utile de considérer l’interaction de l’élément moral et de l’élément matériel de l’infraction et de voir comment la Cour a appliqué le principe susmentionné à la *mens rea*. Comme l’a expliqué le juge Lamer dans l’arrêt *Vaillancourt*, précité, p. 652 :

En fait, dans le *Renvoi : Motor Vehicle Act de la C.-B.*, on reconnaît que dans tous les cas où l’État recourt à la restriction de la liberté, comme l’emprisonnement, pour assurer le respect de la loi, même si, comme dans ce renvoi, il ne s’agit que d’une simple infraction à une réglementation provinciale, la justice fondamentale exige que la présence d’un état d’esprit minimal chez l’accusé constitue un élément essentiel de l’infraction. [. . .] Dans le *Renvoi : Motor Vehicle Act de la C.-B.*, on ne précise pas le degré de *mens rea* qu’exige la Constitution pour chaque type d’infraction, mais on établit indirectement que, même dans le cas d’une infraction à une réglementation provinciale, la négligence est au moins requise, en ce sens que l’accusé qui risque d’être condamné à l’emprisonnement s’il est déclaré coupable doit toujours pouvoir au moins invoquer un moyen de défense fondé sur la diligence raisonnable. [Souligné dans l’original.]

Le juge Lamer a en outre donné les explications suivantes, aux p. 653-654 :

. . . quelle que soit la *mens rea* minimale requise pour l’acte ou le résultat, il existe, quoiqu’ils soient très peu nombreux, des crimes pour lesquels, en raison de la nature spéciale des stigmates qui se rattachent à une déclaration de culpabilité de ceux-ci ou des peines qui peuvent être imposées le cas échéant, les principes de justice fondamentale commandent une *mens rea* qui reflète la nature particulière du crime en question. Tel est le cas du vol dont, selon moi, on ne peut être déclaré coupable que s’il y a preuve d’une certaine malhonnêteté. Le meurtre en est un autre exemple.

The constitutionalization of fault requirements has indeed cast doubt on some *Criminal Code* offences and this Court has, in *Vaillancourt*, *supra*, and in *R. v. Martineau*, [1990] 2 S.C.R. 633, for example, used the criteria of the stigma and punishment attached to an offence as determinative of the fault level or *mens rea* required for conviction. Specifically, the Court has decided that for murder and theft, principles of fundamental justice guaranteed by s. 7 of the *Charter* demand subjective intent or recklessness. Thus, the constructive murder provisions of the *Code* which required only objective foreseeability of death and in some circumstances, only a causal connection, were held to be unconstitutional.

The special mental element required for these offences gives rise to the moral blameworthiness which justifies the stigma and sentence attached to them: *Vaillancourt*, *supra*, at p. 654; *Martineau*, *supra*, at p. 646. In *Martineau*, it was decided that the essential role of requiring subjective foresight of death in the context of murder was to “maintain a proportionality between the stigma and punishment attached to a murder conviction and the moral blameworthiness of the offender” (p. 646). The principles of fundamental justice require, because of the special nature of the stigma attached to a murder conviction, and the available penalties, a *mens rea* reflecting the particular nature of the crime. The moral blameworthiness of a particular offender thus stems from the constitutionally required mental element, which is determined by considering the stigma and criminal sanction attaching to prohibited conduct.

In my view, the principle that stigma and punishment must be proportionate to the moral blameworthiness of the offender stands only if there is a sufficiently blameworthy element in the *actus reus* itself. A culpable mental state attached to a conduct may only be held “culpable” provided that the offender and his conduct ought to be blamed (see A. von Hirsch and N. Jareborg, “Gauging

La constitutionnalisation des exigences relatives à l’existence d’une faute a d’ailleurs remis en question la validité de certaines infractions prévues par le *Code criminel* et, dans les arrêts *Vaillancourt*, précité, et *R. c. Martineau*, [1990] 2 R.C.S. 633, par exemple, la Cour a utilisé les stigmates et la peine rattachés à une infraction comme critères de détermination du degré de faute ou de *mens rea* requis pour qu’il y ait déclaration de culpabilité. Plus précisément, la Cour a jugé que, pour le meurtre et le vol, les principes de justice fondamentale garantis par l’art. 7 de la *Charte* exigent qu’il y ait intention subjective ou insouciance. En conséquence, ont été jugées inconstitutionnelles les dispositions du *Code* créant l’infraction de meurtre par imputation, qui n’exigeaient que la prévisibilité objective de la mort et, dans certaines circonstances, un simple lien de causalité.

L’élément moral spécial requis pour ces infractions est la source de la culpabilité morale justifiant les stigmates et la peine associés à celles-ci : *Vaillancourt*, précité, p. 654; *Martineau*, précité, p. 646. Dans ce dernier arrêt, la Cour a décidé que la condition requérant la prévisibilité subjective de la mort dans le contexte d’un meurtre avait essentiellement pour rôle de « maintenir une proportionnalité entre les stigmates et la peine rattachés à une déclaration de culpabilité de meurtre et la culpabilité morale du délinquant » (p. 646). En raison du caractère particulier des stigmates liés à la déclaration de culpabilité pour meurtre et des peines applicables à cette infraction, les principes de justice fondamentale exigent que la *mens rea* reflète la nature particulière du crime. La culpabilité morale d’un délinquant découle donc de l’élément moral requis sur le plan constitutionnel, dont on détermine l’existence en examinant les stigmates et la sanction criminelle se rattachant au comportement prohibé.

À mon avis, le principe qui exige la proportionnalité entre, d’une part, les stigmates et la peine et, d’autre part, la culpabilité morale du délinquant ne reste valable que si l’*actus reus* lui-même comporte un caractère suffisamment blâmable. L’état d’esprit coupable associé à un comportement ne peut être jugé « coupable » que si le délinquant et son comportement doivent être blâmés (voir A. von Hirsch et

Criminal Harm: A Living-Standard Analysis” (1991), 11 *Oxford J. Legal Stud.* 1, at p. 6). This was implicitly recognized by this Court in *R. v. DeSousa*, [1992] 2 S.C.R. 944, at pp. 964-65, where Sopinka J. held: “[p]rovided that there is a sufficiently blameworthy element in the *actus reus* to which a culpable mental state is attached, there is no additional requirement that any other element of the *actus reus* be linked to this mental state or a further culpable mental state” (emphasis added). Thus, in my opinion, the principles developed in *Motor Vehicle Reference* mandate a consideration of what is blamable in a specific conduct, i.e., what underlies stigma and punishment. Offences have both a mental and a physical element. An evaluation of the blameworthiness of conduct must take into account both elements so that wrongful conduct will not be held blamable without the necessary mental element and, on the other hand, a deliberate (or reckless or negligent) activity will not be held blamable without the activity being wrongful in the first place. Therefore, in assessing the moral blameworthiness of the offender, the inherent nature of the act committed, or the wrongfulness of the *actus reus*, must be considered.

N. Jareborg, « Gauging Criminal Harm : A Living-Standard Analysis » (1991), 11 *Oxford J. Legal Stud.* 1, p. 6). Cette condition a été reconnue implicitement par la Cour dans l’arrêt *R. c. DeSousa*, [1992] 2 R.C.S. 944, p. 964-965, où le juge Sopinka a dit ceci : « [à] la condition qu’il existe un élément suffisamment blâmable dans l’*actus reus* auquel se rattache un état d’esprit coupable, la loi n’exige pas qu’un autre élément de l’*actus reus* soit lié à cet état d’esprit ou à un autre état d’esprit coupable » (je souligne). Voilà pourquoi j’estime que les principes formulés dans le *Renvoi relatif à la Motor Vehicle Act* commandent l’examen du caractère blâmable d’un comportement donné, c’est-à-dire ce qui est à l’origine des stigmates et de la peine. Les infractions comportent à la fois un élément moral et un élément matériel. L’évaluation du caractère blâmable d’un comportement doit tenir compte de ces deux éléments afin qu’un comportement fautif ne soit pas jugé blâmable en l’absence de l’élément moral nécessaire et, à l’inverse, qu’un acte délibéré (ou encore insouciant ou négligent) ne soit pas jugé blâmable s’il n’est pas au départ fautif. Par conséquent, pour juger de la culpabilité morale du délinquant, il faut tenir compte de la nature intrinsèque de l’acte commis ou du caractère fautif de l’*actus reus*.

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What exactly is wrong or blameworthy in a given criminal offence is rarely an object of debate and is usually described by the harm or risk of harm associated with the conduct. Indeed, harm is so intrinsic to most offences that few would contest, for example, the harm to others associated with murder, assault, or theft. Murder affects the fundamental right to life; assault affects the victim’s security and dignity; and theft affects the victim’s material comfort and, in certain circumstances, his or her right to security, dignity and privacy. In fact, harm is often central to the requirement that punishment must be proportionate to the moral blameworthiness of the offender; in other words, “the fundamental principle of a morally based system of law [is] that those causing harm intentionally [should] be punished more severely than those causing harm unintentionally” (*Martineau, supra*, at p. 645; *Creighton, supra*, at p. 46; H. L. A. Hart, “Punishment and the Elimination of Responsibility”, in *Punishment and Responsibility: Essays in the Philosophy of Law*

L’élément précis qui, dans une infraction criminelle, est fautif ou blâmable fait rarement l’objet de débats et on le désigne habituellement en faisant état du préjudice ou risque de préjudice lié au comportement. De fait, l’existence d’un préjudice est un aspect tellement intrinsèque à la plupart des infractions que rares sont les personnes qui contesteraient, par exemple, le préjudice que causent à autrui le meurtre, les voies de fait ou le vol. Le meurtre porte atteinte au droit fondamental à la vie, les voies de fait touchent à la sécurité et à la dignité de la victime et le vol s’attaque au confort matériel de la victime en plus, dans certaines circonstances, de violer son droit à la sécurité, à la dignité et à la vie privée. En fait, le préjudice est souvent l’élément central de l’obligation de proportionnalité entre la peine et la culpabilité morale du délinquant; en d’autres mots, « le principe fondamental d’un système de droit fondé sur la morale [est] que ceux qui causent un préjudice intentionnellement [devraient] être punis plus sévèrement que ceux qui le font involontai-

(1968), at p. 162). Typically, the debate usually does not concern whether the conduct is harmful *per se*, but rather whether the level of harm caused or the inherent gravity of the conduct justify an increase in the harshness of labelling or sentencing.

Courts indeed often undertake an evaluation of the level of blameworthiness of the *actus reus*. Identical levels of intent (e.g., the intention to cause death) can lead to different degrees of labelling if the act itself is more deserving of condemnation. For instance, in *R. v. Arkell*, [1990] 2 S.C.R. 695 (released concurrently with *Martineau*, *supra*), this Court analysed in light of s. 7 whether a sentencing scheme which classified murders done while committing certain underlying offences as more serious, and thereby attaching more serious penalties to them, was unconstitutional. This Court found the increased harshness of labelling and punishment to be constitutionally valid under s. 7. Lamer C.J. came to this by examining the blameworthiness of the offence (at p. 704):

The section is based on an organizing principle that treats murders committed while the perpetrator is illegally dominating another person as more serious than other murders. Further, the relationship between the classification and the moral blameworthiness of the offender clearly exists. . . . Parliament's decision to treat more seriously murders that have been committed while the offender is exploiting a position of power through illegal domination of the victim accords with the principle that there must be a proportionality between a sentence and the moral blameworthiness of the offender and other considerations such as deterrence and societal condemnation of the acts of the offender. [Emphasis added.]

Harm is frequently the determining factor in assessing the severity of an offence and in distinguishing between levels of responsibility for equally mentally blamable acts. For example, under s. 7, this Court, in *DeSousa* (*per Sopinka J.*), held that Parliament could treat crimes that produce certain consequences as more serious than crimes that lack those consequences: “[I]t is acceptable to

rement » (*Martineau*, précité, p. 645; *Creighton*, précité, p. 46; H. L. A. Hart, « Punishment and the Elimination of Responsibility », dans *Punishment and Responsibility : Essays in the Philosophy of Law* (1968), p. 162). En général, il ne s’agit pas de déterminer si le comportement est préjudiciable en soi, mais plutôt si l’ampleur du préjudice causé ou la gravité intrinsèque du comportement justifient une qualification ou une peine plus sévère.

De fait, les tribunaux procèdent souvent à l’évaluation du caractère blâmable de l’*actus reus*. Une même intention (par exemple l’intention de causer la mort) peut entraîner des qualifications différentes si l’acte mérite davantage d’être condamné. À titre d’exemple, dans l’arrêt *R. c. Arkell*, [1990] 2 R.C.S. 695 (rendu en même temps que l’arrêt *Martineau*, précité), la Cour a examiné, au regard de l’art. 7, la constitutionnalité d’un régime de détermination de la peine qui qualifiait de façon plus sérieuse les meurtres commis durant la perpétration de certaines infractions et qui les assortissait en conséquence de peines plus sévères. La Cour a conclu à la constitutionnalité de ces qualifications et peines plus sévères au regard de l’art. 7. Le juge en chef Lamer est arrivé à cette conclusion par suite de l’examen du caractère blâmable de l’infraction (à la p. 704) :

Le paragraphe est fondé sur un principe directeur qui considère que le meurtre commis pendant que son auteur domine illégalement une autre personne est plus grave qu’un autre meurtre. De plus, il y a nettement un rapport entre la classification et la culpabilité morale du délinquant. [. . .] La décision du Parlement de traiter plus sévèrement les meurtres commis pendant que leur auteur exploitait une situation de puissance par la domination illégale de la victime est conforme au principe qu’il doit y avoir proportionnalité entre une peine et la culpabilité morale du délinquant, ainsi qu’à d’autres considérations comme la dissuasion et la réprobation sociale des actes du délinquant. [Je souligne.]

En présence d’actes également blâmables sur le plan moral, le préjudice est souvent le facteur déterminant dans l’évaluation de la gravité d’une infraction et dans la différenciation des degrés de responsabilité. Par exemple, dans l’arrêt *DeSousa* (le juge Sopinka), la Cour a jugé, au regard de l’art. 7, que le législateur pouvait considérer certains crimes, qui entraînaient des conséquences

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distinguish between criminal responsibility for equally reprehensible acts on the basis of the harm that is actually caused” (p. 967). See also *R. v. Williams*, [2003] 2 S.C.R. 134, 2003 SCC 41, at paras. 43-46.

données, comme plus graves que les crimes ne produisant pas ces conséquences : « il est acceptable d’établir une distinction quant à la responsabilité criminelle entre des actes également répréhensibles en fonction du préjudice qui est effectivement causé » (p. 967). Voir également *R. c. Williams*, [2003] 2 R.C.S. 134, 2003 CSC 41, par. 43-46.

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These principles are also in line with all sentencing principles adopted by this Court. Indeed, harm, or the seriousness of prohibited conduct, along with mental blameworthiness, form the basis for culpability, and go hand in hand to determine the appropriate sentence (see D. E. Scheid, “Constructing a Theory of Punishment, Desert, and the Distribution of Punishments” (1997), 10 *Can. J.L. & Juris.* 441, at p. 484; von Hirsch and Jareborg, *supra*, at p. 2). It is a fundamental principle of sentencing that both the severity of the offence and the moral blameworthiness of the offender should dictate the quantum of sentence. As Lamer C.J. held in *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, at para. 36: “For offences where imprisonment is available, the *Code* sets maximum terms of incarceration in accordance with the relative severity of each crime.” And further, at para. 40: “It is a well-established tenet of our criminal law that the quantum of sentence imposed should be broadly commensurate with the gravity of the offence committed and the moral blameworthiness of the offender.” See also s. 718.1 of the *Criminal Code*, which states that “[a] sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender”: *R. v. Proulx*, [2000] 1 S.C.R. 61, 2000 SCC 5, at para. 82; *R. v. Wust*, [2000] 1 S.C.R. 455, 2000 SCC 18, at para. 18; G. P. Fletcher, *Rethinking Criminal Law* (1978), at pp. 461-62.

Ces principes sont également conformes à tous les principes de détermination de la peine adoptés par la Cour. De fait, le préjudice — ou la gravité du comportement prohibé — et la culpabilité morale constituent le fondement même de la culpabilité et vont de pair pour déterminer la peine appropriée (voir D. E. Scheid, « Constructing a Theory of Punishment, Desert, and the Distribution of Punishments » (1997), 10 *Can. J.L. & Juris.* 441, p. 484; von Hirsch et Jareborg, *loc. cit.*, p. 2). Selon un principe fondamental de détermination de la peine, tant la gravité de l’infraction que la culpabilité morale du délinquant doivent dicter la sévérité de la peine. Comme l’a dit le juge en chef Lamer dans l’arrêt *R. c. M. (C.A.)*, [1996] 1 R.C.S. 500, par. 36, « [d]ans le cas des infractions punissables par l’emprisonnement, le *Code* fixe des durées maximales d’incarcération correspondant à la gravité relative de chaque crime. » Il a ajouté ceci, au par. 40, « [i]l existe un principe bien établi de notre droit criminel selon lequel l’importance de la peine infligée doit être généralement proportionnelle à la gravité de l’infraction commise et à la culpabilité morale du contrevenant ». Voir aussi l’art. 718.1 du *Code criminel*, qui précise que « [l]a peine est proportionnelle à la gravité de l’infraction et au degré de responsabilité du délinquant » : *R. c. Proulx*, [2000] 1 R.C.S. 61, 2000 CSC 5, par. 82; *R. c. Wust*, [2000] 1 R.C.S. 455, 2000 CSC 18, par. 18; G. P. Fletcher, *Rethinking Criminal Law* (1978), p. 461-462.

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Hence, harm or the risk of harm is a determinative factor in the assessment of the seriousness or wrongfulness of prohibited conduct. Harm associated with victimizing conduct, i.e., conduct which infringes on the rights and freedoms of identifiable persons, is the most obvious, and the concern usually is with how much the person has been harmed. This, in turn, is likely to dictate the extent of

Par conséquent, le préjudice ou le risque de préjudice constitue un facteur déterminant dans l’appréciation de la gravité ou du caractère fautif du comportement interdit. Le préjudice découlant d’un comportement attentatoire, c’est-à-dire un comportement portant atteinte aux droits et libertés de personnes identifiables, est quelque chose d’évident et la difficulté consiste habituelle-

punishment or the difference in the labelling of an offence, as well as the level of *mens rea* necessary to establish culpability. Other forms of conduct cause harm that is more diffuse, where no identifiable persons have had their rights or freedoms infringed by the conduct; the harm there is collective and it is the public interest that is adversely affected. Finally, other conduct is even more distant from this notion of harm, and the prohibition of that conduct is aimed at advancing public interests distinct from the protection of individuals or society.

The fundamental question raised in these appeals is whether harm is a constitutionally required component of the *actus reus* of any offence punishable by imprisonment. We have seen above that harm may not be the only basis upon which Parliament may decide to prohibit or regulate a given type of conduct. We must now determine whether the *Charter* requires that harm be the sole basis upon which the state may employ the threat of imprisonment as a sanction against a prohibited conduct.

The debate over the harm principle takes place around the traditional confrontation between harm and morality as a basis for restricting an individual's liberty. The liberal view was initially espoused by Victorian philosopher and economist John Stuart Mill in his essay, *On Liberty*. He wrote:

The object of this Essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion. That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to

ment à déterminer son étendue. Ce préjudice dicte généralement la sévérité de la peine ou la qualification de l'infraction ainsi que le degré de *mens rea* nécessaire pour établir la culpabilité. D'autres formes de comportement causent un préjudice plus imprécis. Il s'agit des situations où le comportement ne porte pas atteinte aux droits ou libertés de personnes identifiables, où le préjudice est collectif et où c'est l'intérêt public qui subit l'effet préjudiciable. Enfin, il existe d'autres comportements qui sont encore plus éloignés de cette notion de préjudice et dont l'interdiction vise à défendre des intérêts publics distincts de la protection de personnes données ou de la société.

La question fondamentale que soulèvent les présents pourvois consiste à décider si, suivant la Constitution, le préjudice constitue un élément essentiel de l'*actus reus* de toute infraction punissable par l'emprisonnement. Nous avons vu précédemment que l'existence d'un préjudice n'est pas la seule raison susceptible d'amener le Parlement à décider d'interdire ou de réglementer un comportement donné. Nous devons maintenant nous demander si par l'effet de la *Charte* le préjudice est le seul motif justifiant l'État de recourir à la menace d'emprisonnement comme sanction d'un comportement interdit.

Le débat sur le principe du préjudice s'inscrit dans le débat concernant l'opposition historique entre préjudice et moralité comme raison justifiant de restreindre la liberté de l'individu. L'interprétation libérale a au départ été défendue par le philosophe et économiste de l'ère victorienne, John Stuart Mill, dans son essai intitulé *De la liberté*, où il a écrit ceci :

L'objet de cet essai est de poser un principe très simple, fondé à régler absolument les rapports de la société et de l'individu dans tout ce qui est contrainte ou contrôle, que les moyens utilisés soient la force physique par le biais de sanctions pénales ou la contrainte morale exercée par l'opinion publique. Ce principe veut que les hommes ne soient autorisés, individuellement ou collectivement, à entraver la liberté d'action de quiconque que pour assurer leur propre protection. La seule raison légitime que puisse avoir une communauté pour user de la force contre un de ses membres est de

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prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil in case he do otherwise. To justify that, the conduct from which it is desired to deter him, must be calculated to produce evil to some one else. The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign. [Emphasis added.]

(J. S. Mill, *On Liberty and Considerations on Representative Government* (1946), at pp. 8-9)

Mill's principle was exclusive: "[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others" (p. 8 (emphasis added)).

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Mill's assertion was challenged by Sir James Fitzjames Stephen in *Liberty, Equality, Fraternity* (1967), initially published in 1874, who strongly opposed any limitation on the power of the state to enforce morality. Stephen's argument was best captured in a now-famous passage: "there are acts of wickedness so gross and outrageous that, self-protection apart, they must be prevented as far as possible at any cost to the offender, and punished, if they occur, with exemplary severity" (p. 162). This debate between Mill and Stephen was reignited in England by the recommendation in 1957 of the Committee on Homosexual Offences and Prostitution to decriminalize homosexuality on the basis that it is not the duty of the law to concern itself with immorality as such (*The Wolfenden Report* (1963), at paras. 61-62). The reactions to the *Wolfenden Report* have been vehement. Lord Patrick Devlin, in his Maccabean Lecture delivered at the British Academy in 1959 (later published: P. Devlin, *The Enforcement of Morals* (1965)), argued that purportedly immoral activities, like homosexuality and

l'empêcher de nuire aux autres. Contraindre quiconque pour son propre bien, physique ou moral, ne constitue pas une justification suffisante. Un homme ne peut pas être légitimement contraint d'agir ou de s'abstenir sous prétexte que ce serait meilleur pour lui, que cela le rendrait plus heureux ou que, dans l'opinion des autres, agir ainsi serait sage ou même juste. Ce sont certes de bonnes raisons pour lui faire des remontrances, le raisonner, le persuader ou le supplier, mais non pour le contraindre ou lui causer du tort s'il agit autrement. La contrainte ne se justifie que lorsque la conduite dont on désire détourner cet homme risque de nuire à quelqu'un d'autre. Le seul aspect de la conduite d'un individu qui soit du ressort de la société est celui qui concerne les autres. Mais pour ce qui ne concerne que lui, son indépendance est, de droit, absolue. Sur lui-même, sur son corps et son esprit, l'individu est souverain. [Je souligne.]

(J. S. Mill, *De la liberté* (1990), trad. de L. Lenglet, p. 74-75)

Le principe énoncé par Mill avait un caractère exclusif : « La seule raison légitime que puisse avoir une communauté pour user de la force contre un de ses membres est de l'empêcher de nuire aux autres » (p. 74 (je souligne)).

Cette affirmation de Mill a été contestée par sir James Fitzjames Stephen dans l'ouvrage *Liberty, Equality, Fraternity* (1967), publié pour la première fois en 1874, où l'auteur s'opposait farouchement à toute restriction du pouvoir de l'État de faire respecter la moralité. L'extrait suivant, désormais célèbre, résume parfaitement le raisonnement de Stephen : [TRADUCTION] « certains actes sont d'une méchanceté à ce point grave et intolérable que, exception faite des situations de légitime défense, ils doivent autant que possible être réprimés, et ce quel qu'en soit le coût pour le délinquant, et, s'ils sont commis, ils doivent être punis avec une sévérité exemplaire » (p. 162). Ce débat entre Mill et Stephen a été ranimé en Angleterre lorsque le Committee on Homosexual Offences and Prostitution a recommandé en 1957 la décriminalisation de l'homosexualité parce qu'il ne ressortit pas au droit de se préoccuper de l'immoralité en tant que telle (*The Wolfenden Report* (1963), par. 61-62). Le *Wolfenden Report* a suscité de vives réactions. Par ailleurs, dans un texte qu'il a prononcé dans le cadre des Maccabean

prostitution, should remain criminal offences and he became associated with the principle of legal moralism — the principle that moral offences should be regulated because they are immoral (see on this: B. E. Harcourt, “The Collapse of the Harm Principle” (1999), 90 *J. Crim. L. & Criminology* 109, at pp. 111-12; B. Lauzon, *Les champs légitimes du droit criminel et leur application aux manipulations génétiques transmissibles aux générations futures* (2002), at p. 26).

This position is opposed to the liberal view of Professors Hart and Feinberg who reiterated Mill’s harm principle. According to J. Feinberg, who adopts a less exclusive view of the harm principle in *The Moral Limits of the Criminal Law* (1984), in the first volume, entitled *Harm to Others*, at p. 26, “[i]t is always a good reason in support of penal legislation that it would probably be effective in preventing . . . harm to persons other than the actor.” The debate between legal moralism and the harm principle has stimulated academic discussions and much has been written on this topic (see, *inter alia*, in addition to other sources cited throughout these reasons: “Symposium: The Moral Limits of the Criminal Law” (2001), 5 *Buff. Crim. L. Rev.* 1-319; *Mill’s On Liberty: Critical Essays* (1997), edited by Gerald Dworkin). Braidwood J.A. referred, at paras. 107-12, to various authors who either adopted the harm principle or incorporated it in their writings. One of the most prominent, H. L. Packer, in his influential *The Limits of the Criminal Sanction* (1968) said, at p. 267, that “harm to others” must be a “limiting criteri[on] for invocation of the criminal sanction”. This debate, which has remained focused, as I said earlier, on what should be criminalized, also permeated the work of the Law Reform Commissions in Canada on possible reforms of the *Criminal Code*. I need not expand on their recommendations for my purposes. Suffice it to say that Braidwood J.A. referred to various reports, all of which basically advocated that the criminal law should only be used, save in

Lectures devant la British Academy en 1959 (et qui a plus tard été publié : P. Devlin, *The Enforcement of Morals* (1965)), lord Patrick Devlin a soutenu que des activités censément immorales telles l’homosexualité et la prostitution devraient rester des infractions criminelles. Il a alors été associé au principe du moralisme juridique — principe selon lequel les infractions à la morale devraient être réglementées parce qu’elles sont immorales (voir, à ce sujet, B. E. Harcourt, « The Collapse of the Harm Principle » (1999), 90 *J. Crim. L. & Criminology* 109, p. 111-112; B. Lauzon, *Les champs légitimes du droit criminel et leur application aux manipulations génétiques transmissibles aux générations futures* (2002), p. 26).

Cette position est contraire au point de vue libéral préconisé par les professeurs Hart et Feinberg qui ont réaffirmé le principe du préjudice énoncé par Mill. Selon J. Feinberg, qui adopte une conception moins exclusive de ce principe dans le premier volume, intitulé *Harm to Others*, de son ouvrage *The Moral Limits of the Criminal Law* (1984), p. 26, [TRADUCTION] « [i]l est toujours justifié d’adopter une loi pénale susceptible d’empêcher [. . .] un préjudice à d’autres personnes qu’à l’auteur de l’acte. » Le débat opposant moralisme juridique et principe du préjudice a stimulé les discussions entre théoriciens et on a écrit abondamment sur ce sujet (voir, notamment, en plus des autres sources citées dans les présents motifs : « Symposium : The Moral Limits of the Criminal Law » (2001), 5 *Buff. Crim. L. Rev.* 1-319; *Mill’s On Liberty : Critical Essays* (1997), dir. Gerald Dworkin). Aux paragraphes 107-112, le juge Braidwood de la Cour d’appel de la Colombie-Britannique a cité plusieurs auteurs qui soit ont souscrit au principe du préjudice soit l’ont incorporé dans leurs travaux. L’un des plus connus, H. L. Packer, a dit, à la p. 267 de son important ouvrage intitulé *The Limits of the Criminal Sanction* (1968), que [TRADUCTION] « le préjudice à autrui » doit être considéré comme un « critèr[e] restreignant le recours aux sanctions pénales ». Ce débat qui, comme je l’ai dit plus tôt, est resté axé sur ce qui devrait être criminalisé, a aussi influencé les travaux des diverses commissions de réforme de droit au Canada qui ont étudié de possibles changements au *Code criminel*. Il n’est pas nécessaire

exceptional circumstances, where conduct causes or risks causing significant or grave harm to others or society (see paras. 113-16).

que je m'attarde à leurs recommandations dans les présents motifs. Il suffit de dire que le juge Braidwood a fait état de différents rapports qui ont tous essentiellement proposé que, sauf circonstances exceptionnelles, le législateur ne puisse avoir recours au droit criminel que dans les cas où le comportement litigieux cause ou est susceptible de causer un préjudice grave ou important à d'autres personnes ou à la société (voir les par. 113-116).

240 This philosophical and theoretical debate is of great interest and is a useful policy tool for law makers. It may also serve as a guide in the characterization of the harm principle as a principle of fundamental justice. However, as guardians of the constitutional principles of fundamental justice, courts are not expected to merely choose from among the competing theories of harm advanced by criminal law theorists. As Doherty J.A. said in *R. v. Murdock* (2003), 11 C.R. (6th) 43 (Ont. C.A.), at para. 31:

Ce débat théorique et philosophique présente un grand intérêt et constitue un instrument utile pour les législateurs. Il peut également servir de guide dans la définition du principe du préjudice comme principe de justice fondamentale. Toutefois, le rôle des tribunaux en tant que gardiens des principes de justice fondamentale garantis par la Constitution ne consiste pas simplement à choisir entre les diverses thèses avancées par les théoriciens du droit criminel à l'égard du principe du préjudice. Comme l'a dit le juge Doherty de la Cour d'appel de l'Ontario dans l'arrêt *R. c. Murdock* (2003), 11 C.R. (6th) 43, par. 31 :

Nor should the harm principle be taken as an invitation to the judiciary to consecrate a particular theory of criminal liability as a principle of fundamental justice. This is so even if that theory has gained the support of law reformers, some of whom also happen to be judges. Judicial review of the substantive content of criminal legislation under s. 7 should not be confused with law reform. Judicial review tests the validity of legislation against the minimum standards set out in the *Charter*. Law reform tests the legal *status quo* against the law reformer's opinion of what the law should be.

[TRADUCTION] Il ne faut pas non plus considérer que le principe du préjudice invite les tribunaux judiciaires à ériger en principe de justice fondamentale une théorie particulière en matière de responsabilité criminelle, et ce même si cette théorie a obtenu l'appui de réformateurs du droit, dont certains sont également des juges. Le contrôle judiciaire d'une loi pénale au regard de l'art. 7 ne saurait être confondu avec le processus de réforme du droit. Le contrôle judiciaire vérifie la validité d'une mesure législative au regard des normes minimales prévues par la *Charte*, alors que, dans le cadre de la réforme du droit, on compare le statu quo juridique sur une question à ce que devrait être, de l'avis du réformateur, le droit sur cette question.

241 This Court has discussed, albeit under s. 1, the interaction between morality and harm as a valid basis to restrict *Charter* rights. In *R. v. Butler*, [1992] 1 S.C.R. 452, at p. 498, Sopinka J., writing for the majority, held that "[t]he objective of maintaining conventional standards of propriety, independently of any harm to society, is no longer justified in light of the values of individual liberty which underlie the *Charter*." Sopinka J. also noted, at pp. 492-93, that "[t]o impose a certain standard of public and sexual morality, solely because it reflects the conventions

La Cour a déjà analysé, au regard de l'article premier toutefois, l'interaction de la moralité et du préjudice comme raison justifiant de restreindre les droits garantis par la *Charte*. Dans l'arrêt *R. c. Butler*, [1992] 1 R.C.S. 452, le juge Sopinka, qui s'exprimait au nom des juges majoritaires, a dit que « [l]'objectif de maintenir des normes de bienséance traditionnelles, indépendamment du préjudice causé à la société, n'est plus justifié compte tenu des valeurs relatives à la liberté individuelle qui sous-tendent la *Charte* » (p. 498). Précédemment, aux

of a given community, is inimical to the exercise and enjoyment of individual freedoms, which form the basis of our social contract. . . . The prevention of ‘dirt for dirt’s sake’ is not a legitimate objective which would justify the violation of one of the most fundamental freedoms enshrined in the *Charter*.” Sopinka J. however conceded that Parliament had the right to legislate on the basis of some fundamental conception of morality for the purposes of safeguarding the values which are integral to a free and democratic society (at p. 493):

Moral disapprobation is recognized as an appropriate response when it has its basis in *Charter* values.

As the respondent and many of the interveners have pointed out, much of the criminal law is based on moral conceptions of right and wrong and the mere fact that a law is grounded in morality does not automatically render it illegitimate. In this regard, criminalizing the proliferation of materials which undermine another basic *Charter* right may indeed be a legitimate objective.

Sopinka J. found that the overriding objective of the impugned provision was not however moral disapprobation but the avoidance of harm to society, which he considered a substantial concern that justified restriction of the freedom of expression.

In a concurring opinion, Gonthier J., writing for himself and L’Heureux-Dubé J., said, at p. 522, that “the avoidance of harm to society is but one instance of a fundamental conception of morality”. Speaking about the type of moral claim that could justify an infringement of s. 2(b) of the *Charter*, Gonthier J. wrote, at pp. 523-24:

First of all, the moral claims must be grounded. They must involve concrete problems such as life, harm, well-being, to name a few, and not merely differences of opinion or of taste. Parliament cannot restrict *Charter* rights simply on the basis of dislike; this is what is meant by the expression “substantial and pressing” concern.

p. 492-493, le juge Sopinka avait dit qu’« [i]mposer une certaine norme de moralité publique et sexuelle, seulement parce qu’elle reflète les conventions d’une société donnée, va à l’encontre de l’exercice et de la jouissance des libertés individuelles qui forment la base de notre contrat social. [. . .] La prévention de “l’obscénité pour l’obscénité” ne constitue pas un objectif légitime qui justifierait la violation de l’une des libertés les plus fondamentales consacrées dans la *Charte*. » Il a cependant reconnu, à la p. 493, que le Parlement avait le droit, en se fondant sur une certaine conception fondamentale de la moralité, de légiférer pour protéger les valeurs qui font partie intégrante d’une société libre et démocratique :

[TRADUCTION] La désapprobation morale est reconnue comme une réponse appropriée lorsqu’elle repose sur les valeurs de la *Charte*.

Comme l’intimée et de nombreux intervenants l’ont fait ressortir, une bonne partie du droit criminel repose sur des conceptions morales de ce qui est bon et de ce qui est mauvais, et le simple fait qu’un texte législatif soit fondé sur la moralité ne le rend pas automatiquement illégitime. À cet égard, criminaliser la prolifération du matériel qui porte atteinte à un autre droit fondamental garanti par la *Charte* peut bien constituer un objectif légitime.

Le juge Sopinka a conclu que la disposition contestée ne visait toutefois pas à exprimer la désapprobation morale, mais à éviter qu’un préjudice soit causé à la société, objectif qui constituait selon lui une préoccupation réelle justifiant de porter atteinte à la liberté d’expression.

Dans des motifs concourants, le juge Gonthier, s’exprimant en son nom et au nom de la juge L’Heureux-Dubé, a dit, à la p. 522, que « le fait d’éviter qu’un préjudice soit causé à la société n’est qu’un exemple de conception fondamentale de la moralité ». Commentant les types de prétentions morales susceptibles de justifier une atteinte à l’al. 2(b) de la *Charte*, il a écrit ceci, aux p. 523-524 :

Premièrement, les prétentions morales doivent être fondées. Elles doivent porter sur des problèmes concrets, comme la vie, le préjudice, le bien-être pour n’en nommer que quelques-uns; il ne doit pas s’agir simplement de divergences d’opinions ou de goûts. Le Parlement ne saurait restreindre les droits garantis par la *Charte* simplement pour des motifs d’aversion; c’est ce qu’on entend par préoccupation « réelle et urgente ».

Secondly, a consensus must exist among the population on these claims. They must attract the support of more than a simple majority of people. In a pluralistic society like ours, many different conceptions of the good are held by various segments of the population. . . . In this sense a wide consensus among holders of different conceptions of the good is necessary before the State can intervene in the name of morality.

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In the present case, the state does not advance morality as a basis for restricting the right to liberty of the appellants, although it appears to have played an important role in the original addition of cannabis to the list of prohibited narcotics (both trial judges put special emphasis on the provocative writings of Edmonton, Alberta Magistrate Emily Murphy, which, according to Howard Prov. Ct. J., “consisted of reckless assertions of fact which were, quite simply, untrue” and which “helped to create a climate of irrational fear which, no doubt, provided some impetus to the movement to prohibit the use of marihuana” (para. 32)). Had the respondent based its legislation on morality grounds, we would have had to determine the sufficiency of this justification to resort to imprisonment in light of the harm principle as a principle of fundamental justice. However, it is not necessary to comment on the eventual success of such an argument because in any event, here, as in *Butler, supra*, the overriding purpose of the prohibition is not moral disapprobation, but the protection against harm. Therefore, we are not asked in these cases to take side in the “harm vs. morality” debate nor to determine if, and if so in which circumstances, conduct that offends morality could be said to harm others or society as a whole. The state purports to prohibit conduct that it says is directly harmful to the health of individuals, and incidentally to society as a whole.

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I am of the view that the principles of fundamental justice require that whenever the state resorts to imprisonment, a minimum of harm to others

Deuxièmement, il doit exister un consensus au sein de la population quant à ces prétentions. Elles doivent bénéficier de l’appui de plus d’une majorité simple de la population. Dans une société pluraliste comme la nôtre, les divers segments de la population ont maintes conceptions différentes de ce qui est bien. [. . .] En ce sens, il doit exister un vaste consensus entre les tenants des diverses conceptions du bien pour que l’État puisse intervenir en invoquant la moralité.

En l’espèce, l’État n’invoque pas la moralité pour restreindre le droit des appelants à la liberté, bien que ce motif semble avoir joué un rôle important dans l’ajout initial du cannabis à la liste des stupéfiants interdits (dans les deux procès, les juges ont particulièrement insisté sur les écrits provocateurs de la magistrate Emily Murphy d’Edmonton en Alberta qui, selon la juge Howard, [TRADUCTION] « étaient constitués d’allégations de fait inconsidérées et tout bonnement fausses », « ayant contribué à créer un climat de crainte irrationnelle qui, sans aucun doute, a donné un élan au mouvement en faveur de l’interdiction de la marihuana » (par. 32)). Si l’intimée avait fondé sa mesure législative sur des principes de moralité, il nous aurait fallu statuer sur le caractère suffisant de ces motifs comme justification du recours à l’emprisonnement au regard du principe du préjudice en tant que principe de justice fondamentale. Il est toutefois inutile de commenter les chances de succès d’un tel argument, étant donné que quoi qu’il en soit, tout comme c’était le cas dans l’arrêt *Butler*, précité, l’objectif principal de l’interdiction en l’espèce n’est pas la désapprobation morale mais plutôt la protection contre un préjudice. En conséquence, nous n’avons pas, dans les présents pourvois, à prendre parti dans le débat opposant « préjudice et moralité » ni à déterminer s’il est possible de considérer qu’un comportement choquant la moralité ait pour effet de causer préjudice à d’autres personnes ou à la société en général et, si oui, dans quelles circonstances. L’État veut interdire un comportement qui, selon lui, est directement préjudiciable à la santé de certaines personnes et indirectement préjudiciable à l’ensemble de la société.

J’estime que les principes de justice fondamentale font en sorte que, dans tous les cas où l’État a recours à l’emprisonnement, l’existence d’un

must be an essential part of the offence. The state cannot resort to imprisonment as a punishment for conduct that causes little or no reasoned risk of harm to others. Prohibited conduct punishable by imprisonment cannot be harmless conduct or conduct that only causes harm to the perpetrator. As Braidwood J.A. said in *Caine*, “it is common sense that you don’t go to jail unless there is a potential that your activities will cause harm to others” (para. 134).

In *Murdock*, *supra*, Doherty J.A. characterized the harm principle as follows, at para. 33:

The harm principle, as a principle of fundamental justice, goes only so far as to preclude the criminalization of conduct for which there is no “reasoned apprehension of harm” to any legitimate personal or societal interest. If conduct clears that threshold, it cannot be said that criminalization of such conduct raises the spectre of convicting someone who has not done anything wrong. Difficult questions such as whether the harm justifies the imposition of a criminal prohibition or whether the criminal law is the best way to address the harm are policy questions that are beyond the constitutional competence of the judiciary and the institutional competence of the criminal law adversarial process.

Like Braidwood J.A. in *Caine* and Rosenberg J.A. in *Clay*, Doherty J.A.’s concern was, by his own words, to draw a distinction “between the harm principle as a principle of fundamental justice and closely related, but distinct policy questions surrounding the application of the criminal law” (para. 34). Indeed, he adds in a footnote at para. 33:

For example, many argue that the criminal sanction should be a last resort employed only if other forms of governmental action cannot adequately address the harm flowing from the conduct. This minimalist approach to criminal law may well be sound criminal law policy. However, it hardly reflects the historical reality of the scope of the criminal law so as to be properly described

préjudice minimal à autrui est nécessairement un élément essentiel de l’infraction. L’État ne peut pas sanctionner par l’emprisonnement un comportement qui ne crée peu ou pas de véritables risques pour autrui. Le comportement prohibé que l’on punit par l’emprisonnement ne peut pas être un comportement inoffensif ou préjudiciable uniquement à son auteur. Comme l’a dit le juge Braidwood dans l’arrêt *Caine*, [TRADUCTION] « il est logique qu’on ne vous envoie pas en prison, à moins que vos actes ne soient susceptibles de causer préjudice à autrui » (par. 134).

Dans l’arrêt *Murdock*, précité, le juge Doherty de la Cour d’appel de l’Ontario a fait les observations suivantes au sujet du principe du préjudice, au par. 33 :

[TRADUCTION] En tant que principe de justice fondamentale, le principe du préjudice ne fait qu’empêcher la criminalisation d’un comportement ne soulevant aucune « crainte raisonnée de préjudice » à l’égard d’un droit personnel ou sociétal légitime. Si le comportement souève une telle crainte, il n’est pas possible d’affirmer que sa criminalisation risque d’entraîner la condamnation d’une personne qui n’a rien fait de mal. Des questions épineuses comme celles de savoir si le préjudice justifie la création d’une interdiction pénale ou si le droit criminel est le meilleur moyen de remédier au préjudice sont des questions de politique générale qui débordent la compétence reconnue aux tribunaux judiciaires par la Constitution et la capacité, en tant qu’institution, du système de débat contradictoire applicable en droit criminel.

À l’instar des juges Braidwood dans *Caine* et Rosenberg dans *Clay*, le juge Doherty voulait, selon ses propres termes, faire la distinction [TRADUCTION] « entre le principe du préjudice comme principe de justice fondamentale et les questions de politique générale — intimement liées mais distinctes — concernant l’application du droit criminel » (par. 34). En fait, il a ajouté ceci, dans une note en bas de page au par. 33 :

[TRADUCTION] Par exemple, bon nombre de personnes soutiennent que la création de sanctions criminelles ne devrait être utilisée que comme moyen de dernier ressort, lorsque toutes les autres formes d’intervention gouvernementale ne permettent pas de corriger adéquatement le préjudice découlant du comportement. Il est fort possible que cette conception minimaliste du droit criminel soit

as a principle of fundamental justice. Any attempt to apply minimalist doctrine to a specific piece of legislation would raise complex questions of social policy which would defy effective resolution in the context of the adversarial criminal law process.

une politique judicieuse mais elle tient si peu compte de la réalité historique du champ d'application du droit criminel qu'elle peut difficilement être qualifiée de principe de justice fondamentale. Toute tentative d'appliquer une doctrine minimaliste à une mesure législative donnée soulèverait de complexes questions de politique sociale peu susceptibles d'être réglées efficacement dans le cadre du système de débat contradictoire applicable en matière criminelle.

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As I said before, however, the focus must remain on the choice by the state to resort to imprisonment to sanction conduct that it has decided to prohibit through its criminal law power or otherwise. The power of Parliament to use criminal law is broad and any concern as to what should be criminalized remains in the hands of the elected representatives. However, in my view, be it as a criminal sanction or as a sanction to any other prohibition, imprisonment must, as a constitutional minimum standard, be reserved for those whose conduct causes a reasoned risk of harm to others. "Doing nothing wrong" in that sense means acting in a manner which causes little or no reasoned risk of harm to others or to society. The *Charter* requires that the highest form of restriction of liberty be reserved for those who, at a minimum, infringe on the rights or freedoms of other individuals or otherwise harm society. I note that the notion of harm is not foreign to s. 7. Indeed, in addition to the cases referred to earlier, McLachlin J. (as she then was), in her dissenting reasons in *Rodriguez*, *supra*, at p. 618, referred to the notion of harm to others while discussing the scope of the right to security under s. 7:

Toutefois, comme je l'ai dit précédemment, l'analyse doit être axée sur la décision de l'État de recourir à l'emprisonnement pour sanctionner un comportement qu'il a choisi d'interdire en exerçant son pouvoir de légiférer sur le droit criminel ou en vertu d'un autre chef de compétence. Le Parlement dispose d'un large pouvoir en matière de droit criminel et c'est aux représentants élus qu'il revient de décider des comportements qui doivent être criminalisés. Cependant, que l'emprisonnement soit utilisé comme sanction d'un crime ou d'une autre prohibition, je suis d'avis que la Constitution requiert au minimum que cette peine soit réservée aux individus dont le comportement crée un véritable risque de préjudice pour autrui. En ce sens, « ne rien faire de mal » s'entend du fait d'agir d'une manière qui ne crée que peu ou pas de risques véritables de préjudice pour d'autres personnes ou pour la société. La *Charte* exige que la forme la plus totale de restriction de la liberté ne soit infligée qu'aux individus qui, au minimum, violent les droits ou libertés d'autres personnes ou causent de quelque autre façon préjudice à la société. Je souligne que la notion de préjudice n'est pas étrangère à l'art. 7. En effet, outre les arrêts mentionnés plus tôt, la juge McLachlin (maintenant Juge en chef), dans ses motifs de dissidence dans l'arrêt *Rodriguez*, précité, p. 618, a fait état de la notion de préjudice à autrui dans le cours de son examen de la portée du droit à la sécurité garanti par l'art. 7 :

Security of the person has an element of personal autonomy, protecting the dignity and privacy of individuals with respect to decisions concerning their own body. It is part of the persona and dignity of the human being that he or she have the autonomy to decide what is best for his or her body. This is in accordance with the fact, alluded to by McEachern C.J.B.C. below, that "s. 7 was enacted for the purpose of ensuring human dignity and individual

La sécurité de la personne comporte un élément d'autonomie personnelle protégeant la dignité et la vie privée des individus à l'égard des décisions concernant leur propre corps. Le pouvoir de décider de façon autonome ce qui convient le mieux à son propre corps est un attribut de la personne et de la dignité de l'être humain. Cela rejoint les propos du juge en chef McEachern de la Colombie-Britannique, selon lequel [TRADUCTION] « l'art. 7 a été

control, so long as it harms no one else”: (1993), 76 B.C.L.R. (2d) 145, at p. 164. [Emphasis added.]

Where legislation which may deprive individuals of their liberty is aimed at protecting other individuals or society from the risk of harm caused by the prohibited conduct, courts must scrutinize carefully the harm alleged. In victimizing conduct, the attribution of fault is relatively straightforward because of the close links between the actor’s culpable conduct and the resulting harm to the victim. This Court has used principles of interpretation aimed at excluding from the criminal ambit conduct that is tenuously related to the alleged harm. Thus, in *R. v. Sharpe*, [2001] 1 S.C.R. 45, 2001 SCC 2, the accused accepted that harm to children justified criminalizing possession of some forms of child pornography. The fundamental question was rather whether the prohibition went too far by criminalizing possession of an unjustifiable range of material. McLachlin C.J., for the majority of this Court, had this to say on whether the causal link between a specific prohibition and the harm to children was sufficient, at paras. 74, 75 and 95:

These exclusions support the earlier suggestion that Parliament’s goal was to prohibit possession of child pornography that poses a reasoned risk of harm to children. The primary definition of “child pornography” does not embrace every kind of material that might conceivably pose a risk of harm to children, but appears rather to target blatantly pornographic material. . . .

Yet problems remain. The interpretation of the legislation suggested above reveals that the law may catch some material that particularly engages the value of self-fulfilment and poses little or no risk of harm to children.

. . .

If the law is drafted in a way that unnecessarily catches material that has little or nothing to do with the

adopté afin de protéger la dignité humaine et la maîtrise individuelle, pour autant que cela ne nuise pas à autrui » : (1993), 76 B.C.L.R. (2d) 145, à la p. 164. [Je souligne.]

Lorsqu’une mesure législative dont l’application est susceptible de priver des individus de leur liberté a pour objet de protéger d’autres personnes ou la société contre le risque de préjudice causé par le comportement interdit, les tribunaux doivent examiner soigneusement le préjudice allégué. Dans le cas d’un comportement attentatoire, l’imputation de la faute est relativement simple en raison des liens étroits qui existent entre le comportement coupable et le préjudice en résultant pour la victime. La Cour a appliqué certains principes d’interprétation pour exclure du domaine criminel des comportements ayant des liens très ténus avec le préjudice allégué. Par exemple, dans l’arrêt *R. c. Sharpe*, [2001] 1 R.C.S. 45, 2001 CSC 2, l’accusé reconnaissait que le préjudice susceptible d’être causé aux enfants justifiait la criminalisation de la possession de certains types de pornographie juvénile. La question fondamentale consistait plutôt à décider si l’interdiction allait trop loin et criminalisait sans justification la possession d’un éventail trop large de matériel. S’exprimant au nom de la majorité, la juge en chef McLachlin a fait les observations suivantes relativement au caractère suffisant du lien de causalité entre l’interdiction et le préjudice causé aux enfants, aux par. 74, 75 et 95 :

Ces exclusions étayaient l’affirmation faite plus tôt que l’intention du législateur était d’interdire la possession de la pornographie juvénile suscitant une crainte raisonnée qu’un préjudice ne soit causé à des enfants. La définition fondamentale de la pornographie juvénile n’englobe pas tous les types de matériel qui pourraient théoriquement présenter un risque de préjudice pour les enfants, mais semble plutôt viser le matériel nettement pornographique. . . .

Il reste que certains problèmes subsistent. Selon l’interprétation proposée plus haut, la disposition peut viser du matériel qui fait particulièrement intervenir la valeur de l’épanouissement personnel et ne présente que peu ou pas de risques de préjudice pour les enfants.

. . .

Si la disposition est rédigée de manière à englober inutilement du matériel qui n’a que peu ou rien à voir avec la

prevention of harm to children, then the justification for overriding freedom of expression is absent. [Emphasis added.]

While these comments were made under s. 1, they illustrate the threshold to be met to establish a sufficient causal link between prohibited conduct and the harm alleged to be caused by such conduct. Thus, for our purposes, if the prohibition of conduct engages a s. 7 interest, as the threat of imprisonment does, while the conduct poses little or no risk of harm to others, then the law is contrary to s. 7.

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Where harm to society as a whole is alleged, how must such harm be assessed? Harm caused to collective interests, as opposed to harm caused to identifiable individuals, is not easy to quantify and even less easy to impute to a distinguishable activity or actor. In order to determine whether specific conduct, which perhaps only causes direct harm to the actor, or which seems rather benign, causes more than little or no risk of harm to others, courts must assess the interest of society in prohibiting and sanctioning the conduct. “Societal interests” may indeed form part of the s. 7 analysis where the operative principle of fundamental justice necessarily involves issues like the protection of society. McLachlin J., in *Rodriguez*, *supra*, best summarized this idea. She stated, at p. 622:

As my colleague Sopinka J. notes, this Court has held that the principles of fundamental justice may in some cases reflect a balance between the interests of the individual and those of the state. This depends upon the character of the principle of fundamental justice at issue. Where, for instance, the Court is considering whether it accords with fundamental justice to permit the fingerprinting of a person who has been arrested but not yet convicted (*R. v. Beare*, [1988] 2 S.C.R. 387), or the propriety of a particular change in correctional law which

prévention du préjudice causé aux enfants, alors la suppression de la liberté d’expression n’est pas justifiée. [Je souligne.]

Bien que ces commentaires aient été faits dans le cadre de l’analyse fondée sur l’article premier, ils illustrent le critère minimal qui doit être respecté pour établir l’existence d’un lien de causalité suffisant entre le comportement interdit et le préjudice qui, prétend-on, serait causé par celui-ci. Par conséquent, pour les besoins des présents motifs, si l’interdiction d’un comportement met en jeu un droit protégé par l’art. 7, comme le fait la menace d’emprisonnement, alors que le comportement ne présente que « peu ou pas de risques de préjudice pour d’autres personnes », la mesure législative contrevient alors à l’art. 7.

Lorsque l’existence d’un préjudice pour l’ensemble de la société est alléguée, comment doit-on apprécier ce préjudice? Il n’est pas facile de quantifier le préjudice causé à des intérêts collectifs par opposition à celui causé à des personnes identifiables, et il est encore moins facile d’imputer la responsabilité de ce préjudice à une activité ou à un acteur reconnaissable. Pour déterminer si le comportement en question, qui ne cause peut-être qu’un préjudice direct à son auteur ou semble plutôt bénin, ne cause que « peu ou pas de risques de préjudice pour d’autres personnes », les tribunaux doivent évaluer l’intérêt qu’a la société à interdire ce comportement et à le punir. Les « intérêts sociétaux » peuvent effectivement faire partie de l’analyse fondée sur l’art. 7 lorsque le principe de justice fondamentale pertinent fait intervenir des préoccupations telle la protection de la société. Dans l’arrêt *Rodriguez*, précité, la juge McLachlin a très bien résumé cette idée. Elle a dit ceci, à la p. 622 :

Comme le souligne mon collègue le juge Sopinka, notre Cour a décidé que les principes de justice fondamentale peuvent dans certains cas refléter un équilibre entre les intérêts de l’individu et ceux de l’État. Cela dépend de la nature du principe de justice fondamentale en cause. Quand, par exemple, la Cour détermine si sont conformes à la justice fondamentale la prise d’empreintes digitales d’une personne qui a été arrêtée, mais pas encore déclarée coupable (*R. c. Beare*, [1988] 2 R.C.S. 387), ou un changement précis apporté au droit

has the effect of depriving a prisoner of a liberty interest (*Cunningham v. Canada*, [1993] 2 S.C.R. 143), it may be that the alleged principle will be comprehensible only if the state's interest is taken into account at the s. 7 stage.

(See, *inter alia*, *Cunningham v. Canada*, [1993] 2 S.C.R. 143, at pp. 151-52; *Godbout*, *supra*, at para. 78: "From the foregoing discussion, it is clear that deciding whether the infringement of a s. 7 right is fundamental[ly] just may, in certain cases, require that the right at issue be weighed against the interests pursued by the state in causing that infringement"; *Parker*, *supra*, at para. 113; *R. v. Pan* (1999), 134 C.C.C. (3d) 1, at paras. 177-87, appeal dismissed [2001] 2 S.C.R. 344, 2001 SCC 42, at paras. 39-40.) Considering the nature of the harm principle, societal interests will have to be assessed where the harm alleged to be associated with the prohibited conduct affects society as a whole rather than identifiable individuals.

Societal interests in prohibiting conduct are evaluated by balancing the harmful effects on society if the conduct in question is not prohibited by law against the effects of prohibiting the conduct in question. It would indeed be misleading to engage in an assessment of the state's interest in prohibiting conduct by evaluating solely the collective harm that the state wishes to prevent without also evaluating the collective costs incurred by preventing such harm (see *Packer*, *supra*, at p. 267: "[o]ne cannot meaningfully deal with the question of 'harm to others' without weighing benefits against detriments"). The harm or risk of harm to society caused by the prohibited conduct must outweigh any harm that may result from enforcement.

The impact conduct has on society will be assessed by gauging the tolerance society has for the negative effects (or harm) occasioned by the conduct in question. Similarly to what Sopinka J. said in *Butler*, *supra*, at p. 485, the stronger the inference of a risk of harm, the lesser the likelihood of tolerance. Such an assessment is contextual; it cannot

correctionnel qui a pour effet de priver un prisonnier d'un intérêt de liberté (*Cunningham c. Canada*, [1993] 2 R.C.S. 143), il se peut alors que le principe allégué ne soit compréhensible que si l'intérêt de l'État est pris en compte à l'étape de l'art. 7.

(Voir, notamment, *Cunningham c. Canada*, [1993] 2 R.C.S. 143, p. 151-152; *Godbout*, précité, par. 78 : « Il ressort clairement de l'analyse qui précède que, pour déterminer si l'atteinte à un droit garanti par l'art. 7 est conforme à la justice fondamentale, il faut, dans certains cas, soulever d'une part le droit en cause et d'autre part les objectifs poursuivis par l'État en portant atteinte à ce droit »; *Parker*, précité, par. 113; *R. c. Pan* (1999), 134 C.C.C. (3d) 1, par. 177-187; pourvoi rejeté [2001] 2 R.C.S. 344, 2001 CSC 42, par. 39-40.) Vu la nature du principe du préjudice, l'appréciation des intérêts sociétaux doit se faire dans les cas où le préjudice qu'entraînerait le comportement prohibé touche l'ensemble de la société plutôt que des personnes identifiables.

L'appréciation de l'intérêt qu'a la société à interdire un comportement consiste à soulever, d'une part, les effets préjudiciables qu'aurait pour celle-ci le fait de ne pas interdire par voie législative le comportement en cause et, d'autre part, les effets qui découleraient de la prohibition de celui-ci. Il serait d'ailleurs erroné de faire cette appréciation en examinant seulement le préjudice collectif que l'État désire prévenir et non les coûts qu'entraînerait pour la collectivité la prévention de ce préjudice (voir *Packer*, *op. cit.*, p. 267 : [TRADUCTION] « [i]l est impossible d'analyser à fond la question du "préjudice pour autrui" sans soulever les avantages et les inconvénients »). Le préjudice ou risque de préjudice que crée pour la société le comportement prohibé doit être plus grand que tout préjudice susceptible de résulter des mesures visant à le prévenir.

L'effet d'un comportement sur la société est déterminé en mesurant la tolérance de la société à l'égard des répercussions négatives (ou préjudice) de celui-ci. Comme l'a dit le juge Sopinka dans l'arrêt *Butler*, précité, p. 485, plus le risque de préjudice auquel on conclut est élevé, moins il y a de chances qu'il soit toléré. Cette appréciation

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be undertaken in a vacuum and must therefore be made *in concreto*, by reference, where possible, to the tolerance society shows to the harm occasioned by comparable conduct. The risk of harm to society occasioned by the conduct must then be balanced against the costs imposed upon society by the prohibition of the conduct in question. The stronger the risk of harm to society caused by the conduct, the greater the costs society will be ready to bear to enforce its prohibition. Here once again, if the prohibition of conduct engages a s. 7 interest, as the threat of imprisonment does, while the conduct poses little or no risk of harm to others, then the law is contrary to s. 7.

est contextuelle; elle ne saurait être effectuée dans l'abstrait et elle doit par conséquent être réalisée *in concreto*, au moyen si possible d'une comparaison avec la tolérance que manifeste la société à l'égard d'un préjudice découlant d'un comportement analogue. Le risque de préjudice pour la société doit être examiné à la lumière des coûts que l'interdiction du comportement entraîne pour la société. Plus le risque de préjudice pour la société est élevé, plus celle-ci est disposée à supporter des coûts considérables pour faire respecter son interdiction. Encore une fois, si l'interdiction d'un comportement met en jeu un droit garanti par l'art. 7, comme le fait la menace d'emprisonnement, alors que le comportement ne présente que peu ou pas de risques de préjudice pour autrui, la mesure législative contestée contrevient à l'art. 7.

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I stress that where direct harm to identifiable others is caused by conduct, societal interests are easier to identify because of the nature of the relationship between the state, the offender, and the victim. As Doherty J.A. mentioned in *Murdock*, *supra*, at para. 35, in those circumstances, the state's interest is the protection of individuals in the community from the harm occasioned by the conduct in question. In prohibiting the conduct and in threatening imprisonment for its enforcement, the state restricts the actor's liberty in order to protect the rights or freedoms of others. In circumstances where one's rights and freedoms are directly threatened by another's actions, the state is justified in using imprisonment to sanction the conduct, provided that it causes more than little or no reasoned risk of harm to others. The justification is then grounded in the outer limits of individual freedom which reflect the need to preserve the rights and freedoms of others. In those circumstances, it would be offensive to pursue a further analysis as to whether the costs of enforcement of the offence are such that they outweigh the victim's rights. However, where others' rights and interests are not directly threatened by the prohibited conduct, the justification has a different source. In those circumstances, societal interests, comprising the benefits and detriments of a prohibition, must be such that the restriction of

Je tiens à souligner que, dans les cas où un comportement cause directement préjudice à des personnes identifiables, les intérêts sociétaux en jeu sont plus faciles à reconnaître en raison de la nature des liens existant entre l'État, le délinquant et la victime. Comme l'a mentionné le juge Doherty dans l'arrêt *Murdock*, précité, par. 35, dans une telle situation l'intérêt de l'État est la protection de certains membres de la collectivité contre le préjudice résultant du comportement en cause. En interdisant le comportement, et en menaçant d'avoir recours à l'emprisonnement pour faire respecter son interdiction, l'État restreint la liberté de celui qui s'adonne à ce comportement, et ce dans le but de protéger les droits ou libertés d'autres personnes. Lorsque les droits et les libertés d'une personne sont directement menacés par les actes d'une autre, l'État est justifié de recourir à l'emprisonnement pour punir le comportement, pourvu qu'il ne s'agisse pas d'un comportement ne créant que peu ou pas de risques de préjudice pour autrui. La mesure trouve alors sa justification aux confins de la notion de liberté individuelle, c'est-à-dire là où commence la nécessité de protéger les droits et les libertés d'autrui. En présence de telles circonstances, il serait inopportun de poursuivre l'analyse et de se demander si les coûts nécessaires pour faire respecter l'interdiction sont tels qu'ils l'emportent sur les droits de la victime. Toutefois, lorsque le comportement prohibé ne menace pas

the person's liberty produces a net benefit as a whole.

(b) *Other Principles of Fundamental Justice Involved*

The harm principle is dispositive of these appeals. Therefore, I need not discuss whether other principles of fundamental justice are involved and whether the impugned provisions are in accordance with them.

We must now determine whether the harm associated with marihuana use justifies the state's decision to use imprisonment as a sanction against the prohibition of its possession.

(3) Has the Deprivation of Liberty Occurred in Accordance with the Principles of Fundamental Justice?

It is useful at this stage to briefly revisit the harm caused by marihuana use as found by the trial judges. Although there is no need at this stage to reproduce the findings of the trial judges as to what harms are not associated with marihuana use, remember that these findings displaced many commonly held but entirely erroneous assumptions regarding the effects of marihuana use (see para. 192, above). As to the harmful effects of marihuana use, recall that McCart J. held in *Clay* that the consumption of marihuana is "not completely harmless" but "unlikely to create serious harm for most individual users or society" (para. 26).

Howard Prov. Ct. J. in *Caine* summarized her overall findings on harm as follows, at paras. 121-26:

directement les droits et intérêts d'autrui, la justification trouve sa source ailleurs. Dans un tel cas, les intérêts sociétaux — c'est-à-dire les avantages et les inconvénients de l'interdiction — doivent être tels que la restriction de la liberté de l'intéressé se traduise globalement par un avantage net.

b) *D'autres principes de justice fondamentale sont en cause*

Le principe du préjudice permet de trancher les présents pourvois. Je n'ai en conséquence pas besoin de me demander si d'autres principes de justice fondamentale sont en cause et si les dispositions contestées sont conformes à ceux-ci.

Nous devons maintenant déterminer si le préjudice lié à la consommation de marihuana justifie la décision de l'État d'avoir recours à l'emprisonnement pour faire respecter l'interdiction visant la possession de cette substance.

(3) La privation de liberté est-elle conforme aux principes de justice fondamentale?

À ce stade-ci, il convient de rappeler brièvement les effets néfastes de l'usage de la marihuana qui ont été constatés par les juges de première instance. Bien qu'il ne soit pas nécessaire de reproduire toutes leurs conclusions sur les effets qui ne sont pas liés à l'usage de la marihuana, rappelons qu'ils ont écarté, dans leurs conclusions, de nombreuses hypothèses largement répandues mais totalement erronées quant aux effets de la consommation de cette substance (voir le par. 192 des présents motifs). Pour ce qui est des effets néfastes de l'usage de la marihuana, il convient de rappeler que, dans *Clay*, le juge McCart a dit que la marihuana [TRADUCTION] « n'est pas complètement inoffensive » mais qu'elle « est néanmoins peu susceptible d'avoir des effets néfastes graves pour la plupart des personnes qui en consomment ou pour la société » (par. 26).

Dans l'affaire *Caine*, par. 121-126, la juge Howard de la Cour provinciale a résumé ainsi ses conclusions générales sur la question du préjudice :

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The evidence before me demonstrates that there is a reasonable basis for believing that the following health risks exist with [marihuana use].

There is a general risk of harm to the users of marihuana from the acute effects of the drug, but these adverse effects are rare and transient. Persons experiencing the acute effects of the drug will be less adept at driving, flying and other activities involving complex machinery. In this regard they represent a risk of harm to others in society. At current rates of use, accidents caused by users under the influence of marihuana cannot be said to be significant.

There is also a risk that any individual who chooses to become a casual user, may end up being a chronic user of marihuana, or a member of one of the vulnerable persons identified in the materials. It is not possible to identify these persons in advance.

As to the chronic users of marihuana, there are health risks for such persons. The health problems are serious ones but they arise primarily from the act of smoking rather than from the active ingredients in marihuana. Approximately 5% of all marihuana users are chron[i]c users. At current rates of use, this comes to approximately 50,000 persons. There is a risk that, upon legalization, rates of use will increase, and with that the absolute number of chronic users will increase.

In addition, there are health risks for those vulnerable persons identified in the materials. There is no information before me to suggest how many people might fall into this group. Given that it includes young adolescents who may be more prone to becoming chronic users, I would not estimate this group to be min[u]scule.

All of the risks noted above carry with them a cost to society, both to the health care and welfare systems. At current rates of use, these costs are negligible compared to the costs associated with alcohol and drugs [sic]. There is a risk that, with legalization, user rates will increase and so will these costs.

[TRADUCTION] La preuve qui m'a été soumise démontre l'existence de motifs raisonnables de croire que [la consommation de marihuana] comporte les risques suivants pour la santé.

Les effets aigus de la marihuana présentent un risque général pour les consommateurs de cette drogue, mais ces effets néfastes sont rares et passagers. Les personnes qui subissent ces effets aigus sont moins aptes à conduire un véhicule à moteur, à piloter un avion ou à exercer d'autres activités exigeant de faire fonctionner des appareils complexes. Ces personnes créent, de ce point de vue, un risque de préjudice pour les autres membres de la société. Eu égard aux niveaux actuels de consommation, on ne saurait affirmer que le nombre d'accidents causés par des personnes sous l'effet de la marihuana est important.

Il se peut également que la personne qui consomme occasionnellement de la marihuana devienne éventuellement un consommateur chronique ou fasse partie des personnes vulnérables mentionnées dans la documentation. Il est impossible d'identifier d'avance ces personnes.

Pour ce qui est des consommateurs chroniques de marihuana, ils courent des risques pour leur santé. Ces problèmes sont graves, mais ils découlent principalement du fait que la drogue est fumée, plutôt que des ingrédients actifs de celle-ci. Environ 5 % de tous les consommateurs de marihuana sont des consommateurs chroniques. Suivant les niveaux actuels de consommation, cela représente environ 50 000 personnes. La légalisation risque d'entraîner une augmentation des niveaux de consommation et, corollairement, du nombre absolu de consommateurs chroniques.

De plus, il existe également des risques pour la santé des personnes vulnérables mentionnées dans la documentation. On ne m'a fourni aucune information indiquant combien de personnes sont susceptibles d'entrer dans cette catégorie. Étant donné qu'il s'agit notamment de jeunes adolescents, personnes peut-être plus disposées à devenir des consommateurs chroniques, je ne crois pas qu'il s'agisse d'un groupe minuscule.

Tous les risques susmentionnés entraînent des coûts pour la société, tant pour le système de soins de santé que pour le régime d'aide sociale. Compte tenu des niveaux actuels de consommation, ces coûts sont négligeables si on les compare à ceux liés à l'alcool et aux drogues (sic). La légalisation risque d'entraîner une augmentation du nombre d'utilisateurs et, en conséquence, de ces coûts.

La conclusion qui s'impose est que, exception faite des risques que comporte l'usage de la

The inevitable conclusion is that apart from the risks of impairment while driving, flying or

operating complex machinery and the impact of marihuana use on the health care and welfare systems, to which I will return, the harms associated with marihuana use are exclusively health risks for the individual user, ranging from almost non-existent for low/occasional/moderate users of marihuana to relatively significant for chronic users. In my view, as I stated above, harm to self does not satisfy the constitutional requirement that whenever the state resorts to imprisonment, there must be a minimum harm to others as an essential part of the offence. The prohibition of conduct that only causes harm to self, regardless of the gravity of the harm, is not in accordance with the principles of fundamental justice and, if imprisonment is available as a means to enforce the prohibition, a breach of s. 7 of the *Charter* will have been established.

It is important at this stage to address a specific issue raised by my colleagues. Although they find that the purpose of the impugned legislation is the protection of health and public safety in general (see majority reasons at para. 65), my colleagues put great emphasis on the fact that it also aims at protecting vulnerable groups from self-inflicted harm (see majority reasons at paras. 76, 77, 100, 108, 123-126 and 132). Specifically, they recall the state's interest in acting to protect vulnerable groups, citing *New Brunswick (Minister of Health and Community Services) v. G. (J.)*, [1999] 3 S.C.R. 46, at para. 70; and *B. (R.)*, *supra*, at para. 88. They also claim that the protection of vulnerable groups is a valid exercise of the criminal law power, citing *Rodriguez*, *supra*, at p. 595; *R. v. Morgentaler*, [1988] 1 S.C.R. 30, at pp. 74-75; *R. v. Keegstra*, [1995] 2 S.C.R. 381; *Sharpe*, *supra*; and *Butler*, *supra*. While the cases referred to by my colleagues clearly illustrate the state's interest in the protection of vulnerable groups from others who might harm them, they are far from suggesting that it is the vulnerable ones who should be sent to jail for their self-protection. Implicit in my colleagues' argument is that the state would be

marihuana pour la personne qui conduit un véhicule à moteur, pilote un avion ou fait fonctionner un appareil complexe et des répercussions de l'usage de cette substance sur les systèmes de soins de santé et d'aide sociale, questions sur lesquelles je vais revenir plus loin, les effets néfastes de la consommation de marihuana présentent exclusivement des risques pour la santé de l'utilisateur, risques qui vont de quasi inexistantes pour les personnes qui n'en font qu'une consommation faible, occasionnelle ou modérée à relativement élevés pour les consommateurs chroniques. Comme je l'ai dit précédemment, j'estime que le préjudice qu'une personne se cause à elle-même ne satisfait pas à l'exigence constitutionnelle selon laquelle, dans tous les cas où l'État a recours à l'emprisonnement, l'existence d'un préjudice minimal à autrui est un des éléments essentiels de l'infraction. L'interdiction d'un comportement qui ne cause préjudice qu'à son auteur, peu importe la gravité de ce préjudice, n'est pas conforme aux principes de justice fondamentale et, si celui qui y contrevient est passible d'emprisonnement, la violation de l'art. 7 de la *Charte* est établie.

Il est important, à ce stade-ci, d'examiner une question précise qu'ont soulevée mes collègues. Bien que ces derniers concluent que la mesure législative contestée a pour objet de protéger la santé et la sécurité du public en général (voir les motifs de la majorité, par. 65), mes collègues insistent beaucoup sur le fait qu'elle vise aussi à protéger des groupes vulnérables contre les préjudices qu'ils peuvent s'infliger à eux-mêmes (voir les par. 76, 77, 100, 108, 123-126 et 132). De façon plus particulière, ils rappellent que l'État a intérêt à prendre des mesures pour protéger les groupes vulnérables, invoquant à cet effet les arrêts *Nouveau-Brunswick (Ministre de la Santé et des Services communautaires) c. G. (J.)*, [1999] 3 R.C.S. 46, par. 70, et *B. (R.)*, précité, par. 88. Se référant aux arrêts *Rodriguez*, précité, p. 595; *R. c. Morgentaler*, [1988] 1 R.C.S. 30, p. 74-75; *R. c. Keegstra*, [1995] 2 R.C.S. 381; *Sharpe*, précité; et *Butler*, précité, ils affirment également que le législateur exerce valablement sa compétence sur le droit criminel lorsqu'il légifère pour protéger des groupes vulnérables. Bien que les arrêts invoqués par mes collègues montrent clairement que l'État a intérêt à protéger les groupes vulnérables contre

justified in threatening with imprisonment adolescents with a history of poor school performance, women of childbearing age and persons with pre-existing diseases such as cardiovascular diseases, respiratory diseases, schizophrenia and other drug dependencies, who are at particular risk of harming themselves by using marihuana. I do not think that an exception to the harm principle is justified to allow the state to threaten with imprisonment vulnerable people in order to prevent them from harming themselves. To this effect, I note Abella J.A.'s sound reasoning (with which the other members of the panel agreed, albeit on narrower grounds), in *R. v. M. (C.)* (1995), 30 C.R.R. (2d) 112 (Ont. C.A.), at pp. 121-23. In that case, the issue was the constitutionality of criminalizing anal intercourse between non-married persons under 18 years of age, regardless of consent:

The issue then comes down to this: is sending young persons to jail a reasonable way for the state to protect them from any risks associated with consensual anal intercourse?

If the prevention of harm by discouraging the risk is the objective, it is difficult to imagine a more intrusive way to protect an individual from harm than criminal prosecution. . . . The risk associated with unprotected sexual conduct is a health risk. It strikes me as decidedly inappropriate to deal with minimizing health risks at any age by using the punitive force of the *Criminal Code*, but especially so for young people.

. . . .

There is no evidence that threatening to send an adolescent to jail will protect him (or her) from the risks of anal intercourse. I can see no rational connection between protecting someone from the potential harm of exercising

les personnes qui pourraient causer préjudice à ces groupes, ces décisions sont loin de suggérer qu'on envoie les personnes vulnérables en prison pour assurer leur propre protection. La proposition de mes collègues sous-entend que l'État serait justifié de menacer d'emprisonnement les adolescents ayant des résultats scolaires médiocres, les femmes en âge de procréer et les personnes souffrant de maladies préexistantes — par exemple des troubles cardiovasculaires, des problèmes respiratoires, la schizophrénie et d'autres toxicomanies —, autant de personnes qui risquent plus particulièrement de se faire du tort en consommant de la marihuana. Je ne pense pas qu'il soit justifié de déroger au principe du préjudice et de permettre à l'État de menacer d'emprisonnement des personnes vulnérables afin de les empêcher de se causer préjudice à elles-mêmes. À cet égard, je tiens à signaler le solide raisonnement énoncé par la juge Abella de la Cour d'appel de l'Ontario (auquel ont souscrit les autres juges qui ont entendu l'affaire, quoique pour des motifs plus restreints) dans l'arrêt *R. c. M. (C.)* (1995), 30 C.R.R. (2d) 112, p. 121-123. Dans cette affaire, la Cour d'appel devait se prononcer sur la constitutionnalité de la criminalisation des relations anales entre personnes non mariées âgées de moins de 18 ans, indépendamment de la question du consentement :

[TRADUCTION] La question qui se pose est donc la suivante : Est-il raisonnable pour l'État d'envoyer des jeunes en prison pour les protéger contre les risques liés aux relations anales consensuelles?

Si l'objectif poursuivi est de prévenir le préjudice en dissuadant les intéressés de s'exposer aux risques, il est difficile d'imaginer méthode plus envahissante que les poursuites criminelles pour protéger un individu contre un préjudice. [. . .] Le risque lié aux relations sexuelles non protégées est un risque pour la santé. Il me semble carrément inapproprié d'essayer de réduire les risques pour la santé, quel que soit l'âge en ayant recours aux mesures coercitives du *Code criminel*, particulièrement dans le cas de personnes aussi jeunes.

. . . .

Il n'existe aucune preuve que la menace d'emprisonnement protège les adolescents ou les adolescentes contre les risques découlant des relations sexuelles anales. Il n'y a selon moi aucun rapport logique entre le fait de

sexual preferences and imprisoning that individual for exercising them. There is no proportionality between the articulated health objectives and the Draconian criminal means chosen to achieve them.

While these comments were made in the analysis of the proportionality test under s. 1, they reflect my view that sending vulnerable people to jail to protect them from self-inflicted harm does not respect the harm principle as a principle of fundamental justice. Similarly, the fact that some vulnerable people may harm themselves by using marihuana is not a sufficient justification to send other members of the population to jail for engaging in that activity. In other words, the state cannot prevent the general population, under threat of imprisonment, from engaging in conduct that is harmless to them, on the basis that other, more vulnerable persons may harm themselves if they engage in it, particularly if one accepts that imprisonment would be inappropriate for the targeted vulnerable groups. I agree with Packer that to justify imprisonment of both vulnerable persons and other members of the population on that basis would create a society in which “all are safe but none is free” (Packer, *supra*, at p. 65).

My colleagues Gonthier and Binnie JJ. have argued that imprisonment for simple possession is not a serious threat upon conviction for possession of marihuana by members of vulnerable groups, since it is only in the presence of “aggravating circumstances” that imprisonment will be a fit sentence. This assertion does not strengthen their position. In fact, it highlights the main difficulty. Imprisonment is an available punishment for simple possession. As demonstrated by the cases cited by my colleagues (at para. 156), imprisonment has been and continues to be employed by Canadian courts in sentencing those convicted of possession *simpliciter*. By definition, the vulnerable groups are the ones whose members are most likely to suffer harm from the use

protéger une personne contre les conséquences potentiellement dangereuses de l'exercice de ses préférences sexuelles et l'emprisonnement de cette personne parce qu'elle les a exercées. Il n'y a pas de commune mesure entre les objectifs en matière de santé clairement exprimés et les dispositions pénales draconiennes choisies pour les réaliser.

Bien que ces commentaires aient été faits à l'étape de la proportionnalité de l'analyse fondée sur l'article premier, ils reflètent mon opinion selon laquelle le fait d'envoyer des personnes vulnérables en prison pour les protéger contre elles-mêmes ne respecte pas le principe du préjudice en tant que principe de justice fondamentale. De même, le fait que certaines personnes vulnérables puissent se faire du tort en consommant de la marihuana n'est pas une raison suffisante pour emprisonner d'autres personnes se livrant à cette activité. En d'autres mots, l'État ne peut pas, en les menaçant d'emprisonnement, empêcher les justiciables en général d'adopter un comportement qui ne leur est pas préjudiciable, pour le motif que d'autres personnes plus vulnérables pourraient se causer préjudice à elles-mêmes si elles adoptaient ce comportement, particulièrement si on reconnaît que l'emprisonnement ne serait pas une mesure appropriée pour les groupes vulnérables visés. À l'instar de Packer, j'estime qu'invoquer ce motif pour justifier l'emprisonnement des personnes vulnérables et d'autres membres de la société aurait pour effet de créer une société dans laquelle [TRADUCTION] « tous sont à l'abri du danger mais nul n'est libre » (Packer, *op. cit.*, p. 65).

Mes collègues les juges Gonthier et Binnie ont avancé que les membres de groupes vulnérables déclarés coupables de possession de marihuana ne risquent pas sérieusement l'emprisonnement, puisque ce n'est qu'en présence de « circonstances aggravantes » que l'emprisonnement constitue une peine appropriée. Cette affirmation n'étaye pas leur position, mais fait plutôt ressortir la principale difficulté que soulève la situation. L'emprisonnement est une peine qui peut être infligée à l'égard de la simple possession. Comme l'illustrent les affaires mentionnées par mes collègues (au par. 156), des tribunaux canadiens ont, dans le passé, condamné à l'emprisonnement des personnes déclarées coupables de simple possession et cette peine continue

of marihuana. However, by the reasoning of my colleagues, it is those offenders who are not members of vulnerable groups, i.e., those that do not risk anything more than negligible harm to self and others, who will face the threat of imprisonment due to the “presence of aggravating circumstances” (para. 155).

d’être infligée. Par définition, les groupes vulnérables sont constitués de personnes susceptibles de subir des préjudices découlant de la consommation de marihuana. Toutefois, si on applique le raisonnement de mes collègues, c’est sur les délinquants qui ne font pas partie de groupes vulnérables — c’est-à-dire les personnes qui créent tout au plus un risque négligeable de préjudice pour eux-mêmes et pour autrui — que pèsera la menace d’emprisonnement à cause de la « présence de circonstances aggravantes » (par. 155).

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The argument of the majority that the availability of imprisonment as a fit sentence in this case is more appropriately approached under s. 12 than under s. 7 is unconvincing. Section 12 of the *Charter* protects against “cruel and unusual treatment or punishment”. Although imprisonment is undoubtedly very serious, it is not inherently “cruel and unusual”. Section 7 provides the proper scope for considering whether the availability of imprisonment for an offence and the consequent engagement of the liberty interest in s. 7 are in accordance with the principles of fundamental justice. This accords with Lamer J.’s observations in *Motor Vehicle Reference*, *supra*, at p. 515:

A law enacting an absolute liability offence will violate s. 7 of the *Charter* only if and to the extent that it has the potential of depriving of life, liberty, or security of the person.

Obviously, imprisonment . . . deprives persons of their liberty. An offence has that potential as of the moment it is open to the judge to impose imprisonment. There is no need that imprisonment, as in s. 94(2), be made mandatory. [Emphasis added.]

It is inappropriate to restrict the consideration of the constitutionality of a person’s liberty interest to s. 12. Such a stance is counter to the notion that ss. 8 to 14 of the *Charter* are specific illustrations of the principles of fundamental justice in s. 7, as explained by Lamer J. in *Motor Vehicle Reference*,

L’argument de la majorité selon lequel il est préférable d’examiner au regard de l’art. 12 plutôt que de l’art. 7 la question de savoir si, en l’espèce, la seule possibilité d’emprisonnement constitue une peine appropriée n’est pas convaincant. L’article 12 de la *Charte* accorde à chacun la protection contre « tous traitements ou peines cruels et inusités ». Bien que l’emprisonnement soit indubitablement une mesure très sérieuse, une telle peine n’est pas intrinsèquement « cruelle et inusitée ». L’article 7 établit le cadre approprié pour l’examen de la question de savoir si la décision du législateur de prévoir la possibilité d’emprisonnement à l’égard d’une infraction — et l’atteinte au droit à la liberté en découlant — est conforme aux principes de justice fondamentale. Ces remarques sont compatibles avec les observations suivantes du juge Lamer dans le *Renvoi relatif à la Motor Vehicle Act*, précité, p. 515 :

Une loi qui définit une infraction de responsabilité absolue ne violera l’art. 7 de la *Charte* que si et dans la mesure où elle peut avoir comme conséquence de porter atteinte à la vie, à la liberté ou à la sécurité de la personne.

Manifestement, l’emprisonnement [. . .] prive les personnes de leur liberté. Une infraction peut avoir cet effet dès que le juge peut imposer l’emprisonnement. Il n’est pas nécessaire que l’emprisonnement soit obligatoire comme c’est le cas au par. 94(2). [Je souligne.]

Il ne convient pas de se limiter à l’art. 12 dans l’examen d’une atteinte au droit à la liberté d’une personne. Une telle position va à l’encontre de l’idée que les art. 8 à 14 de la *Charte* sont des exemples précis de principes de justice fondamentale visés à l’art. 7, comme l’a expliqué le juge Lamer dans le

supra, at p. 502. Where, as here, a principle of fundamental justice that is not specifically named in ss. 8 to 12 — the harm principle — is invoked, the analysis is appropriately conducted pursuant to s. 7.

With respect to the harm to others or to society as a whole occasioned by marihuana use, Howard Prov. Ct. J. (McCart J. came to the same conclusion) identified (i) the risk that persons intoxicated from marihuana may be less adept at driving, flying, or doing other activities involving complex machinery, and (ii) the “cost to society, both to the health care and welfare systems” (para. 126). Regarding the former, she acknowledges that “[a]t current rates of use, accidents caused by users under the influence of marihuana cannot be said to be significant” (para. 122). Regarding the latter, she acknowledged, at para. 52, that “[t]he evidence establishes that any health care concerns (including financial concerns) associated with marihuana use in this country are minor compared to the social, criminal and financial costs associated with the use of alcohol or tobacc[o]”, but considered that “[t]here is a risk that, with legalization, user rates will increase and so will these costs” (para. 126). Hence, describing the two risks of harm to others (from driving and from the burden on the health and welfare systems), Howard Prov. Ct. J. said that at current rates of use, the first risk “cannot be said to be significant”, and that the second is “minor”.

With respect, I can see no difference for the purpose of determining the level of harm to others caused by marihuana use between the terms “insignificant” and “trivial”, used by Braidwood J.A. in *Caine* and Rosenberg J.A. in *Clay* to describe

Renvoi relatif à la Motor Vehicle Act, précité, p. 502. Dans les cas où, comme en l’espèce, on invoque un principe de justice fondamentale non mentionné expressément aux art. 8 à 12 — en l’occurrence le principe du préjudice — il faut procéder à l’analyse fondée sur l’art. 7.

Pour ce qui est du préjudice que la consommation de marihuana cause à d’autres personnes ou à l’ensemble de la société, la juge Howard (le juge McCart est arrivé à la même conclusion) a dégagé les éléments suivants : (i) le risque que les personnes ayant consommé de la marihuana soient moins aptes à conduire un véhicule à moteur, à piloter un avion ou à exercer d’autres activités exigeant de faire fonctionner des appareils complexes, (ii) [TRADUCTION] « des coûts pour la société, tant pour le système de soins de santé que pour le régime d’aide sociale » (par. 126). En ce qui concerne le premier élément, la juge a reconnu que « [e]u égard aux niveaux actuels de consommation, on ne saurait affirmer que le nombre d’accidents causés par des personnes sous l’effet de la marihuana est important » (par. 122). Pour ce qui est du deuxième élément, elle a reconnu que « [l]a preuve montre que les inquiétudes relatives aux soins de santé (y compris les inquiétudes financières) que suscite l’usage de la marihuana dans notre pays sont mineures par rapport aux coûts d’ordre social, criminel et financier liés à la consommation d’alcool et de tabac » (par. 52), mais elle a considéré que « [l]a légalisation risque d’entraîner une augmentation du nombre d’usagers et, en conséquence, de ces coûts » (par. 126). Par conséquent, décrivant les deux risques de préjudice à autrui (celui découlant de la conduite automobile et celui découlant du fardeau créé pour les systèmes de soins de santé et d’aide sociale), la juge Howard a dit, eu égard aux niveaux actuels de consommation, que, d’une part, « on ne saurait affirmer » que le premier risque « est important » et, d’autre part, que le second est « mineu[r] ».

En toute déférence, je ne vois aucune différence, aux fins de détermination de l’étendue du préjudice à autrui causé par la consommation de marihuana, entre les mots « *insignificant* » (insignifiant) et « *trivial* » (négligeable), utilisés

the threshold level of harm, and the expressions “cannot be said to be significant” and “negligible”, used by Howard Prov. Ct. J. to quantify the level of harm to society. Both Braidwood J.A. and Rosenberg J.A. concluded that the findings of fact of the trial judges show that marihuana indeed poses a risk of harm to others and society that is not insignificant nor trivial (paras. 141-43 in *Caine*; para. 34 in *Clay*). However, Braidwood J.A. came to this conclusion after he quoted in whole the passage from Howard Prov. Ct. J.’s reasons which summarizes all the possible harms associated with marihuana use, including health risks to the user. Rosenberg J.A. apparently did the same since he referred to the findings of McCart J. as a whole and concluded that this showed that “there is some harm associated with marijuana use” (para. 34). Braidwood J.A. and Rosenberg J.A. apparently failed to distinguish between harm caused only to self from harm which puts others or society as a whole at risk. Having made this essential distinction, I conclude that the evidence does not support a conclusion that marihuana use causes a reasoned risk of harm to others or to society that is not insignificant or trivial, to use Braidwood J.A.’s own terms.

par le juge Braidwood dans *Caine* et par le juge Rosenberg dans *Clay* pour décrire le préjudice, et les mots « *cannot be said to be significant* » (on ne saurait affirmer que le nombre [. . .] est important) et « *negligible* » (négligeable) utilisés par la juge Howard de la Cour provinciale pour quantifier le préjudice causé à la société. Les juges Braidwood et Rosenberg ont tous deux considéré que les conclusions de fait des juges de première instance montrent que la marihuana présente effectivement, tant pour d’autres personnes que pour la société, un risque de préjudice qui n’est ni négligeable ni insignifiant (par. 141-143 dans *Caine*; par. 34 dans *Clay*). Cependant, le juge Braidwood a tiré cette conclusion après avoir cité intégralement le passage des motifs de la juge Howard dans lequel elle résume tous les effets néfastes possibles liés à l’usage de la marihuana, y compris les risques pour la santé de l’usager. Le juge Rosenberg de la Cour d’appel a apparemment fait la même chose, puisqu’il a repris intégralement les constatations du juge McCart et conclu qu’elles indiquaient l’existence de [TRADUCTION] « certains effets préjudiciables liés à l’usage de la marihuana » (par. 34). Les juges Braidwood et Rosenberg n’ont visiblement pas fait de distinction entre le préjudice causé à soi-même uniquement et celui créant un risque pour d’autres personnes ou pour l’ensemble de la société. Comme je fais cette distinction essentielle, j’estime que la preuve ne permet pas de conclure que l’usage de la marihuana crée, pour d’autres personnes ou pour la société en général, un risque véritable de préjudice qui n’est ni insignifiant ni négligeable, pour reprendre les termes utilisés par le juge Braidwood.

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In any event, in my view, the two spheres of risks to others or society as a whole identified by the trial judges are not sufficient to justify recourse to the most severe penalty imposed by law, a sentence generally viewed as a last resort (see *Motor Vehicle Reference*, *supra*, at p. 532, *per* Wilson J.). The two risks do not show that marihuana use causes more than little or no harm to others or to society. First, while the risk that persons experiencing the acute effects of the drug may be less adept at driving, flying and engaging in other activities involving complex machinery is indeed

Quoi qu’il en soit, je suis d’avis que les deux risques pour autrui ou pour la société en général dont l’existence a été constatée par les juges de première instance ne suffisent pas pour justifier l’application de la peine la plus sévère prévue par la loi, sanction qui est généralement considérée comme une solution de dernier recours (voir le *Renvoi relatif à la Motor Vehicle Act*, précité, p. 532, la juge Wilson). Ces deux risques ne démontrent pas que la consommation de marihuana cause plus qu’un faible préjudice à autrui ou à la société. Tout d’abord, bien que le risque que des personnes ressentant les effets

a valid concern, the act of driving while under the influence of alcohol or drugs is an activity separate from mere possession and use. Such dangerous driving is already dealt with in the *Criminal Code*, and rightly so, because it is this act which risks victimizing identifiable others as well as society as a whole. In my view, the state cannot rely on this separate offence to justify the prohibition of possession of marihuana *simpliciter*. This is indeed the approach Parliament has adopted regarding alcohol. I note that in *Caine*, *supra*, Howard Prov. Ct. J. stated explicitly that “[a]part from the above problem [operation of vehicles or other machinery while intoxicated], there is no evidence to suggest that harm of any kind will befall individual members of society as a result of any actions by individual marihuana users” (para. 50).

The second negative effect on society as a whole found by the trial judge, i.e., general harm to the health care and welfare systems, is simply too remote and minor to justify the threat of imprisonment for simple possession of marihuana. Much seemingly innocent conduct may have deleterious consequences. In fact, it is not easy to identify conduct which can be said confidently to be without risk of injury in the long run (see, *inter alia*, A. von Hirsch, “Extending the Harm Principle: ‘Remote’ Harms and Fair Imputation”, in A. P. Simester and A. T. H. Smith, eds., *Harm and Culpability* (1996), 259, at p. 260; Harcourt, *supra*). Canadians have a universal health care system to deal with injuries and illnesses, irrespective of fault. Arguments solely based on vague general costs to the health care system cannot justify imprisonment for any kind of risky undertaking. There is hardly a net benefit to society in imprisoning, on the basis of the costs they impose on the health care and welfare systems, those very persons who may need access to and support from such systems. Canadians do not expect to go to jail whenever they embark on some adventure

aigus de la drogue puissent être moins aptes à conduire un véhicule à moteur, à piloter un avion ou à exercer d’autres activités exigeant de faire fonctionner un appareil complexe soit effectivement une préoccupation valide, le fait de conduire sous l’effet de l’alcool ou de drogues constitue toutefois une activité distincte du simple fait de posséder et consommer une telle substance. La conduite dangereuse fait déjà l’objet de dispositions dans le *Code criminel*, à juste titre d’ailleurs, parce que c’est cet acte qui risque de causer préjudice à d’autres personnes identifiables ainsi qu’à l’ensemble de la société. À mon avis, l’État ne peut pas invoquer cette infraction distincte pour justifier l’interdiction visant le simple fait d’être en possession de marihuana. C’est effectivement l’attitude qu’a adoptée le Parlement à l’égard de l’alcool. Je signale que, dans l’affaire *Caine*, précitée, la juge Howard a expressément dit que, [TRADUCTION] « exception faite du problème susmentionné [conduite, en état d’intoxication, de véhicules à moteur ou d’autres appareils], il n’y a aucune preuve que des actes accomplis par des consommateurs de marihuana causeront préjudice à certains membres de la société » (par. 50).

Le deuxième effet préjudiciable à l’ensemble de la société dont le juge de première instance a constaté l’existence, c’est-à-dire le préjudice général aux systèmes de soins de santé et d’aide sociale, est tout simplement trop éloigné et trop mineur pour justifier de punir par l’emprisonnement la simple possession de marihuana. Plusieurs comportements en apparence inoffensifs peuvent avoir des conséquences néfastes. En fait, il n’est pas facile de trouver un comportement au sujet duquel on peut affirmer, sans craindre de se tromper, qu’il ne présente aucun risque de préjudice à long terme (voir, notamment, A. von Hirsch, « Extending the Harm Principle : “Remote”, Harms and Fair Imputation », dans A. P. Simester et A. T. H. Smith, dir., *Harm and Culpability* (1996), 259, p. 260; Harcourt, *loc. cit.*). Les Canadiens ont un régime universel de soins de santé applicable aux blessures et maladies, indépendamment de toute faute contributive. On ne saurait invoquer uniquement de vagues coûts généraux pour le système de soins de santé dans le but de justifier l’infliction de l’emprisonnement pour tous les comportements à risque. Il est difficile d’affirmer

which involves a possibility of injury to themselves. I see no reason to single out those who may jeopardize their health by smoking marihuana.

que la société tirerait un avantage net du fait d'emprisonner certaines personnes qui peuvent avoir besoin de services de santé ou de services sociaux en raison des coûts qu'elles entraînent pour ces services. Les Canadiens ne s'attendent pas à aboutir en prison chaque fois qu'ils adoptent un comportement susceptible de leur être préjudiciable. Je ne vois aucune raison de réserver un traitement particulier aux personnes qui peuvent mettre leur santé en péril en fumant de la marihuana.

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In the cases before us, the societal interests in prohibiting marihuana possession must take into account, on the one hand, the burden that marihuana use imposes on the health care and welfare systems, and, on the other, the costs incurred by society because of the prohibition. Howard Prov. Ct. J. noted that at current rates of use, the costs imposed upon the health care and welfare systems by marihuana are negligible compared to the costs associated with alcohol and drugs. As I mentioned earlier, society's tolerance for the harmful effects that the conduct may entail must be assessed, where possible, by reference to its tolerance for comparable conduct. I will thus simply take note of the trial judges' findings that the burden that marihuana use imposes on society is "negligible" or "very, very small" compared to the costs imposed by comparable conduct that society tolerates (i.e., alcohol and tobacco use).

Dans les présents pourvois, l'intérêt qu'a la société à interdire la possession de marihuana doit tenir compte, d'une part, du fardeau que constitue la consommation de cette substance pour les systèmes de soins de santé et d'aide sociale et, d'autre part, des coûts de l'interdiction pour la société. La juge Howard a souligné que, compte tenu des niveaux actuels de consommation, les coûts qu'entraîne la consommation de marihuana pour les systèmes de soins de santé et d'aide sociale sont négligeables si on les compare à ceux liés à l'alcool et à d'autres drogues. Comme je l'ai indiqué précédemment, la tolérance de la société à l'égard des effets préjudiciables que le comportement peut entraîner doit si possible être appréciée par comparaison avec la tolérance de la société à l'égard d'un comportement analogue. Je vais donc simplement prendre acte de la conclusion des juges de première instance selon laquelle le fardeau qu'impose la consommation de marihuana à la société est [TRADUCTION] « négligeable » ou « très, très faible » si on le compare aux coûts liés à des comportements analogues que la société tolère (c'est-à-dire la consommation d'alcool et le tabagisme).

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If there remained any doubt as to whether the harms associated with marihuana use justified the state in using imprisonment as a sanction against its possession, this doubt disappears when the harms caused by the prohibition are put in the balance. The record shows and the trial judges found that the prohibition of simple possession of marihuana attempts to prevent a low quantum of harm to society at a very high cost. A "negligible" burden on the health care and welfare systems, coupled with the many significant negative effects of the prohibition, cannot be said to amount to more than little or

S'il subsiste encore des doutes quant à la question de savoir si les préjudices liés à la consommation de marihuana justifiaient le recours par l'État à l'emprisonnement comme sanction applicable en cas de possession de cette substance, ils disparaissent lorsque l'on jette dans la balance les effets préjudiciables de l'interdiction. Il ressort du dossier et des constatations des juges de première instance que l'interdiction de la simple possession de marihuana vise à empêcher un faible préjudice pour la société, mais qu'elle le fait à un coût très élevé. Il est tout simplement impossible d'affirmer

no reasoned risk of harm to society. I thus conclude that s. 3(1) and (2) of the *Narcotic Control Act*, as it prohibits the possession of marihuana for personal use under threat of imprisonment, violates the right of the appellants to liberty in a manner that is not in accordance with the harm principle, a principle of fundamental justice, contrary to s. 7 of the *Charter*.

(4) Possession for the Purpose of Trafficking

Before moving to the issue of whether the infringement is justified under s. 1 of the *Charter*, I will briefly address the issues raised by the appellant Malmo-Levine. Malmo-Levine argues that the prohibition of possession for the purpose of trafficking under s. 4(2) of the *Narcotic Control Act* infringes ss. 7 and 15 of the *Charter*. My colleagues Gonthier and Binnie JJ. have discussed Malmo-Levine's argument under s. 15, and have concluded that s. 4(2) of the *Narcotic Control Act* does not discriminate against the appellant since the decision to possess and traffic in marihuana is not an immutable personal characteristic, and treating persons who choose to do so in a differential manner in no way infringes human dignity or reinforces prejudicial stereotypes or historical disadvantage. I agree entirely with this conclusion.

Considering their conclusion that the prohibition of simple possession of marihuana does not violate s. 7 of the *Charter*, my colleagues Gonthier and Binnie JJ. did not address the issue raised by Malmo-Levine with regard to s. 7 and, for the same reason, neither did the courts below. In fact, Malmo-Levine's challenge at the British Columbia Court of Appeal was restricted to the part of his charge relating to possession (para. 8 of Braidwood J.A.'s reasons). Moreover, the findings of fact of the trial judges in *Clay* and *Caine* concern the harm

qu'un fardeau « négligeable » pour les systèmes de soins de santé et d'aide sociale, conjugué aux nombreux effets négatifs importants de l'interdiction, crée davantage qu'un faible risque véritable de préjudice pour la société. En conséquence, j'estime que les par. 3(1) et (2) de la *Loi sur les stupéfiants*, dans la mesure où ils interdisaient la possession de marihuana aux fins de consommation personnelle sous peine d'emprisonnement, portaient atteinte, en contravention de l'art. 7 de la *Charte*, au droit à la liberté des appelants d'une manière qui n'est pas conforme au principe du préjudice, un principe de justice fondamentale.

(4) Possession aux fins de trafic

Avant de se demander si l'atteinte est justifiée au regard de l'article premier de la *Charte*, je vais me pencher brièvement sur les divers points soulevés par l'appellant Malmo-Levine. Ce dernier prétend que l'interdiction visant la possession de stupéfiants en vue d'en faire le trafic que prévoit le par. 4(2) de la *Loi sur les stupéfiants* contrevient aux art. 7 et 15 de la *Charte*. Mes collègues les juges Gonthier et Binnie ont examiné cet argument présenté par M. Malmo-Levine sur le fondement de l'art. 15 et ils ont conclu que le par. 4(2) de la *Loi sur les stupéfiants* n'est pas discriminatoire à l'égard de l'appellant, étant donné que la décision d'avoir de la marihuana en sa possession et d'en faire le trafic n'est pas une caractéristique personnelle immuable, et que le fait de traiter différemment les personnes qui choisissent d'agir ainsi ne porte d'aucune façon atteinte à la dignité humaine ni ne renforce des stéréotypes préjudiciables ou des désavantages historiques. Je suis entièrement d'accord avec cette conclusion.

Ayant conclu que l'interdiction visant la simple possession de marihuana ne contrevient pas à l'art. 7 de la *Charte*, mes collègues les juges Gonthier et Binnie n'ont pas examiné la question soulevée par M. Malmo-Levine au sujet de l'art. 7, et les juridictions inférieures ne l'ont pas fait non plus, pour le même motif. En fait, devant la Cour d'appel de la Colombie-Britannique, M. Malmo-Levine a uniquement contesté le chef d'accusation de possession (le juge Braidwood, par. 8). De plus, les conclusions de fait des juges de première instance dans les affaires

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related to marihuana use, but there is nothing in the factual record concerning the harm associated specifically with the act of trafficking. Most if not all of the arguments before this Court have focussed on possession for personal use. On this record, it is virtually impossible to determine whether possession of marihuana for the purpose of trafficking causes more than little or no harm to others. I am aware that the health risks associated with marihuana use could be used to demonstrate that the trafficker, involving third parties, puts their health at risk and thus risks causing more than little or no harm to others than himself or herself. However, this obvious argument cannot be properly addressed without consideration of many factors which were not argued by the parties, such as, for instance, the issue of consent (see, e.g., P. Alldridge, “Dealing with Drug Dealing”, in *Harm and Culpability*, *supra*, at p. 239). A conclusion on this issue raised by the appellant Malm-Levine would be based on pure speculation. On this record, I cannot conclude that the appellant has met his burden and therefore his constitutional challenge fails.

(5) Is the Infringement Justified Under Section 1 of the Charter?

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This Court has explained, in *R. v. Mills*, [1999] 3 S.C.R. 668, the relation between ss. 7 and 1. McLachlin and Iacobucci JJ., writing for the majority, held as follows, at paras. 65-67:

It is also important to distinguish between balancing the principles of fundamental justice under s. 7 and balancing interests under s. 1 of the *Charter*. The s. 1 jurisprudence that has developed in this Court is in many respects quite similar to the balancing process mandated by s. 7. . . .

However, there are several important differences between the balancing exercises under ss. 1 and 7. The most important difference is that the issue under s. 7 is the delineation of the boundaries of the rights in question whereas under s. 1 the question is whether the viola-

Clay et Caine concernent le préjudice lié à la consommation de marihuana, mais rien dans le dossier factuel ne porte sur le préjudice découlant du trafic de marihuana. La plupart des arguments qui ont été soumis à la Cour portent essentiellement sur la possession aux fins de consommation personnelle. À la lumière du dossier, il est virtuellement impossible de déterminer si la possession de marihuana en vue d'en faire le trafic cause davantage qu'un faible préjudice à autrui. Je suis consciente que les risques pour la santé qui résultent de la consommation de marihuana pourraient servir à démontrer que le trafiquant, dont les activités touchent des tiers, met la santé de ces personnes en danger et risque de causer davantage qu'un faible préjudice à d'autres personnes qu'à lui-même. Toutefois, cet argument évident ne peut pas être examiné adéquatement sans considérer d'autres facteurs qui n'ont pas été débattus par les parties, notamment la question du consentement (voir, par exemple, P. Alldridge, « Dealing with Drug Dealing », dans *Harm and Culpability*, *op. cit.*, p. 239). Toute conclusion sur cette question soulevée par l'appelant Malm-Levine ne serait que pure conjecture. À la lumière du dossier, je ne puis conclure que l'appelant s'est acquitté du fardeau de preuve qui lui incombait et, par conséquent, sa contestation constitutionnelle est rejetée.

(5) L'atteinte est-elle justifiée au regard de l'article premier de la Charte?

Dans l'arrêt *R. c. Mills*, [1999] 3 R.C.S. 668, la Cour a expliqué le lien qui existe entre l'art. 7 et l'article premier. S'exprimant au nom des juges majoritaires, les juges McLachlin et Iacobucci ont tiré les conclusions suivantes, aux par. 65-67 :

Il est également important d'établir une distinction entre l'évaluation des principes de justice fondamentale au sens de l'art. 7 et l'évaluation d'intérêts fondée sur l'article premier de la *Charte*. La jurisprudence de notre Cour relative à l'article premier est, à maints égards, fort semblable au processus d'évaluation prescrit par l'art. 7. . . .

Il y a cependant plusieurs différences importantes entre l'évaluation fondée sur l'article premier et celle qui est fondée sur l'art. 7. La différence la plus importante réside dans le fait que la question qui se pose en vertu de l'art. 7 est celle de la délimitation des droits en question

tion of these boundaries may be justified. The different role played by ss. 1 and 7 also has important implications regarding which party bears the burden of proof. If interests are balanced under s. 7 then it is the rights claimant who bears the burden of proving that the balance struck by the impugned legislation violates s. 7. If interests are balanced under s. 1 then it is the state that bears the burden of justifying the infringement of the *Charter* rights.

Because of these differences, the nature of the issues and interests to be balanced is not the same under the two sections. As Lamer J. (as he then was) stated in *Re B.C. Motor Vehicle Act*, *supra*, at p. 503: “the principles of fundamental justice are to be found in the basic tenets of our legal system”. In contrast, s. 1 is concerned with the values underlying a free and democratic society, which are broader in nature. In *R. v. Oakes*, [1986] 1 S.C.R. 103, Dickson C.J. stated, at p. 136, that these values and principles “embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society”. In *R. v. Keegstra*, [1990] 3 S.C.R. 697, at p. 737, Dickson C.J. described such values and principles as “numerous, covering the guarantees enumerated in the *Charter* and more”. [Emphasis added.]

In the cases before this Court, certain factors would be better evaluated in the analysis under s. 1, where the Crown will bear the burden of proving them, rather than under s. 7. As Rosenberg J.A. held in *Parker*, *supra*, the companion case of *Clay* at the Court of Appeal for Ontario, at para. 119:

Thus, the difference between the s. 1 and the s. 7 analysis is important not only because of the different interests to be considered but also because of the shift in the burden of proof. For example, the Crown argued that in considering whether the law struck the right balance between the accused’s interests and the interests of the state under s. 7, the court should consider Canada’s international treaty obligations. It may be, however, that such interests are more properly a matter for consideration under s. 1, in which case the Crown would bear the onus

tandis que la question qui se pose en vertu de l’article premier est de savoir si le non-respect de ces limites peut être justifié. Le rôle différent que jouent l’article premier et l’art. 7 a également des répercussions importantes sur l’identité de la partie à qui incombe le fardeau de la preuve. Si les intérêts sont évalués en vertu de l’art. 7, c’est la personne qui revendique des droits qui a le fardeau de prouver que l’équilibre établi par la mesure législative contestée viole l’art. 7. Si les intérêts sont évalués en vertu de l’article premier, il incombe alors à l’État de justifier l’atteinte aux droits garantis par la *Charte*.

À cause de ces différences, la nature des questions et des intérêts qui doivent être évalués n’est pas la même pour les deux articles. Comme le juge Lamer (maintenant Juge en chef) l’a dit dans le *Renvoi relatif à la Motor Vehicle Act de la C.-B.*, précité, à la p. 503, « les principes de justice fondamentale se trouvent dans les préceptes fondamentaux de notre système juridique ». Par contre, l’article premier touche les valeurs qui sous-tendent une société libre et démocratique, qui sont plus larges par nature. Dans l’arrêt *R. c. Oakes*, [1986] 1 R.C.S. 103, le juge en chef Dickson a affirmé, à la p. 136, que ces valeurs et ces principes « comprennent (. . .) le respect de la dignité inhérente de l’être humain, la promotion de la justice et de l’égalité sociales, l’acceptation d’une grande diversité de croyances, le respect de chaque culture et de chaque groupe et la foi dans les institutions sociales et politiques qui favorisent la participation des particuliers et des groupes dans la société ». Dans l’arrêt *R. c. Keegstra*, [1990] 3 R.C.S. 697, à la p. 737, le juge en chef Dickson a décrit ces valeurs et principes comme étant « nombreux, englobant les garanties énumérées dans la *Charte* et plus encore ». [Je souligne.]

Dans les présents pourvois, il est préférable d’évaluer certains facteurs dans l’analyse fondée sur l’article premier — étape à laquelle il incombe au ministère public d’en faire la preuve — plutôt que dans l’analyse fondée sur l’art. 7. Comme l’a dit le juge Rosenberg dans l’arrêt *Parker*, précité (dossier connexe de l’affaire *Clay* devant la Cour d’appel de l’Ontario, au par. 119) :

[TRADUCTION] En conséquence, la différence entre l’analyse fondée sur l’article premier et celle fondée sur l’art. 7 est importante non seulement en raison des intérêts distincts dont il faut tenir compte, mais aussi à cause de l’inversion du fardeau de la preuve. Par exemple, le ministère public a soutenu que, le tribunal appelé à décider si la mesure législative a établi l’équilibre requis par l’art. 7 entre les droits de l’accusé et ceux de l’État doit prendre en compte les obligations découlant de traités internationaux auxquels le Canada est partie. Il se peut

of demonstrating that the violation of s. 7 was necessary to uphold Canada's treaty obligations. See *R. v. Malmo-Levine*, 2000 BCCA 335, at para. 151, 145 C.C.C. (3d) 225.

Some balancing of societal interests has been done here under s. 7 in ascertaining the existence and the content of the harm principle as a principle of fundamental justice. In many instances, Canada's treaty obligations will be apposite to a s. 7 analysis. Indeed, in some cases an examination of international law will provide indispensable insight into the scope and content to be given to the "principles of fundamental justice" (*Motor Vehicle Reference*, *supra*, at p. 503; *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1, at para. 46; *United States v. Burns*, [2001] 1 S.C.R. 283, 2001 SCC 7, at paras. 79-81). This is not the case here, however. Given the nature of the harm principle, Canada's treaty obligations are not particularly helpful in demonstrating the existence or application of the principle as a principle of fundamental justice. Treaty obligations and international law generally may, of course, also be considered under s. 1 in the determination of whether a violation of s. 7 can be justified (*R. v. Oakes*, [1986] 1 S.C.R. 103, at pp. 140-41; *Mills*, *supra*, at paras. 65-67).

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However, while s. 7 violations may be saved by s. 1, this will occur rarely, as was explained by Lamer C.J. in *New Brunswick (Minister of Health and Community Services)*, *supra*, at para. 99:

Section 7 violations are not easily saved by s. 1. . . .

. . . .

This is so for two reasons. First, the rights protected by s. 7 — life, liberty, and security of the person — are very significant and cannot ordinarily be overridden by

toutefois qu'il soit préférable d'examiner ces droits au regard de l'article premier, auquel cas il incombe au ministère public de démontrer que la violation de l'art. 7 était nécessaire pour permettre au Canada de respecter ses obligations issues de traités. Voir *R. c. Malmo-Levine*, 2000 BCCA 335, par. 151, 145 C.C.C. (3d) 225.

En l'espèce, une certaine mise en balance des intérêts de la société a été faite, au cours de l'analyse fondée sur l'art. 7, pour décider si le principe du préjudice est un principe de justice fondamentale et, si oui, quel est son contenu. Dans bon nombre de cas, les obligations issues de traités du Canada sont pertinentes dans le cadre de l'analyse fondée sur l'art. 7. D'ailleurs, dans certaines affaires, l'examen du droit international fournit des indications indispensables sur la portée qui doit être reconnue aux « principes de justice fondamentale » (*Renvoi relatif à la Motor Vehicle Act*, précité, p. 503; *Suresh c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [2002] 1 R.C.S. 3, 2002 CSC 1, par. 46; *États-Unis c. Burns*, [2001] 1 R.C.S. 283, 2001 CSC 7, par. 79-81). Nous ne sommes toutefois pas en présence d'une telle affaire en l'espèce. Vu la nature du principe du préjudice, les obligations issues de traités du Canada ne sont pas particulièrement utiles pour établir l'existence ou l'application du principe de ce préjudice en tant que principe de justice fondamentale. Évidemment, ces obligations ainsi que le droit international en général peuvent néanmoins être également pris en compte dans l'analyse fondée sur l'article premier, pour décider si la violation de l'art. 7 peut être justifiée (*R. c. Oakes*, [1986] 1 R.C.S. 103, p. 140-141; *Mills*, précité, par. 65-67).

Toutefois, bien que certaines violations de l'art. 7 puissent être justifiables au regard de l'article premier, cela ne se produit que rarement, comme l'a expliqué le juge en chef Lamer dans l'arrêt *Nouveau-Brunswick (Ministre de la Santé et des Services communautaires)*, précité, par. 99 :

Il n'est pas facile de sauver une atteinte à l'art. 7 par application de l'article premier. . . .

. . . .

Deux raisons expliquent ceci. D'abord, les intérêts protégés par l'art. 7 — la vie, la liberté et la sécurité de la personne — revêtent une grande importance et

competing social interests. Second, rarely will a violation of the principles of fundamental justice, specifically the right to a fair hearing, be upheld as a reasonable limit demonstrably justified in a free and democratic society.

The general approach in international law is that a state may not invoke its internal law as justification for its failure to perform a treaty (*Vienna Convention on the Law of Treaties*, Can. T.S. 1980 No. 37, Art. 27; *Zingre v. The Queen*, [1981] 2 S.C.R. 392, at p. 410). However, the treaty obligations Canada has undertaken in the war on drugs are subject to, *inter alia*, Canada's "constitutional limitations" (*Single Convention on Narcotic Drugs, 1961*, Can. T.S. 1964 No. 30, Art. 36) and Canada's "constitutional principles and the basic concepts of its legal system" (*Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, Can. T.S. 1990 No. 42, Art. 3(2)). The express subordination of these treaties to the requirements of domestic constitutional law suggests that they would not significantly assist an attempt to justify the s. 7 violation in s. 1.

The respondent has not made any submissions regarding s. 1, and none of the courts below considered the issue. Given that the burden is on the Crown to establish that the infringement was justified under s. 1, I conclude that it has not met this burden.

III. Conclusion

A. *Malmo-Levine*

For the foregoing reasons, in the case of the appellant David Malmo-Levine, I would dismiss the appeal.

The constitutional questions in the *Malmo-Levine* appeal should be answered as follows:

1. Does prohibiting possession of Cannabis (marihuana) for the purpose of trafficking under s. 4(2) of the *Narcotic Control Act*, R.S.C. 1985, c. N-1,

généralement, des exigences sociales concurrentes ne pourront prendre le pas sur eux. Ensuite, le non-respect des principes de justice fondamentale — et, en particulier, du droit à une audience équitable — sera rarement reconnu comme une limite raisonnable dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

En droit international, on considère qu'un État ne peut invoquer les dispositions de son droit interne pour justifier la non-exécution des obligations prévues par un traité (*Convention de Vienne sur le droit des traités*, R.T. Can. 1980 n° 37, art. 27; *Zingre c. La Reine*, [1981] 2 R.C.S. 392, p. 410). Toutefois, l'exécution par le Canada de ses obligations issues de traités en matière de lutte contre la drogue est subordonnée, entre autres choses, au respect de ses « dispositions constitutionnelles » (*Convention unique sur les stupéfiants de 1961*, R.T. Can. 1964 n° 30, art. 36) et « de ses principes constitutionnels et des concepts fondamentaux de son système juridique » (*Convention contre le trafic illicite de stupéfiants et de substances psychotropes*, R.T. Can. 1990 n° 42, par. 3(2)). La subordination expresse de ces traités aux exigences du droit constitutionnel interne tend à indiquer que les premiers ne seraient pas très utiles pour tenter de justifier, à l'étape de l'article premier, la violation d'un droit garanti par l'art. 7.

L'intimée n'a pas présenté d'observations au sujet de l'article premier et aucune des juridictions inférieures n'a examiné cette question. Comme il incombait au ministère public d'établir que l'atteinte est justifiée au regard de l'article premier, j'estime qu'il ne s'est pas acquitté de ce fardeau.

III. Conclusion

A. *Malmo-Levine*

Pour les motifs qui précèdent, dans le cas de l'appelant David Malmo-Levine, je rejetterais le pourvoi.

Je répondrais de la manière suivante aux questions constitutionnelles soulevées dans le pourvoi *Malmo-Levine* :

1. Est-ce que l'interdiction d'avoir en sa possession du Cannabis (marihuana) en vue d'en faire le trafic que prévoit le par. 4(2) de la *Loi sur les stupéfiants*,

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by reason of the inclusion of this substance in s. 3 of the Schedule to the Act (now s. 1, Schedule II, *Controlled Drugs and Substances Act*, S.C. 1996, c. 19), infringe s. 7 of the *Canadian Charter of Rights and Freedoms*?

Answer: No.

2. If the answer to Question 1 is in the affirmative, is the infringement justified under s. 1 of the *Charter*?

Answer: It is unnecessary to answer this question.

3. Does prohibiting possession of Cannabis (marihuana) for the purpose of trafficking under s. 4(2) of the *Narcotic Control Act*, R.S.C. 1985, c. N-1, by reason of the inclusion of this substance in s. 3 of the Schedule to the Act (now s. 1, Schedule II, *Controlled Drugs and Substances Act*, S.C. 1996, c. 19), infringe s. 15(1) of the *Charter* by discriminating against a certain group of persons on the basis of their substance orientation, occupation orientation, or both?

Answer: No.

4. If the answer to Question 3 is in the affirmative, is the infringement justified under s. 1 of the *Charter*?

Answer: It is unnecessary to answer this question.

B. *Caine*

275 In the case of the appellant Victor Eugene Caine, I would allow the appeal and set aside the conviction for simple possession.

276 The constitutional questions in the *Caine* appeal should be answered as follows:

1. Does prohibiting possession of Cannabis (marihuana) for personal use under s. 3(1) of the *Narcotic Control Act*, R.S.C. 1985, c. N-1, by reason of the inclusion of this substance in s. 3 of the Schedule to the Act (now s. 1, Schedule II, *Controlled Drugs and*

L.R.C. 1985, ch. N-1, du fait de la mention de cette substance à l'art. 3 de l'annexe de cette loi (maintenant l'art. 1 de l'annexe II de la *Loi réglementant certaines drogues et autres substances*, L.C. 1996, ch. 19), porte atteinte à l'art. 7 de la *Charte canadienne des droits et libertés*?

Réponse : Non.

2. Si la réponse à la question 1 est affirmative, l'atteinte est-elle justifiée au regard de l'article premier de la *Charte*?

Réponse : Il n'est pas nécessaire de répondre à cette question.

3. Est-ce que l'interdiction d'avoir en sa possession du Cannabis (marihuana) en vue d'en faire le trafic que prévoit le par. 4(2) de la *Loi sur les stupéfiants*, L.R.C. 1985, ch. N-1, du fait de la mention de cette substance à l'art. 3 de l'annexe de cette loi (maintenant l'art. 1 de l'annexe II de la *Loi réglementant certaines drogues et autres substances*, L.C. 1996, ch. 19), porte atteinte au par. 15(1) de la *Charte* en traitant un certain groupe de personnes de façon discriminatoire sur le fondement de leur orientation sous l'angle de la substance concernée, de leur orientation sous l'angle de leur occupation ou de leur orientation sous ces deux aspects?

Réponse : Non.

4. Si la réponse à la question 3 est affirmative, l'atteinte est-elle justifiée au regard de l'article premier de la *Charte*?

Réponse : Il n'est pas nécessaire de répondre à cette question.

B. *Caine*

Dans le cas de l'appelant Victor Eugene Caine, j'accueillerais le pourvoi et j'annulerais la déclaration de culpabilité pour simple possession.

Je répondrais de la manière suivante aux questions constitutionnelles soulevées dans le pourvoi *Caine* :

1. Est-ce que l'interdiction d'avoir en sa possession du Cannabis (marihuana) aux fins de consommation personnelle — interdiction prévue au par. 3(1) de la *Loi sur les stupéfiants*, L.R.C. 1985, ch. N-1, du fait de la mention de cette substance à l'art. 3 de

Substances Act, S.C. 1996, c. 19), infringe s. 7 of the *Canadian Charter of Rights and Freedoms*?

Answer: Yes.

2. If the answer to Question 1 is in the affirmative, is the infringement justified under s. 1 of the *Charter*?

Answer: No.

3. Is the prohibition on the possession of Cannabis (marihuana) for personal use under s. 3(1) of the *Narcotic Control Act*, R.S.C. 1985, c. N-1, by reason of the inclusion of this substance in s. 3 of the Schedule to the Act (now s. 1, Schedule II, *Controlled Drugs and Substances Act*, S.C. 1996, c. 19), within the legislative competence of the Parliament of Canada as being a law enacted for the peace, order and good government of Canada pursuant to s. 91 of the *Constitution Act, 1867*; as being enacted pursuant to the criminal law power in s. 91(27) thereof; or otherwise?

Answer: Yes.

The following are the reasons delivered by

LEBEL J. (dissenting in *Caine*) — I have had the opportunity of reading the joint reasons of Justices Gonthier and Binnie who would dismiss the appeal, and those of Justice Arbour who would allow it. With respect for the other view, I am in agreement with the disposition suggested by Arbour J. and I would answer the constitutional questions as she proposes. Nevertheless, I am not yet convinced that we should raise the harm principle to the level of a principle of fundamental justice within the meaning of s. 7 of the *Canadian Charter of Rights and Freedoms*. On this question, I share the skepticism of my colleagues Binnie and Gonthier JJ. I part company with them, however, at the point where they hold that the prohibition of simple possession of marihuana is not an arbitrary or irrational legislative response. On the evidence which is available to us and which was carefully reviewed by Arbour J., the law, as it stands, is indeed an arbitrary response

l'annexe de cette loi (maintenant l'art. 1 de l'annexe II de la *Loi réglementant certaines drogues et autres substances*, L.C. 1996, ch. 19) — porte atteinte à l'art. 7 de la *Charte canadienne des droits et libertés*?

Réponse : Oui.

2. Si la réponse à la question 1 est affirmative, l'atteinte est-elle justifiée au regard de l'article premier de la *Charte*?

Réponse : Non.

3. Est-ce que l'interdiction d'avoir en sa possession du Cannabis (marihuana) aux fins de consommation personnelle — interdiction prévue au par. 3(1) de la *Loi sur les stupéfiants*, L.R.C. 1985, ch. N-1, du fait de la mention de cette substance à l'art. 3 de l'annexe de cette loi (maintenant l'art. 1 de l'annexe II de la *Loi réglementant certaines drogues et autres substances*, L.C. 1996, ch. 19) — relève de la compétence législative du Parlement du Canada en tant que règle de droit édictée soit en vertu de l'art. 91 de la *Loi constitutionnelle de 1867* pour assurer la paix, l'ordre et le bon gouvernement du Canada, soit en vertu du pouvoir de légiférer sur le droit criminel prévu au par. 91(27) de la *Loi constitutionnelle de 1867*, soit en vertu d'un autre pouvoir?

Réponse : Oui.

Version française des motifs rendus par

LE JUGE LEBEL (dissident dans *Caine*) — J'ai pris connaissance des motifs conjoints des juges Gonthier et Binnie, qui sont d'avis de rejeter le pourvoi, ainsi que des motifs de la juge Arbour, qui pour sa part l'accueillerait. Avec égards pour l'avis contraire, je souscris au dispositif que propose la juge Arbour de même qu'aux réponses qu'elle donne aux questions constitutionnelles. Néanmoins, je ne suis pas convaincu que nous devrions élever le principe du préjudice au rang des principes de justice fondamentale visés à l'art. 7 de la *Charte canadienne des droits et libertés*. Sur ce point, je partage le scepticisme de mes collègues les juges Binnie et Gonthier. Je ne peux toutefois me ranger à leur conclusion selon laquelle l'interdiction visant la simple possession de marihuana ne constitue pas une réponse législative arbitraire ou irrationnelle. À la lumière de la preuve dont nous disposons et qu'a soigneusement examinée la juge Arbour, dans

to social problems. The Crown has failed to properly delineate the societal concerns and individual rights at stake, more particularly the liberty interest involved in this appeal.

278 The process of delineation of rights under s. 7 unavoidably involves balancing competing rights and interests (*R. v. Mills*, [1999] 3 S.C.R. 668, at paras. 65-66). In this respect, concerns about the harm done to society or some of its members or even to the accused themselves must be weighed together with the consequences which flow from the criminalization of simple possession. A balancing of this nature must occur when it is asserted that the liberty interest of the accused has been infringed in a way that is inconsistent with the tenets of fundamental justice under s. 7 of the *Charter*. Such an analysis is not as narrowly focussed as a review of a punishment under s. 12 of the *Charter* where courts must determine whether a specific penalty should be considered as cruel and unusual because of its grossly disproportionate nature.

279 In the course of a s. 7 analysis, the inquiry of the Court is more subtle, broader, and more difficult. Although the availability of imprisonment triggers the inquiry into the applicability of s. 7, the investigation must move beyond the sole question of the penalty and the courts must take into account all relevant factors viewed as a whole, in order to determine whether a breach of fundamental rights has been made out. It is made out if and when the response to a societal problem may overreach in such a way as to taint the particular legislative response with arbitrariness. (See for example, *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1, at para. 47; *Godbout v. Longueuil (City)*, [1997] 3 S.C.R. 844, at para. 76; *R. v. Seaboyer*, [1991] 2 S.C.R. 577, at pp. 621 and 625.)

280 On the evidence which is available in this appeal, such a legislative overreach happened. I do not need to engage in any additional review of this evidence, given that it was carefully reviewed and discussed by my colleagues. I will not even attempt to

sa forme actuelle la loi apporte effectivement une solution arbitraire à certains problèmes sociaux. Le ministère public n'a pas été en mesure de bien définir les préoccupations sociales et les droits individuels qui sont en jeu, plus particulièrement le droit à la liberté que soulève le présent pourvoi.

Pour définir correctement les droits garantis par l'art. 7, il faut inmanquablement mettre en balance des droits et intérêts opposés (*R. c. Mills*, [1999] 3 R.C.S. 668, par. 65-66). À cet égard, on doit soupeser les craintes concernant le préjudice causé à la société ou à certains de ses membres, voire à l'accusé lui-même, et les conséquences de la criminalisation de la simple possession de marihuana. Une telle mise en balance s'impose lorsque l'accusé prétend qu'on a porté atteinte à son droit à la liberté d'une manière incompatible avec les préceptes de la justice fondamentale visés à l'art. 7 de la *Charte*. Cette analyse n'est pas aussi étroitement circonscrite que l'examen d'une sanction au regard de l'art. 12 de la *Charte*, où le tribunal doit se demander si la peine en question possède un caractère exagérément disproportionné et si elle doit, de ce fait, être tenue pour cruelle et inusitée.

Dans l'analyse fondée sur l'art. 7, l'examen auquel doit se livrer le tribunal est plus subtil, il a une portée plus large, et il est aussi plus ardu. Bien que l'applicabilité de l'art. 7 découle de la possibilité d'emprisonnement, le tribunal ne doit pas limiter son examen à la seule question de la peine, mais il lui faut aussi tenir compte de tous les facteurs pertinents, considérés globalement, pour décider si une atteinte à un droit fondamental a été établie. Il y a atteinte lorsque la mesure législative édictée pour répondre à un problème social peut avoir une portée à ce point excessive qu'elle en devient arbitraire. (Voir, par exemple, *Suresh c. Canada (Ministre de la Citoyenneté et de l'Immigration)*, [2002] 1 R.C.S. 3, 2002 CSC 1, par. 47; *Godbout c. Longueuil (Ville)*, [1997] 3 R.C.S. 844, par. 76; *R. c. Seaboyer*, [1991] 2 R.C.S. 577, p. 621 et 625.)

À la lumière de la preuve dont nous disposons dans le présent pourvoi, la mesure législative en cause présente une portée excessive. Il n'est pas nécessaire que je procède à un examen supplémentaire de cette preuve, que mes collègues ont déjà

summarize it again. In my mind, it cannot be denied that marihuana can cause problems of varying nature and severity to some people or to groups of them. Nevertheless, the harm its consumption may cause seems rather mild on the evidence we have. In contrast, the harm and the problems connected with the form of criminalization chosen by Parliament seem plain and important. Few people appear to be jailed for simple possession but the law remains on the books. The reluctance to enforce it to the extent of actually jailing people for the offence of simple possession seems consistent with the perception that the law, as it stands, amounts to some sort of legislative overreach to the apprehended problems associated with marihuana consumption. Moreover, besides the availability of jail as a punishment, the enforcement of the law has tarred hundreds of thousands of Canadians with the stigma of a criminal record. They have had to bear the burden of the consequences of such criminal records as Arbour J. points out. The fundamental liberty interest has been infringed by the adoption and implementation of a legislative response which is disproportionate to the societal problems at issue. It is thus arbitrary and in breach of s. 7 of the *Charter*. For these reasons, I agree with Arbour J. that fundamental rights are at stake, that they were breached, and that this Court must intervene as part of its duty under the Constitution to uphold the fundamental principles of our constitutional order.

soigneusement examinée et analysée. Je ne tenterai même pas de la résumer à nouveau. À mon avis, il est indéniable que la marihuana peut causer à certaines personnes ou à certains groupes des problèmes de nature et de gravité variables. Néanmoins, compte tenu de la preuve qui nous a été présentée, le préjudice susceptible d'être causé par la consommation de cette substance paraît assez peu important. À l'opposé, le préjudice et les problèmes associés à la forme de criminalisation retenue par le législateur paraissent clairs et importants. Il semble que peu de gens soient emprisonnés pour simple possession de marihuana, mais il n'en reste pas moins que la loi continue de prévoir cette possibilité. La réticence des tribunaux à infliger cette peine et à emprisonner effectivement une personne déclarée coupable de simple possession semble confirmer la perception selon laquelle la loi, dans sa forme actuelle, constitue en quelque sorte une réaction législative démesurée aux problèmes que fait craindre la consommation de marihuana. Non seulement la loi permet-elle l'emprisonnement, mais son application signifie que des centaines de milliers de Canadiens sont aux prises avec les stigmates qu'entraînent des antécédents judiciaires et doivent, comme le signale la juge Arbour, supporter les conséquences de l'existence d'un casier judiciaire. L'adoption et l'application d'une mesure législative qui est disproportionnée aux problèmes sociétaux visés ont porté atteinte au droit fondamental à la liberté. Cette mesure est en conséquence arbitraire et contrevient à l'art. 7 de la *Charte*. Pour ces motifs, j'estime, à l'instar de la juge Arbour, que des droits fondamentaux sont en jeu, que ces droits ont été violés et que notre Cour doit intervenir dans le cadre de l'obligation qui lui incombe, en vertu de la Constitution, de faire respecter les principes fondamentaux de notre ordre constitutionnel.

English version of the reasons delivered by

DESCHAMPS J. (dissenting in *Caine*) — The appellants contest Parliament's power to prohibit the simple possession of marihuana. Their challenge is based on two grounds: the division of powers and the *Canadian Charter of Rights and Freedoms*.

Les motifs suivants ont été rendus par

LA JUGE DESCHAMPS (dissidente dans *Caine*) — Les appelants contestent le pouvoir du Parlement de prohiber la simple possession de marihuana. Leur contestation comporte deux volets : le partage des pouvoirs et la *Charte canadienne des droits et libertés*.

282 Like my colleagues, I conclude that, in Canada, the prohibition of the possession of drugs lies within federal jurisdiction. At issue here is Parliament's power to prohibit certain conduct by imposing a sanction of imprisonment, whether pursuant to its jurisdiction over peace, order and good government or under its criminal law power. As the exercise for determining the proper division of powers depends more upon a categorization of the nature of the enactment than on the enactment's legality, which is the focus of a *Charter* challenge, I find that Parliament may validly exercise its coercive power by invoking a ground falling within its criminal law jurisdiction, namely health.

283 There remains the question of conformity with the *Charter*. Four main arguments are raised: Parliament may not use its coercive power to limit an individual's personal freedom to use marihuana; the purpose of the original statute (*The Opium and Narcotic Drug Act, 1923*, S.C. 1923, c. 22) has shifted over time; the prohibition is unconstitutional because marihuana does not harm anyone other than its users; and the prohibition is disproportionate and arbitrary.

284 I agree with the majority of this Court on the arguments relating to the protection of lifestyle and the shifting purpose of the Act. I will limit my comments to the arguments concerning the "harm principle" and the arbitrary nature of the legislation. The latter argument leads me to conclude that the inclusion of cannabis in the schedule to the *Narcotic Control Act*, R.S.C. 1985, c. N-1 (rep. S.C. 1996, c. 19, s. 94), infringes the appellants' right to liberty.

I. The "Harm Principle"

285 The "harm principle", as defined by John Stuart Mill, is cited and interpreted in both the majority opinion and the opinion of Arbour J. I agree with the conclusion of the majority in that I am of the opinion that the "harm principle" is not a principle of fundamental justice *per se*, but I believe it would be useful

Comme mes collègues, je conclus que la prohibition de la possession de drogues au Canada relève de la compétence du législateur fédéral. Que ce soit en vertu de son pouvoir de légiférer pour assurer la paix, l'ordre et le bon gouvernement ou de sa compétence en matière de droit criminel, ce qui est en jeu ici, c'est le pouvoir d'intervention du Parlement pour prohiber une conduite et la sanctionner par l'emprisonnement. Comme l'exercice requis pour déterminer si le partage des pouvoirs est respecté relève davantage de la catégorisation de la nature de la loi que de l'évaluation de sa légalité, comme c'est le cas pour l'application de la *Charte*, je constate que le Parlement fédéral peut avoir recours à son pouvoir de contrainte puisqu'il peut invoquer une matière qui relève de sa compétence sur le droit criminel, soit la santé.

Reste la question de la conformité à la *Charte*. Quatre arguments principaux sont plaidés : le Parlement ne peut utiliser son pouvoir de contrainte pour violer le choix personnel de faire usage de marihuana; l'objet de la loi originale (*Loi de l'opium et des drogues narcotiques, 1923*, S.C. 1923, ch. 22) ne peut plus être légitimement invoqué; la prohibition est inconstitutionnelle parce que la marihuana ne causerait de dommage qu'aux usagers eux-mêmes; la prohibition est disproportionnée et arbitraire.

Je me rallie à mes collègues de la majorité quant aux arguments ayant trait à la protection du mode de vie et à la modification de l'objet original de la Loi. Je limiterai mes commentaires aux arguments concernant le « principe du préjudice » et le caractère arbitraire de la Loi. Je retiens le dernier argument pour conclure que l'inclusion du cannabis dans l'annexe de la *Loi sur les stupéfiants*, L.R.C. 1985, ch. N-1 (abr. L.C. 1996, ch. 19, art. 94), porte atteinte au droit à la liberté des appelants.

I. Le « principe du préjudice »

Le « principe du préjudice », défini par John Stuart Mill, est cité et interprété tant dans l'opinion de la majorité que dans celle de la juge Arbour. Je souscris à la conclusion de mes collègues de la majorité, en ce que je ne suis pas d'avis que le « principe du préjudice » est un principe de justice

to focus on one aspect of their reasoning and even elaborate upon it.

A vision of the criminal law based on Mill's work, attractive though it may be, leaves the state no room to intervene in order to safeguard the moral values that are fundamental to a free and democratic society: see *R. v. Butler*, [1992] 1 S.C.R. 452, at p. 493. Mill's restrictive position does not fit well with the Canadian reality, in which it is accepted that social morality and criminal law are inextricably linked. Many prohibitions cannot be rationalized under the "harm principle", as emphasized in para. 118 of the majority opinion. Moreover, the state's intervention in punishing a crime is generally the expression of a popular consensus condemning socially reprehensible conduct, such as murder or sexual assault. Thus, reprehension for such conduct must generally be accompanied by the requirement that the individual understand that the conduct is blameworthy, in other words, that the individual have a guilty mind (*mens rea*): see in this regard H. L. Packer, *The Limits of the Criminal Sanction* (1968), at p. 262; V. V. Ramraj, "Freedom of the Person and the Principles of Criminal Fault" (2002), 18 *S. Afr. J. Hum. Rts.* 225. To be sure, morality alone cannot be the sole justification for the state's exercise of its criminal law power. Still, social morality remains an integral part of the justificatory framework for allowing the state to use this power, and its categorical exclusion under the "harm principle" demonstrates the limitations of this concept.

Moreover, I believe that restricting criminal law to situations in which harm is caused to others would minimize the role of the state as protector of society. Indeed, the fundamental purpose of criminal justice is the protection of society: see *Report of the Canadian Committee on Corrections — Toward Unity: Criminal Justice and Corrections* (the Ouimet Report) (1969), at p. 11. The "harm principle" can prove difficult to apply, for example, when the victim is not easily identifiable, as in the case of certain crimes against society as a whole. Mill was himself ambiguous on this point. The state's use of dissuasive sanctions can also help to eliminate

fondamentale en soi, mais je crois utile de préciser un élément du raisonnement et même d'y ajouter.

Si attrayante que soit la vision du droit criminel qui se dégage de l'ouvrage de Mill, elle ne laisse pas place à l'intervention de l'État pour garantir le respect de certaines valeurs morales de notre société qui demeurent fondamentales à la réalisation d'une société libre et démocratique : voir *R. c. Butler*, [1992] 1 R.C.S. 452, p. 493. La position restrictive de Mill colle donc mal à la réalité canadienne où il est acquis que la moralité sociale est inextricablement liée au droit criminel. Ainsi, maintes prohibitions ne peuvent être rationalisées par le « principe du préjudice », comme la majorité le souligne au par. 118. De plus, l'intervention de l'État pour sanctionner un crime traduit généralement un consensus populaire concernant une conduite socialement répréhensible, tel le meurtre ou l'agression sexuelle. À cet égard, la réprobation d'une conduite implique généralement l'exigence que la personne comprenne que sa conduite est répréhensible, autrement dit qu'elle ait une intention coupable (*mens rea*) : voir à ce sujet H. L. Packer, *The Limits of the Criminal Sanction* (1968), p. 262; V. V. Ramraj, « Freedom of the Person and the Principles of Criminal Fault » (2002), 18 *S. Afr. J. Hum. Rts.* 225. Certes, la morale ne peut, à elle seule, justifier le recours de l'État au droit criminel. Il reste que la moralité sociale fait partie intégrante du cadre justificatif permettant à l'État de recourir au droit criminel et que son exclusion catégorique du « principe du préjudice » met en relief l'insuffisance du concept.

Par ailleurs, j'estime que la restriction du droit criminel aux situations où un dommage est causé à autrui minimise le rôle de l'État comme protecteur de la société. En effet, le principe de base de la justice criminelle est de protéger la société : voir à ce sujet le *Rapport du Comité canadien de la réforme pénale et correctionnelle — Justice pénale et correction : un lien à forger* (Rapport Ouimet) (1969), p. 11. Le « principe du préjudice » peut s'avérer difficile d'application, par exemple, lorsque la victime ne peut être identifiée facilement, comme dans certains crimes commis contre la société dans son ensemble. Mill est lui-même ambigu à cet effet. Le

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conduct where the resulting harm may be difficult to evaluate or prove, such as corruption, in certain cases.

288 The criminal law thus finds its justification in the protection of society, both as a whole and in its individual components. While there can be no doubt that the state is justified in using its criminal law tools to prevent harm to others, this principle is too narrow to encompass all the elements that may place limits on the state's exercise of the criminal law. It cannot validly be characterized as a principle of fundamental justice.

II. Arbitrary Nature of the Inclusion of Marihuana in the Schedule to the *Narcotic Control Act*

289 The criminal law is one of the most aggressive weapons the state has to enforce its dictates. This weapon must be wielded with great care. The courts must intervene when an enactment violates constitutional guarantees. More specifically, and without repeating the detailed comments of my colleagues, the courts must act when the right to liberty is infringed without regard for the principles of fundamental justice. In the present case, I believe Parliament has exercised its power arbitrarily.

290 When the state prohibits socially neutral conduct, that is, conduct that causes no harm, that is not immoral and upon which there is no societal consensus as to its blameworthiness, it cannot do so without raising a problem of legitimacy and, consequently, losing credibility. Citizens become inclined not to take the criminal justice system seriously and lose confidence in the administration of justice. Judges become reluctant to impose the sanctions attached to such laws.

291 Recognizing this chain reaction allows one to grasp the importance of the principle of fundamental justice which holds that for the state to be able to justify limiting an individual's liberty, the legislation upon which it bases its actions must not be arbitrary: see, e.g., *R. v. Arkel*, [1990] 2 S.C.R. 695, at p. 704; *Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519, at pp. 619-20 (*per*

recours de l'État à des sanctions dissuasives peut aussi contribuer à l'élimination de conduites dans les cas où il pourrait s'avérer difficile d'évaluer et de prouver le dommage, par exemple dans certaines affaires de corruption.

Le droit criminel trouve donc sa justification dans la protection de la société, vue tant dans son ensemble que dans ses composantes. En ce sens, s'il est certain que l'État est justifié d'intervenir en utilisant les outils du droit criminel pour prévenir le dommage à autrui, ce principe est trop étroit pour réunir tous les éléments qui peuvent limiter l'action de l'État en droit criminel. Il ne peut valablement être qualifié de principe de justice fondamentale.

II. Le caractère arbitraire de l'inclusion de la marihuana dans l'annexe de la *Loi sur les stupéfiants*

Le droit criminel est une des armes les plus puissantes dont l'État dispose pour faire respecter ses prescriptions. Cette arme doit être utilisée avec discernement. Les tribunaux doivent intervenir lorsque la loi viole les garanties constitutionnelles, en particulier, et je ne reviendrai pas sur les énoncés détaillés de mes collègues, lorsque le droit à la liberté est enfreint sans égards pour les principes de justice fondamentale. En l'espèce, j'estime que l'exercice législatif est arbitraire.

Lorsque l'État prohibe une conduite socialement neutre, c'est-à-dire une conduite qui ne cause pas de préjudice, qui n'est pas immorale et pour laquelle il n'y a pas de consensus social concernant la réprobation, il ne peut que faire face à un problème de légitimité et, par conséquent, de perte de crédibilité. Les citoyens sont enclins à banaliser le système de justice criminelle et perdent confiance dans l'administration de la justice. Les juges hésitent à imposer les sanctions prévues par ces lois.

La prise de conscience de ces réactions en chaîne permet de saisir toute l'importance du principe de justice fondamentale qui veut qu'avant de pouvoir justifier la limitation de la liberté d'un individu, l'État doit se fonder sur une loi qui n'est pas arbitraire : voir, par exemple, *R. c. Arkel*, [1990] 2 R.C.S. 695, p. 704; *Rodriguez c. Colombie-Britannique (Procureur général)*, [1993]

McLachlin J. (as she then was) dissenting); *R. v. Heywood*, [1994] 3 S.C.R. 761, at p. 793. There are several basic tenets of criminal law that can be used to measure the arbitrariness of a prohibition. I shall rely on three of these principles here: the need for the state to protect society from harm, the availability of tools other than criminal law that could adequately control the conduct and the proportionality of the measure to the problem in question. In emphasizing these three rules, I do not mean to suggest that others could not be used to determine if an enactment is arbitrary, nor that these three rules must always be met in a given case. They do, however, serve to delineate the legitimate scope of criminal law. These rules are not new. They were referred to over 35 years ago by the Canadian Committee on Corrections (Ouimet Report, *supra*, at p. 12) in the chapter dealing with the basic principles and goals of criminal justice. I realize that such working groups usually attempt to describe the law as it should be, in a normative sense, but in this chapter, the Committee took care to outline the foundations specific to our criminal law. Those factors are still relevant today.

Is the inclusion of marihuana in the schedule to the *Narcotic Control Act* arbitrary?

As mentioned by the majority, the reasons for adding marihuana to the schedule to the *Narcotic Control Act* are nebulous, at best. The historical background outlined by the trial judge in the case of the appellant Caine clearly shows that Parliament's decision was made at a time when a climate of irrational fear predominated, owing to a campaign led by Edmonton magistrate Emily Murphy, who claimed that marihuana caused users to lose their minds, along with all sense of moral responsibility, becoming maniacs capable of murder and many other acts of cruelty.

Fortunately, the consequences of marihuana use are nothing like those described at that time. Although I do not accept the "harm principle" as an

3 R.C.S. 519, p. 619-620 (motifs dissidents de la juge McLachlin (maintenant Juge en chef)); *R. c. Heywood*, [1994] 3 R.C.S. 761, p. 793. Plusieurs règles de base du droit criminel peuvent être utilisées pour mesurer le caractère arbitraire d'une prohibition. J'aurai ici recours à trois de ces règles, soit le besoin de l'État de protéger la société contre un préjudice, la possibilité pour l'État d'avoir recours à d'autres outils que le droit criminel pour réprimer adéquatement une conduite et la proportionnalité de la mesure par rapport au problème à enrayer. Le choix de ces trois règles ne signifie pas qu'on ne peut en utiliser d'autres pour statuer sur le caractère arbitraire d'une loi, ni qu'elles doivent toujours toutes trois être respectées dans un cas donné. Elles circonscrivent cependant le champ d'application légitime du droit criminel. Ces règles ne sont pas nouvelles. Elles ont déjà été mentionnées il y a plus de 35 ans par le Comité canadien de la réforme pénale et correctionnelle (Rapport Ouimet, *op. cit.*, p. 12) au chapitre traitant des principes de base et des buts de la justice criminelle. Je conçois qu'un tel groupe de travail cherche habituellement à décrire ce que la loi devrait être, au sens normatif, mais, dans ce chapitre, le Comité s'attardait à retracer les fondements propres à notre droit criminel. Ces facteurs sont toujours d'actualité.

Qu'en est-il de l'inclusion de la marihuana dans l'annexe de la *Loi sur les stupéfiants*?

Comme le mentionne la majorité, les motifs justifiant l'ajout de la marihuana dans l'annexe de la *Loi sur les stupéfiants* sont des plus nébuleux. Il ressort certainement de l'historique fait par le juge de première instance dans le dossier de l'appelant Caine que la décision du gouvernement a été prise à une époque où régnait un climat de crainte irrationnelle engendrée par une campagne menée par une magistrate d'Edmonton, Emily Murphy, qui prétendait que la marihuana faisait perdre la raison, et donc tout sens de responsabilité morale, et que ses adeptes devenaient des maniaques capables de tuer ou d'infliger toutes sortes de traitements cruels.

Les conséquences de l'usage de la marihuana sont, heureusement, totalement étrangères à ce qui a pu alors être décrit. Même si je ne reconnais pas

independent principle, I believe that the need for the state to protect society from harm plays an active role in any assessment of the arbitrariness of legislation. As a general rule, the state is justified in using the coercive tools of criminal law in cases where an individual willfully causes harm.

295 Although I do not adopt the approach of my colleague Arbour J., who would limit the sanction of imprisonment to cases where harm is done to others, I agree with her description of the consequences of marihuana use. The inherent risks of marihuana use, apart from those related to the operation of vehicles and the impact on public health care and social assistance systems, affect only the users themselves. These risks can be situated on a spectrum, ranging from no risk for occasional users to more significant risks for frequent users and vulnerable groups. On the whole, with a few exceptions, moderate use of marihuana is harmless. Thus, it seems doubtful that it is appropriate to classify marihuana consumption as conduct giving rise to a legitimate use of the criminal law in light of the *Charter*.

296 An examination of the second criterion, that of the availability of more tailored methods than the criminal law for controlling conduct, is equally perplexing.

297 The criminal law is an indispensable tool, but only in very limited circumstances: when society needs to be protected from an offender, when punishment is required to deter an individual or society in general from committing offences and when corrective measures specific to this field of law are necessary (see s. 718 of the *Criminal Code*, R.S.C. 1985, c. C-46). The minimal harm caused by marihuana does not fit squarely within the categories of conduct usually kept in check by the criminal law.

298 I would refer back to the comments made by Arbour J. (at paras. 192 to 200) concerning the risks identified by the trial judges. Only three

le « principe du préjudice » comme principe autonome, j'estime que le besoin de l'État de protéger la société contre un dommage joue un rôle actif dans l'évaluation du caractère arbitraire de la législation. Ainsi, le fait qu'une personne cause volontairement un dommage constitue, règle générale, une justification pour l'État de recourir aux outils de contrainte du droit criminel.

Bien que je n'adopte pas l'approche de ma collègue la juge Arbour qui limite le droit d'imposer l'emprisonnement aux cas de dommages à autrui, je souscris à la description qu'elle fait des conséquences de l'usage de la marihuana. Les risques inhérents à l'usage de la marihuana, mis à part ceux liés à la conduite de véhicules et à l'impact sur les régimes publics de soins et d'aide, ne pèsent que sur les usagers eux-mêmes. Ces risques se situent sur une échelle qui va d'une absence de risque pour les usagers occasionnels à des risques plus significatifs pour les consommateurs fréquents ou pour les groupes vulnérables. Dans l'ensemble, sauf exceptions, l'usage modéré de la marihuana s'avère inoffensif. Pour cette raison, il y a lieu de douter de la pertinence de sa classification comme conduite donnant ouverture à un recours légitime au droit criminel sous le régime de la *Charte*.

L'étude du second critère, celui du choix du droit criminel pour réprimer une conduite alors que d'autres moyens plus adaptés sont disponibles, laisse tout aussi perplexé.

Le droit criminel s'avère une arme indispensable dans des circonstances très circonscrites : lorsque la société a besoin d'être protégée contre les délinquants, lorsqu'une punition est nécessaire pour créer un effet dissuasif sur un individu ou sur la société en général et lorsque les mesures correctrices propres à ce domaine du droit sont nécessaires (voir l'art. 718 du *Code criminel*, L.R.C. 1985, ch. C-46). Le peu de préjudice causé par la marihuana cadre mal avec les conduites habituellement réprimées par le droit criminel.

Je me reporte aux commentaires élaborés de la juge Arbour (au par. 192 à 200) au sujet des risques relevés par les juges de première instance.

groups are traditionally identified as requiring state intervention for their protection: young persons, pregnant women and certain people with medical conditions. This line of reasoning does not have to be pushed very far before it becomes obvious that criminal law is not society's preferred means of controlling the conduct of these groups. The use of imprisonment and all the other aspects of the criminal justice system, including the imposition of a criminal record, to suppress conduct that causes little harm to moderate users or to control high-risk groups for whom the effectiveness of deterrence or correction is highly dubious and seems to me out of keeping with Canadian society's standards of justice.

This brings me to the third factor, proportionality. The harmful effects of marihuana use have already been discussed and are highly debatable. The harm caused by its prohibition, however, is clear and significant. For the details, I refer back once again to the effects listed by Arbour J. (para. 200). A balancing of these two factors yields the result that the harm caused by prohibiting marihuana is fundamentally disproportionate to the problems created by its use that the state seeks to suppress.

While I am more comfortable using three criteria for evaluating constitutionality rather than just one, I nevertheless agree with LeBel J.'s analysis with regard to proportionality.

The harm caused by using the criminal law to punish the simple use of marihuana far outweighs the benefits that its prohibition can bring. LeBel J. notes that the fact that jail sentences are rarely imposed illustrates the perception of judges that imprisonment is not a sanction that befits the inherent dangers of using marihuana. In the case of the appellant Caine, Howard Prov. Ct. J. also observed that the prohibition had brought the law into disrepute in the eyes of over one million people. These are exactly the kinds of reactions that are indicative of the arbitrariness of the impugned provisions. As I have already mentioned, and as Howard Prov. Ct. J. observed, when the state prohibits socially neutral

Seulement trois groupes sont traditionnellement identifiés comme justifiant l'intervention de l'État dans son rôle de protecteur : les jeunes, les femmes enceintes et certains malades. Sans qu'il soit nécessaire de pousser le raisonnement très loin, il paraît évident que ce ne sont pas là des groupes pour lesquels la société privilégie le recours au droit criminel comme moyen de contrôle. Le recours à l'emprisonnement, et même à l'appareil criminel tout entier, y compris, entre autres, l'imposition de casiers judiciaires, pour réprimer une conduite qui ne cause que peu de dommages aux utilisateurs modérés ou pour encadrer des groupes à risque pour lesquels l'effet dissuasif ou correctif est plus que douteux ne me paraît pas à la hauteur des normes de justice de la société canadienne.

Cette réflexion m'amène à l'étude du troisième facteur, la proportionnalité. Les effets préjudiciables de l'usage de la marihuana ont déjà été discutés, et sont très discutables. Ceux causés par la prohibition sont toutefois certains et importants. Pour les détails, je me reporte à nouveau à l'énumération de la juge Arbour (par. 200). Il ressort de la comparaison de ces deux données que les effets préjudiciables de la prohibition sont foncièrement disproportionnés par rapport au problème créé par l'usage que l'État cherche à enrayer.

Quoique je préfère évaluer la conformité constitutionnelle d'après trois critères plutôt qu'un seul, je me rallie par ailleurs à l'analyse du juge LeBel au sujet de la proportionnalité.

Les effets préjudiciables du recours au droit criminel pour sanctionner le simple usage de la marihuana dépassent de loin les bienfaits de la prohibition. Le juge LeBel note d'ailleurs que le fait que la peine d'emprisonnement ne soit pas fréquemment imposée illustre la réaction des juges : l'emprisonnement n'est pas une sanction compatible avec les dangers inhérents à l'usage de la marihuana. La juge Howard de la Cour provinciale, dans le dossier de l'appelant Caine, constate aussi que la prohibition a eu pour effet de discréditer la loi chez plus d'un million de personnes. Ce sont justement ces réactions qui dénotent le caractère arbitraire de la loi. Comme je l'ai déjà mentionné, lorsque l'État prohibe une

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conduct, it exposes itself to the risk of eroding its credibility.

302 Canadian society is changing. Its knowledge base is growing, and its morals are evolving. Even if it was once the case, and in my view it never was, the prohibition against cannabis is no longer defensible. My analysis leads me to conclude that the little harm caused by marihuana casts doubt on the appropriateness of state intervention in this case. When I weigh the prohibition against, first, other available methods for countering the harm that marihuana use presents and, second, the problems caused by marihuana use, I must conclude that the legislation is inconsistent with the constitutional guarantee in s. 7 of the *Charter*.

303 The respondent did not attempt to justify the prohibition under s. 1 of the *Charter*. It has therefore not satisfied its burden.

304 For these reasons, I agree with the disposition proposed by Arbour J.

APPENDIX

Extracts from a document entitled *Cannabis: a health perspective and research agenda*, Division of Mental Health and Prevention of Substance Abuse, World Health Organization (1997), at pp. 30-31:

Chronic health effects of cannabis use

The chronic use of cannabis produces additional health hazards including:

- selective impairments of cognitive functioning which include the organization and integration of complex information involving various mechanisms of attention and memory processes;
- prolonged use may lead to greater impairment, which may not recover with cessation of use, and which could affect daily life functions;

conduite socialement neutre, il s'expose à ce que sa crédibilité soit érodée. C'est la constatation qu'a faite la juge Howard.

La société canadienne se transforme, ses connaissances s'accroissent et sa morale évolue. La prohibition du cannabis, si elle l'a un jour été, ce que je ne crois pas, n'est de toute évidence aujourd'hui plus de mise. Suite à mon analyse, je conclus que le peu de dommage causé par la marihuana fait douter de la pertinence de l'intervention de l'État en l'espèce. En outre, lorsque je jauge la prohibition par rapport, premièrement, aux autres moyens disponibles pour circonscrire le dommage que l'usage représente et, deuxièmement, aux problèmes qu'elle engendre, je ne peux que conclure que la loi n'est pas conforme à la garantie constitutionnelle de l'art. 7 de la *Charte*.

L'intimée n'a pas tenté de justifier la prohibition en vertu de l'article premier de la *Charte*. Elle ne s'est donc pas acquittée de son fardeau.

Pour ces motifs, je suis d'accord avec le dispositif proposé par la juge Arbour.

ANNEXE

Extraits du rapport intitulé *Cannabis : a health perspective and research agenda*, Division de la santé mentale et de la prévention des toxicomanies, Organisation mondiale de la santé (1997), p. 30-31 :

[TRADUCTION]

Effets chroniques de la consommation de cannabis sur la santé

La consommation chronique de cannabis crée d'autres risques pour la santé, notamment les suivants :

- troubles sélectifs du fonctionnement cognitif, touchant notamment l'organisation et l'intégration d'informations complexes dans lesquels interviennent divers mécanismes d'attention et processus mnémoniques;
- une consommation prolongée peut entraîner des troubles plus importants, qui peuvent être irréversibles même si la personne cesse de consommer du cannabis et qui peuvent affecter les fonctions de la vie quotidienne;

- development of a cannabis dependence syndrome characterized by a loss of control over cannabis use is likely in chronic users;
- cannabis use can exacerbate schizophrenia in affected individuals;
- epithelial injury of the trachea and major bronchi is caused by long-term cannabis smoking;
- airway injury, lung inflammation, and impaired pulmonary defence against infection from persistent cannabis consumption over prolonged periods;
- heavy cannabis consumption is associated with a higher prevalence of symptoms of chronic bronchitis and a higher incidence of acute bronchitis than in the non-smoking cohort;
- cannabis use during pregnancy is associated with impairment in fetal development leading to a reduction in birth weight;
- cannabis use during pregnancy may lead to postnatal risk of rare forms of cancer although more research is needed in this area.
- les consommateurs chroniques risquent fort de développer un syndrome de dépendance qui se caractérise par l’incapacité de limiter leur consommation de cannabis;
- la consommation de cannabis peut aggraver la schizophrénie chez les personnes atteintes de cette maladie;
- le fait de fumer du cannabis pendant une très longue période cause des lésions épithéliales de la trachée et des bronches souches;
- la consommation soutenue de cannabis pendant des périodes prolongées peut provoquer des lésions des voies aériennes, des inflammations pulmonaires et l’affaiblissement des mécanismes pulmonaires de défense contre les infections;
- une forte consommation de cannabis est associée à une prévalence plus grande des symptômes de bronchite chronique et à une incidence plus élevée de la bronchite aiguë qu’au sein de la cohorte des non-consommateurs;
- la consommation de cannabis pendant la grossesse est associée à l’altération du développement du fœtus causant une réduction du poids à la naissance;
- la consommation de cannabis pendant la grossesse peut entraîner un risque postnatal de formes rares de cancer, quoique des recherches plus poussées soient requises dans ce domaine.

The health consequences of cannabis use in developing countries are largely unknown because of limited and non-systematic research, but there is no reason *a priori* to expect that biological effects on individuals in these populations would be substantially different to what has been observed in developed countries. However, other consequences might be different given the cultural and social differences between countries.

Therapeutic uses of cannabinoids

Several studies have demonstrated the therapeutic effects of cannabinoids for nausea and vomiting in the advanced stages of illnesses such as cancer and AIDS. Dronabinol (tetrahydrocannabinol) has been available by prescription for more than a decade in the USA. Other therapeutic uses of cannabinoids are being demonstrated by controlled studies, including treatment of asthma and glaucoma, as an antidepressant, appetite stimulant, anticonvulsant and anti-spasmodic, research in this area should continue. For example, more basic research on the central and peripheral mechanisms of the effects of

Dans les pays en développement, les conséquences de l’usage du cannabis pour la santé sont largement inconnues car la recherche sur le sujet est limitée et non systématique. Cependant, *a priori*, il n’y a aucune raison de s’attendre à ce que les effets biologiques sur ces populations soient sensiblement différents de ceux observés dans les pays développés. En revanche, d’autres conséquences pourraient être différentes compte tenu des particularités culturelles et sociales des pays.

Usage thérapeutique des cannabinoïdes

Plusieurs études ont montré les effets thérapeutiques des cannabinoïdes chez les personnes souffrant de nausées et de vomissements à des stades avancés de maladies comme le cancer ou le sida. Aux États-Unis, le dronabinol (tétrahydrocannabinol) est délivré sur ordonnance depuis plus de dix ans. Des études contrôlées révèlent que les cannabinoïdes peuvent être utilisés à d’autres fins thérapeutiques, entre autres pour le traitement de l’asthme et du glaucome ainsi que comme antidépresseurs, stimulants de l’appétit, anticonvulsivants et antispasmodiques. Il y a donc lieu de poursuivre les recherches dans

cannabinoids on gastrointestinal function may improve the ability to alleviate nausea and emesis. More research is needed on the basic neuropharmacology of THC and other cannabinoids so that better therapeutic agents can be found.

Appeal in Malmo-Levine dismissed.

Appeal in Caine dismissed, ARBOUR, LeBEL and DESCHAMPS JJ. dissenting.

Solicitors for the appellant Caine: Conroy & Company, Abbotsford.

Solicitor for the respondent: Attorney General of Canada, Vancouver.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitors for the intervener the British Columbia Civil Liberties Association: Arvay Finlay, Victoria.

Solicitors for the intervener the Canadian Civil Liberties Association: Paliare, Roland, Rosenberg, Rothstein, Toronto.

ce domaine. Par exemple, des recherches fondamentales plus poussées sur les mécanismes centraux et périphériques des effets des cannabinoïdes sur la fonction gastro-intestinale pourraient permettre de trouver de meilleurs moyens d'atténuer les nausées et les vomissements. Il faut aussi effectuer davantage de recherches sur la neuropharmacologie fondamentale du THC et des autres cannabinoïdes de manière à découvrir de meilleurs agents thérapeutiques.

Pourvoi rejeté dans Malmo-Levine.

Pourvoi rejeté dans Caine, les juges ARBOUR, LeBEL et DESCHAMPS sont dissidents.

Procureurs de l'appellant Caine : Conroy & Company, Abbotsford.

Procureur de l'intimée : Procureur général du Canada, Vancouver.

Procureur de l'intervenant le procureur général de l'Ontario : Procureur général de l'Ontario, Toronto.

Procureurs de l'intervenante British Columbia Civil Liberties Association : Arvay Finlay, Victoria.

Procureurs de l'intervenante l'Association canadienne des libertés civiles : Paliare, Roland, Rosenberg, Rothstein, Toronto.

1990 CarswellOnt 802

Supreme Court of Canada

R. v. McKinlay Transport Ltd.

**Please see in particular
paras. 24-25 and 29-30**

1990 CarswellOnt 992, 1990 CarswellOnt 802, [1990] 1 S.C.R. 627, [1990] 2 C.T.C. 103, [1990] S.C.J. No. 25, 106 N.R. 385, 10 W.C.B. (2d) 16, 39 O.A.C. 385, 47 C.R.R. 151, 55 C.C.C. (3d) 530, 68 D.L.R. (4th) 568, 72 O.R. (2d) 798 (note), 76 C.R. (3d) 283, 90 D.T.C. 6243, J.E. 90-576, EYB 1990-67530

**McKinlay Transport Ltd. and C.T. Transport Inc. v. Her Majesty
The Queen and The Attorney General for Ontario, The Attorney
General of Quebec, The Attorney General for Alberta (Intervenors)**

Lamer, **Wilson**, La Forest, L'Heureux-Dubé, Sopinka JJ.

Judgment: March 29, 1990

Docket: Court No. 20761

Proceedings: on appeal from a judgment of the Court of Appeal of Ontario reported at [\[1988\] 1 C.T.C. 426](#)

Counsel: *Alan Shanoff* and *Ted Saskin* for the appellants.

S.R. Fainstein and *James W. Leising* for the respondents.

Leah Price and *Timothy Macklem* for the Attorney General for Ontario.

Jean Bouchard and *Gilles Laporte* for the Attorney General of Quebec.

Robert C. Maybank for the Attorney General for Alberta.

Subject: Criminal; Income Tax (Federal)

Headnote**Income tax --- Administration and enforcement — Investigations — General****Income tax --- General principles — Constitutional issues — General****Income tax --- Administration and enforcement of Act — Investigations****Income tax --- Administration and enforcement of Act — Search and seizure — Charter of Rights and Freedoms**

Income tax — Federal — [Income Tax Act](#), R.S.C. 1952, c. 148 (am. S.C. 1970-71-72, c. 63) — 231(3), 238(2) (as they stood at the relevant time) — [Constitution Act](#), 1982 — 1, 8, [Charter of Rights and Freedoms](#) — Whether a demand for information or documents under [subsection 231\(3\) of the Income Tax Act](#) constituted a seizure and, if so, whether it violated [the Charter](#).

In October 1983, Revenue Canada, pursuant to [subsection 231\(3\) of the Income Tax Act](#), served the appellants with letters demanding a wide array of information and documents in respect of the

1979-80 tax year. On their failure to comply, an information was issued invoking subsection 238(2) and its penalties. The appellants brought an action in the Ontario Provincial Court to have the information quashed as contrary to [the Charter](#) and it was quashed. That decision was appealed to the Supreme Court of Ontario where Trainor, J. decided that subsection 231(3) did not authorize a seizure and, therefore, did not violate [the Charter](#). A further appeal to the Ontario Court of Appeal was dismissed on the same ground.

Leave to appeal to the Supreme Court of Canada was granted. These questions were set:

- (1) Was subsection 231(3) [as it read then] inconsistent with [section 8 of the Charter](#)?
- (2) If so, did [section 1 of the Charter](#) save subsection 231(3) from being declared of no force and effect?

HELD:

Per Wilson, J. (concurrent in by Lamer, La Forest and L'Heureux-Dubé, JJ.):

The seminal case on the interpretation of [section 8 of the Charter](#) was *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, where it was determined that [section 10 of the Combines Investigation Act](#) was in violation of that section, one purpose of which was the protection of an individual's reasonable expectation of privacy. The first question in the present appeal was whether subsection 231(3) was effectively a seizure within the meaning of [section 8](#). In *Thomson Newspapers Ltd. v. Canada*, decided concurrently with this case, it was decided that a seizure was "the taking hold by a public authority of a thing belonging to a person against that person's will". That case concerned a seizure in a criminal or quasi-criminal context which was distinguishable from this case by the essentially regulatory nature of the provision in the [Income Tax Act](#). The purpose of subsection 231(3) of that Act was not to penalize criminal conduct but to enforce compliance.

There was a privacy interest at issue in subsection 231(3) but was the intrusion therein reasonable? A flexible view is needed in considering the extent of protection [the Charter](#) provides. A lesser standard of protection is appropriate in a regulatory context than in criminal contexts. The quality and degree of incursion into the individual's privacy is also important. There was involved here, and generally in subsection 231(3), no intrusion into the home or business premises. It called for the production of information and records. The taxpayer's privacy interest was low and section 241 protected it from disclosure to third parties. The application of subsection 231(3) did constitute a seizure but not an unreasonable one. Reference to [section 1 of the Charter](#) was unnecessary.

Per Sopinka, J. (concurring in the disposition of the appeal but for a different reason):

The letters of demand did not constitute a seizure nor did subsection 231(3) authorize a seizure within the meaning of [section 8 of the Charter](#). Appeal dismissed.

Table of Authorities

Cases referred to:

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R. v. Therens, [1985] 1 S.C.R. 613, 18 D.L.R. (4th) 655;

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R. v. Grimwood, [1987] 2 S.C.R. 755, [1988] 1 C.T.C. 44, 88 D.T.C. 6001;

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Re Alberta Human Rights Commission and Alberta Blue Cross Plan, 1 D.L.R. (4th) 301, [1983] 6 W.W.R. 758;

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Re Belgoma Transportation Ltd. and Director of Employment Standards (1985), 20 D.L.R. (4th) 156, 51 O.R. (2d) 509;

R. v. Bichel, 33 D.L.R. (4th) 254, [1986] 5 W.W.R. 261;

Stelco Inc. v. A.-G. Canada (1990), 55 C.C.C. (3d) 227.

Words and phrases considered:

REASONABLE SEIZURE

Since individuals have different expectations of privacy in different contexts and with regard to different kinds of information and documents, it follows that the standard of review of what is "reasonable" in a given context must be flexible if it is to be realistic and meaningful. I think the point is aptly made by Alan D. Reid and Alison Harvison Young in "Administrative Search and Seizure under the Charter" (1985), 10 Queen's L.J. 392 at pp. 398-400:

.....

There is, therefore, a large circle of social and business activity in which there is a very low expectation of privacy. The issue is not whether, but rather when, how much, and under what conditions information must be disclosed to satisfy the state's legitimate requirements. Every person who files an annual tax return may be said to enjoy a low expectation of privacy with respect to information about his income. But that is surely tempered by an expectation that demands for information have limits, and will be administered under terms that are fair and reasonable. That is what section 8 of the *Charter* is all about.

.....

At the beginning of my analysis I noted that the *Income Tax Act* [S.C. 1970-71-72, c. 63] was based on the principle of self-reporting and self-assessment. The Act could have provided that each taxpayer submit all his or her records to the Minister and his officials so that they might make the calculations necessary for determining each person's taxable income. The legislation does not so provide, no doubt because it would be extremely expensive and cumbersome to operate such a

system. However, a self-reporting system has its drawbacks. Chief among these is that it depends for its success upon the taxpayers' honesty and integrity in preparing their returns. While most taxpayers undoubtedly respect and comply with the system, the facts of life are that certain persons will attempt to take advantage of the system and avoid their full tax liability.

Accordingly, the Minister of National Revenue must be given broad powers in supervising this regulatory scheme to audit taxpayers' returns and inspect all records which may be relevant to the preparation of these returns. The Minister must be capable of exercising these powers whether or not he has reasonable grounds for believing that a particular taxpayer has breached the Act. Often it will be impossible to determine from the face of the return whether any impropriety has occurred in its preparation. A spot check or a system of random monitoring may be the only way in which the integrity of the tax system can be maintained. If this is the case, and I believe that it is, then it is evident that the [*Hunter v. Southam Inc.* (1984), 11 D.L.R. (4th) 641 . . . (S.C.C.)] criteria are ill-suited to determine whether a seizure under s. 231(3) of the *Income Tax Act* is reasonable. The regulatory nature of the legislation and the scheme enacted require otherwise. The need for random monitoring is incompatible with the requirement in *Hunter* that the person seeking authorization for a search or seizure have reasonable and probable grounds, established under oath, to believe that an offence has been committed. If this *Hunter* criterion is inapplicable, then so too must be the remaining *Hunter* criteria since they all depend for their vitality upon the need to establish reasonable and probable grounds.

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. . . subsection 231(3) provides the least intrusive means by which effective monitoring of compliance with the *Income Tax Act* can be effected. It involves no invasion of a taxpayer's home or business premises. It simply calls for the production of records which may be relevant to the filing of an income tax return. A taxpayer's privacy interest with regard to these documents vis-a-vis the Minister is relatively low. The Minister has no way of knowing whether certain records are relevant until he has had an opportunity to examine them. At the same time, the taxpayer's privacy interest is protected as much as possible since s. 241 of the Act protects the taxpayer from disclosure of his records or the information contained therein to other persons or agencies.

SEIZURE

For the reasons which I gave in [*Thomson Newspapers Ltd. v. Canada (Director of Investigation & Research, Combines Investigation Branch)* (1990), 76 C.R. (3d) 129 (S.C.C.)], I am of the opinion that neither the letters of demand herein nor s. 231(3) of the *Income Tax Act*, R.S.C. 1952, c. 148, violate s. 8 of the *Canadian Charter of Rights and Freedoms*. The letters of demand do not constitute a seizure and s. 231(3) does not authorize a seizure within the meaning of s. 8 of the *Charter*.

Since subsection 231(3) [of the *Income Tax Act* R.S.C. 1952, c. 148] is not legislation in relation to a criminal or quasi-criminal proceeding, the question arises whether a "seizure" within the meaning of s. 8 [of the *Canadian Charter of Rights and Freedoms*] takes place when the state compels the production of documents in a regulatory context.

. . . compelled production reaches beyond the strict filing and maintenance requirement of the Act, and may well extend to information and documents in which the taxpayer has a privacy interest in need of protection under s. 8 of the *Charter* although it may not be as vital an interest as that obtaining in a criminal or quasi-criminal context. I would therefore conclude that the application of s. 231(3) of the *Income Tax Act* to the appellants constitutes a "seizure", since it infringes on their expectations of privacy . . .

Wilson, J.:

1 This appeal raises the question of the constitutional validity of [subsection 231\(3\) of the *Income Tax Act*, R.S.C. 1952, c. 148](#), in light of [section 8 of the *Canadian Charter of Rights and Freedoms*](#).

1. The Facts

2 The appellants, McKinlay Transport Limited and C.T. Transport Inc., are both incorporated under the laws of the Province of Ontario and carry on the business of freight transport of general commodities. Central Cartage Company is a parent company of McKinlay and a sister company of C.T. Transport. All these corporations are subsidiaries of Centra Inc.

3 Although both appellants have nominal head offices in Ontario, the *de facto* head office of each corporation is in Sterling Heights, Michigan. All books and records of the appellants are kept there.

4 In 1982 Revenue Canada commenced an income tax audit of both appellants in respect of their 1979-80 tax year. In October, 1983 Revenue Canada, pursuant to subsection 231(3) of the Act, served the appellants with letters demanding the production of a wide array of information and documents. The appellants did not comply with these demands and an information was issued on August 9, 1984 alleging that the appellants had breached [subsection 238\(2\) of the *Income Tax Act*](#) because of their failure to comply with the demands made pursuant to [subsection 231\(3\)](#).

5 The appellants brought an application before Langdon, Prov. C.J. asking that the information be quashed because [subsection 231\(3\)](#) coupled with [subsection 238\(2\)](#) were in violation of [the Charter](#). Langdon, Prov. C.J. found that [subsection 231\(3\)](#) violated [section 8 of the Charter](#) and quashed the information: (1986) 1 C.T.C. 29, 85 D.T.C. 5537.

6 An appeal was taken by the respondent to the Ontario Supreme Court where Mr. Justice Trainor found that the section did not violate [section 8 of the Charter](#). He allowed the appeal: [1988] 1 C.T.C. 421, 87 D.T.C. 5051, 58 O.R. (2d) 310. A further appeal by the appellants to the

Ontario Court of Appeal was dismissed: [1988] 1 C.T.C. 426, 88 D.T.C. 6314, 62 O.R. (2d) 757. Leave to appeal to this Court was granted on June 2, 1988, [1989] 1 S.C.R. xi, 90 D.T.C. 6243 and the following constitutional questions were set at a later date:

1. Is subsection 231(3) of the *Income Tax Act*, R.S.C. 1952, c. 148, inconsistent with the provisions of section 8 of the *Canadian Charter of Rights and Freedoms*?
2. If there is such an inconsistency, does section 1 of the *Canadian Charter of Rights and Freedoms* save subsection 231(3) from being declared of no force and effect?

2. The Courts Below

7

(a) Ontario Provincial Court

8 Langdon, Prov. C.J., in considering whether the compelled disclosure of information and documents pursuant to subsection 231(3) violated section 8 of the *Charter*, concluded that there did not have to be a physical intrusion by state authorities for there to be a search or seizure. He stated at page 38 (D.T.C. 5544):

If that analysis is correct (that there must be a physical intrusion for there to be a search or seizure), then if the State were unable to obtain a search warrant under section 443 of the *Criminal Code*, would it be lawful for Parliament in the exercise of its criminal law jurisdiction to authorize the Attorney General of Canada, for any purposes related to the administration or enforcement of the *Criminal Code*, by registered letter or by a demand served personally, to require from any person that he produce any document or thing. Parliament could couple the failure or refusal of the subject with a penalty of ten years' imprisonment. If the approach to the *Charter of Rights* is a purposive one, it seems to me that the guarantee against unreasonable search and seizure would then be made meaningless by such a provision. The effect of the hypothetical provision would perhaps be more draconian than a power of unlimited search. In any event, it would seem that any subject having a defence to a charge of failing to answer a requirement would virtually have to permit the search to exculpate himself if charged with failing to answer the requirement. Therefore, followed to its logical conclusion, the unrestricted right to demand coupled with a penalty for failure to comply is very akin to seizure. In appropriate circumstances, the distinction between them would indeed be a distinction without a difference.

9 Langdon, Prov. C.J., relying on this Court's decision in *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145, 84 D.T.C. 6467, and *R. v. Therens*, [1985] 1 S.C.R. 613, 18 D.L.R. (4th) 655, also rejected the argument that it was open to the individual who received the demand to refuse to comply and determine his liabilities at a later time. He stated at page 43 (D.T.C. 5547):

I agree with Le Dain, J. that it is unrealistic to speak of the recipient of a letter of requirement as being free to refuse to comply. If he is not free to refuse to comply he is subject to compulsion. Thus the service of the requirement is tantamount to a seizure.

10 Having found that [subsection 231\(3\)](#) authorized a seizure within the meaning of [section 8 of the Charter](#), Langdon, Prov. C.J. had no difficulty in concluding that the form of seizure authorized was unreasonable. He found that it met none of the criteria espoused by Dickson, J. in *Hunter*. In particular:

- (1) The legislation did not provide for a method of prior authorization;
- (2) The Minister when acting under [subsection 231\(3\)](#) could not be a neutral or impartial arbiter acting judicially;
- (3) The legislation provided for no form of review of the Minister's discretion; and
- (4) The legislation did not require the establishment of reasonable and probable grounds under oath that an offence had been committed or that there was evidence to be found at the place of the search.

For these reasons Langdon, Prov. C.J. quashed the information.

(b) Ontario High Court

11 Mr. Justice Trainor had the advantage of the Ontario Court of Appeal's decision in *Thomson Newspapers Ltd. v. Director of Investigation and Research* (1986), 17 O.A.C. 330, 57 O.R. (2d) 257 in preparing his reasons and he relied upon it heavily. Of importance to the Court of Appeal in *Thomson* was the fact that an individual compelled to produce documents pursuant to [subsection 17\(1\) of the Combines Investigation Act](#) could, in the Court's opinion, effectively challenge the order of the Restrictive Trade Practices Commission prior to producing the documents. The Court of Appeal for this reason felt that [subsection 17\(1\)](#) did not authorize a seizure within the meaning of [section 8 of the Charter](#).

12 Trainor, J. applied similar reasoning to the appeal before him. Relying on this Court's decision in *James Richardson & Sons, Ltd. v. Minister of National Revenue*, [1984] 1 S.C.R. 614, [1984] C.T.C. 345, 84 D.T.C. 6325, he found that [subsection 231\(3\)](#) had been given a restrictive interpretation by the Court and this allowed a person served with an order for production an opportunity to challenge its validity before producing the material. He stated at page 426 (D.T.C. 5055; O.R. 317):

The recipient of a demand under [subsection 231\(3\)](#) can successfully attack such demand before prosecution for failure to comply on a number of grounds including the following:

(1) That a reasonable time for production has not been afforded.

Re Joseph et al. and Minister of National Revenue, [1985] D.T.C. 164, 85 D.T.C. 5391, 51 O.R. (2d) 658.

(2) That the Minister is engaged in a fishing expedition and not a genuine and serious inquiry as to some taxpayer's liability.

(3) That the documents demanded are not germane or relevant to the issues between the parties.

(4) That the documents are privileged.

There are no doubt many other grounds of attack available, dependent on the circumstances. For example, I would think that where a demand is made and where the issues between the parties are not clearly identified, unlike a case where charges have been laid, it would be incumbent on the Minister to set out the grounds for the demand in order that relevance could readily be ascertained, in the first instance by the recipient of the demand and later, if necessary, by the court.

These avenues of attack cannot be said to be illusory. They create substantial defences and are an answer to many of the concerns raised during argument about ministerial excesses and oppressive conduct.

13 Accordingly, Trainor, J. found that [subsection 231\(3\)](#) did not authorize a seizure. He therefore allowed the appeal. He noted *in obiter*, however, that had he found that a seizure was authorized by the section, it would not have been a reasonable one since the criteria enumerated in *Hunter* were not satisfied.

14 (c) *The Ontario Court of Appeal*

15 Mr. Justice Grange delivered the opinion of the court on behalf of himself, Lacourcière and Goodman, J.J.A. Like Trainor, J., Grange, J.A.'s saw this case as very similar to the [Thomson](#) case. In Grange, J.A.'s opinion, the fact that the individual could challenge the requirement to produce was sufficient to dispel the notion that it was a seizure. He stated at page 428 (D.T.C. 6315; O.R. 760):

As Trainor J. pointed out, the subsection of the *Income Tax Act* is not unqualified or unlimited. It is subject to *certiorari* proceedings wherein the requirement will be tested objectively to determine whether it is authorized by the section and whether it is relevant to the tax liability of a specific person. No "fishing expedition" will be permitted. See *Canadian Bank of Commerce v. Attorney General of Canada*, [1962] S.C.R. 729, [1962] C.T.C. 35, 62 D.T.C. 1236, and *James Richardson & Sons, Ltd. v. Minister of National Revenue*, [1984] 1 S.C.R.

614 at 623 *et seq.*; [1984] C.T.C. 345, 84 D.T.C. 1264. In a system where the tax authorities depend largely on the good faith and integrity of the taxpayer to disclose information relevant to tax liability, it is necessary to give wide investigative powers to those authorities without compelling them to give statements under oath of reasonable and probable grounds for the requirement to produce, particularly where the requirement does not constitute enforced production. The essential consideration in my view is that the requirement to produce is not so intrusive as a search or seizure, that it in no sense resembles a search and cannot be tantamount to a seizure because the person subject to it has a right to take action to circumvent the required production.

Grange, J.A. thought that in this case it was even clearer than in *Thomson* that the provision did not constitute a seizure since, while the *Combines Investigation Act* provided a mechanism to compel compliance with the order to produce, the *Income Tax Act* provided only a penalty for disobedience.

16 Accordingly, the Ontario Court of Appeal dismissed the appeal.

3. The Issues

17 The issues arising in this appeal are as follows:

1. Does subsection 231(3) of the *Income Tax Act*, R.S.C. 1952, c. 148, violate section 8 of the *Canadian Charter of Rights and Freedoms*

?

2. If the answer to question 1 is affirmative, can subsection 231(3) of the *Income Tax Act* be sustained as a reasonable limit demonstrably justified in a free and democratic society under section 1 of the *Canadian Charter of Rights and Freedoms* or is the provision of no force and effect by virtue of section 52 of the *Constitution Act, 1982*?

4. Analysis

18 A chief source of revenue for the federal government is the collection of income tax. The legislative scheme which has been put in place to regulate the collection of tax is the *Income Tax Act*. The Act requires taxpayers to file annual returns and estimate their tax payable as a result of calculations made in these returns. Moreover, the Act requires various third parties such as employers, corporations and banks to file information on wages, dividends, interest payments and the like: see paragraph 221(1)(d) and Part II of the *Income Tax Regulations*, C.R.C. 1978, c. 945. In essence, the system is a self-reporting and self-assessing one which depends upon the honesty and integrity of the taxpayers for its success: see *Search and Seizure Under the Income Tax Act* (1985), a study paper prepared for the Law Reform Commission of Canada by Neil Brooks and Judy Fudge. Nonetheless, it would be naïve to think that no one attempts to take advantage of the

self-reporting system in order to avoid paying his or her full share of the tax burden by violating the rules set forth in the Act. Because of this reality Parliament enacted several provisions, among them [subsection 231\(3\)](#), giving the Minister of National Revenue power to investigate and audit taxpayers. [Section 231](#) reads in part as follows:

231.(1) Any person thereunto authorized by the Minister, for any purpose related to the administration or enforcement of this Act, may, at all reasonable times, enter into any premises or place where any business is carried on or any property is kept or anything is done in connection with any business or any books or records are or should be kept, and

(a) audit or examine the books and records and any account, voucher, letter, telegram or other document which relates or may relate to the information that is or should be in the books or records or the amount of tax payable under this Act,

(b) examine property described by an inventory or any property, process or matter an examination of which may, in his opinion, assist him in determining the accuracy of an inventory or in ascertaining the information that is or should be in the books or records or the amount of any tax payable under this Act,

(c) require the owner or manager of the property or business and any other person on the premises or place to give him all reasonable assistance with his audit or examination and to answer all proper questions relating to the audit or examination either orally or, if he so requires, in writing, on oath or by statutory declaration and, for that purpose, require the owner or manager to attend at the premises or place with him, and

(d) if, during the course of an audit or examination, it appears to him that there has been a violation of this Act or a regulation, seize and take away any of the documents, books, records, papers or things that may be required as evidence as to the violation of any provision of this Act or a regulation.

(2) The Minister shall,

(a) within 120 days from the date of seizure of any documents, books, records, papers or things pursuant to paragraph (1)(d), or

(b) if within that time an application is made under this subsection that is after the expiration of that time, rejected, then forthwith upon the disposition of the application, return the documents, books, records, papers or things to the person from whom they were seized unless a judge of a superior court or county court, on application made by or on behalf of the Minister, supported by evidence on oath establishing that the Minister has reasonable and probable grounds to believe that there has been a violation of this Act or a regulation and that the seized documents, books, records, papers or things are or may be required as evidence in relation thereto, orders that they be retained by the

Minister until they are produced in any court proceedings, which order the judge is hereby empowered to give on ex parte application.

(3) The Minister may, for any purposes related to the administration or enforcement of this Act, by registered letter or by a demand served personally, require from any person

(a) any information or additional information, including a return of income or a supplementary return, or

(b) production, or production on oath, of any books, letters, accounts, invoices, statements (financial or otherwise) or other documents,

within such reasonable time as may be stipulated therein.

(4) Where the Minister has reasonable and probable grounds to believe that a violation of this Act or a regulation has been committed or is likely to be committed, he may, with the approval of a judge of a superior or county court, which approval the judge is hereby empowered to give on ex parte application, authorize in writing any officer of the Department of National Revenue, together with such member of the Royal Mounted Police or other peace officers as he calls on to assist him and such other persons as may be named therein, to enter and search, if necessary by force, any building, receptacle or place for documents, books, records, papers or things that may afford evidence as to the violation of any provision of this Act or a regulation and to seize and take away any such documents, books, records, papers or things and retain them until they are produced in any court proceedings.

(5) An application to a judge under subsection (4) shall be supported by evidence on oath establishing the facts upon which the application is based.

.....

238.(2) Every person who has failed to comply with or contravened subsection 116(3), 127(3.1) or (3.2), 153(1), 227(5), 230.1(1) or 230.1(2), or section 230 or 231 is guilty of an offence and, in addition to any penalty otherwise provided, is liable on summary conviction to

(a) a fine of not less than \$200 and not exceeding \$10,000, or

(b) both the fine described in paragraph (a) and imprisonment for a term not exceeding 6 months.

19 This Court had occasion to consider subsection 231(3) of the Act in *James Richardson & Sons, Ltd. v. Minister of National Revenue*, *supra*. It noted that the wording of the subsection was, on its face, extremely broad. The Court found, however, after reviewing its earlier decision in *Canadian Bank of Commerce v. Attorney General of Canada*, [1962] S.C.R. 729, 62 D.T.C. 1236 that once the appropriate rules of statutory interpretation had been applied to the subsection, it was not to be construed so broadly. The Court found at page 350 (D.T.C. 6329; S.C.R. 623) that:

- (a) the test of whether the Minister is acting for a purpose specified in the Act is an objective one and has to be decided on the proper interpretation of the subsection and its application to the circumstances disclosed;
- (b) the obtaining of information relevant to the tax liability of some specific person or persons whose liability to tax is under investigation is a purpose related to the administration or enforcement of the Act;
- (c) it is not necessary that the person from whom the information is sought be one whose liability to tax is under investigation;
- (d) the fact that the giving of the information may disclose private transactions involving persons who are not under investigation and may not be liable to tax does not invalidate the Requirement.

20 Notwithstanding that subsection 231(3) has been narrowed in scope as a result of the common law rules relating to statutory interpretation, the appellants submit that the provision cannot withstand [Charter](#) scrutiny. They submit that the demand for information or documents under subsection 231(3), coupled with its enforcement mechanism in subsection 238(2), violates [section 8 of the Charter](#) and cannot be saved under section 1.

21 [Sections 8 and 1 of the Charter](#) provide:

8. Everyone has the right to be secure against unreasonable search or seizure.

1. The [Canadian Charter of Rights and Freedoms](#) guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

22 The seminal case on the interpretation to be given to [section 8 of the Charter](#) is this Court's decision in *Hunter v. Southam Inc.*, *supra*. In *Hunter* the Court found that [section 10 of the Combines Investigation Act](#) violated [section 8](#). In coming to that conclusion the Court determined that one of the purposes underlying the [section 8](#) right was the protection of an individual's reasonable expectation of privacy.

23 In *Hunter* it was clear that a search was contemplated by the legislation and the Court therefore focused its attention on the question whether the search was reasonable. In the present appeal we must answer the threshold question whether subsection 231(3) authorizes a "seizure" within the meaning of [section 8 of the Charter](#). Subsection 231(3) has the effect of requiring the individual named in the demand to provide information pursuant to paragraph (a) or documents pursuant to paragraph (b). In *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)* (1990), 67 D.L.R. (4th) 161, 72 O.R. (2d)

415n (reasons delivered concurrently herewith), I concluded that a seizure was "the taking hold by a public authority of a thing belonging to a person against that person's will". *Thomson*, however, involved a seizure in a criminal or quasi-criminal law context and I confined my remarks to that situation. Subsection 231(3) is not criminal or quasi-criminal legislation. The *Income Tax Act* is essentially a regulatory statute since it controls the manner in which income tax is calculated and collected. This Court pointed out in *R. v. Grimwood*, [1987] 2 S.C.R. 755, [1988] 1 C.T.C. 44, 88 D.T.C. 6001 at page 44 (D.T.C. 6001; S.C.R. 756), that "the purpose of ss. 231(3) and 238(2), when read together, is not to penalize criminal conduct but to enforce compliance with the Act".

24 Since subsection 231(3) is not legislation in relation to a criminal or quasi-criminal proceeding, the question arises whether a "seizure" within the meaning of section 8 takes place when the state compels the production of documents in a regulatory context. To answer this question one must, I think, return to the general discussion of Dickson, J. in *Hunter* on the purposes underlying the section 8 right. One of those purposes, he found, is the protection of the individual's reasonable expectation of privacy. He stated at pages 159-60 (D.T.C. 6473-74):

The guarantee of security from unreasonable search and seizure only protects a *reasonable* expectation. This limitation on the right guaranteed by section 8, whether it is expressed negatively as freedom from "unreasonable" search and seizure, or positively as an entitlement to a "reasonable" expectation of privacy, indicates that an assessment must be made as to whether in a particular situation the public's interest in being left alone by government must give way to the government's interest in intruding on the individual's privacy in order to advance its goals, notably those of law enforcement.

[Emphasis in original.]

25 It is apparent from the above that Dickson, J. considered that the underlying value to be protected by section 8 of the Charter was the individual's interest in privacy. However, it was his view that the section 8 protection was confined to "a reasonable expectation" because of the fact that the words "search or seizure" were qualified by the word "unreasonable": see also *R. v. Simmons*, [1988] 2 S.C.R. 495, 55 D.L.R. (4th) 673. Undoubtedly there will be instances in which an individual will have no privacy interest or expectation in a particular document or article required by the state to be disclosed. Under such circumstances, the state authorized inspection or the state demand for production of documents will not amount to a search or seizure within section 8: see *R. v. Hufsky*, [1988] 1 S.C.R. 621 at page 638; 4 M.V.R. (2d) 170. However, I do not think that is so here. I reach that conclusion for two reasons. First, subsection 231(3), even construed narrowly in accordance with prior authority, envisages the compelled production of a wide array of documents and not simply those which the state requires the taxpayer to prepare and maintain under the legislation. Second, the legislation contemplates that parties who are not the subject of an investigation or audit can be compelled to produce documents relating to another taxpayer who

is the subject of such investigation or audit. Thus, compelled production reaches beyond the strict filing and maintenance requirements of the Act and may well extend to information and documents in which the taxpayer has a privacy interest in need of protection under section 8 of the Charter although it may not be as vital an interest as that obtaining in a criminal or quasi-criminal context. I would therefore conclude that the application of subsection 231(3) of the *Income Tax Act* to the appellants constitutes a "seizure" since it infringes on their expectations of privacy. It remains to be determined, however, whether the state's intrusion on that privacy interest is unreasonable or, to put it another way, whether it violates the taxpayers' reasonable expectation of privacy.

26 In *Hunter*, Dickson, J. set forth several criteria which had to be met in order that a search be reasonable. I summarized these criteria in Thomson (D.L.R. 177):

- (a) a system of prior authorization, by an entirely neutral and impartial arbiter who is capable of acting judicially in balancing the interests of the State against those of the individual;
- (b) a requirement that the impartial arbiter must satisfy himself that the person seeking the authorization has reasonable grounds, established under oath, to believe that an offence has been committed;
- (c) a requirement that the impartial arbiter must satisfy himself that the person seeking the authorization has reasonable grounds to believe that something which will afford evidence of the particular offence under investigation will be recovered; and
- (d) a requirement that the only documents which are authorized to be seized are those which are strictly relevant to the offence under investigation.

27 It is important to note that these criteria were enunciated in the context of an appeal concerning the validity of a section which was, in essence, criminal or quasi-criminal in nature. As I stated in *Thomson* at pages 211-12:

Not all seizures violate s. 8 of the *Charter*; only unreasonable ones. Put another way, an individual is accorded only a reasonable expectation of privacy. At some point the individual's interest in privacy must give way to the broader state interest in having the information or document disclosed. However, the state interest only becomes paramount when care is taken to infringe the privacy interest of the individual as little as possible. It is because of this need for delicate balancing that Dickson J. in *Hunter* identified several criteria which must be met if a search in a criminal investigation is to meet the test of reasonableness. I think that these criteria were accurately summarized by J. Holland J. at trial as set out earlier in these reasons. I would agree, however, that these criteria are not hard and fast rules which must be adhered to in all cases under all forms of legislation. What may be reasonable in the regulatory or civil context may not be reasonable in a criminal or *quasi*-criminal context. What is important is not so much that the strict criteria be mechanically applied in every case but that the legislation

respond in a meaningful way to the concerns identified by Dickson J. in *Hunter*. This having been said, however, it would be my view that the more akin to traditional criminal law the legislation is, the less likely it is that departures from the *Hunter* criteria will be countenanced. This seems to have been what Dickson C.J.C. had in mind when he said in *R. v. Simmons* (1988), 55 D.L.R. (4th) 673 at p. 696, 45 C.C.C. (3d) at p. 319, [1988] 2 S.C.R. 495, that departures from the *Hunter* criteria will be exceedingly rare.

28 In *Simmons, supra*, this Court departed from the rigidity of the *Hunter* criteria. In that case the Court found that it was not necessary for the *Hunter* criteria to be met in the context of customs searches since a person's reasonable expectation of privacy was quite low at border crossings. Chief Justice Dickson stated at page 528 (D.L.R. 697):

I accept the proposition advanced by the Crown that the degree of personal privacy reasonably expected at customs is lower than in most other situations. People do not expect to be able to cross international borders free from scrutiny. It is commonly accepted that sovereign states have the right to control both who and what enters their boundaries. For the general welfare of the nation the state is expected to perform this role. Without the ability to establish that all persons who seek to cross its borders and their goods are legally entitled to enter the country, the state would be precluded from performing this crucially important function. Consequently, travellers seeking to cross national boundaries fully expect to be subject to a screening process.

29 In my opinion, flexibility is key to interpreting any constitutional document including the Charter. It would be wrong, I think, for the courts to apply a rigid approach to a particular section of the Charter since that provision must be capable of application in a vast variety of legislative schemes. As Dickson, J. stated in *Hunter* at page 155 (D.T.C. 6471-72):

It is clear that the meaning of "unreasonable" cannot be determined by recourse to a dictionary, nor for that matter, by reference to the rules of statutory construction. The task of expounding a constitution is crucially different from that of construing a statute. 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 unrelenting protection of individual rights and liberties.

30 Since individuals have different expectations of privacy in different contexts and with regard to different kinds of information and documents, it follows that the standard of review of what is "reasonable" in a given context must be flexible if it is to be realistic and meaningful. I think the point is aptly made by Alan D. Reid and Alison Harvison Young in "Administrative Search and Seizure under the Charter" (1985), 10 *Queen's L.J.* 392, at pages 398-400:

A person's expectations of privacy with respect to administrative search and seizure have been less well defined (than criminal search and seizure). There are facets of state authority, generically associated with search or seizure, that are so intertwined with the regulated activity as to raise virtually no expectation of privacy whatsoever. Inspections may be blended into product grading functions, and in fact, they may be so integrated into the production process that a refusal to inspect can by law be invoked as a sanction to enforce the maintenance of prescribed sanitary conditions within the plant. Other activities are regulated so routinely that there is virtually no expectation of privacy from state intrusion. Annual filing requirements for banks, corporations, trust companies, loan companies, and the like are inextricably associated with carrying on business under state licence.

There are other situations in which government intrusion cannot be as confidently predicted, yet the range of discretion extended to state officials is so wide as to create in the regulatee an expectation that he may be inspected or requested to provide information at some point in the future. This may arise in the form of an inspection carried out either on a "spot check" basis, or on the strength of suspected non-compliance. The search may be in the form of a request for information that is not prescribed as an annual filing requirement, but is required to be produced on a demand basis. For the most part, there is no requirement that these powers be exercised on belief or suspicion of non-compliance. Rather, they are based on the common sense assumption that the threat of unannounced inspection may be the most effective way to induce compliance. They are based on view that inspection may be the only means of detecting non-compliance, and that its detection serves an important public purpose. Inspections to determine workplace safety, building safety, aviation safety, fire safety, environmental quality, food quality, health standards and the like have been routinely authorized by statute without specifying grounds for intruding upon someone's privacy.

There is, therefore, a large circle of social and business activity in which there is a very low expectation of privacy. The issue is not whether, but rather when, how much, and under what conditions information must be disclosed to satisfy the state's legitimate requirements. Every person who files an annual tax return may be said to enjoy a low expectation of privacy with respect to information about his income. But that is surely tempered by an expectation that demands for information have limits, and will be administered under terms that are fair and reasonable. That is what section 8 of the Charter is all about.

[Emphasis added.]

31 The lower courts, generally speaking, have shown no hesitation in applying [section 8](#) flexibly in relation to a wide variety of regulatory schemes. A few examples make the point. In *Re Alberta Human Rights Commission and Alberta Blue Cross Plan*, 1 D.L.R. (4th) 301, [1983] 6 W.W.R. 758 (Alta. C.A.), the Court held that the provisions of the *Individual's Rights Protection*

Act which allowed for the compulsory production of an individual's documents by the Human Rights Commission were not unreasonable. In that case the Court did not apply the standard of reasonableness applicable to criminal cases. Rather, the Court applied the rough model of reasonableness employed in production of documents in civil cases. The rationale for this was that what is reasonable "depends upon consideration of what is sought, from whom, for what purpose, by whom, and in what circumstances": see (D.L.R.) page 307. This approach was followed in *Re Reich and College of Physicians and Surgeons of Alberta (No. 2)* (1984), 8 D.L.R. (4th) 696, 9 C.R.R. 90 (Alta. Q.B.) wherein McDonald, J. held that the provisions of the *Medical Profession Act* which compelled the production of a doctor's documents and records were reasonable.

32 In *Re Belgoma Transportation Ltd. and Director of Employment Standards* (1985), 51 O.R. (2d) 509, 20 D.L.R. (4th) 156 (C.A.) the Court upheld the validity of the provisions of the *Employment Standards Act* which allowed an employment standards officer to enter upon business premises and require the production of certain documents and remove them for copying. MacKinnon, A.C.J.O. stated at page 512 (D.L.R. 159):

The standards to be applied to the reasonableness of a search or seizure and the necessity for a warrant with respect to criminal investigations cannot be the same as those to be applied to search or seizure within an administrative and regulatory context ... The "search or seizure" in the instant case, if such it is, is not aimed at detecting criminal activity, but rather, as indicated, in ensuring and securing compliance with the regulatory provisions of the Act enacted for the purpose of protecting the public interest.

33 In *R. v. Bichel*, 33 D.L.R. (4th) 254, [1986] 5 W.W.R. 261 (B.C.C.A.), the Court considered the validity of a by-law which authorized the entry of a building inspector on property or premises to ascertain whether there had been compliance with the by-law. The Court applied the reasoning in *Belgoma* and ruled that an individual's privacy interests in connection with this type of inspection were much less than those in *Hunter*.

34 I refer to these cases not to approve or disapprove the results achieved but rather as evidence of the need to take a flexible and purposive approach to [section 8 of the Charter](#). It is consistent with this approach, I believe, to draw a distinction between seizures in the criminal or quasi-criminal context to which the full rigours of the *Hunter* criteria will apply, and seizures in the administrative or regulatory context to which a lesser standard may apply depending upon the legislative scheme under review. I do not believe that when the Chief Justice said in *Simmons* at page 527 (D.L.R. 696) that departures from the *Hunter* criteria would be rare he was applying his mind to searches or seizures in the context of regulatory legislation. I think he was addressing as in the cases of *Hunter* and *Simmons* themselves searches or seizures in a criminal or quasi-criminal context. It is with these considerations in mind that I examine the reasonableness of [subsection 231\(3\) of the Income Tax Act](#).

35 At the beginning of my analysis I noted that the *Income Tax Act* was based on the principle of self-reporting and self-assessment. The Act could have provided that each taxpayer submit all his or her records to the Minister and his officials so that they might make the calculations necessary for determining each person's taxable income. The legislation does not so provide, no doubt because it would be extremely expensive and cumbersome to operate such a system. However, a self-reporting system has its drawbacks. Chief among these is that it depends for its success upon the taxpayers' honesty and integrity in preparing their returns. While most taxpayers undoubtedly respect and comply with the system, the facts of life are that certain persons will attempt to take advantage of the system and avoid their full tax liability.

36 Accordingly, the Minister of National Revenue must be given broad powers in supervising this regulatory scheme to audit taxpayers' returns and inspect all records which may be relevant to the preparation of these returns. The Minister must be capable of exercising these powers whether or not he has reasonable grounds for believing that a particular taxpayer has breached the Act. Often it will be impossible to determine from the face of the return whether any impropriety has occurred in its preparation. A spot check or a system of random monitoring may be the only way in which the integrity of the tax system can be maintained. If this is the case, and I believe that it is, then it is evident that the *Hunter* criteria are ill-suited to determine whether a seizure under subsection 231(3) of the *Income Tax Act* is reasonable. The regulatory nature of the legislation and the scheme enacted require otherwise. The need for random monitoring is incompatible with the requirement in *Hunter* that the person seeking authorization for a search or seizure have reasonable and probable grounds, established under oath, to believe that an offence has been committed. If this *Hunter* criterion is inapplicable, then so too must the remaining *Hunter* criteria since they all depend for their vitality upon the need to establish reasonable and probable grounds. For example, there is no need for an impartial arbiter capable of acting judicially since his central role under *Hunter* is to ensure that the person seeking the authorization has reasonable and probable grounds to believe that a *particular* offence has been committed, that there are reasonable and probable grounds to believe that the authorization will turn up something relating to that *particular* offence, and that the authorization only goes so far as to allow the seizure of documents relevant to that *particular* offence.

37 This is not to say that any and all forms of search and seizure under the *Income Tax Act* are valid. The state interest in monitoring compliance with the legislation must be weighed against an individual's privacy interest. The greater the intrusion into the privacy interests of an individual, the more likely it will be that safeguards akin to those in *Hunter* will be required. Thus, when the tax officials seek entry onto the private property of an individual to conduct a search or seizure, the intrusion is much greater than a mere demand for production of documents. The reason for this is that, while a taxpayer may have little expectation of privacy in relation to his business records relevant to the determination of his tax liability, he has a significant privacy interest in the inviolability of his home.

38 In my opinion, subsection 231(3) provides the least intrusive means by which effective monitoring of compliance with the *Income Tax Act* can be effected. It involves no invasion of a taxpayer's home or business premises. It simply calls for the production of records which may be relevant to the filing of an income tax return. A taxpayer's privacy interest with regard to these documents *vis-a-vis* the Minister is relatively low. The Minister has no way of knowing whether certain records are relevant until he has had an opportunity to examine them. At the same time, the taxpayer's privacy interest is protected as much as possible since section 241 of the Act protects the taxpayer from disclosure of his records or the information contained therein to other persons or agencies.

5. Disposition

39 For these reasons I conclude that the seizure contemplated by subsection 231(3) of the *Income Tax Act* is reasonable and does not violate section 8 of the Charter. That being so, it is unnecessary for me to consider whether the section is justified under section 1 of the Charter. I would dismiss the appeal and make no order as to costs.

La Forest, J.:

40 I have had the advantage of reading the reasons of my colleague Wilson, J., who sets forth the facts, the issues and the judicial history of this appeal. As in *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)* (1990), 67 D.L.R. (4th) 161, 72 O.R. (2d) 415n, released concurrently, we are dealing with a statute which, though supported by penal sanctions, including imprisonment, is essentially of an administrative nature. These sanctions, as in *Thomson*, appear in the Act for strictly instrumental reasons and, as in *Thomson*, the impugned provision is necessary to ensure compliance with the Act. For the reasons I gave in *Thomson* and, subject to what I there said, those of Wilson, J. in this appeal, I would dispose of the appeal and answer the constitutional question in the manner proposed by her.

L'Heureux-Dubé, J.:

41 Subject to the reasons set out in my opinion in the case of *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)* (1990), 67 D.L.R. (4th) 161, 72 O.R. (2d) 415n, released concurrently, I concur with Wilson, J. in her disposition of the present appeal and I would answer the constitutional questions as she does.

Sopinka, J.:

42 This appeal was heard together with *Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)* (1990), 67 D.L.R. (4th) 161; 72 O.R. (2d) 415n, and *Stelco Inc. v. Canada (Attorney General)* (1990), 55 C.C.C. (3d) 227, and

judgment in the three appeals is being delivered concurrently. The issues in the appeal are set out in the constitutional questions which have been stated:

1. Is subsection 231(3) of the *Income Tax Act*, R.S.C. 1952, c. 148, inconsistent with the provisions of section 8 of the *Canadian Charter of Rights and Freedoms*?
2. If there is such an inconsistency, does section 1 of the *Canadian Charter of Rights and Freedoms* save subsection 231(3) from being declared of no force or effect?

43 I agree with the disposition of this appeal proposed by Madame Justice Wilson but for different reasons. For the reasons which I gave in *Thomson*, I am of the opinion that neither the letters of demand herein nor subsection 231(3) of the *Income Tax Act*, R.S.C. 1952, c. 148, violate section 8 of the *Canadian Charter of Rights and Freedoms*. The letters of demand do not constitute a seizure and subsection 231(3) does not authorize a seizure within the meaning of section 8 of the *Charter*. The demand authorized by subsection 231(3) is less intrusive than an order under section 17 of the *Combines Investigation Act*, R.S.C. 1970, c. C-23, and therefore what I said in *Thomson* applies *a fortiori* to the demand letters in issue in this appeal.

44 I would answer the constitutional questions:

1. Is subsection 231(3) of the *Income Tax Act*, R.S.C. 1952, c. 148, inconsistent with the provisions of section 8 of the *Canadian Charter of Rights and Freedoms*?

45 Answer: No.

2. If there is such an inconsistency, does section 1 of the *Canadian Charter of Rights and Freedoms* save subsection 231(3) from being declared of no force or effect?

46 Answer: Need not be answered.

Appeal dismissed.

R. v. McKnight

Ontario Judgments

Please see in particular para. 55**Ontario Court of Appeal**

Toronto, Ontario

McMurtry C.J.O., **Laskin** and O'Connor JJ.A.

Heard: February 9, 1999.

Judgment: April 23, 1999.

Docket No. C23383

[1999] O.J. No. 1321 | [44 O.R. \(3d\) 263](#) | [135 C.C.C. \(3d\) 41](#) | [42 W.C.B. \(2d\) 198](#) | [1999 CanLII 3717](#) | [1999 CarswellOnt 1079](#)

Between Her Majesty the Queen, (respondent), and Robert McKnight,
(applicant/appellant)

(59 pp.)

On appeal from Cavarzan J.

Counsel

Edward L. Greenspan and Alison Wheeler, for the applicant/appellant. Michal Fairburn, for the respondent.

Reasons for judgment were delivered by Laskin J.A., concurred in by O'Connor J.A. Separate reasons were delivered by McMurtry C.J.O.

LASKIN J.A.**A. OVERVIEW**

1 The appellant Robert McKnight was convicted by a jury of the second-degree murder of his wife Janet. The trial judge, Cavarzan J., imposed a period of parole ineligibility of 17 years. The appellant appeals the parole ineligibility period.

2 McKnight murdered his wife in their bedroom with a 10-inch serrated bread knife in the morning of January 10, 1994. The attack lasted 10 to 15 minutes. The victim sustained numerous injuries and had over 50 defensive wounds on her hands and forearms.

3 The appellant's defence at trial was that he was not criminally responsible under s. 16 of the Criminal Code. All of the expert witnesses agreed that at the time of the offence the appellant suffered from major depression. Even the Crown's expert acknowledged that the appellant likely would not have killed his wife but for his depression, schizoid personality and hypochondriacal fears.

4 The appellant was acquitted of first-degree murder but convicted of second-degree murder. He spent 15 months in pre-trial and pre-sentence custody. At the time of the offence, the appellant was 52 years old and had been married to Janet McKnight for 20 years. He has both a law degree and a medical degree. From 1985 until the date of the murder, he had his own medical practice in Hamilton specializing in rehabilitating persons injured in car accidents. He has no previous criminal record and after the offence he expressed deep remorse for what he had done.

5 The jury recommended that the appellant serve 20 years of his sentence before being eligible for parole. Defence counsel recommended a parole ineligibility period of 10 years and Crown counsel supported the 20 year period recommended by the jury. The trial judge imposed 17 years.

6 The appellant appeals the period of parole ineligibility on three grounds:

- (i) The trial judge erred in principle by over-emphasizing the importance of denunciation and diminishing the appellant's potential for rehabilitation.
- (ii) The trial judge erred in principle by misapprehending the psychiatric evidence and by failing to give enough weight to the mitigating aspects of that evidence.
- (iii) The trial judge imposed a period of parole ineligibility that was outside an acceptable range.

7 In my view, the trial judge did not commit either of the errors in principle alleged by the appellant. He did, however, impose a period of parole ineligibility that I consider unreasonable. In my view, the appropriate range in this case was 12 to 15 years. I would impose a period of parole ineligibility at the upper end of that range and, therefore, I would reduce the period imposed by the trial judge from 17 years to 14 years.

APPLICABLE PRINCIPLES

8 Section 745.4 of the Criminal Code (s. 744 at the time the appellant was sentenced) gives the trial judge discretion to increase the period of parole ineligibility from the minimum 10 years up to 25 years and requires the trial judge in exercising that discretion to take into account the following four considerations:

- * the character of the offender

- * the nature of the offence
- * the circumstances surrounding the commission of the offence; and
- * any recommendation made by the jury under s. 745.2 of the Code.

9 In assessing these considerations and in deciding whether to increase the period of parole ineligibility, all of the objectives of sentencing are relevant. In *R. v. Shropshire*¹ the Supreme Court of Canada held that the British Columbia Court of Appeal had erred by isolating denunciation and future dangerousness as the only relevant criteria. Iacobucci J. wrote at pp. 203:

The only difference in terms of punishment between first and second degree murder is the duration of parole ineligibility. This clearly indicated that parole ineligibility is part of the "punishment" and thereby forms an important element of sentencing policy. As such, it must be concerned with deterrence, whether general or specific. The jurisprudence of this court is clear that deterrence is a well-established objective of sentencing policy. In *R. v. Lyons* (1987), 37 C.C.C. (3d) 1 at p. 22 ..., La Forest J. held:

In a rational system of sentencing, the respective importance of prevention, deterrence, retribution and rehabilitation will vary according to the nature of the crime and the circumstances of the offender. No one would suggest that any of these functional considerations should be excluded from the legitimate purview of legislative or judicial decisions regarding sentencing.

Section 744 must be concerned with all of the factors cited in *Lyons*. In *R. v. Luxton* (1990), 58 C.C.C. (3d) 449 ..., the importance of structuring sentences to take into account the individual accused and the particular crime was emphasized. This is also a factor that any order made pursuant to s. 744 ought to take into consideration.

10 Iacobucci J. also rejected the notion that the period of parole ineligibility should only be increased in unusual circumstances²:

[A]s a general rule, the period of parole ineligibility shall be for 10 years, but this can be ousted by a determination of the trial judge that, according to the criteria enumerated in s. 744, the offender should wait a longer period before having his suitability to be released into the general public assessed. To this end, an extension of the period of parole ineligibility would not be "unusual", although it may well be that, in the median number of cases, a period of 10 years might still be awarded.

11 With these principles in mind, I will briefly review the relevant facts.

RELEVANT FACTS

The Offender and the Victim

12 Janet McKnight and the appellant met in 1963 and married a decade later. Despite their best efforts, they were unable to have children. When she died, Janet McKnight was a tenured professor at the McMaster University School of Nursing. Over the years, she had gained international acclaim, lecturing at such diverse places as the United Arab Emirates and Chile. She had been scheduled to lecture in Australia on February 2, 1994. Her secretary described Janet as a kind, caring and compassionate person with a wonderful sense of humour.

13 The appellant was called to the Bar of the Law Society in 1967. He went back to school to study medicine and graduated from McMaster University's medical school in 1977. In 1983, he was certified by the College of Physicians and Surgeons as a specialist in rehabilitation medicine. From 1985 until the offence, he carried on his own practice rehabilitating accident victims.

14 The appellant testified that at first his marriage was a "good relationship" but because of their separate careers he and his wife had grown apart by 1986. He sought companionship elsewhere by placing personal ads in local papers. Between 1986 and 1993, he carried on clandestine relationships with three women. He showered these three women with gifts worth more than \$60,000. The first two relationships were non-sexual; the appellant admitted that he fell in love with the third woman and remained obsessed with her even though he ended the relationship after he discovered she was seeing another man.

15 On June 15, 1992, shortly after ending this relationship, the appellant attempted to strangle his wife in the car inside the garage of their home. That afternoon, the appellant's secretary telephoned Janet McKnight to say that the appellant was very depressed and that she should come and get him. Janet did so, they drove home and parked the car in the garage. The appellant then closed the garage door. He and his wife went into the house for a few minutes and then returned to the car. As he got into the car, the appellant decided to end his life and his wife's because of problems in his medical practice and what he considered to be "the imminent disaster of a collapsed practice, public censure and loss of face and standing". He began to choke Janet. She, however, managed to press the garage door button and sound the horn. Neighbours responded and the appellant was eventually subdued. He was taken to St. Joseph's Hospital where he stayed overnight. While at the hospital, he confessed to Janet that he planned to kill both of them and their cats. The following day he was taken to McMaster University Medical Centre where he stayed for about a month.

The Appellant's History of Depression

16 At trial, the appellant testified to his personal struggle with depression. The earliest incident occurred in 1982 when he was a medical student. Because he had lost some

weight and muscle tone, he feared that he had contracted amyotrophic lateral sclerosis (ALS). Three doctors assured him that he did not have ALS but he remained unconvinced and was depressed for three to four weeks. In the spring of 1992 he became depressed after a complaint about his practice from a professional colleague. He did not sleep well, lost weight and was always tired.

17 After his attempt to choke his wife, the treatment team at McMaster initially diagnosed the incident as a brief psychotic episode, not the result of a major depression. For the first two weeks of his stay at the McMaster hospital, the appellant was considered a suicide risk. Gradually his condition improved. When he was discharged on July 17, 1992, Dr. Gaind, the supervisor of the treatment team, gave a discharge diagnosis of major depression with psychotic features. In Dr. Gaind's view, these psychotic features were grounded in fears of professional misconduct, which appeared to have no basis in reality. Dr. Gaind testified that these fears escalated to delusional beliefs of financial ruin, public humiliation and loss of respect in the community. Dr. Gaind described these delusional beliefs as nihilistic. He also suggested that the extension of these nihilistic beliefs to Janet McKnight was consistent with psychotic features and episodes of depression.

18 After the appellant was released from McMaster Hospital, Dr. Gaind referred him to a psychiatrist, Dr. Buie, who met with the appellant nine times over the next year and one-half. Dr. Buie concurred with Dr. Gaind's diagnosis of depression but could not find any evidence of psychosis. He saw the appellant's health concerns not as a delusional but as hypochondriacal fears consistent with depression.

19 The appellant felt better between August 1992 and August 1993 but his health concerns re-surfaced in the late summer of 1993. Successively, he believed that he was suffering from heart disease, colon cancer and ALS. A complaint about him from a chiropractor to the Ontario Medical Association exacerbated his depression. Dr. Buie testified that the appellant was an anxious man, inclined to exaggerate fears and dangers. He suggested that the appellant's fears were a product of a perfectionist and obsessive personality.

20 The appellant showed signs of stress and depression when Dr. Buie saw him on December 13, 1993. Dr. Buie prescribed an anti-depressant, feeling that the appellant's depression would worsen if not treated. The appellant said that he felt depressed over the Christmas holidays in 1993. He testified that he nonetheless tried to appear as normal as possible at Christmas, which he spent with his wife and her family. After Christmas, he and Janet McKnight went to New York City for four or five days. In the two weeks before the murder, the appellant was seen smiling, waving to his neighbours and shovelling snow with Janet. He seemed to be in reasonable spirits. Dr. Gaind described this behaviour as "smiling depression", the desire and ability of a person not to be seen

to be depressed but to maintain a fairly normal façade despite subjective feelings of depression.

The Week Before the Murder

21 On January 3, 1994, the appellant returned to work. He testified that he continued to be depressed for the next week. His wife knew that he was depressed and commented to him about it.

22 The appellant testified that by January 4th he entertained thoughts of suicide, although he told Dr. Buie otherwise. On January 3rd or 4th he obtained prescriptions for 60 tablets of phenobarb, a lethal dosage. On January 8th, he took more steps to prepare for his suicide. He obtained 30 tablets of lorazepan and purchased a rope at Canadian Tire. On January 9th, the day before the murder, he drove around aimlessly, then went to his office, took all his personal papers from his briefcase and left the briefcase by the back door. He and wife had supper together but later that evening he practiced making nooses with a shoelace and necktie. He had no thoughts of harming his wife that day.

The Murder - January 10, 1994

23 The appellant testified that he awoke at 6:30 a.m. on January 10, 1994 with the same thoughts and fears he had on June 15, 1992 when he first tried to kill his wife. He went downstairs to the kitchen, took a 10-inch serrated bread knife, and while his wife was still asleep, put the knife under the foot of the bed. He said that he was uncertain whether he would use it. For the next 10 to 20 minutes he tried to fall back asleep. Then the alarm went off and Janet McKnight got up and went to the bathroom. The appellant got out of bed and waited in the middle of the room. When Janet came out of the bathroom, the appellant grabbed her around the neck and tried to choke her. During the struggle which then took place, the appellant took the knife and repeatedly stabbed his wife. The attack lasted 10 to 15 minutes. Janet McKnight pleaded for her life. She asked whether he wanted her dead because she had become overweight or because he had a girlfriend. He replied no. No other words were spoken.

24 Janet suffered numerous injuries, mainly to her arms, hands, neck, shoulders and face. She had nine or more deep wounds on her right shoulder and over 50 defensive wounds on her hands and forearms.

25 The appellant testified that throughout his attack on his wife he was thinking about the tragedy about to befall them. He thought of the allegations against him in front of the College of Physicians and Surgeons and his outstanding debts. He said that he had no feeling at the time and only later did he think that he might have done something wrong.

26 After the attack he put down the knife and sat at the top of the staircase. Several

hours later, believing the police would soon arrive, he decided to hang himself. He did not think he had time to go to his car to get the rope he had purchased from Canadian Tire. Instead he took a pair of shoelaces, tied them together and tied the laces around a column. With his knees bent he stood on a side table and put the noose around his neck. When the appellant did not arrive for work, his secretary became concerned. Eventually she called the police who went inside the appellant's home around noon. The police found the appellant with the noose around his neck. They cut the laces and helped him down from the table. The appellant was taken to the Hamilton Civic Hospital where he was described as being almost catatonic. He testified that at the time he was heartbroken over what he had done and felt terrible.

The Expert Evidence of the Appellant's Mental State

27 The defence called two experts, Dr. John Bradford, the clinical director of the Royal Ottawa Hospital and Dr. Brian Butler. Dr. Andrew Malcolm testified for the Crown.

28 The appellant was transferred to the Royal Ottawa Hospital under an order to assess his fitness to stand trial. In Dr. Bradford's opinion, the appellant had been suffering from major depression with psychotic features since before January 10, 1994. He disagreed that the appellant's trip to New York City with his wife after Christmas was inconsistent with a diagnosis of depression. Dr. Bradford explained that at times people mask their depression and present themselves to psychiatrists and physicians as reasonable people when in fact they are severely depressed. The staff at the Royal Ottawa Hospital recommended that the appellant was medically fit to stand trial.

29 Dr. Butler met with the appellant twice. In his opinion, on January 10, 1994 "the appellant was suffering from major depressive episode, severe in nature with psychotic features". He also showed signs of schizoid and obsessional personality. Dr. Butler concluded that the appellant's depression moved from mild to moderate and then became severe at the time of the murder and afterwards.

30 Dr. Malcolm met with the appellant three times in early 1995. Dr. Malcolm accepted that the appellant suffered from depression from December 1993 to January 10, 1994 but he viewed the real issue as the severity of the depression. He agreed with Dr. Butler that the appellant's depression was mild to moderate before January 10, 1994 and became severe after the offence. However, in Dr. Malcolm's opinion, the appellant's conduct at Christmas and his trip to New York City showed that he was not overwhelmingly depressed just before the murder.

31 Dr. Malcolm thought that the appellant was probably good at concealing his feelings other than depression, which explained why Janet McKnight did not sense any danger and so did nothing to protect herself before she was killed. Dr. Malcolm also rejected the notion that this was a murder suicide. In his opinion, the stabbing was an act of

"exquisite and relentless hostility towards a particular person". Although the appellant thought of suicide, he was in a state of rage and fully aware that he wanted to kill his wife.

32 Nonetheless, Dr. Malcolm concluded that the appellant had a disease of the mind, consisting of recurrent major depressive disorder, a schizoid personality disorder and hypochondriacal fears. Dr. Malcolm acknowledged that without this disease of the mind, the appellant probably would not have killed his wife. He testified:

Now, I am quite willing to say without this disease of the mind of the various elements I have mentioned already in this examination, he probably would not have committed this act. Without the depression, without the schizoid personality, without the hypochondriasis - as well the dysthymia is also the depression - without all those things he wouldn't have done this. I agree with that absolutely.

33 I now turn to the grounds of appeal.

GROUNDS OF APPEAL

34 The period of parole ineligibility imposed by a trial judge in the exercise of the judge's discretion is an element of the sentence for second-degree murder. The period imposed by the trial judge is therefore entitled to deference on appeal. An appellate court should interfere only if the trial judge erred in principle or imposed a period of parole ineligibility that was unreasonable because it was outside an acceptable range.

First Submission: The trial judge erred in principle by over-emphasizing denunciation and diminishing the appellant's potential for rehabilitation.

35 The appellant submits that the trial judge made an error in principle because he over-emphasized denunciation and did not give enough weight to the appellant's potential for rehabilitation. Both denunciation and rehabilitation are relevant factors in fixing the period of parole ineligibility. Moreover, this court has held that over-emphasizing a relevant factor or failing to give enough weight to a relevant factor may amount to an error in principle³. This does not mean, however, that an appellate court is justified in interfering with a trial judge's exercise of discretion merely because it would have given different weight or emphasis to a factor relevant to the sentence. To suggest that a trial judge commits an error in principle because in an appellate court's opinion the trial judge gave too much weight to one relevant factor or not enough weight to another is to abandon deference altogether. The weighing of relevant factors, the balancing process is what the exercise of discretion is all about⁴. To maintain deference to the trial judge's exercise of discretion, the weighing or balancing of relevant factors must be assessed against the reasonableness standard of review. Only if by emphasizing one factor or by not giving enough weight to another, the trial judge exercises his or her discretion unreasonably

should an appellate court interfere with the sentence on the ground the trial judge erred in principle.

36 In imposing a period of parole ineligibility above the minimum, the trial judge relied heavily on denunciation of the appellant and his crime; he gave far less weight to the appellant's potential for rehabilitation. In weighing these two factors in my opinion, the trial judge did not exercise his discretion unreasonably. Admittedly, the trial judge relied on the British Columbia Court of Appeal decision in *R. v. Brown*⁵, which was disapproved of by the Supreme Court of Canada in *Shropshire*. Referring to *Brown*, Cavarzan J. wrote: "It has been said that it surely must be under the heading of denunciation of the offender and the crime that the justification must lie for the imposition of a period of parole ineligibility in excess of ten years...".

37 Although all sentencing objectives are relevant to the determination of the period of parole ineligibility, depending on the facts of the case, the trial judge is entitled to give different weight to the various objectives. On the facts of this case, the trial judge was reasonably entitled to emphasize denunciation in the way that he did.

38 In considering the appellant's potential for rehabilitation, Cavarzan J. held:
An additional consideration under "the character of the offender" factor in s. 744 of the Code is the rehabilitation potential of the offender. In a case such as this, however, where the minimum sentence is life imprisonment with a period of parole ineligibility of ten years, this consideration cannot have the same scope that it would have in other sentencing situations.

39 His words mirror the observation of Morden A.C.J.O. speaking for this court in *R. v. A. (T.S.)*⁶:

... I think that under the "character of the offender" factor in s. 744 of the Code, the rehabilitation potential of the offender cannot be excluded from consideration. I recognize, however, that in the setting of a sentence of life imprisonment with a minimum period of parole ineligibility of ten years, this factor cannot have the same scope that it would have in other sentencing situations.

The words of Morden A.C.J.O., which were applied by Cavarzan J., reflect the common sense notion that the statutory 10 year minimum period of parole ineligibility for second-degree murder limits the weight that can be accorded to the appellant's prospects of rehabilitation.

40 I would not give effect to this ground of appeal.

Second Submission: The trial judge erred in principle by misapprehending the psychiatric evidence and by failing to give enough weight to the mitigating aspects of that evidence.

41 The appellant submits that the trial misapprehended the psychiatric evidence and thus failed to use it as a mitigating factor in fixing the period of parole ineligibility. In support of this submission, the appellant relies on the following passage from the trial judge's reasons:

A further aggravating factor is the breach of trust involved in representing to your wife, to her family, and to her friends that all was well in the marriage. The deception practised on your wife and on the psychiatrists who undertook to help you, fed the false sense of security evidently felt by your wife in the days preceding the fatal attack and was instrumental in exposing her to such an attack. She had every right to feel safe and secure in the bedroom of the house she shared with you.

42 The appellant acknowledges that his attack on his wife was a breach of trust and properly considered as an aggravating factor. The appellant argues, however, that the way the trial judge characterized his behaviour in the days before the murder was not supported by the evidence.

43 This argument fails for three reasons. First, the trial judge's reasons show that he appreciated the psychiatric evidence, which he succinctly and accurately summarized as follows:

The unanimous opinion of the psychiatrists who testified at the behest of both the Crown and the defence, was that you were suffering a bout of major depression when you killed your wife on January 10, 1994.

44 Second, ample evidence was led at trial for Cavarzan J. to reasonably conclude that despite the previous attempt on her life, Janet McKnight was lulled into a sense of security by the appellant's seemingly contented attitude in the weeks before the murder. The appellant's attitude contributed to his wife's vulnerability. Moreover, the trial judge's finding that the appellant led his wife to believe "all was well in the marriage" is not at odds with the psychiatric evidence concerning the appellant's depression.

45 Finally, the trial judge expressly stated that in fixing the period of parole ineligibility, he considered the "relevant medical and psychiatric evidence". I would not give effect to this ground of appeal.

Third Submission: 17 years parole ineligibility is outside an acceptable range.

46 The aggravating features of this crime and the circumstances surrounding its commission fully justified an increase in the period of parole ineligibility. These aggravating features included: the appellant had made a previous attempt to kill his wife; during the marriage he carried on clandestine relationships with three other women; in the weeks preceding the offence he led his wife to believe that "all was well in the

marriage"; he murdered Janet McKnight in the trial judge's words "with savage brutality" when she was least suspecting, having just woken up; the killing was a breach of trust and showed elements of planning and deliberation; after the murder, the appellant did not try to get help but instead faked an attempted suicide.

47 On the other side of the scale, the appellant can point to several features about his character and his circumstances that mitigate any increase in parole ineligibility. These mitigating features include: he had no previous criminal record; he had contributed to society by practicing medicine and helping to rehabilitate accident victims; when the crime occurred he was severely depressed and even the Crown's expert Dr. Malcolm conceded that but for his depression, the appellant would likely not have killed his wife; he expressed deep and genuine remorse for what he did; he has positive potential for rehabilitation; he was 53 years old when sentenced and with a 17-year period of parole ineligibility would not be eligible for parole until he was 69.

48 Taking into account all of these aggravating and mitigating features, in my opinion, a 17-year period of parole ineligibility falls outside a reasonable range. No two cases are the same but similar cases from this province of brutal second-degree murders of an unarmed wife or girlfriend suggest a range of 12 to 15 years.

49 In *R. v. McMaster*⁷, the appellant stabbed his girlfriend while she was sleeping. The trial judge imposed a 12-year period of parole ineligibility, which was upheld by this court. In *R. v. Munroe*⁸, the appellant strangled his wife after becoming overwrought with anger during an argument. During the marriage, he had exhibited a previous pattern of violence and emotional abuse extending over several years. The jury made no recommendation on the period of parole ineligibility. The trial judge imposed 12 years, which was upheld on appeal.

50 In contrast, in *R. v. Muir*⁹, the accused murdered his wife by shooting her when she was asleep. He had no criminal record, had not previously abused his wife during the marriage and was remorseful. The jury had not recommended an increase in parole ineligibility beyond the mandatory 10 years. The trial judge imposed 12 years. Although a case of spousal homicide, this court reduced the period to 10 years finding no justification for the increase.

51 In *R. v. McCormack*¹⁰, a particularly helpful case on the facts, this court used *Munroe* as a guide in imposing a 12-year period of parole ineligibility. In *McCormack*, the accused's killing of his wife was brutal and unprovoked. He had a lengthy history of inflicting verbal and physical abuse on his wife. He also had a criminal record. Although most of the offences were unrelated, a few years before the murder, he was convicted of assaulting his wife and a year before the murder, he had chased his wife with a knife and was convicted of carrying a concealed weapon. Eight jurors declined to make any recommendation on parole ineligibility but the other four jurors recommended the

maximum period, 25 years. The trial judge imposed 14 years observing: "[I]t is that vulnerability and the betrayal of that trust which sets wife murder apart from other forms of murder. It is itself an exceptional circumstance which justifies the increase of the period of parole ineligibility". On appeal, the majority of a panel of this court reduced the period to 12 years concluding that "it was an error in principle for the trial judge to hold that wife murder is in itself an exceptional circumstance justifying an increase in the period of parole ineligibility".

52 Other relevant Ontario cases include R. v. Barry¹¹ in which the accused brutally killed his girlfriend. She suffered 62 stab wounds to her head, chest, abdomen, back, right arm and hands. She was unarmed and many of the wounds were defensive. The accused also superficially wounded himself to try to give credence to his story of being attacked by the victim. He had no previous criminal record but posed some risk of re-offending. Nine jurors recommended 10 years parole ineligibility and three recommended 15 years. The trial judge, Watt J., imposed a 12-year period, which was upheld by this court.

53 In R. v. Parmar¹², the accused stabbed his girlfriend to death in her house, after locking her children outside. He had a previous conviction for domestic assault. The trial judge imposed a 15-year period of parole ineligibility, the period recommended by the jury. Finally, in R. v. Morrow¹³, the accused murdered his common law spouse by cutting her throat in front of their 2 1/2 year old son. The accused had a criminal record, which included a conviction for assault causing bodily harm to his son when the boy was four months old. The jury recommended a 20-year period of parole ineligibility. The trial judge imposed 15 years.

54 The trial judge in the case before us did not refer to any of this case law, and in fairness to him, several of the cases were decided around or just after the time that he sentenced the appellant. My survey of recent Ontario case law suggests a reasonable range of 12 to 15 years parole ineligibility for the appellant. I would fix his period of parole ineligibility at the upper end of that range, at 14 years.

55 The jury recommended a 20-year period of parole ineligibility and the jury's recommendation must be considered in fixing the appropriate period. Nonetheless the jury's recommendation need not be slavishly followed. As Watt J. pointed out in R. v. Barry:

It is difficult to gauge with any accuracy the weight that should be attributed to a jury recommendation regarding parole ineligibility. In one sense, it might be said to represent the community view upon the issue. To so hold, however, as it appears to me, is somewhat to overstate the case. They are given no guidance on the precedents concerning the appropriate range. They are simply told the numbers. They are not required at least to endeavour to achieve unanimity. It is, as it was in this case, but a brief, somewhat informal exercise, after they have been earlier told that sentence forms no part of their responsibility in determining liability, and then

thereafter told it is but a recommendation. They receive no further evidence concerning, for example, the likelihood of recidivism, future danger to society or other matters which might logically bear upon the issue other than what they can recall was given at trial.

56 Here the jury recommended a significant increase in the period of parole ineligibility. In that sense, I would give effect to the jury's recommendation. However, although this was horrible and brutal killing of a kind and decent woman, I think a period of 20 years or even 17 years is excessive. Setting parole ineligibility at 14 years does not mean that the appellant will automatically be released from prison after serving this time. The appellant was sentenced to life imprisonment for the murder of his wife. After he has served 14 years, the parole authorities will assess whether he should remain in custody.

CONCLUSION

57 I would grant leave to appeal the period of parole ineligibility. I would allow the appeal and reduce the period of parole ineligibility to 14 years.

LASKIN J.A.

O'CONNOR J.A. -- I agree.

McMURTRY C.J.O. (dissenting)

58 The appellant, Robert McKnight, was convicted by the verdict of a jury of second degree murder in the killing of his wife, Janet McKnight. The jury that found him guilty made a parole ineligibility recommendation pursuant to section 743¹⁴ of the Criminal Code, recommending a period of 20 years parole ineligibility. After hearing the submissions from the appellant and the Crown, the trial judge, Cavarzan J., sentenced the appellant to life imprisonment with no eligibility for parole for 17 years. The appellant appeals against his sentence.

FACTS

59 Counsel submitted an agreed statement of facts for consideration of this appeal.

60 The appellant and the deceased were married for over 20 years. They did not have any children. At the time of the offence, the appellant was 52 years old, and a member of good standing in the Law Society of Upper Canada. He was also a licensed physician, and he had his own medical practice in Hamilton, Ontario, focusing on musculo-skeletal injuries arising from motor vehicle accidents. The deceased was a tenured nursing professor at the McMaster University School of Nursing.

61 On January 10, 1994 at approximately 6:30 a.m., while the deceased was sleeping,

the appellant went downstairs to their kitchen, where he retrieved a 10-inch serrated bread knife. The appellant returned to the bedroom, placed the knife under the foot of the bed, and got back into bed. The appellant lay in bed beside his sleeping wife for approximately 10-20 minutes, at which point the alarm went off.

62 The deceased woke up and went into the bathroom. As the deceased came out of the bathroom, the appellant grabbed her around the neck and began to choke her. He then took the knife that he had stored behind the bed and repeatedly stabbed the deceased.

63 The attack lasted ten to fifteen minutes. During the attack, Janet McKnight begged for her life. She asked the appellant why he was attacking her. Specifically, she asked whether he wanted her dead because she had grown overweight, or because he had a girlfriend, to which the appellant replied no. No other words were apparently spoken.

64 The deceased suffered numerous injuries, primarily to her arms, hands, neck, shoulders and face. She had over 50 defensive wounds on her hands and forearms, and over 50 superficial wounds to both of her shoulders. There were more than 20 wounds around the back of her neck. The deceased lost most of her blood from a deep incised wound at the front of her neck. The evidence indicated that for at least part of the attack, the appellant had incapacitated the deceased by straddling her back.

65 Following the attack, the appellant put down the knife and left the bedroom. He sat at the top of the staircase outside the bedroom. Several hours later, feeling that the arrival of the police was imminent, the appellant allegedly decided to hang himself. He removed a pair of shoelaces from a pair of athletic shoes and tied them together to form a noose.

66 The appellant's secretary became concerned when the appellant did not arrive at work. She called her husband, who went to the McKnight's home at approximately 9:45 a.m., and knocked at their door, but did not receive a response. The police were then called. Upon entering the McKnights' home at approximately noon, the police found the appellant with the noose around his neck. The police cut the shoelaces and helped the appellant down from the table. The police asked the appellant if he had done something to his wife, and he indicated that he had.

67 The appellant was charged with first degree murder. He pleaded not criminally responsible by reason of mental disorder. Specifically, the appellant claimed that he suffered from depression and other psychotic features which prevented him from appreciating the nature and quality of his actions in killing his wife, and that he did not understand at the time of the attack that what he was doing was wrong. A great deal of evidence was led at trial regarding the appellant's mental state before, during and after he killed his wife.

68 The appellant had experienced episodes of mental illness prior to the fatal attack on his wife. He experienced episodes of depression, often accompanied by unfounded concerns about his health. In 1982, while he was in medical school, the appellant became convinced that he was suffering from amyotrophic lateral sclerosis (ALS). Despite assurances from three physicians that he did not have ALS, the appellant remained unconvinced, and he was depressed for three to four weeks.

69 In 1992, the appellant was experiencing significant pressure at work. He became depressed and was unable to keep pace with his medical practice. His poor work performance worsened his state of depression. During the afternoon of June 15, 1992, the appellant's secretary called Janet McKnight and told her that the appellant was very depressed. Janet McKnight attended at the appellant's office, and they agreed that he would seek treatment. They returned home so that the appellant could collect his wallet.

70 While the appellant and his wife were seated in the car in their garage, the appellant reached over and began to choke her. She managed to press the garage door button and sounded the horn. Neighbours responded, and the appellant was subdued and then taken to hospital. While at the hospital, the appellant admitted that he was attempting to kill both Janet and himself. The appellant had felt that, in order to protect Janet and him from what he considered was the imminent collapse of his practice, public censure and a loss of face and standing, he had decided that the only course of action was to end both of their lives.

71 The appellant remained in hospital for approximately one month. His diagnosis upon discharge was major depression with psychotic features. The appellant was referred to a psychiatrist, Dr. Buie, for ongoing outpatient therapy. The appellant saw Dr. Buie nine times over the next year and a half.

72 The appellant's mental condition generally improved between the summers of 1992 and 1993, except for a brief relapse in the fall of 1992 which was primarily attributable to the appellant's ceasing to take his medication.

73 In August 1993, the appellant became concerned about a complaint that had been filed against him with the Ontario Medical Association. The appellant also began to develop further concerns regarding his health. Despite tests which indicated that these medical concerns were unfounded, the appellant continued to worry about his health.

74 In November 1993, the appellant again became convinced that he was suffering from ALS. Once again, medical tests failed to assuage these fears. In December, 1993 the appellant also lost money in stocks and his real estate properties were depreciating in value. Once again, the appellant fell behind in his work.

75 The appellant saw Dr. Buie on December 13 and 21, 1993, and January 4, 1994. While Dr. Buie found that the appellant was exhibiting signs of depression and stress, he did not find any evidence of delusions or signs of psychosis during those sessions. He prescribed the appellant an anti-depressant, Paxil. The appellant spent Christmas with his wife and her family. Following Christmas, the appellant and his wife took a brief holiday in New York. While the appellant testified that he felt depressed throughout this time, he appeared quite normal to friends, family, colleagues and neighbours.

76 The appellant told Dr. Buie during their January 4, 1994 session that he did not have any suicidal thoughts. However, the appellant testified that he began entertaining thoughts of suicide around that time. He testified that he took various steps to prepare for his suicide. He obtained prescriptions for drugs with the thought of overdosing. He also purchased a rope at Canadian Tire.

77 The appellant testified that he awoke on the morning of January 10, 1994 with the same thoughts and fears that he had experienced on June 15, 1992, when he first attempted to kill his wife. He decided that, in order to avoid their imminent financial and personal ruination, they would both have to die.

78 The appellant testified that throughout his attack on the deceased, he was "thinking about the tragedy that was going to befall" them. The appellant testified that he had no feeling at the time, and that it only came to him later, while sitting on the stairs, that he might have done something wrong. The appellant also testified that he attempted to kill himself by hanging. However, the rope that he had purchased for that purpose was in his car, and he felt that he did not have time to retrieve it before the police came. He therefore made a noose out of shoelaces. He tied the laces around a column and, with his knees bent, stood on a side table and put the noose around his neck. Shortly thereafter the police entered the McKnight home and found the appellant.

79 Defence counsel called two expert medical witnesses at trial. Dr. John Bradford treated the appellant following his arrival at the Royal Ottawa Hospital on January 28, 1994. Dr. Bradford testified that, in his opinion, the appellant had been suffering from major depression with psychotic features since before January 10, 1994. Dr. Bradford testified that the appellant's psychotic features, particularly his feelings of despair and hopelessness, produced thoughts of extended suicide: a distorted but altruistic frame of mind in which a person feels that the only way to protect a loved one from misery is to kill him or her. Dr. Bradford's opinion was that, although the appellant could appreciate the physical nature and consequences of his actions on the morning of January 10, 1994, the appellant was not able to consider the views of the community, nor did he have the capacity to realize that his actions were wrong.

80 Dr. Brian Butler met with the appellant on January 24, 1994 and February 9, 1995.

Dr. Butler testified that, in his opinion, "the appellant was suffering from major depressive episode, severe in nature with psychotic features" on January 10, 1994. Dr. Butler testified that the account of the killing given by the accused was "absolutely consistent with a man who is severely mentally ill, with a severe state of depression and impairment in his rational thinking processes". Dr. Butler gave the opinion that, at the time of the killing, the appellant could not "address the wrongfulness of his conduct even though in the general sense in his entire life he has always been pro social and would recognize the wrongfulness of such conduct".

81 The Crown also called an expert medical witness. Dr. Andrew Malcolm interviewed the appellant on three occasions, February 26 and 28, 1995, and March 11, 1995. While Dr. Malcolm testified that the appellant suffered from recurrent major depressive disorder, along with schizoid personality and hypochondriachal traits, it was his opinion that the appellant's disorder did not have psychotic features. Dr. Malcolm gave the opinion that, at the time of the killing, the appellant "was fully aware that he wanted to kill his wife, and possibly himself. He knew to do both of these things would be both morally and legally wrong".

82 The trial lasted 25 days. On March 24, 1995 the jury returned a verdict of not guilty of first degree murder, but guilty of second degree murder. The trial judge, Cavarzan J., then asked the jury, pursuant to s. 743 of the Criminal Code, if they wished to make a recommendation regarding a period of parole ineligibility for the appellant. After brief deliberations, the jury returned with a recommendation of 20 years parole ineligibility. On April 7, 1995, after hearing counsels' submissions regarding sentencing, Cavarzan J. sentenced the appellant to life imprisonment, without eligibility for parole for 17 years.

Relevant Legislation

83 The relevant portions of the Criminal Code that were in effect at the time of the appellant's sentencing are as follows:

742. ¹⁵Subject to s. 742.1, the sentence to be pronounced against a person who is to be sentenced to imprisonment for life shall be

...

(b) in respect of a person who has been convicted of second degree murder, that he be sentenced to imprisonment for life without eligibility for parole until he has served at least ten years of his life sentence or such greater number of years, not being more than twenty-five years, as has been substituted therefore pursuant to section 744;

743. ¹⁶Subject to section 743.1, where a jury finds an accused guilty of second degree murder, the judge presiding at the trial shall, before discharging the jury, put to them the following question:

You have found the accused guilty of second degree murder and the law requires that I now pronounce a sentence of imprisonment for life against the accused. Do you wish to make any recommendation with respect to the number of years that the accused must serve before the accused is eligible for release on parole? You are not required to make any recommendation but if you do, your recommendation will be considered by me when I am determining whether I should substitute for the ten year period, which the law would otherwise require the accused to serve before the accused is eligible to be considered for release on parole, a number of years that is more than ten but not more than twenty-five.

744. ¹⁷Subject to section 744.1, at the time of the sentencing under paragraph 742(b) of an offender who is convicted of second degree murder, the judge who presided at the trial of the offender or, if that judge is unable to do so, any judge of the same court may, having regard to the character of the offender, the nature of the offence and the circumstances surrounding its commission, and to the recommendation, if any, made pursuant to section 743, by order, substitute for ten years a number of years of imprisonment (being more than ten but not more than twenty-five), without eligibility for parole, as the judge deems fit in the circumstances.

ANALYSIS

84 It is a well-settled principle of law that appellate courts are to allow sentencing judges deference. This deference equally applies to decisions regarding parole ineligibility: see *R. v. Shropshire* (1995), 102 C.C.C. (3d) 193 (S.C.C.); *R. v. M.* (C.A.) (1996), 105 C.C.C. (3d) 327 (S.C.C.). In both cases, the Supreme Court of Canada emphasized the importance of giving the trial judge an element of discretion in deciding upon an appropriate period of parole ineligibility. In *Shropshire*, the Supreme Court identified the objective of s. 744 as "to give the trial judge an element of discretion in sentencing to reflect the fact that within second degree murder there is both a range of seriousness and varying degrees of moral culpability" (p. 205). Hence, an appellate court must afford a trial judge a wide discretion in reviewing the period of parole ineligibility imposed, as stated at p. 210:

The formulation of a sentencing order is a profoundly subjective process; the trial judge has the advantage of having seen and heard all of the witnesses whereas the appellate court can only base itself upon a written record. A variation in the sentence should only be made if the Court of Appeal is convinced it is not fit. That is to say, that it has found the sentence to be clearly unreasonable.

85 In *M.(C.A.)* (at p. 374), Lamer C.J.C., writing for the Court, enumerated the "profound functional justifications" for this deferential standard of review, including the following:

- (a) where a trial was held, the trial judge has the advantage of having seen and heard the witnesses to the crime;
- (b) even in cases where a guilty plea was entered, and no trial held, the trial judge still has the advantage of being able to directly assess the sentencing submissions of both the Crown and the offender;
- (c) the unique qualifications of experience that trial judges have from "having served on the front lines of our criminal justice system"; and
- (d) the trial judge's relationship with the community that has suffered the consequences of the crime, resulting in a strong sense of what sentences would be "just and appropriate" for the protection of that community.

86 An appellate court should not interfere with the period of parole ineligibility imposed by the sentencing judge unless the sentence imposed is "clearly unreasonable" (Shropshire, p. 210). In *R. v. Rezaie*, (1996), 112 C.C.C. (3d) 97 (Ont. C.A.), Laskin J.A. explained what the Supreme Court meant by "clearly unreasonable" at p. 103:

These two decisions [Shropshire and M.(C.A.)] demonstrate that an appellate court may interfere with a trial judge's sentencing discretion in only two kinds of cases. First, an appellate court may interfere if the sentencing judge commits an "error in principle". Error in principle is a familiar basis for reviewing the exercise of judicial discretion. It connotes, at least, failing to take into account a relevant factor, taking into account an irrelevant factor, failing to give sufficient weight to relevant factors, overemphasizing relevant factors and, more generally, it includes an error of law.

Second, although the trial judge does not commit an error in principle, an appellate court may still interfere if the sentence is outside an "acceptable range". The Supreme Court has used a variety of phrases to convey this point: an appellate court cannot interfere unless the sentence is "clearly unreasonable", "clearly or manifestly excessive", "clearly excessive or inadequate", "demonstrably unfit" or a "substantial and marked departure".

87 The appellant submits that, in sentencing the appellant to a period of 17 years parole ineligibility, the sentencing judge committed three errors in principle. First, the appellant claims that the sentencing judge overemphasized the importance of denunciation and gave insufficient weight to the appellant's prospects for rehabilitation, in imposing sentence. Second, the appellant submits that the sentencing judge erred in considering elements of planning and deliberation as an aggravating factor. Third, according to the appellant, the sentencing judge misapprehended the psychiatric evidence given at trial regarding the appellant, and failed to give sufficient weight to the mitigating aspects of that evidence. The appellant also submits that the period of parole ineligibility imposed by the sentencing judge, 17 years, is outside the acceptable range of sentence.

- (i) Consideration of denunciation and potential for rehabilitation

88 At the beginning of his reasons for sentence, the sentencing judge set out the factors that he was required to consider in determining the appellant's period of parole ineligibility:

Section 744 provides that in exercising that discretion, I must consider the character of the offender, the nature of the offence and the circumstances surrounding its commission, and the jury's recommendation.

This approach to s. 744 is consistent with the wording of the provision. It is also consistent with Iacobucci J.'s analysis in *Shropshire*, although the sentencing judge did not have the benefit of the Supreme Court's reasoning in *Shropshire*, which was released after the appellant's sentencing. At p. 201 in *Shropshire*, Iacobucci J. stated:

The factors to be considered in fixing an extended period of parole ineligibility are:

- (1) the character of the offender;
- (2) the nature of the offence; and
- (3) the circumstances surrounding the commission of the offence;

all bearing in mind the discretionary power conferred on the trial judge.¹⁸

89 The appellant submits that the sentencing judge erred in his application of this approach, by giving insufficient weight to appellant's prospects for rehabilitation and, in turn, overemphasizing denunciation. He submits that the sentencing judge overemphasized the need for denunciation due to his reliance on the British Columbia Court of Appeal's decision in *R. v Brown* (1993), 83 C.C.C. (3d) 394. The appellant claims that *Brown* was overturned by the Supreme Court's decision in *Shropshire*, and that the sentencing judge, in relying on *Brown*, erred in principle. The appellant relies on the following passages from the reasons for sentence, in which Cavarzan J. quotes extensively from *Brown*¹⁹:

The questions which the sentencing judge should ask and should answer are the following:

Having regard to the factors set out in s. 744 of the Code, does society's expression of repudiation, that is, denunciation, for the particular crime by the particular accused, carrying with it that repudiation's concomitants of individual and general deterrence, require that in addition to the repudiation and denunciation involved in the imposition of a sentence of life imprisonment coupled with a period of parole ineligibility of 10 years, a further period of parole ineligibility must be added on to the 10-year period in order for the sentence to be commensurate with the gravity of the offence? If so, how much longer should that period be?

[*R. v. Brown*, [supra] at 407]

It has been said that it surely must be under the heading of denunciation of the offender and the crime that the justification of must lie for the imposition of a period of parole ineligibility in excess of ten years:

Sections 743 and 744 of the Code provide that after a jury verdict of second degree murder the trial judge will ask the jury for their recommendation about the period of parole ineligibility, and that if a recommendation is made the trial judge must have regard to it, though he need not necessarily follow it, in setting the period of parole ineligibility. [T]hose provisions indicate and confirm that the principal purpose of the setting of a period of parole ineligibility of more than 10 years is denunciation of the offender and the crime because the jury's recommendation must be seen as reflecting society's view and it is in order to reflect society's view that denunciation is a sentencing factor at all.

[R. v. Brown, [supra] at 408]

90 The sentencing judge very well may not have referred to these passages from Brown, supra, had he the benefit of the Supreme Court's decision in Shropshire. However, I find that the sentencing judge's reference to Brown does not constitute an error in principle for the following reasons.

91 First, Iacobucci J. made clear in Shropshire that denunciation of the crime committed is a relevant consideration in a section 744 analysis, stating (at p. 202) that "'denunciation' can fall within the statutory criterion of the nature of the offence". In Shropshire, the Supreme Court found that the majority of the British Columbia Court of Appeal had erred in their consideration of denunciation, not because they considered denunciation as a relevant factor, but because they considered it *to the exclusion of other s. 744 criteria* (at p. 201-202):

By elevating "denunciation" and "assessment of future dangerousness" as the *only criteria* by which extended periods of parole ineligibility can be determined, the majority of the British Columbia Court of Appeal has, in effect, judicially amended the clear statutory language. [Emphasis added.]

A reading of the reasons for sentence in the present case as a whole makes it clear that the sentencing judge, while considering denunciation as a factor, also considered all of the other factors relevant under s. 744, including the nature of the offence, the circumstances surrounding its commission, and the character of the offender, including his prospects for rehabilitation.

92 Furthermore, determining the period of parole ineligibility under s. 744, like all sentencing, is a fact-sensitive process, and the relative emphasis that a sentencing judge will place upon the various criteria considered in sentencing will therefore vary depending on the circumstances of the case. In Shropshire, Iacobucci J. underscored

this point (at p. 203) by referring to the Supreme Court of Canada's decision in *R. v. Lyons* (1987), 37 C.C.C. (3d) 1:

In *R. v. Lyons* [supra] at p. 22, La Forest J. held:

In a rational system of sentencing, the respective importance of prevention, deterrence, retribution and rehabilitation will vary according to the nature of the crime and the circumstances of the offender. No one would suggest that any of these functional considerations should be excluded from the legitimate purview of legislative or judicial decisions regarding sentencing.

Section 744 must be concerned with all of the factors cited in *Lyons*. In *R. v. Luxton* (1990), 58 C.C.C. (3d) 449 the importance of structuring sentences to take into account the individual accused and the particular crime was emphasized. This is also a factor that any order made pursuant to s. 744 ought to take into consideration.

I therefore agree with Laskin J.A.'s statement (at paragraph 35 of his reasons) that appellate courts must afford a sentencing judge the discretion to weigh the relevant sentencing factors as he or she sees fit in the circumstances of a particular case.

93 Finally, I believe that it is important to note the context in which the sentencing judge referred to *Brown* in his reasons for sentence. The sentencing judge relied on *Brown*'s holding that "an additional period of ineligibility should not be ordered except in exceptional circumstances". In *Shropshire*, Iacobucci J. rejected this threshold for having a period of parole ineligibility in excess of ten years as being too high (at p. 204). To the extent that the sentencing judge believed that *Brown* precluded him from imposing a period of parole ineligibility of more than ten years unless he found the case to be "unusual", the sentencing judge's reliance on *Brown* would have benefited the appellant. In the end, the sentencing judge concluded that there were "substantial and convincing reasons" for imposing a longer period of parole ineligibility. However, I find that he did so only after a thorough review and consideration of all of the factors of the appellant's case.

94 The appellant submits that the sentencing judge did not give sufficient weight to the appellant's prospects for rehabilitation. I do not accept this submission. In his reasons for sentence, the sentencing judge said:

An additional consideration under the "character of the offender" factor in s. 744 of the Code is the rehabilitation potential of the offender. In a case such as this, however, where the minimum sentence is life imprisonment with a period of parole ineligibility of ten years, this consideration cannot have the same scope that it would have in other sentencing situations.

In this regard I recognize and have taken into consideration the absence of a prior criminal record, your candid admissions made at trial about prior non-criminal misconduct, and your expressions of remorse over your conduct.

95 I find that the sentencing judge's approach to considering the appellant's prospects for rehabilitation, as outlined in the first paragraph of the above excerpt, discloses no error in principle. In effect, the sentencing judge is saying that rehabilitation is relevant in a s. 744 analysis, although the ten-year minimum parole ineligibility limits the extent to which an appellant's "positive" rehabilitative prospects can be considered. This analysis mirrors the reasoning of Morden A.C.J.O., in *R. v. A. (T.S.)*, a judgment of the Court of Appeal for Ontario, released February 23, 1995, leave to appeal to S.C.C. refused November 16, 1995 (at p. 13):

With respect, I think that under the "character of the offender" factor in s. 744 of the Code, the rehabilitation potential of the offender cannot be excluded from consideration. I recognize, however, that in the setting of a sentence of life imprisonment with a minimum period of parole ineligibility of ten years, this factor cannot have the same scope it would have in other sentencing situations.

96 Morden A.C.J.O.'s finding that the minimum period of parole ineligibility lessens the scope for consideration that may be placed upon an accused's good prospects for rehabilitation is consistent with the following statement from *R. v. Ly* (1992), 72 C.C.C. (3d) 57 (at p. 61) (Man. C.A.), which was cited approvingly in both *M.(C.A.)* (at p. 361) and *Shropshire* (at p. 202):

Parliament's purpose in adding a minimum period of parole ineligibility to a life sentence [for second degree murder] was, in my view, twofold. It was to deter and denounce the crime.

97 In addition, I find that, in the second paragraph of the above excerpt, the sentencing judge specifically turns his mind to the rehabilitative prospects of the appellant, taking into consideration the absence of prior criminal record, the appellant's candid admissions at trial about prior misconduct, and the appellant's remorse.

98 I therefore see no merit to this ground of appeal.

(ii) Planning and Deliberation

99 In his reasons for sentence, the sentencing judge said:

The record in this case discloses elements of planning and deliberation. This is an aggravating circumstance which adds to the gravity of the offence.

The appellant submits that, in doing so, the sentencing judge, in effect, implicitly rejected the jury's verdict that the appellant was not guilty of first degree murder and, as such erred in principle.

100 I do not agree. In my opinion, the sentencing judge was correct in considering this aspect of the crime, as it falls under the statutory criterion of "the circumstances of the

commission of the offence". Once again, I adopt Morden A.C.J.O.'s analysis in *R. v. A. (T.S.)*, supra, (at p. 9):

In determining the gravity of the offence, it is proper for the sentencing judge to consider the planning and deliberation aspects of the evidence as relevant evidence of the "nature of the offence and the circumstances surrounding its commission" and many courts have done so: *R. v. S.B.S.* (1990), 44 O.A.C. 326 (C.A.); *R. v. Johnston*, Ont. C.A., June 25, 1991; *R. v. Young* (1992), 73 C.C.C. (3d) 289 (Ont. C.A.); *R. v. Chaudhary (No. 2)* (1988), 31 O.A.C. 243 (C.A.); *R. v. Able* (1993), 65 O.A.C. 37 (C.A.); and *R. v. Kulba* (1986), 27 C.C.C. (3d) 349 (Man.C.A.)

It would make no sense and, indeed, would distort the facts, if courts could consider a whole range of aggravating circumstances under s. 744 but not, because they are elements of first degree murder, those which indicate planning and deliberation.

101 I would also note that, earlier in his reasons for sentence, the sentencing judge specifically directed himself that he "should not apply a period of parole ineligibility so as to implicitly reject the finding of the jury that the crime did not fall within the category of first degree murder". The appellant does not dispute that the record did indeed disclose elements of planning and deliberation. The sentencing judge properly considered these factors along with all of the other factors relevant under s. 744.

102 This ground of appeal must also fail.

(iii) Psychiatric Evidence

103 The appellant submits that the sentencing judge erred by misapprehending the psychiatric evidence in this case. He further submits that the sentencing judge failed to give sufficient weight to the mitigating aspects of this evidence. The Crown submits that the appellant's argument on this ground really amounts to an attack on the jury's verdict.

104 The appellant points to the following passage in the sentencing judge's reasons:
A further aggravating factor is the breach of trust involved in representing to your wife, to her family, and to her friends that all was well in the marriage. The deception practised on your wife and on the psychiatrists who undertook to help you, fed the false sense of security evidently felt by your wife in the days preceding the fatal attack and was instrumental in exposing her to such an attack. She had every right to feel safe and secure in the bedroom of the house she shared with you.

The appellant claims that, in this passage, the sentencing judge is implying that "the appellant's appearance of relative well-being at Christmas, 1993 and on the trip to New

York in January, 1994 were a deliberate attempt to deceive his wife in order to facilitate the fatal attack", a finding that is not supported by the evidence.

105 I do not agree with the appellant's interpretation of the sentencing judge's reasons. The sentencing judge did not state that the appellant had deceived his wife and others in order to facilitate his attack on her. Rather, the sentencing judge correctly concluded that the appellant's tendency to mask his depression, and other problems, allowed the victim to have a "false" sense of security, which was suddenly and violently dispelled on the morning she was murdered. In my opinion, there was sufficient evidence to support his finding, including the following:

- (a) The appellant testified that he saw his psychiatrist, Dr. Buie, on December 13 and 21, 1993. By that time, he was convinced that he was suffering from ALS, his finances were in trouble, and he was unable to keep up with his usual workload.
- (b) However, according to various friends and family, he appeared to be fine at a family Christmas gathering, and he and the deceased appeared to enjoy a post-Christmas holiday trip to New York.
- (c) The appellant testified that, by January 4, 1994, he was entertaining thoughts of suicide. In fact, he began to take steps toward committing suicide. On January 3 or 4, 1994, he collected two prescriptions for the purpose of a drug overdose. On January 8 he obtained more prescription drugs and purchased a rope at Canadian Tire.
- (d) However, other witnesses and evidence indicated that, at that time, the appellant appeared to be fine. On January 8, 1994, just two days before the murder, the deceased sent the following email to her secretary, indicating that all was well at home:

After we did the driveway AGAIN last night, we had a wonderful homemade stew, thanks to the pressure cooker. Bob [the appellant] even thought ahead and stopped on his way home to pick up some wine, and strawberries for dessert.

- (e) On January 9, 1994, the night before her murder, the deceased sent another "happy" email to her secretary, saying that she had enjoyed a "great day - no shovelling". The deceased also spoke to her sister on the telephone that night, who testified that the deceased seemed fine and at ease.

106 The sentencing judge was also entitled to consider that the appellant had deceived, or at least withheld information from, his psychiatrist, Dr. Buie. Dr. Buie testified that he found that the appellant was not communicative during their psychotherapy sessions. In addition, the appellant admitted in his testimony that, during his January 4, 1994 session, he deliberately misinformed Dr. Buie that he and the deceased had enjoyed sexual

relations during their trip to New York. This led Dr. Buie to conclude that the anti-depressant medication he had prescribed for the appellant was working.

107 The sentencing judge gave considerable attention to the evidence of the appellant's psychiatric condition throughout his reasons for sentence. In the beginning of his reasons, under the heading "The Character of the Offender", the sentencing judge said:

You have a well-documented history of psychiatric disorder attributable largely, according to the medical opinions tendered in evidence, to hereditary factors. Your mother suffered from depression for which she was hospitalized and for which she was treated with Electroconvulsive therapy. A paternal uncle and aunt also suffered from depression. The unanimous opinion of the psychiatrists who testified at the behest of both the Crown and the defence, was that you were suffering a bout of major depression when you killed your wife on January 10, 1994.

This condition was diagnosed on or about June 15, 1992, when you attacked and attempted to kill your wife by manual strangulation. You received psychiatric attention on June 15, 1992, following which you were admitted and treated in a hospital setting for one month. You were released from hospital and thereafter continued being observed and treated by a private psychiatrist until the date of the second attack on your wife on January 10, 1994. Indeed, on the very morning when the attack occurred, you had failed to attend an 8:00 a.m. appointment with your psychiatrist.

After your release from hospital in July of 1992, you resumed your practice as a physiatrist. While in hospital and after your release, you and your wife received joint counselling concerning the importance of you continuing with your prescribed medication and concerning the signs to look for which would indicate the onset of any further bout of depression.

Following your arrest on January 10, 1994, you were twice committed to the Royal Ottawa Hospital for psychiatric assessment and treatment. You received Electroconvulsive therapy on your second admission, which treatments continued until the eve of trial and permitted the Royal Ottawa Hospital to certify you to be fit to stand trial.

The appellant does not take issue with any of these findings, as they accurately reflect the evidence presented at trial.

108 Later in his reasons, under the heading, "The Nature of the Offence and the Circumstances Surrounding the Commission of the Offence", Cavarzan J. stated:

The defence of not criminally responsible by reason of mental disorder was not accepted by the jury. That defence rested on the opinion of psychiatrists who testified that you suffered major depression with psychotic features, the principal psychotic feature being delusions which led you to believe at the time you killed your wife that the act was not morally wrong. That psychiatric opinion advanced

the view that your act was an extended suicide, and that the killing was altruistic and intended to spare the victim the pain and humiliation of your impending professional, financial and social ruin. In rejecting this defence the jury did not accept that the killing was an extended suicide. Furthermore, as already noted, the jury did not accept that you genuinely attempted to commit suicide. A substantial period of time, perhaps several hours, elapsed between the time of the killing and 12:30 p.m., which was approximately the time when the police entered and found you.

109 Finally, after imposing the 17-year period of parole ineligibility, the sentencing judge once again referred to the appellant's psychiatric history:

Because of your psychiatric history, I am recommending that appropriate assessment, treatment and counselling be made available to you.

110 In my opinion, this review of the sentencing judge's consideration of the psychiatric evidence discloses no error in principle. The sentencing judge accurately summarized and considered the psychiatric evidence which was not in dispute, including the medical experts' unanimous diagnosis that the appellant was suffering a bout of major depression at the time of the killing.

111 The sentencing judge does not specifically refer to the Crown's psychiatric evidence, i.e. the appellant's major depression, as a mitigating factor. However, it is implicit in his reasons that Cavarzan J. gave ample consideration the nature and impact of the psychiatric evidence in sentencing the appellant. Cavarzan J. referred to the appellant's "well-documented history of psychiatric disorder" and that "the unanimous opinion of the psychiatrists who testified at the behest of both the Crown and defence was that you [the appellant] were suffering a bout of major depression when you killed your wife on January 10, 1994."

112 I therefore see no merit to this ground of appeal.

(iv) The appropriate range of sentence

113 Finally, the appellant submits that the 17-year period of parole ineligibility imposed by the sentencing judge is unduly long, and outside the range of sentences that have been imposed in similar sentences. In support of this argument, counsel for the appellant referred this court to sentences in a number of cases involving the second degree murder of a spouse. The period of parole ineligibility in these cases range from the statutory minimum, ten years, to 20 years.

114 While the 17-year period of parole ineligibility imposed in this case is at that "high end of the spectrum", this alone, however, is not sufficient reason to justify interference by an appellate court: see R. v. MacDonnell [\(1997\), 114 C.C.C. \(3d\) 436](#), where Sopinka

J., writing for the majority of the Supreme Court, noted (at 451) "that in both *Shropshire* and *M.(C.A.)*, two recent, unanimous decisions, this Court refused on the basis of deference to reduce sentences that were clearly at the high end of the spectrum."

115 As the following passage from *R. v. M. (C.A.)* at p. 375 demonstrates, the threshold at which an appellate court should intervene is a high one:

Appellate courts, of course, serve an important function in reviewing and minimizing the disparity of sentences imposed by sentencing judges for similar offenders and similar offences committed throughout Canada [cites omitted]. But in exercising this role, courts of appeal must still exercise a margin of deference before intervening in the specialized discretion that Parliament has explicitly vested in sentencing judges. It has been repeatedly stressed that there is no such thing as a uniform sentence for a particular crime [cites omitted]. Sentencing is an inherently individualized process, and the search for a single appropriate sentence for a similar offender and a similar crime will frequently be a fruitless exercise of academic abstraction. As well, sentences for a particular offence should be expected to vary to some degree across various communities and regions in this country, as the "just and appropriate" mix of accepted sentencing goals will depend on the needs and current conditions of and in the particular community where the crime occurred. For these reasons, consistent with the general standard of review we articulated in *Shropshire*, I believe that a court of appeal should only intervene to minimize the disparity of sentences where the sentence imposed by the trial judge is in substantial and marked departure from the sentences customarily imposed for similar offenders committing similar crimes.

116 I note that there are many distinguishing features between some of these cases and the present case. In many of these cases, the accused pleaded guilty to the offence of second degree murder, and this was no doubt considered a mitigating factor. In addition, in several cases, there was no jury recommendation regarding the period of parole ineligibility, or the jury recommended a period of parole ineligibility that was lower than the 20 years recommended by the jury in this case. While the sentencing judge was not bound by the 20-year recommendation made by the jury, he was bound by ss. 744 and 743 of the Criminal Code to consider this recommendation in sentencing the appellant.

117 In the present case, the trial judge gave very specific reasons for imposing the period of parole ineligibility that he did, including the following:

- (a) there were elements of planning and deliberation in the killing;
- (b) the appellant's breach of trust involved in deceiving his wife, family and psychiatrists into thinking that all was well within the marriage;
- (c) the false sense of security that the wife felt, due to this deception, which made her particularly vulnerable to attack; and

(d) the circumstances of the killing, which the sentencing judge described in his reasons for sentence as "one of appalling and unspeakable cruelty".

118 The appellant concedes that the fact that his "attack on his wife was a breach of trust" is properly considered an aggravating factor. The appellant and his wife had been married for twenty years, and she was described as the appellant's "only friend". The appellant attacked his wife while she was in their bedroom, having just awakened. He choked her and stabbed her repeatedly. When she begged him to stop, and asked him why he was doing this to her, he offered her no explanation.

119 I do not find that the period of parole ineligibility imposed by the sentencing judge was outside the appropriate range of sentence.

CONCLUSION AND DISPOSITION

120 The sentencing judge presided over a 25-day trial, which involved evidence from 57 witnesses. Like the jury, he heard live testimony from various expert medical witnesses, and also heard from the appellant himself. He was therefore in a better position than this court to appreciate all aspects of this case. The sentencing judge did not err in his analysis or application of s. 744 of the Criminal Code. He correctly identified and considered all of the relevant criteria in deciding that a sentence of 17 years parole ineligibility was fit in the circumstances of this case.

121 In conclusion, I would grant leave to appeal the sentence, but dismiss the appeal.

McMURTRY C.J.O.

1 [\(1995\), 102 C.C.C. \(3d\) 193](#) (S.C.C.) at 204.

2 Shropshire at 204.

3 See R. v. Rezaie [\(1996\), 112 C.C.C. \(3d\) 97](#) (Ont. C.A.).

4 See Canada (Director of Investigation and Research) v. Southam Inc. [\[1997\] 1 S.C.R. 748](#) at 770; and Sa Majesté du Chef du Québec et al v. Committee for the Equal Treatment of Asbestos Minority Shareholders, [\[1999\] O.J. No. 388](#) (C.A.).

5 [\(1993\), 83 C.C.C. \(3d\) 394](#) at 407.

6 [\[1995\] O.J. No. 535](#), (C.A.); leave to appeal to S.C.C. refused November 16, 1995.

7 [\(1998\), 122 C.C.C. \(3d\) 371](#) (Ont. C.A.).

8 [\(1995\), 96 C.C.C. \(3d\) 431](#) (Ont. C.A.), affirmed [102 C.C.C. \(3d\) 383](#) (S.C.C.).

9 [\[1995\] O.J. No. 670](#) (C.A.).

10 [\[1995\] O.J. No. 1897](#) (C.A.).

11 [\[1991\] O.J. No. 2666](#) (Gen. Div.) affirmed [\[1993\] O.J. No. 3955](#) (C.A.).

- 12 [\[1997\] O.J. No. 3302](#) (Gen. Div.).
- 13 [\[1995\] O.J. No. 4052](#) (Gen. Div.).
- 14 Now s. 745.2.
- 15 Now s. 745.
- 16 Now s. 745.2.
- 17 Now s. 745.4.
- 18 Shropshire involved a guilty plea and there was therefore no jury recommendation to consider.
- 19 For ease of reference, I have set out the passages that the sentencing judge quoted from Brown in italics.

End of Document

1993 CarswellNS 19

Supreme Court of Canada

R. v. Morgentaler

**Please see in particular paras.
50-51**

1993 CarswellNS 272, 1993 CarswellNS 19, [1993] 3 S.C.R. 463, [1993] S.C.J. No. 95, 107 D.L.R. (4th) 537, 125 N.S.R. (2d) 81, 157 N.R. 97, 20 W.C.B. (2d) 585, 25 C.R. (4th) 179, 349 A.P.R. 81, 85 C.C.C. (3d) 118, J.E. 93-1654, EYB 1993-67381

**R. v. HENRY MORGENTALER; ATTORNEY GENERAL OF CANADA,
ATTORNEY GENERAL FOR NEW BRUNSWICK, R.E.A.L. WOMEN OF
CANADA and CANADIAN ABORTION RIGHTS ACTION LEAGUE (Intervenors)**

Lamer C.J.C., La Forest, L'Heureux-Dubé, Sopinka,
Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

Heard: February 4, 1993

Judgment: September 30, 1993

Docket: Doc. 22578

Counsel: *Marian F.H. Tyson* and *Louise Walsh Poirier*, for the Crown.

Anne S. Derrick and *Jacqueline Mullenger*, for respondent.

Edward R. Sojonky, Q.C. and *Yvonne E. Milosevic*, for intervenor Attorney General of Canada.

Bruce Judah, for intervenor Attorney General for New Brunswick.

Angela M. Costigan and *Lynn Kirwin*, for intervenor R.E.A.L. Women of Canada.

Mary Eberts and *Ian Godfrey*, for intervenor Canadian Abortion Rights Action League.

Subject: Criminal; Constitutional; Public

Headnote

Criminal Law --- Constitutional issues in criminal law — Constitutional responsibility for criminal law — Federal powers — Nature and extent of federal criminal power

Health Law --- Miscellaneous health facilities — Abortion clinics

Constitutional law — [Constitution Act, 1867](#) — Distribution of legislative powers — Criminal law — Nova Scotia legislation and regulation prohibiting abortion anywhere other than in approved hospitals being in pith and substance criminal law and ultra vires province — Legislation ultra vires in its entirety.

Interpretation of statutes — Interpretive aids — Origin and history — Extrinsic evidence being admissible if relevant and not inherently unreliable — Hansard evidence being admissible respecting constitutional challenge to provincial law prohibiting abortion outside hospital.

In January 1988, the Supreme Court of Canada declared the [Criminal Code](#) provisions relating to abortion unconstitutional. A year later the accused announced his intention to establish a

free-standing abortion clinic in Halifax. In March 1989, the Nova Scotia government adopted regulations prohibiting abortion anywhere other than a place approved of as a hospital and denying medical services insurance coverage for out of hospital abortions. In June 1989, the government revoked these regulations and adopted the *Medical Services Act (N.S.)* and a new regulation which continued the prohibitions on abortion. The accused nevertheless opened his clinic and performed 14 abortions. He was charged with 14 counts of violating the Act. However, the trial judge held that the legislation was in pith and substance criminal law and ultra vires the province. The acquittal was upheld by the Nova Scotia Court of Appeal. The Crown appealed.

Held:

The appeal was dismissed.

The *Medical Services Act* and its regulation were criminal law in pith and substance and consequently ultra vires the province. The legislation was suspect on its face in dealing with a subject historically considered part of the criminal law. It was aimed primarily at suppressing the perceived public harm or evil of abortion clinics. Its primary objective was to prohibit abortion outside hospitals as socially undesirable conduct. Any concern with safety and security of pregnant women or with health care policy, hospitals or the regulation of the medical profession was merely ancillary. It was unnecessary to conclude whether the practical effect of the legislation would restrict abortion in Nova Scotia. The Act and regulation were ultra vires in their entirety and could not be severed.

In determining the background, context and purpose of challenged legislation, the court is entitled to refer to extrinsic evidence of various kinds provided it is relevant and not inherently unreliable. This includes related legislation, evidence of the "mischief" at which the legislation is directed and the legislative history in the sense of events occurring during drafting and enactment. Provided that the court remains mindful of the limited reliability and weight of Hansard evidence, it should be admitted as relevant to both the background and purpose of legislation. Its admissibility in constitutional cases is well established.

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(1989), 39 Admin. L.R. 171, 63 D.L.R. (4th) 680, 93 N.S.R. (2d) 197, 242 A.P.R. 197 (T.D.), leave to appeal to S.C.C. refused [1990] 2 S.C.R. v, 100 N.S.R. (2d) 90 (note), 272 A.P.R. 90 (note), 74 D.L.R. (4th) viii (note), 127 N.R. 158 (note) — referred to

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R. v. Morgentaler, [1993] 1 S.C.R. 462 — referred to

R. v. Videoflicks Ltd., (sub nom. *R. v. Edwards Books & Art Ltd.*) [1986] 2 S.C.R. 713, 55 C.R. (3d) 193, 87 C.L.L.C. 14,001, 28 C.R.R. 1, 19 O.A.C. 239, 71 N.R. 161, (sub nom. *Edwards Books & Art Ltd. v. R.*; *R. v. Nortown Foods Ltd.*) 30 C.C.C. (3d) 385, 35 D.L.R. (4th) 1 — referred to

R. v. Westendorp, [1983] 1 S.C.R. 43, 32 C.R. (3d) 97, [1983] 2 W.W.R. 385, 23 Alta. L.R. (2d) 289, 20 M.P.L.R. 267, 144 D.L.R. (3d) 259, 2 C.C.C. (3d) 330, 46 N.R. 30, 41 A.R. 306 — considered

R. v. Whyte, [1988] 2 S.C.R. 3, 64 C.R. (3d) 123, 6 M.V.R. (2d) 138, [1988] 5 W.W.R. 26, 86 N.R. 328, 42 C.C.C. (3d) 97, 29 B.C.L.R. (2d) 273, 51 D.L.R. (4th) 481, 35 C.R.R. 1 — referred to

Reference re Alberta Bill of Rights Act, [1947] A.C. 503, [1947] 2 W.W.R. 401, [1947] 4 D.L.R. 1 (P.C.) — referred to

Reference re Alberta Legislation, [1938] S.C.R. 100, [1938] 2 D.L.R. 81, affirmed [1939] A.C. 117, [1938] 3 W.W.R. 337, (sub nom. *Alberta (Attorney General) v. Canada (Attorney General)*) [1938] 4 D.L.R. 433 (P.C.) — applied

Reference re Anti-Inflation Act, 1975 (Canada), [1976] 2 S.C.R. 373, 9 N.R. 541, 68 D.L.R. (3d) 452 — applied

Reference re Freedom of Informed Choice (Abortions) Act (1985), 50 C.R. (3d) 89, 44 Sask. R. 104, 25 D.L.R. (4th) 751 (C.A.) — referred to

Reference re Lord's Day Act (Ontario) (sub nom. *Ontario (Attorney General) v. Hamilton Street Railway*) [1903] A.C. 524, 2 O.W.R. 672, 7 C.C.C. 326 (P.C.) — referred to

Reference re Residential Tenancies Act, (sub nom. *Re Residential Tenancies Act of Ontario*) [1981] 1 S.C.R. 714, 123 D.L.R. (3d) 554, 37 N.R. 158 — applied

Reference re Validity of s. 5(a) of Dairy Industry Act (Canada), (Margarine Case), [1949] 1 S.C.R. 1, [1949] 1 D.L.R. 433 [affirmed (sub nom. *Canadian Federation of Agriculture v. Quebec (Attorney General)*) [1951] A.C. 179, [1950] 4 D.L.R. 689 (P.C.)] — applied *Rio Hotel Ltd. v. Liquor Licensing Board (New Brunswick)*, (sub nom. *Rio Hotel Ltd. v. New Brunswick (Liquor Licensing Board)*) [1987] 2 S.C.R. 59, 58 C.R. (3d) 378, 77 N.R. 104, 28 Admin. L.R. 1, 44 D.L.R. (4th) 663, 81 N.B.R. (2d) 328, 205 A.P.R. 328 — referred to *Saskatchewan (Attorney General) v. Canada (Attorney General)*, [1949] A.C. 110, [1949] 1 W.W.R. 742, [1949] 2 D.L.R. 145 (P.C.) — referred to *Saumur v. Quebec (City)*, [1953] 2 S.C.R. 299, 106 C.C.C. 289, [1953] 4 D.L.R. 641 — referred to *Schneider v. R.*, (sub nom. *Schneider v. British Columbia*) [1982] 2 S.C.R. 112, 43 N.R. 91, [1982] 6 W.W.R. 673, 39 B.C.L.R. 273, 139 D.L.R. (3d) 417, 68 C.C.C. (2d) 449 — considered *Scowby v. Saskatchewan (Board of Inquiry)*, (sub nom. *Scowby v. Glendinning*) [1986] 2 S.C.R. 226, [1986] 6 W.W.R. 481, 70 N.R. 241, 29 C.C.C. (3d) 1, 32 D.L.R. (4th) 161, 51 Sask. R. 208, 8 C.H.R.R. D/3677 — considered *Smith v. R.*, [1960] S.C.R. 776, 33 C.R. 318, 25 D.L.R. (2d) 225, 128 C.C.C. 145 — referred to *Starr v. Ontario (Commissioner of Inquiry)*, (sub nom. *Starr v. Houlden*) [1990] 1 S.C.R. 1366, 55 C.C.C. (3d) 472, 68 D.L.R. (4th) 641, 110 N.R. 81, 41 O.A.C. 161 — considered *Stephens v. R.*, [1960] S.C.R. 823, 33 C.R. 312, 33 W.W.R. 379, 128 C.C.C. 21, 25 D.L.R. (2d) 296 — referred to *Switzman v. Elbling*, [1957] S.C.R. 285, 117 C.C.C. 129, 7 D.L.R. (2d) 337 — applied *Texada Mines Ltd. v. British Columbia (Attorney General)*, [1960] S.C.R. 713, 32 W.W.R. 37, 24 D.L.R. (2d) 81 — considered *Bryden v. Union Colliery Co. of British Columbia* (1899), (sub nom. *Union Colliery Co. of British Columbia v. Bryden*) [1899] A.C. 580, 1 M.M.C. 337, 1899 CarswellBC 13, (sub nom. *Union Colliery Co. of British Columbia v. Bryden*) C.R. [12] A.C. 175 (British Columbia P.C.) — referred to *Walter v. Alberta (Attorney General)*, [1969] S.C.R. 383, 66 W.W.R. 513, 3 D.L.R. (3d) 1 — considered *Whitbread v. Walley*, [1990] 3 S.C.R. 1273, [1991] 2 W.W.R. 195, 52 B.C.L.R. (2d) 187, 120 N.R. 109, 77 D.L.R. (4th) 25 — referred to

Statutes considered:

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B of the Canada Act 1982 (U.K.), 1982, c. 11.

Constitution Act, 1867 (U.K.), 30 & 31 Vict., c. 3 —

s. 91

s. 91(27)

s. 92

s. 92(7)

s. 92(13)

s. 92(15)

s. 92(16)

Criminal Code, R.S.C. 1970, c. C-34 [R.S.C. 1985, c. C-46] —

s. 251 [R.S.C. 1985, c. C-46, s. 287]

Criminal Code, R.S.C. 1985, c. C-46 —

s. 121.1(b)

s. 287

Criminal Law Amendment Act, 1968-69, S.C. 1968-69, c. 38 —

s. 18

Health Act, R.S.N.S. 1989, c. 195.

Health Services and Insurance Act, R.S.N.S. 1989, c. 197.

Heroin Treatment Act, S.B.C. 1978, c. 24 [R.S.B.C. 1979, c. 166].

Hospitals Act, R.S.N.S. 1989, c. 208.

Lord Ellenborough's Act, 1803 (U.K.), 43 Geo. 3, c. 58.

Lord's Day Act, R.S.C. 1970, c. L-13.

Medical Services Act, R.S.N.S. 1989, c. 281 —

s. 2

s. 3(a)

s. 4

s. 5

s. 6

s. 6(1)

s. 7

s. 8

s. 8(1)(a)

Regulations considered:

Health Act, R.S.N.S. 1989, c. 195 —

N.S. Reg. 33/89 [rep. N.S. Reg. 150/89]

Health Services and Insurance Act, R.S.N.S. 1989, c. 197 —

N.S. Reg. 32/89 [rep. N.S. Reg. 149/89]

Hospitals Act, R.S.N.S. 1989, c. 208 —

N.S. Reg. 34/89 [rep. N.S. Reg. 151/89]

Medical Services Act, R.S.N.S. 1989, c. 281 —

Medical Services Designation Regulation

N.S. Reg. 152/89

Appeal from judgment reported at (1991), 7 C.R. (4th) 1, 104 N.S.R. (2d) 361, 283 A.P.R. 361, 66 C.C.C. (3d) 288, 83 D.L.R. (4th) 8 (C.A.) affirming acquittal on charges of violating *Medical Services Act* (N.S.).

The judgment of the court was delivered by Sopinka J.:

Introduction

1 The question in this appeal is whether the *Nova Scotia Medical Services Act*, R.S.N.S. 1989, c. 281, and the regulation made under the Act, N.S. Reg. 152/89, are ultra vires the province of Nova Scotia on the ground that they are in pith and substance criminal law. The Act and regulation make it an offence to perform an abortion outside a hospital.

2 Between October 26 and November 2, 1989, the respondent performed fourteen abortions at his clinic in Halifax. He was charged with fourteen counts of violating the *Medical Services Act*. He was acquitted at trial after the trial judge held that the legislation under which he was charged was beyond the province's legislative authority to enact because it was in pith and substance criminal law [reported (1990), 99 N.S.R. (2d) 293 (Prov. Ct.)]. This decision was upheld by the Nova Scotia Court of Appeal [reported (1991), 104 N.S.R. (2d) 361, 7 C.R. (4th) 1]. The Crown appeals from the Court of Appeal's decision with leave of this Court.

Facts And Legislation

3 In January, 1988, this Court ruled that the *Criminal Code* provisions relating to abortion were unconstitutional because they violated women's *Charter* guarantee of security of the person: *R. v. Morgentaler*, [1988] 1 S.C.R. 30 (*Morgentaler* (1988)). At the same time the Court reaffirmed its earlier decision that the provisions were a valid exercise of the federal criminal law power: *R. v. Morgentaler* (1975), [1976] 1 S.C.R. 616 (*Morgentaler* (1975)). The 1988 decision meant that abortion was no longer regulated by the criminal law. It was no longer an offence to obtain or perform an abortion in a clinic such as those run by the respondent. A year later, in January, 1989, it was rumoured in Nova Scotia that the respondent intended to establish a free-standing abortion clinic in Halifax. Subsequently, the respondent publicly confirmed his intention to do so.

4 On March 16, 1989, the Nova Scotia government took action to prevent Dr. Morgentaler from realizing his intention. The Governor in Council approved two identical regulations, one under the *Health Act*, R.S.N.S. 1989, c. 195 (N.S. Reg. 33/89), and one under the *Hospitals Act*, R.S.N.S. 1989, c. 208 (N.S. Reg. 34/89), which prohibited the performance of an abortion anywhere other than in a place approved as a hospital under the *Hospitals Act*. At the same time it made a regulation (N.S. Reg. 32/89) pursuant to the *Health Services and Insurance Act*, R.S.N.S. 1989, c. 197, denying medical services insurance coverage for abortions performed outside a hospital. These regulations are referred to collectively as the "March regulations."

5 On May 8, 1989, one of the intervenors in the present case, the Canadian Abortion Rights Action League (CARAL), launched a court challenge to the constitutionality of the March regulations. The matter was set for hearing on June 22, 1989. The case was adjourned and ultimately dismissed for lack of standing, primarily because the same issues would be determined in the present case: *Canadian Abortion Rights Action League Inc. v. Nova Scotia (Attorney General)* (1990), 96 N.S.R. (2d) 284 (C.A.), affirming (1989), 93 N.S.R. (2d) 197 (T.D.), leave to appeal to S.C.C. refused, [1990] 2 S.C.R. v.

6 CARAL's court challenge to the March regulations was still outstanding on June 6, 1989, when the Minister of Health and Fitness introduced the *Medical Services Act* for first reading. The Act progressed rapidly through the legislature. It received third reading and Royal Assent on June 15, the last day of the legislative session. The relevant portions of the Act are as follows:

2. The purpose of this Act is to prohibit the privatization of the provision of certain medical services in order to maintain a single high-quality health-care delivery system for all Nova Scotians.

3. In this Act,

(a) "designated medical service" means a medical service designated pursuant to the regulations;

.....

4. No person shall perform or assist in the performance of a designated medical service other than in a hospital approved as a hospital pursuant to the *Hospitals Act*.

5. Notwithstanding the *Health Services and Insurance Act*, a person who performs or for whom is performed a medical service contrary to this Act is not entitled to reimbursement pursuant to that Act.

6(1) Every person who contravenes this Act is guilty of an offence and liable upon summary conviction to a fine of not less than ten thousand dollars nor more than fifty thousand dollars.

.....

7. Notwithstanding any other provisions of this Act, where designated medical services are being performed contrary to this Act, the Minister may, at any time, apply to a judge of the Supreme Court for an injunction, and the judge may make any order that in the opinion of the judge the case requires.

8(1) The Governor in Council, on the recommendation of the Minister, may make regulations

(a) after consultation by the Minister with the Medical Society of Nova Scotia, designating a medical service for the purpose of this Act;

The Medical Society was consulted after the passage of the Act, and a list of medical services was finalized. On July 20, 1989, the *Medical Services Designation Regulation*, N.S. Reg. 152/89, was made, designating the following medical services for the purposes of the Act:

(a) Arthroscopy

(b) Colonoscopy (which, for greater certainty, does not include flexible sigmoidoscopy)

(c) Upper Gastro-Intestinal Endoscopy

(d) Abortion, including a therapeutic abortion, but not including emergency services related to a spontaneous abortion or related to complications arising from a previously performed abortion

(e) Lithotripsy

- (f) Liposuction
- (g) Nuclear Medicine
- (h) Installation or Removal of Intraocular Lenses
- (i) Eletromyography, including Nerve Conduction Studies.

The March regulations were revoked on the same day by N.S. Regs. 149-151/89. Item (d) of the new regulation continued the March regulations' prohibition of the performance of abortion outside hospitals. Section 5 of the Act continued the denial of health insurance coverage for abortions performed in violation of the prohibition.

7 Despite these actions, Dr. Morgentaler opened his clinic in Halifax as predicted. At first the clinic only provided counselling and referrals to Dr. Morgentaler's Montreal clinic. On October 26, 1989, however, Dr. Morgentaler defied the Nova Scotia legislation by performing seven abortions. He announced that he had done so at a press conference later that day. Several days later he performed seven more abortions. He was charged with fourteen counts of unlawfully performing a designated medical service, to wit, an abortion, other than in a hospital approved as such under the *Hospitals Act*, contrary to s. 6 of the *Medical Services Act*. Dr. Morgentaler publicly announced his resolve to continue his activities in contravention of the Act, and on November 6, 1989 the government of Nova Scotia obtained an interim injunction under s. 7 of the Act to restrain him from further violations of the Act pending the resolution of the charges and the constitutional challenge in court: *Nova Scotia (Attorney General) v. Morgentaler* (1989), 64 D.L.R. (4th) 297 (N.S. T.D.), affirmed (1990), 69 D.L.R. (4th) 559 (N.S. C.A.), leave to appeal to the S.C.C. refused [1990] 2 S.C.R. ix.

8 When the case proceeded to trial in June, 1990, Dr. Morgentaler did not dispute that he had performed the abortions as alleged. He argued, instead, that the Act and the regulation were inconsistent with the Constitution of Canada and consequently of no force or effect, on the grounds that they violate women's *Charter* rights to security of the person and equality and that they are an unlawful encroachment on the federal Parliament's exclusive criminal law jurisdiction. He also argued that the regulation was an abuse of discretion by the provincial cabinet and therefore in excess of its jurisdiction.

Judgments Below

A. Provincial Court of Nova Scotia (1990), 99 N.S.R. (2d) 293

10 Kennedy Prov. J. decided to address the distribution of powers issue first and having done so, found it unnecessary to go any further. He concluded that "the prohibition and regulation of abortion has been and remains criminal law in this country" and held:

It would seem, therefore, that if the prohibition or regulation of abortion is criminal law and if Parliament, as part of its proper exercise of its exclusive criminal law-making power, may determine what is not criminal as well as what is criminal, then by restricting the performance of therapeutic abortions to hospitals the Province of Nova Scotia has trespassed into an area of Federal Government competence. [At p. 295.]

He held that he could properly look beyond the four corners of the legislation to consider extrinsic evidence of the legislative history in determining the pith and substance of the legislation. He found that the Nova Scotia government had notice in January, 1989 of Dr. Morgentaler's intention to open an abortion clinic in Halifax. He reviewed the chronology of events that followed and held that it was reasonable to infer that the government believed that the *Medical Services Act* and regulation accomplished the same purpose as the March regulations. He observed that the provincial government had created a Royal Commission on Health Care Issues in 1987, with a mandate to recommend health care policy, and that the Act was passed before the Commission had rendered its report even though the Throne Speech of February 23, 1989 indicated that the government was awaiting the report. Kennedy Prov. J. also noted that the Medical Society was not consulted until after the Act was passed and that even then, according to the then president of the Society, the restriction of abortion was not negotiable.

11 Kennedy Prov. J. held evidence of statements and speeches made in the legislature during debates to be relevant and admissible. He found that the Health Minister had openly stated the government's policy to stop free-standing abortion clinics, in particular Dr. Morgentaler's, that this sentiment permeated the debates on both sides of the Assembly, and that Dr. Morgentaler was an acknowledged "mischief" against which the legislation was directed. He also considered relevant, though not determinative, the substantial penalties imposed by the Act (s. 6(1)).

12 He concluded that the Act and regulation were in pith and substance criminal law, "made primarily to control and restrict abortions within the province" and "to keep free-standing abortion clinics, and in the specific, Dr. Morgentaler out of Nova Scotia" (at p. 302). The province's privatization concerns, while real, were incidental to the paramount purpose of the legislation. Given this conclusion, Kennedy Prov. J. acquitted the respondent. He refrained from dealing with the *Charter* issues unless directed by an appeal court to do so.

B. Nova Scotia Supreme Court, Appeal Division (1991), 104 N.S.R. (2d) 361**(1) *Freeman J.A., Clarke C.J.N.S. and Hart and Chipman JJ.A. concurring***

13 Freeman J.A. held that while the province had the legislative power to pass a law in the present form, the question was whether it was colourable criminal law, i.e.:

... whether the province properly used [its] powers and created a law within the provincial competence, or whether it improperly attempted to use federal powers to pass a law that, regardless of its form, is actually a criminal law. [At p. 363.]

He held that both purpose and effect are relevant to characterizing the "matter" in relation to which a law is enacted. He found that the legislation effectively duplicated [s. 251 of the *Criminal Code*, R.S.C. 1970, c. C-34](#) (now [s. 287](#)), the section struck down by this Court in *Morgentaler* (1988), supra. On the other hand, he also held that the effect of the Act was to prevent privatization, and since legislative effects alone were inconclusive, he examined purpose in more depth. He held that the legislative debates were admissible and relevant to the background and purpose of the legislation. They demonstrated that the government's intent in making the March regulations and introducing the Act was to prevent the establishment of Morgentaler clinics in Nova Scotia, and that the members of both sides of the House understood this as the paramount purpose of the legislation.

14 Freeman J.A. conceded that a credible case could be made out for the provincial objective of stamping out privatization of health care services, but disagreed that this was the primary target of the legislation. Six factors pointed in the other direction, and they are worth repeating in full:

1. Privatization of medical services had not been enunciated as a government objective prior to the introduction of the [Medical Services Act](#). It was not mentioned in the Throne Speech on February 23, 1989. The Throne Speech did say that a Royal Commission Report was being awaited. The order-in-council establishing the Royal Commission made no reference to privatization.

2. The "March regulations" were obviously aimed at Morgentaler clinics. Hon. David Nantes, Health Minister, made that clear when he announced them to the legislature ... The [Medical Services Act](#) was presented to the legislature following a court challenge to the March regulations. It was introduced on June 6, 1989, and passed, with the appearance of last-minute haste, the day the House closed on June 15, 1989. The March regulations were encompassed by the [Medical Services Act](#) and its regulation. They were revoked, no longer necessary, on July 20, 1989, the day the regulation was passed under the [Medical Services Act](#).

3. In explaining the desirability of avoiding the pitfalls of privatization, the Crown relied heavily on economic considerations. The report of the Royal Commission on Health Costs

was being awaited, as the Throne Speech noted. In passing the *Medical Services Act* on June 15, 1989, the legislature elected to do so without the benefit of observations or recommendations by the Royal Commission ...

4. The Crown's evidence as to the official policy of the government of Nova Scotia on the privatization issue was given by Mr. Malcom [a senior bureaucrat] ... The Minister of Health or other cabinet Ministers could have given the best evidence as to the real purpose of the *Medical Services Act*. While Mr. Nantes emphasized privatization in moving second reading of the *Medical Services Act*, his remarks to the house about the abortion clinics left little doubt about the government's objectives for the *Act*.

5. The Department of Health had been engaged in discussion with the Medical Society of Nova Scotia to have more health care services delivered outside of hospitals. The Medical Society was not consulted about the *Act* prior to its introduction. The evidence suggests the *Act* runs counter to the direction of the talks.

6. Under s. 35 of the *Health Services and Insurance Act* the penalty for a violation of either the *Act* or regulations made under it is a maximum fine of \$100 for the first offence and \$200 for a subsequent offence. Under the *Hospitals Act* the maximum fine is \$500. The *Medical Services Act* provides for a minimum fine of \$10,000 and a maximum fine of \$50,000. The Crown's explanation for the substantial penalties under the *Medical Services Act* is noteworthy:

Penalties are a means of enforcing compliance with provincial laws ... Where a person is determined to carry on a lucrative business, as is Dr. Morgentaler, who charged an average of \$350 per procedure (Admission of Facts), and who anticipates being open for business in Halifax two days per week, (Transcript, p. 1165) at 15 procedures per day, or approximately \$10,000 for two days work, if the penalty was not substantial, it would not ensure compliance with the law. *In this case a penalty of \$10,000 represents approximately two days work for Dr. Morgentaler.*

[At pp. 376-77, Freeman J.A.'s emphasis.]

15 Freeman J.A. concluded as follows:

In summary, there is little in the evidence of the purpose of the *Medical Services Act* to suggest that its primary thrust was privatization, and a great deal that shows it was primarily intended to prohibit Morgentaler abortion clinics. It will be recalled that the effect was somewhat equivocal: it impacted upon private abortion clinics in the same manner as s. 251 of the *Criminal Code*, but it also had the effect of preventing privatization. When the purpose and effect of the *Act* are considered together, against the background of all the relevant circumstances, the conclusion is inescapable.

The *Medical Services Act* is in its pith and substance criminal law, as Judge Kennedy found it to be. As such, it is beyond the jurisdiction of the government of Nova Scotia; it must be struck down. [At p. 378.]

(2) *Jones J.A. dissenting*

16 In Jones J.A.'s view, the issue was "simply whether the province has the power to regulate how and where medical services may be performed in the province" (at p. 378). He referred to the province's general jurisdiction over health matters including the non-criminal aspects of abortion, and after considering the terms of the *Medical Services Act*, he concluded:

In the absence of federal legislation the province has a legitimate interest in the performance of abortions in doctors' offices where that practice is objectionable to the public. Obviously that was the view of the Legislature. In my view the pith and substance of the *Act* is simply the regulation of where these medical services can be ... performed. I see no difference in principle between such legislation and legislation requiring the treatment of aids patients or battered children in hospitals. Those are matters within the power of the provinces to legislate in relation to public health. That being so it is not open to this Court to review the reasons for the legislation. [At p. 383.]

He considered the "colourability" doctrine inapplicable since here the province was empowered to deal with the subject, and "[l]egislation is not open to review on the issue of colourability where a legislature is clearly acting within its powers" (at pp. 384-85). He would have allowed the appeal and ordered the trial to continue.

Issues

17 On February 18, 1992, the Chief Justice stated the following constitutional questions:

1. Is the *Medical Services Act*, R.S.N.S. 1989, c. 281, ultra vires the Legislature of the Province of Nova Scotia on the ground that the Act is legislation in relation to criminal law falling within the exclusive legislature jurisdiction of the Parliament of Canada under s. 91(27) of the *Constitution Act, 1867*?
2. Is the *Medical Services Designation Regulation*, N.S. Reg. 152/89, made on the 20th day of July, 1989, pursuant to s. 8 of the *Medical Services Act*, R.S.N.S. 1989, c. 281, ultra vires the Lieutenant Governor in Council on the ground the regulation was made pursuant to legislation in relation to criminal law falling within the exclusive legislative jurisdiction of the Parliament of Canada under s. 91(27) of the *Constitution Act, 1867*?

18 It is important to keep in mind that the question before us is limited to the distribution of powers. The impact of the *Canadian Charter of Rights and Freedoms* on legislation of this kind,

while an important subject, is not in issue here. A holding that this legislation relates to a matter within the legislative competence of one or the other level of government does not mean that such legislation would either survive or fail the scrutiny of *the Charter*.

19 Moreover, even for purposes of the distribution of powers the issues are limited in this case: the criminal law power is the only federal head of power in issue. This is the basis on which the case has proceeded since the trial, and is reflected in the terms of the constitutional questions. Although the argument has been made elsewhere that abortion falls properly under the federal government's residual power to legislate for peace, order and good government (see, e.g., M. McConnell and L. Clark, "Abortion Law in Canada: A Matter of National Concern" (1991) 14 Dalhousie L.J. 81), that argument cannot be entertained here because of the way in which the issues were framed. Hence the intervenor CARAL was not allowed to present argument on this issue in this case: *R. v. Morgentaler*, [1993] 1 S.C.R. 462 (motion in chambers). The only issues are whether the legislation is within the competence of the province under *s. 92 of the Constitution Act, 1867*, or whether it is in relation to the criminal law and thus within the exclusive competence of Parliament under *s. 91(27)*.

Analysis

20

A. General

21 The appellant argued that the *Medical Services Act* and the regulation are valid provincial legislation enacted pursuant to the province's legislative authority over hospitals, health, the medical profession and the practice of medicine. It relies particularly on heads (7), (13), and (16) of *s. 92 of the Constitution Act, 1867*, which give the province exclusive legislative authority over:

92. ...

7. The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.

.....

13. Property and Civil Rights in the Province.

.....

16. Generally all Matters of a merely local or private Nature in the Province.

The ground on which the legislation is challenged is head (27) of *s. 91*, which reserves "The Criminal Law ..." to Parliament. On the basis of the analysis that follows I conclude that the *Medical Services Act* and *Medical Services Designation Regulation* are criminal law in pith and substance and consequently ultra vires the province of Nova Scotia. The appeal must therefore be dismissed.

22 In my opinion, the Act and *Medical Services Designation Regulation* must be considered together for the purposes of constitutional characterization. The Act is in general terms, and only by [N.S. Reg.152/89](#) were its terms given specific meaning by attachment to particular medical services. The history of the Act, including its consideration in the House of Assembly and its connection to the earlier March regulations, shows that it was always considered in light of the medical services to which it would apply, and it was almost always discussed with particular reference to one of them, namely abortion. The Act and the list of services eventually embodied in the regulation were intertwined from the start.

23 The situation is similar to that in *Texada Mines Ltd. v. British Columbia (Attorney General)*, [\[1960\] S.C.R. 713](#), in which British Columbia enacted legislation providing for a tax to be imposed in respect of a mineral or minerals found in a "producing area". The rate of tax, the minerals subject to it and the producing area in which it would apply were all left to be designated. Regulations were made designating a certain area as a "producing area", designating iron as the only mineral subject to the tax and setting the rate of tax. This Court considered the statute together with the regulations for the purposes of constitutional characterization, and found (after referring also to related statutes, the legislative history and background including the province's historical efforts to encourage iron smelting in the province by means of what were effectively export taxes, the nature of the iron ore market, and the deterrent effect of the tax) that the statute was an ultra vires attempt to encourage the establishment of an iron ore smelter by imposing a prohibitive export tax. The regulations gave concrete meaning and content to the statute and were indispensable to its classification for constitutional purposes.

24 In similar fashion, the statute and regulation are considered together in the following analysis. I will refer to them both together as "the legislation." Together, in my opinion, they constitute an indivisible attempt by the province to legislate in the area of criminal law.

B. Classification of Laws

25

(1) "What's the 'matter'?"

26 Classification of a law for purposes of federalism involves first identifying the "matter" of the law and then assigning it to one of the "classes of subjects" in respect to which the federal and provincial governments have legislative authority under [ss. 91 and 92 of the *Constitution Act, 1867*](#). This process of classification is "an interlocking one, in which the British North America Act and the challenged legislation react on one another and fix each other's meaning". B. Laskin, "Tests for the Validity of Legislation: What's the 'Matter'?" (1955) 11 U.T.L.J. 114, at p. 127. Courts apply considerations of policy along with legal principle; the task requires "a nice balance of legal

skill, respect for established rules, and plain common sense. It is not and never can be an exact science": F.R. Scott, *Civil Liberties and Canadian Federalism* (1959), at pp. 26-27.

27 A law's "matter" is its leading feature or true character, often described as its pith and substance: *Union Colliery Co. of British Columbia v. Bryden*, [1899] A.C. 580 (P.C.), at p. 587; see also *Whitbread v. Walley*, [1990] 3 S.C.R. 1273, at p. 1286. There is no single test for a law's pith and substance. The approach must be flexible and a technical, formalistic approach is to be avoided. See P. Hogg, *Constitutional Law of Canada*, 3d ed. (Toronto: Carswell, 1992), at p. 15-13. While both the purpose and effect of the law are relevant considerations in the process of characterization (see, e.g., *Alberta (Attorney General) v. Canada (Attorney General)*, [1939] A.C. 117 (P.C.) (the *Alberta Bank Taxation Reference*), at p. 130; *Starr v. Ontario (Commissioner of Inquiry)*, (sub nom. *Starr v. Houlden*) [1990] 1 S.C.R. 1366 [hereinafter *Starr v. Houlden*], at pp. 1389, 1392), it is often the case that the legislation's dominant purpose or aim is the key to constitutional validity. Rand J. put it this way in *Switzman v. Elbling*, [1957] S.C.R. 285, at pp. 302-3:

The detailed distribution made by ss. 91 and 92 places limits to direct and immediate purposes of provincial action ... The settled principle that calls for a determination of the "real character", the "pith and substance", of what purports to be enacted and whether it is "colourable" or is intended to effect its ostensible object, means that the true nature of the legislative act, its substance in purpose, must lie within s. 92 or some other endowment of provincial power.

See also *Carnation Co. v. Quebec (Agricultural Marketing Board)*, [1968] S.C.R. 238; *Canadian Indemnity Co. v. British Columbia (Attorney General)*, [1977] 2 S.C.R. 504, at p. 512; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at pp. 354-55, 357-58; and *R. v. Videoflicks Ltd.*, (sub nom. *R. v. Edwards Books & Art Ltd.*) [1986] 2 S.C.R. 713 [hereinafter *R. v. Edwards Books & Art Ltd.*], at pp. 744-45, 747 and 751 (Dickson C.J.C.), p. 788 (Beetz J.), and p. 807 (Wilson J.).

(2) Purpose and Effect

(a) "Legal effect" or strict legal operation

28 Evidence of the "effect" of legislation can be relevant in two ways: to establish "legal effect" and to establish "practical effect". The analysis of pith and substance necessarily starts with looking at the legislation itself, in order to determine its legal effect. "Legal effect" or "strict legal operation" refers to how the legislation as a whole affects the rights and liabilities of those subject to its terms, and is determined from the terms of the legislation itself. See Hogg, *supra*, at pp. 15-13, 15-15. Legal effect is often a good indicator of the purpose of the legislation (see, e.g., *Reference re Alberta Bill of Rights Act*, [1947] A.C. 503 (P.C.) (the *Alberta Bill of Rights case*), and *Saumur v. Quebec (City)*, [1953] 2 S.C.R. 299, at p. 326, Rand J.), but is relevant in constitutional characterization even when it is not fully intended or appreciated by the enacting body. Thus in *Starr v. Houlden*, *supra*, the terms of reference of the Patricia Starr inquiry were

held to duplicate the purposes and functions of a police investigation and preliminary inquiry into criminal allegations against specific individuals, which are criminal law matters, even though the province may not have intended that result.

29 The analysis of pith and substance is not, however, restricted to the four corners of the legislation (see, e.g., *Reference re Anti-Inflation Act, 1975 (Canada)*, [1976] 2 S.C.R. 373, at pp. 388-89). Thus the court "will look beyond the direct legal effects to inquire into the social or economic purposes which the statute was enacted to achieve", its background and the circumstances surrounding its enactment (Hogg, *supra*, at p. 15-13) and, in appropriate cases, will consider evidence of the second form of "effect", the actual or predicted practical effect of the legislation in operation (*Alberta Bank Taxation Reference*, *supra*, at p. 130). The ultimate long-term, practical effect of the legislation will in some cases be irrelevant. See *Reference re Anti-Inflation Act*, *supra*, at p. 389.

(b) The use of extrinsic materials

30 In determining the background, context and purpose of challenged legislation, the court is entitled to refer to extrinsic evidence of various kinds provided it is relevant and not inherently unreliable: *Reference re Residential Tenancies Act*, (sub nom. *Re Residential Tenancies Act of Ontario*) [1981] 1 S.C.R. 714, at p. 723, per Dickson J. This clearly includes related legislation (such as, in this case, the March regulations and the former s. 251 of the *Criminal Code*), and evidence of the "mischief" at which the legislation is directed: *Alberta Bank Taxation Reference*, *supra*, at pp. 130-33. It also includes legislative history, in the sense of the events that occurred during drafting and enactment; as Ritchie J., concurring in *Reference re Anti-Inflation Act*, *supra*, wrote at p. 437, it is "not only permissible but essential" to consider the material the legislature had before it when the statute was enacted.

31 The former exclusionary rule regarding evidence of legislative history has gradually been relaxed (*Churchill Falls (Labrador) Corp. v. Newfoundland (Attorney General)*, [1984] 1 S.C.R. 297 [hereinafter *Reference re Upper Churchill Water Rights Reversion Act*], at pp. 317-19), but until recently the courts have balked at admitting evidence of legislative debates and speeches. Such evidence was described by Dickson J. in *Reference re Residential Tenancies Act*, *supra*, at p. 721 as "inadmissible as having little evidential weight," and was excluded in *Reference re Upper Churchill Water Rights Reversion Act*, *supra*, at p. 319, and *Canada (Attorney General) v. Reader's Digest Assn.*, [1961] S.C.R. 775. The main criticism of such evidence has been that it cannot represent the "intent" of the legislature, an incorporated body, but that is equally true of other forms of legislative history. Provided that the court remains mindful of the limited reliability and weight of Hansard evidence, it should be admitted as relevant to both the background and the purpose of legislation. Indeed, its admissibility in constitutional cases to aid in determining the background and purpose of legislation now appears well established. See *Reference re Anti-Inflation Act*, *supra*, at p. 470, Beetz J. (dissenting); *R. v. Edwards Books & Art Ltd.*, *supra*, at p. 749; *Starr v. Houlden*,

supra, at pp. 1375-76, 1404 (distribution of powers); *R. v. Whyte*, [1988] 2 S.C.R. 3, at pp. 24-25; *Irwin Toy Ltd. c. Québec (Procureur général)*, [1989] 1 S.C.R. 927, at pp. 983-84 (*Charter*); and *R. v. Mercure*, [1988] 1 S.C.R. 234, at pp. 249-251 (language rights). I would adopt the following passage from Hogg, supra, as an accurate summary of the state of the law on this point:

In determining the "purpose" of a statute in this special sense, there is no doubt as to the propriety of reference to the state of law before the statute and the defect in the law (the "mischief") which the statute purports to correct. These may be referred to under ordinary rules of statutory interpretation. Until recently, there was doubt about the propriety of reference to parliamentary debates (Hansard) and other sources of the "legislative history" of the statute. The relevance of legislative history is obvious: it helps to place the statute in its context, gives some explanation of its provisions, and articulates the policy of the government that proposed it. Legislative history has usually been held inadmissible in Canada under ordinary rules of statutory interpretation. But the interpretation of a particular provision of a statute is an entirely different process from the characterization of the entire statute for purposes of judicial review. There seems to be no good reason why legislative history should not be resorted to for the latter purpose, and, despite some earlier authority to the contrary, it is now established that reports of royal commissions and law reform commissions, government policy papers and even parliamentary debates are indeed admissible. [At pp. 15-14 to 15-15, footnotes omitted.]

32 I would therefore hold, as did Freeman J.A. in the Court of Appeal, that the excerpts from Hansard were properly admitted by the trial judge in this case. In a nutshell, this evidence demonstrates that members of all parties in the House understood the central feature of the proposed law to be prohibition of Dr. Morgentaler's proposed clinic on the basis of a common and almost unanimous opposition to abortion clinics per se. I will return to the evidence below.

(c) Practical effect

33 In the present case the Attorney General of Nova Scotia submits that the evidence shows that the future administration of the Act will not result in a restriction on abortion services; the respondent submits the opposite. This raises the question of the relevance of evidence of practical effect. I have noted that the legal effect of the terms of legislation is always relevant. Barring material amendments, it does not change over time. The practical effect of legislation, on the other hand, has a less secure status in constitutional analysis. Practical effect consists of the actual or predicted results of the legislation's operation and administration (see, e.g., *Saumur*, supra). Courts are often asked to adjudicate the constitutionality of legislation which is not yet in force or which, as here, has only been in force a short time. In such cases any prediction of future practical effect is necessarily short-term, since the court is not equipped to predict accurately the future consequential impact of legislation.

34 In the *Anti-Inflation Act* reference, supra, Laskin C.J.C. was willing to admit evidence of the circumstances in which the legislation was passed (at p. 391), but did not admit evidence of its predicted operation and effect, finding that "no general principle of admissibility or inadmissibility can or ought to be propounded by this Court" (at p. 389). The difficulty with practical effect is that whereas in one context practical effect may reveal the true purpose of the legislation (see *Saumur*, supra), in another context it may be incidental and entirely irrelevant even though it is drastic (*Saskatchewan (Attorney General) v. Canada (Attorney General)*, [1949] A.C. 110 (P.C.), *Canadian Indemnity Co. v. British Columbia (Attorney General)*, supra, *Whitbread v. Walley*, supra, at p. 1286); and in yet another context provincial and federal enactments with the same practical impact may both stand if the matter to which they relate has two "aspects" of roughly equivalent importance, one within federal and the other within provincial competence (*Hodge v. R.* (1883), 9 App. Cas. 117 (P.C.), at p. 130; *Québec (Commission de la santé & de la sécurité du travail du Québec) v. Bell Canada* (sub nom. *Bell Canada v. Québec (Commission de la santé & de la sécurité du travail)*), [1988] 1 S.C.R. 749).

35 In the majority of cases the only relevance of practical effect is to demonstrate an ultra vires purpose by revealing a serious impact upon a matter outside the enacting body's legislative authority and thus either contradicting an appearance of intra vires or confirming an impression of ultra vires. It was in light of the difficult status of practical effect (particularly as exemplified in *Walter v. Alberta (Attorney General)*, [1969] S.C.R. 383, wherein provincial legislation banning communal landholding was held intra vires even though the legislation drastically infringed the Hutterite community's religious freedom) that Wilson J., concurring in *R. v. Big M Drug Mart Ltd.*, supra, held that legislative purpose is the focal point in distribution of powers analysis. One of the issues in that case was whether the *Lord's Day Act*, R.S.C. 1970, c. L-13, was enacted pursuant to Parliament's criminal law power. Dickson J. (as he then was), writing for the majority, held that the Act was valid criminal law because its purpose was to compel religious observance of a Sunday sabbath (at p. 352), and emphasized that his conclusion depended on the identification of the purpose of the Act (at p. 355). Wilson J. held, in a passage not in conflict with Dickson J.'s approach to division of powers, that the pith and substance of legislation is determined through "an examination of the primary legislative purpose with a view to distinguishing the central thrust of the enactment from its merely incidental effects" (at p. 357). She concluded, at p. 358, that:

Only when the effects of the legislation so directly impinge on some other subject matter as to reflect some alternative or ulterior purpose do the effects themselves take on analytic significance ...

36 If, however, pith and substance can be determined without reference to evidence of practical effect, the absence of evidence that the legislation has a practical effect in line with this characterization will not displace the conclusion as to the legislation's invalidity. In such a case, "evidence as to the likely effect of legislation would not add anything useful to the task of

characterization, but would merely bear on the wisdom or efficacy of the statute. In those cases the evidence is not relevant" (Hogg, *supra*, at p. 15-16). See also *Reference re Anti-Inflation Act*, *supra*, at pp. 424-25. Such evidence will not change the legislation's "matter", and only goes to the effectiveness of the statute to fulfil its object. The court is not concerned with the wisdom of a statute, and the government surely cannot justify legislation already determined to be ultra vires by arguing that it will not realize its aim or objective. Moreover, as I have said, legislation is often considered before experience has shown its actual impact, and prediction of future impact is necessarily short-term. I would adapt what La Forest J. said in another context (*R. v. Edwards Books & Art Ltd.*, *supra*, at p. 803) to this situation: "[i]t is undesirable that an Act be found constitutional today and unconstitutional tomorrow" simply because of the absence of conclusive evidence as to future impact or the possibility of a change in practical effect.

(3) Scope of the Applicable Heads of Power

37 The issue we face in the present case is whether Nova Scotia has, by the present legislation, regulated the place for delivery of a medical service with a view to controlling the quality and nature of its health care delivery system, or has attempted to prohibit the performance of abortions outside hospitals with a view to suppressing or punishing what it perceives to be the socially undesirable conduct of abortion. The former would place the legislation within provincial competence; the latter would make it criminal law.

(a) *The criminal law*

38 Section 91(27) of the *Constitution Act, 1867* gives the federal Parliament exclusive legislative jurisdiction over criminal law in the widest sense of the term: *Reference re Lord's Day Act (Ontario)*, (sub nom. *Ontario (Attorney General) v. Hamilton Street Railway*) [1903] A.C. 524 (P.C.), at p. 529. In *Proprietary Articles Trade Assn. v. Canada (Attorney General)*, [1931] A.C. 310 (P.C.), at p. 324, the Judicial Committee took this to include any act prohibited with penal consequences, but this interpretation was too generous and the missing ingredient was supplied by Rand J. in his classic formulation of the scope of the tests for criminal law in the *Reference re Validity of s. 5(a) of Dairy Industry Act (Canada)*, (*Margarine Case*), [1949] S.C.R. 1 (the *Margarine Reference*), at pp. 49-50:

... we can properly look for some evil or injurious or undesirable effect upon the public against which the law is directed. That effect may be in relation to social, economic or political interests; and the legislature has had in mind to suppress the evil or to safeguard the interest threatened.

.....

Is the prohibition then enacted with a view to a public purpose which can support it as being in relation to criminal law? Public peace, order, security, health, morality: these are the ordinary though not exclusive ends served by that law ...

39 The presence or absence of a criminal public purpose or object is thus pivota: see *Lord's Day Alliance v. British Columbia (Attorney General)*, [1959] S.C.R. 497, at pp. 508-9; *Goodyear Tire & Rubber Co. of Canada v. R.*, [1956] S.C.R. 303, at p. 313; and *R. v. Boggs*, [1981] 1 S.C.R. 49. This is not contradicted by the decision in *Starr v. Houlden*, supra. In that case the province of Ontario established a commission of inquiry to investigate and find whether Patricia Starr and Tridel Corporation had, in their dealings with public officials, conferred benefits, advantages or rewards of any kind on any public official. The terms of reference specified individuals by name and used language virtually indistinguishable from that of s. 121.1(b) of the *Criminal Code*. Lamer J. (as he then was), speaking for the majority, held the inquiry ultra vires:

... it is the combined and cumulative effect of the names together with the incorporation of the *Criminal Code* offence that renders this inquiry *ultra vires* the province. The terms of reference name private individuals and do so in reference to language that is virtually indistinguishable from the parallel *Criminal Code* provision. Those same terms of reference require the Commissioner to investigate and make findings of fact that would in effect establish a *prima facie* case against the named individuals sufficient to commit those individuals to trial for the offence in s. 121 of the *Code*. The net effect of the inquiry, although perhaps not intended by the province, is that it acts as a substitute for a proper police investigation, and for a preliminary inquiry ... [At p. 1402.]

Lamer J. found the circumstances surrounding the establishment of the inquiry and the legal effect of its terms of reference to be overpowering and determinative of the inquiry's criminal character. That the province may not have intended to usurp the criminal process of an investigation and preliminary inquiry into specific offences by named individuals was irrelevant. That does not mean, however, that the purpose or object of the inquiry was irrelevant. It was simply a case in which the legal effect of the terms of reference was paramount in establishing a criminal public purpose within Rand J.'s tests. In sum, Lamer J. found that the inquiry offended the principle that the province cannot use an inquiry "for the purpose of gathering sufficient evidence to lay charges or to gather sufficient evidence to establish a *prima facie* case" (at pp. 1411-12).

(b) Provincial health jurisdiction

40 The provinces have general legislative jurisdiction over hospitals by virtue of s. 92(7) of the *Constitution Act, 1867*, and over the medical profession and the practice of medicine by virtue of ss. 92(13) and (16). Section 92(16) also gives them general jurisdiction over health matters within the province: *Schneider v. R.*, (sub nom. *Schneider v. British Columbia*) [1982] 2 S.C.R. 112, at p. 137. The *Schneider* case gives an indication of the watershed between valid health legislation and criminal law. In that case, British Columbia's *Heroin Treatment Act* was held to be intra vires because its object was not to punish narcotics addicts, but to treat their addiction and ensure their safety and security. Narcotic addiction was targeted not as a public evil but as a "physiological

condition necessitating both medical and social intervention" (at p. 138). Accordingly, if the central concern of the present legislation were medical treatment of unwanted pregnancies and the safety and security of the pregnant woman, not the restriction of abortion services with a view to safeguarding the public interest or interdicting a public harm, the legislation would arguably be valid health law enacted pursuant to the province's general health jurisdiction.

41 In addition, there is no dispute that the heads of s. 92 invoked by the appellant confer on the provinces jurisdiction over health care in the province generally, including matters of cost and efficiency, the nature of the health care delivery system, and privatization of the provision of medical services.

(c) *The regulation of abortion*

42 In the U.K. and Canada, the prohibition of abortion with penal consequences has long been considered a subject for the criminal law. As early as the mid-nineteenth century, with the adoption of legislation imitating *Lord Ellenborough's Act, 1803* (U.K.), 43 Geo. 3, c. 58, through the time of Confederation and up to the 1969 amendments to the *Criminal Code* which introduced the relieving portion of s. 251 (*Criminal Law Amendment Act, 1968-69*, S.C. 1968-69, c. 38, s. 18), the criminal law in Canada prohibited abortions with penal consequences; before the introduction of the relieving portion of s. 251 there was no such thing as a non-criminal abortion. As Dickson J. (as he then was) said in *Morgentaler* (1975), supra, at p. 672, "since Confederation, and indeed before, the law of Canada has regarded as criminal, interference with pregnancy, however early it may take place ..."

43 Section 251 of the *Criminal Code* was a valid exercise of the criminal law power. Why? In *Morgentaler* (1975), supra, Dr. Morgentaler argued that s. 251 was an encroachment on provincial legislative power in relation to hospitals and the regulation of the profession of medicine and the practice of medicine, but this argument was dismissed unanimously from the bench without hearing from the Crown. Laskin C.J.C., who dissented as to the result, was the only judge who gave reasons for the Court's rejection of the argument that s. 251 was legislation for the protection of a pregnant woman's health:

This, however, is to attribute to Parliament a particular, indeed exclusive concern under s. 251 with health, to the exclusion of any other purpose that would make it a valid exercise of the criminal law power. [At p. 626.]

He held, on the contrary, that s. 251 was well within Rand J.'s tests for criminal law in the *Margarine Reference*, supra, because:

What is patent on the face of the prohibitory portion of s. 251 is that Parliament has in its judgment decreed that the interference by another, or even by the pregnant woman herself,

with the ordinary course of conception is socially undesirable conduct subject to punishment.
[At p. 627.]

The presence of the dispensing provisions in [s. 251](#) was explained on the basis that "Parliament may determine what is not criminal as well as what is, and may hence introduce dispensations or exemptions in its criminal legislation" (at p. 627). Finally, in so far as [s. 251](#) had "any relationship to the establishment of hospitals or the regulation of the medical profession or the practice thereof," Laskin C.J.C. held this relationship to be "so incidental as to be little short of ephemeral" (at p. 628).

44 In *Morgentaler* (1988), supra, this Court unanimously reaffirmed the holding that [s. 251](#) was valid criminal law for purposes of the distribution of powers. Beetz J. (with whom Estey J. concurred), at pp. 82 and 122-3, and Wilson J., at p. 181, held that while [s. 251](#) had as an ancillary objective the protection of the life or health of pregnant women, its principal objective was the protection of the state interest in the foetus. (I would note that although in this case the objective of the legislation was also discussed in the context of [the Charter](#), a statute's "objective" for [Charter](#) purposes necessarily reflects its "purpose" for distribution of powers purposes: *R. v. Big M Drug Mart Ltd.*, supra, at pp. 353, 361-62.). Beetz J. held, at pp. 128-29, that this made it a valid exercise of the criminal law power. On the other hand, Dickson C.J.C. (Lamer J., as he then was, concurring), at p. 75, and McIntyre J. (dissenting, La Forest J. concurring), at pp. 135 and 156, held that the objective of the section was to balance the interests of the foetus and the pregnant woman. McIntyre J. held, at p. 156, that this objective made the section a valid exercise of the criminal law power. Dickson C.J.C. and Wilson J. did not give reasons for finding the section *intra vires*.

45 The two *Morgentaler* decisions focus attention on the purpose or concern of abortion legislation to determine if it is truly criminal law: is the performance or procurement of abortion prohibited as socially undesirable conduct; is protecting the state interest in the foetus or balancing the interests of the foetus against those of women seeking abortions a primary objective of the legislation; is the protection of the woman's health only an ancillary concern; and are other provincial concerns such as the establishment of hospitals or the regulation of the medical profession or the practice thereof merely incidental?

46 It is not necessary for the purposes of this appeal to attempt to delineate the scope of provincial jurisdiction to regulate the performance of abortions. Suffice it to say that any provincial jurisdiction to regulate the delivery of abortion services must be solidly anchored in one of the provincial heads of power which give the provinces jurisdiction to legislate in relation to such matters as health, hospitals, the practice of medicine and health care policy.

C. Application of the Principles to the Case at Bar

47 An examination of the terms and legal effect of the *Medical Services Act* and the *Medical Services Designation Regulation*, their history and purpose and the circumstances surrounding

their enactment leads to the conclusion that the legislation's central purpose and dominant characteristic is the restriction of abortion as a socially undesirable practice which should be suppressed or punished. Although the evidence of the legislation's practical effect is equivocal, it is not necessary to establish that its immediate or future practical impact will actually be to restrict access to abortions in order to sustain this conclusion.

(1) Legal Effect: the Four Corners of the Legislation

48 Starting with the terms of the legislation, the *Medical Services Act* makes it an offence subject to significant fines (s.6), to perform abortions or other services designated by the *Medical Services Designation Regulation* outside a hospital approved as such under the *Hospitals Act* (s.4). It is impossible to tell from the legislation itself whether this amounts to a total prohibition of abortion (which all parties concede would be ultra vires the province), since extrinsic evidence is necessary to establish that abortions are available in Nova Scotia hospitals. The Act also denies public health insurance coverage for the performer and recipient of such services (s.5), and provides for injunctive relief against violations of its terms (s.7). It is entitled "An Act to Restrict the Privatization of Medical Services", and its purpose is expressed to be the prohibition of the privatization of certain medical services in order to maintain a single high-quality health care delivery system in the province (s.2). The allegation of ultra vires and the decisions in the courts below focused on the offence provisions of the legislation. No argument was directed toward the "de-insurance" section in this Court (s.5). Although the "de-insurance" and injunction provisions clearly enhance the practical clout of the prohibition, they do not require independent consideration in the context of this case. It is sufficient for the purposes of characterizing this legislation to concentrate on the prohibition of the performance of a designated service outside a hospital. It is apparent from the combined effect of the offence and the regulation that one purpose of the legislation is to prohibit the establishment of free-standing abortion clinics.

49 The majority in the Court of Appeal conceded that the province had the legislative authority to pass a law in the present form. I acknowledge that the legislation has the legal effect of preventing privatization by prohibiting the private (i.e., outside a hospital) provision of the designated services. But the legislation expressly prohibits the performance of abortions in certain circumstances with penal consequences, a subject, as I have said, traditionally regarded as part of the criminal law. In *Scowby v. Saskatchewan (Board of Inquiry)*, (sub nom. *Scowby v. Glendinning*) [1986] 2 S.C.R. 226, [hereinafter *Scowby v. Glendinning*], a majority of this Court held provincial legislation creating an offence of arbitrary arrest or detention and a right to relief in the form of habeas corpus to be suspect on its face since arbitrary arrest or detention and the availability of habeas corpus in such circumstances have been dealt with by Parliament in the criminal law "almost since the advent of Confederation" (at p. 240). Likewise, one of the reasons behind this Court's invalidation of a municipal by-law prohibiting street prostitution in *R. v. Westendorp*, [1983] 1 S.C.R. 43, was that conduct relating to prostitution has long been regarded as criminal. The present legislation, prohibiting traditionally criminal conduct, is therefore of questionable

validity on its face: *Rio Hotel Ltd. v. Liquor Licensing Board (New Brunswick)*, (sub nom. *Rio Hotel Ltd. v. New Brunswick (Liquor Licensing Board)*) [1987] 2 S.C.R. 59, at p. 80 [hereinafter *Rio Hotel Ltd. v. New Brunswick (Liquor Licensing Board)*], Estey J. (concurring in the result).

50 This conclusion makes it unnecessary to invoke the "colourability doctrine," but since it figured prominently in the courts below and in argument before us, I will address it briefly. The respondent attacks the legislation on the basis that it is colourable criminal law. The "colourability doctrine" in the distribution of powers is invoked when a law looks as though it deals with a matter within jurisdiction, but in essence is addressed to a matter outside jurisdiction: *Starr v. Houlden*, supra, at p. 1403; *Reference re Upper Churchill Water Rights Reversion Act*, supra, at p. 332; *Ladore v. Bennett*, [1939] A.C. 468 (P.C.), at p. 482. There is no need to invoke the doctrine in this case because while the Act states in its title and s. 2 that its aim is to prohibit the privatization of medical services, there are doubts about the legislation's vires on its face due to the fact that it appears to occupy ground historically occupied by the criminal law. Moreover the ordinary approach to pith and substance entitles the Court to look beyond the terms of the legislation. As Rand J. declared in the *Margarine Reference*, supra, at p. 48, a statement of purpose is at most "a fact to be taken into account, the weight to be given to it depending on all the circumstances".

51 In any event, the colourability doctrine really just restates the basic rule, applicable in this case as much as any other, that form alone is not controlling in the determination of constitutional character, and that the court will examine the substance of the legislation to determine what the legislature is really doing:

[t]he legislative bodies cannot, by statutory recitals, settle the classification of their own statutes for purposes of the distribution of powers ... Selection of the aspect that matters is the exclusive prerogative of the court, and the so-called doctrine of colourability is simply an instance of this rule ...

See W.R. Lederman, "The Balanced Interpretation of the Federal Distribution of Legislative Powers in Canada" (1965), reprinted in Lederman, *Continuing Canadian Constitutional Dilemmas: Essays on the Constitutional History, Public Law, and Federal Systems of Canada* (1981), 266, at p. 282; see also A.S. Abel, "The Neglected Logic of 91 and 92" (1969) 19 U.T.L.J. 487, at p. 494; *Ontario (Attorney General) v. Reciprocal Insurers*, [1924] A.C. 328 (P.C.), at p. 337; and *Central Canada Potash Co. v. Saskatchewan*, [1979] 1 S.C.R. 42, at p. 76. Under either the basic approach to pith and substance or the "colourability doctrine", therefore, we need to look beyond the four corners of the legislation to see what it is really about. As stated by Laskin C.J.C. in *Potash*, supra, at p. 76, "[i]t is nothing new for this Court, or indeed, for any Court in this country seized of a constitutional issue, to go behind the words used by a Legislature and to see what it is that it is doing."

(2) Beyond the Four Corners

52

(a) Duplication of Criminal Code provisions

53 Once the legal effect of legislation is ascertained, it can be compared with that of any relevant legislation passed by the other level of government. The majority of the Court of Appeal found that the present legislation effectively duplicated s. 251 (now s. 287) of the *Criminal Code*. Freeman J.A. held that:

Using s. 251 as a starting point, even a cursory examination discloses that the *Medical Services Act* has an impact and effect on abortions in private clinics virtually indistinguishable from that of s. 251. [At p. 367.]

.....

If a distinction exists, it is a philosophical one too subtle to alter the outcome. Under either piece of legislation, a doctor who performed an abortion in a private clinic might find a policeman in the waiting room. He or she could be convicted on precisely the same evidence under either enactment. [At pp. 371-72.]

54 Provincial legislation has been held invalid when it employs language "virtually indistinguishable" from that found in the *Criminal Code*: *McNeil v. Nova Scotia (Board of Censors)*, [1978] 2 S.C.R. 662, at p. 699; *Rio Hotel Ltd. v. New Brunswick (Liquor Licensing Board)*, supra, at pp. 70-71, 80; and *Starr v. Houlden*, supra, at pp. 1402, 1405-6. However, even when the legal effect of federal and provincial legislation is virtually identical this does not necessarily determine validity, since the provinces can enact provisions with the same legal effect as federal legislation provided this is done in pursuit of a provincial head of power: *O'Grady v. Sparling*, [1960] S.C.R. 804; *Smith v. R.*, [1960] S.C.R. 776; *Stephens v. R.*, [1960] S.C.R. 823; *R. v. Chiasson* (1982), 39 N.B.R. (2d) 631 (C.A.), at p. 636, affirmed [1984] 1 S.C.R. 266. The duplication of *Criminal Code* language may raise an inference that the province has stepped into the realm of the criminal law; the more exact the reproduction, the stronger the inference that this is the dominant purpose of the enactment.

55 The guiding principle is that the provinces may not invade the criminal field by attempting to stiffen, supplement or replace the criminal law (*Reference re Freedom of Informed Choice (Abortions) Act* (1985), 44 Sask. R. 104 (C.A.)) or to fill perceived defects or gaps therein (*Scowby v. Glendinning*, supra, at p. 238). The legal effect of s. 251 and the present legislation, each taken as a whole, is quite different: among other things, s. 251 made it an offence for a woman to obtain an abortion, and prescribed the burdensome "therapeutic abortion committee" system and the "life or health" criterion for a legal abortion, none of which is present in the Act and regulation; and the present legislation prohibits other services besides abortion and directly concerns public health

insurance coverage. Freeman J.A. was clearly right, however, that in so far as it prohibits abortion clinics the legal effect of the medical services legislation is completely embraced by s. 251 and, had the latter provision not been struck down, the present legislation would have been redundant in that respect. Section 251 is now, of course, inoperative. The absence of operative federal legislation does not enlarge provincial jurisdiction, though. It simply means that if the provincial legislation is found to be *intra vires*, no problem of paramountcy arises.

56 In my opinion the overlap of legal effects between the now defunct criminal provision and the Nova Scotia legislation is capable of supporting an inference that the legislation was designed to serve a criminal law purpose. It is a piece in the puzzle which along with the other evidence may demonstrate the true purpose of the legislation.

(b) Background and surrounding circumstances

57 The events leading up to and including the enactment of the Act and regulation do not support the appellant's assertions that the pith and substance of the legislation relate to provincial jurisdiction over health. On the contrary, they strengthen the inference that the impugned Act and regulation were designed to serve a criminal law purpose.

(i) The course of events

58 It is clear that the catalyst for government action was the rumour and later announcement of Dr. Morgentaler's intention to open his clinic. The Crown concedes this. The respondent was clearly, as the trial judge concluded, a "mischief" against which the legislation was directed. The government knew of Dr. Morgentaler's intention to open a clinic by some time in January 1989. It responded with the March regulations, which prohibited abortions outside hospitals and "de-insured" such services. The direct and exclusive aim of this action was to stop the Morgentaler clinic and no one disputes that. The Minister of Health made this clear upon announcing the regulations:

... Cabinet has today approved two new regulations relating to the provision of abortion services.

As all members know, it is not the policy of this government to endorse or support in any way the provision of these services through free-standing clinics or other facilities which do not fall within the category of an approved hospital.

(Nova Scotia, House of Assembly, *Debates and Proceedings* (March 16, 1989), at p. 1008.)

The March regulations singled out abortion, and the Morgentaler clinic in particular.

59 In May, 1989, the March regulations were challenged in court by CARAL on the ground that they were unconstitutional: see *Canadian Abortion Rights Action League Inc. v. Nova Scotia*

(*Attorney General*), supra. Shortly before the date when that action was first to come on for hearing (June 22, 1989), and days before the close of the legislative session, the government introduced and rushed the Act through the House of Assembly. It was introduced on June 6 and received third and final reading and Royal assent on June 15. The legislation was enacted in what can only be considered great haste. The Act, considered along with the services that were proposed to be designated, accomplished all the purposes of the March regulations. Yet instead of singling out abortion, it took the form of a general "floating" prohibition of the performance of medical services other than in a hospital, which would crystallize upon the designation of several services among which abortion was to be found. On July 20, 1989, the Executive Council made the *Medical Services Designation Regulation* and simultaneously revoked the March Regulations. I am in complete agreement with Freeman J.A.'s characterization of the course of events, which I reproduce again here for convenience:

2. The "March regulations" were obviously aimed at Morgentaler clinics. Hon. David Nantes, Health Minister, made that clear when he announced them to the legislature ... The *Medical Services Act* was presented to the legislature following a court challenge to the March regulations. It was introduced on June 6, 1989, and passed, with the appearance of last-minute haste, the day the House closed on June 15, 1989. The March regulations were encompassed by the *Medical Services Act* and its regulation. They were revoked, no longer necessary, on July 20, 1989, the day the regulation was passed under the *Medical Services Act*. [At pp. 376-77.]

60 Neither the timing nor the overlap of subject matter can be viewed as coincidental. It is reasonable to infer, as did the trial judge, and the government believed that the new legislation would accomplish the purpose of the March regulations, and intended it to do so. The March regulations were the first response to Dr. Morgentaler's announcement, and the subsequent legislation was the continuation and consolidation of that response. Together they constituted a hastily-devised plan aimed directly at ridding the province of Dr. Morgentaler and his proposed clinic. The course of events suggests that this purpose was the principal purpose of the legislation and contributes to the impression that privatization and quality assurance were only incidental concerns at best.

(ii) *Hansard*

61 I have reviewed the evidence of the legislative debates on the *Medical Services Act*, and have concluded that they give a clear picture of what the members of the House, both government and opposition, saw as being in issue. Both the trial judge and Freeman J.A. referred extensively to excerpts from Hansard. The following passage from the trial judge's reasons fairly captures the flavour of the proceedings:

During the debate at the time of second reading on June 12, 1989, the Opposition Health Critic, Sandra Jolly, says at page 4678:

... It is a dilemma that is both complex and emotional and the Liberal caucus of Nova Scotia agrees with the Minister of Health and Fitness that the Morgentaler clinic should not be set up in this province. I want to make that point very clear. (Applause)

The Liberal caucus is of the opinion that it is unnecessary for the clinic to come to Nova Scotia, so in that part of the bill, we do agree with the current government. We are in agreement and we have stated that right from the very beginning, that we do not feel that the clinic is required here. What concerns me is that the government has very hurriedly put together this legislation, and what they are doing is not only trying to work at keeping the Morgentaler clinic out, but we really do see it as a regression or a step backwards in regard to medical services for the people of Nova Scotia.

The Opposition critic went on at length expressing concerns about the broad implications of the Bill.

When the Minister of Health had a chance to respond, he states: (at page 4716):

I heard the most weak-kneed, weak-hearted support for the question of the control of free-standing abortion clinics that I heard yet in this entire session of the Legislature. It was always the Liberal caucus that has this position, we have this position. Well, I am going to make mine personal and say I, as the Minister of Health and I, as an MLA, am not supportive of free-standing abortion clinics.

(Applause)

On June 5, 1989, the day before the proposed Act was introduced in First Reading, the Minister of Health and Fitness, in discussions concerning the budget estimates for the Department of Health said at p. 785:

... we have adopted a policy as government that we are not going to be supportive [of free-standing abortion clinics] and we will do everything in our effort to stop them. That is what we have said and that is what we are doing, if we need more steps, if we have to take more steps, we are going to take them. I am going to be carrying out that policy ... and I am going to be supportive of that policy.

[At pp. 300-301.]

62 Freeman J.A. made reference, among others, to the following excerpts:

Paul MacEwan, member for Cape Breton Nova, said:

So certainly, you know, if this government wants to pose as being the great champion of those that want to keep Mr. Morgentaler out of Nova Scotia, let it be noted that it was the very last thing that they thought of before they adjourned the House for the year ...

Now we are led to believe that this is a bill that is not really just to restrict the privatization of medical services, whatever that is, but it is a bill to make it impossible or to make it unlikely I suppose that the abortion clinic that Morgentaler wants to establish can be set up ...

Following the remarks by members of opposition parties Mr. Nantes spoke again:

I do not think you can play both sides of this issue. You cannot criticize the health care system and say, we do it all wrong and talk about clinics and all that sort of thing without coming out on this particular element. Do you support or do you not support a free-standing abortion clinic? I want you to know that not only can I speak personally, but also, I think we represent the consensus and overwhelming view of this side of the legislature. (Applause)

I think I am even prepared to go a little further and say that I do think it represents the majority view of quite a number of members on the other side of the house, also.

(Applause). [At pp. 375-76.]

63 The Hansard evidence demonstrates both that the prohibition of Dr. Morgentaler's clinic was the central concern of the members of the legislature who spoke, and that there was a common and emphatically expressed opposition to free-standing abortion clinics per se. The Morgentaler clinic was viewed, it appears, as a public evil which should be eliminated. The concerns to which the appellant submits the legislation is primarily directed — privatization, cost and quality of health care, and a policy of preventing a two-tier system of access to medical services — were conspicuously absent throughout most of the legislative proceedings. They were emphasized by the Minister, Mr. Nantes, on moving second reading of the bill on June 12, 1989. This does not, however, in my view, detract significantly from the overall impression left by the debates.

64 Of course, one must be mindful of the limited use to which such evidence can be put, as I discussed earlier. To quote Kennedy Prov. J., at first instance:

I recognize that it would be a folly for a court to conclude that everything that is said in a political forum has meaning in relation to the characterization of the legislation produced by that body. [At p. 301.]

Nonetheless, I see no reason to interfere with Freeman J.A.'s assessment of the tone of the proceedings, at p. 367:

One need not look beyond the pages of *Hansard* ... to realize the sense of moral outrage of representatives in the House of Assembly engendered by the prospect of Morgentaler clinics in Nova Scotia. Moral considerations attach not only to the performance of abortions, but to where they are performed and under what circumstances.

65 The appellant argues that even if the object of the legislation was to suppress free-standing abortion clinics on grounds of public morals, this is not fatal to provincial jurisdiction. Although there has been some recognition of a provincial "morality" power, it is clear that the exercise of such a power must be firmly anchored in an independent provincial head of power: *Rio Hotel Ltd. v. New Brunswick*, supra, at pp. 71-80; *Canada (Attorney General) v. Dupond*, (sub nom. *Canada (Attorney General) v. Montreal (City)*) [1978] 2 S.C.R. 770; R. Pepin, "Le pouvoir des provinces canadiennes de légiférer sur la moralité publique" (1988) 19 R.G.D. 865; *Canada (Attorney General) v. Law Society (British Columbia)*, [1982] 2 S.C.R. 307, at p. 364.

66 While legislation which authorizes the establishment and enforcement of a local standard of morality does not ipso facto "invade the field of criminal law" (see *McNeil v. Nova Scotia (Board of Censors)*, supra, at pp. 691-92), it cannot be denied that interdiction of conduct in the interest of public morals was and remains one of the classic ends of the criminal law, as established in the *Margarine Reference*, supra, at p. 50: see *R. v. Westendorp*, supra, and *Johnson v. Alberta (Attorney General)*, [1954] S.C.R. 127, at pp. 148-49.

67 As Wilson J. recognized in *Morgentaler* (1988), supra, at p. 171, a woman's decision to have an abortion is "profound[ly] social and ethical;" indeed it is "essentially a moral decision" (cf. M.L. McConnell, "'Even by Commonsense Morality': *Morgentaler*, *Borowski* and the Constitution of Canada" (1989) 68 Can. Bar Rev. 765, at p. 766) and it seems clear to me that the present legislation, whose primary purpose is to prohibit abortions except in certain circumstances, treats of a moral issue.

68 In view of the foregoing, there is a strong inference that the purpose of the legislation and its true nature relate to a matter within the federal head of power in respect of criminal law. In order to determine whether this is its dominant purpose or characteristic, it is necessary to compare the above indicia of federal subject matter with indications of provincial objectives.

(iii) Searching for provincial objectives

69 At trial the appellant presented evidence that the Act's objectives were to prevent privatization and the consequent development of a two-tier system of medical service delivery, to ensure the delivery of high-quality health care, and to rationalize the delivery of medical services so as to avoid duplication and reduce public costs. The principal Crown witness on these points, John Malcom, the Health Department Administrator, testified that Nova Scotia's health care system evolved around the public hospital and that there have never been private, "for-profit" medical

clinics in the province. He said that Nova Scotia has a policy of equal access to health care services, and that duplication of health care services creates a two-tier system. Moreover, his evidence was that rationalization of health care services was the most cost-effective approach.

70 It may be that this evidence represented the policy of the government of Nova Scotia at one time. The respondent correctly pointed out, however, that this evidence was not established at trial to have been the basis for the impugned legislation. Indeed, Kennedy Prov. J. considered the evidence and found that any privatization concerns were "incidental to the paramount purpose of the legislation" (at p. 302). I see no good reason to question this finding.

71 First, as to the health and safety of women and the argument that the in-hospital requirement was enacted because of a concern over quality assurance, there is no evidence in the record to indicate that abortions performed in clinics like Dr. Morgentaler's pose any danger to the health of women. Counsel conceded that the quality of medical service in free-standing abortion clinics is comparable to that available in hospitals. I also note that in *Morgentaler (1988)*, supra, Beetz J. held that studies, experience and expert evidence established that abortions can safely be performed in clinics and that the in-hospital requirement was no longer justified from a medical point of view. Since the appellant agrees that the quality of medical service in clinics is comparable to that in hospitals, the argument that the legislation was directed at quality assurance and women's health and safety is deprived of any force.

72 Second, the government did not express concerns about privatization in relation to this legislation or the March regulations until the Act was moved for second reading. Again, I would adopt Freeman J.A.'s statement of the relevant facts, at pp. 376-77:

1. Privatization of medical services had not been enunciated as a government objective prior to the introduction of the *Medical Services Act*. It was not mentioned in the Throne Speech on February 23, 1989. The Throne Speech did say that a Royal Commission Report was being awaited. The order-in-council establishing the Royal Commission made no reference to privatization.

.....

3. In explaining the desirability of avoiding the pitfalls of privatization, the Crown relied heavily on economic considerations. The report of the Royal Commission on Health Costs was being awaited, as the Throne Speech noted. In passing the *Medical Services Act* on June 15, 1989, the legislature elected to do so without the benefit of observations or recommendations by the Royal Commission ...

On February 23, 1989, just three weeks before the adoption of the March regulations, the Throne Speech was delivered. Although it discussed health care policy, it made no mention of a policy with respect to privatization. As Freeman J.A. observes, it did refer to the Royal Commission on Health Care, which had been established in 1987 to undertake a thorough examination of the

province's health care system. The Throne Speech indicated that the government was awaiting the Commission's report.

73 That report was delivered in December, 1989. Its recommendations were inconsistent with a policy of opposing privatization. It recommended, inter alia, moving as many services as possible out of hospitals and minimizing the length of hospital stays, in order to reduce public health care costs. It stated, in part, that while institutions should continue to be the focal points of health care delivery in Nova Scotia:

... there is an increasing understanding that health care services can be provided safely and appropriately outside of the institutional setting.

John Malcom, the Crown health care policy expert, testified, on cross-examination, that the directions enunciated in the report were consistent with the approach the Department of Health had been taking. The Throne Speech of 1990, delivered two months after the report, discussed the report, and again — understandably, in light of the Commission's recommendations — made no mention of a policy of opposing the private delivery of health care services.

74 Third, it is significant that there is no evidence of any prior study or consultation regarding the cost-effectiveness or quality of medical services delivered in private clinics. Again, Freeman J.A.'s words are apropos and I repeat them for convenience:

5. The Department of Health had been engaged in discussions with the Medical Society of Nova Scotia to have more health care services delivered outside of hospitals. The Medical Society was not consulted about the *Act* prior to its introduction. The evidence suggests the *Act* runs counter to the direction of the talks. [At p. 377.]

The Medical Society was not consulted until after the legislation was introduced, and then only to discuss the services to be designated. This would not be particularly significant on its own, but, according to the evidence of Dr. Vincent Audain, who was the president of the Medical Society at the relevant time, the Medical Society had been engaged in discussions with government toward moving more health care services outside hospitals. Dr. Audain learned of the Act through a telephone message the day the bill was introduced. He testified that the Society was perturbed by this unexpected action and suspected that the motive behind it was the "abortion issue". The Society passed a resolution, which it communicated to the government, condemning the legislation on the basis that it would have a negative impact on the delivery of medical care, would add to the cost of hospital care and conflict with emerging technological advances in medicine. The legislation was seen to contradict the government's stated policy goals of moving more services outside hospitals. Furthermore, according to Dr. Audain, when the Medical Society was consulted in June, 1989 as to the medical services to be designated, the restriction of abortion was non-negotiable.

75 Although the Crown's expert witness, Mr. Malcom, testified as to the adequacy of access to abortion in Nova Scotia, no studies or consultation on the delivery of, access to, or cost-effectiveness of abortion services in hospitals or clinics were conducted, and the Crown relied at trial on dated statistical evidence as to the adequacy of existing facilities. The appellant argued, on the basis of Mr. Malcom's opinion evidence, that quality assurance is best ensured through the Canadian Council on Hospital Accreditation. There is no evidence, however, that the government had inquired into either the quality of services provided in hospitals vis-à-vis clinics or the existence of standards for the delivery of abortion services.

76 The appellant refers to a meeting of the House of Assembly's Committee on Community Services at the abortion unit of the Victoria General Hospital ("VGH"), in Halifax, on May 30, 1989, as evidence of prior consultation. Eighty-three per cent of all abortions performed in Nova Scotia are performed at this hospital. The topic of the meeting was the VGH's termination of pregnancy unit. The Committee met with the head of the gynaecology department, the head of the abortion unit and the charge nurse of the ambulatory care unit. The head of the abortion unit said that in his view Nova Scotia adequately met its own abortion needs and a Morgentaler clinic was unnecessary; however, he also said that such a clinic would serve all the Atlantic provinces. The three guests generally praised the efficiency and safety of existing abortion services, although it was revealed that average delays at the VGH were from a week to ten days, the medical staff willing to perform abortions at the hospital had fallen from ten to five, the quarters were cramped, and the greatest concern was a lack of information and counselling for both patients and doctors. Little hard data was provided. The meeting, indeed, seems to have provided more of a political platform for the expression of the views of the politicians on the committee than a forum for consultation and fact-finding regarding the issues the legislation was purported to address.

77 The lack of prior study or consultation is not raised to show that the province acted indiscreetly or ineffectually in pursuing provincial objectives, but rather to indicate that the evidence simply does not support the submission that these provincial objectives were the basis for the legislative action in question.

78 Another factor I consider relevant is that the "cost- effectiveness" rationale appears to be divorced from reality. Dr. Morgentaler's clinic will not represent a direct increase in the cost to the province of the provision of health care services. The parties dispute the actual cost of abortion services in and out of hospitals, but I do not propose to enter into that argument. In response to questions from the bench, appellant's counsel agreed that the fee paid to the respondent in respect of abortion services would be the same as that provided to a doctor who performed an abortion in a hospital. Consequently the establishment of an abortion clinic would not result in an increased direct cost to the province in the form of doctors' fees. The appellant's argument, as developed through Mr. Malcom's evidence, was that the duplication of services would lower the number of abortions performed in hospitals and eventually lead to an increase in the cost per procedure.

The evidence did not establish, however, that the erosion in the number of abortions performed in hospitals would be great enough to have this effect.

79 A fifth consideration is the list of designated medical services itself. There is no apparent link between the different services. The only common denominator suggested by the appellant is that the government anticipated that these services might be attractive to private facilities. The appellant argued at trial and maintained before us, however, that the government's policy was to oppose the performance of any and all surgical procedures outside hospital. If that were the case, one might wonder why the Act did not prohibit the performance of surgical procedures generally outside a hospital. Designating nine apparently unrelated procedures does not accomplish this purpose.

80 If the means employed by a legislature to achieve its purported objectives do not logically advance those objectives, this may indicate that the purported purpose masks the legislation's true purpose. In *R. v. Westendorp*, supra, Laskin C.J.C. held that it was specious to regard a by-law which prohibited street prostitution as relating to control of the streets, since if that were its true purpose, "it would have dealt with congregation of persons on the streets or with obstruction, unrelated to what the congregating or obstructing persons say or otherwise do" (at p. 51). Here, one would expect that if the province's policy were to prohibit the performance of any surgical procedures outside hospitals, the legislation would have simply done so.

81 Finally, although I put little weight on this factor, I agree with both courts below that the relatively severe penalties provided for by the Act are relevant to its constitutional characterization. Section 6(1) of the Act prescribes fines of \$10,000 to \$50,000 for each infraction of the Act. Kennedy Prov. J. and Freeman J.A. considered the relative severity of the fines as one indication that the fines were not simply measures to enforce a regulatory scheme, but penalties to punish abortion clinics as inherently wrong. Of course, [s. 92\(15\) of the Constitution Act, 1867](#) allows the provinces to impose punishment to enforce valid provincial law, and the mere addition of penal sanctions to an otherwise valid provincial legislative scheme does not make the legislation criminal law: *Smith v. R.*, supra, at p. 800; *McNeil v. Nova Scotia (Board of Censors)*, supra, at p. 697; *Irwin Toy Ltd. c. Québec (Procureur général)*, supra, at p. 965. However, the unusual severity of penalties may be taken into account in characterizing legislation: *R. v. Westendorp*, at p. 51.

D. Conclusion

(1) *Pith and Substance*

82 This legislation deals, by its terms, with a subject historically considered to be part of the criminal law — the prohibition of the performance of abortions with penal consequences. It is thus suspect on its face. Its legal effect partially reproduces that of the now defunct [s. 251 of the Criminal Code](#), in so far as both precluded the establishment and operation of free-standing abortion clinics. Its legislative history, the course of events leading up to the Act's passage and the making of [N.S. Reg. 152/89](#), the Hansard excerpts and the absence of evidence that privatization

and the cost and quality of health care services were anything more than incidental concerns, lead to the conclusion that the *Medical Services Act* and the *Medical Services Designation Regulation* were aimed primarily at suppressing the perceived public harm or evil of abortion clinics. The legislation meets the tests set out in the *Margarine Reference*, supra and of *Morgentaler (1975)* and *Morgentaler (1988)*, supra. The primary objective of the legislation was to prohibit abortions outside hospitals as socially undesirable conduct, and any concern with the safety and security of pregnant women or with health care policy, hospitals or the regulation of the medical profession was merely ancillary. This legislation involves the regulation of the place where an abortion may be obtained, not from the viewpoint of health care policy, but from the viewpoint of public wrongs or crimes, to echo Cannon J.'s words in *Reference re Alberta Legislation*, [1938] S.C.R. 100, at p. 144 (appeal dismissed as moot in *Alberta Bank Taxation Reference*, supra, at pp. 127-28):

I agree with the submission of the Attorney-General for Canada that this bill deals with the regulation of the press of Alberta, *not from the viewpoint of private wrongs or civil injuries* resulting from any alleged infringement or privation of civil rights which belong to individuals ... *but from the viewpoint of public wrongs or crimes*, i.e., involving a violation of the public rights and duties to the whole community, considered as a community, in its social aggregate capacity. [Emphasis added.]

83 Paraphrasing what Lamer J. said in *Starr v. Houlden*, supra, at p. 1405: I find unpersuasive the argument that this legislation is solidly anchored in s. 92(7), (13) or (16) of the *Constitution Act, 1867*. There is nothing on the surface of the legislation or in the background facts leading up to its enactment to convince me that it is designed to protect the integrity of Nova Scotia's health care system by preventing the emergence of a two-tiered system of delivery, to ensure the delivery of high quality health care, or to rationalize the delivery of medical services so as to avoid duplication and reduce public health care costs. Any such objectives are clearly incidental to the central feature of the legislation, which is the prohibition of abortions outside hospitals as socially undesirable conduct subject to punishment.

(2) Practical Effect

84 This legislation will certainly restrict abortion in the sense that it makes abortions unavailable in any place other than hospitals. But will it lead to a practical restriction of access to abortion in Nova Scotia? Will the present hospital system be able and willing to accommodate all the women who desire to terminate a pregnancy, given among other things that the hospital in which 83 per cent of all abortions are performed has lost half of its medical staff willing to perform the procedure? These are questions that the trial judge did not answer, and on which the parties are resolutely divided. Women may not wish to have an abortion in a hospital for any number of legitimate reasons. Clearly restrictions as to place can have the effect of restricting abortions in practice, and indeed it was the operation of s. 251 of the *Criminal Code* in restricting abortions to certain hospitals that contributed largely to its demise. One of the reasons that the former s.

251 of the *Criminal Code* was struck down in *Morgentaler* (1988), supra, was that the in-hospital requirement in that section led to unacceptable delays, undue stress and trauma, and a severe practical restriction of access to abortion services. Several years of experience under s. 251 showed that the combined decisions and actions of individual anti-abortion hospital boards could render access to legal abortion non-existent in large areas of the country. Something similar may occur in Nova Scotia but that is something we have no way of predicting. One of the effects of the legislation is consolidation of abortions in the hands of the provincial government, largely in one provincially-controlled institution. This renders free access to abortion vulnerable to administrative erosion.

85 Having applied the ordinary tests as to the matter of the present legislation, I am able to conclude that the legislation was an ultra vires invasion of the field of criminal law. I am able to reach this conclusion without predicting the ultimate practical effect of this legislation, and it is consequently unnecessary to adjudicate the intractable dispute between the parties as to whether this legislation will, in fact, restrict access to abortion in Nova Scotia. The appellant's evidence that the legislation will not have the practical effect of restricting abortions is simply evidence that the legislation will not actually accomplish what it set out to do. In view of my conclusion as to the pith and substance of the legislation, I am not concerned with whether the legislation is effective and such evidence can no more be used to validate ultra vires legislation than to invalidate intra vires legislation, as was held in *Reference re Anti-Inflation Act*, supra.

(3) Severance

86 Severance is infrequently applied in distribution of powers cases. The general rule is that severance is available where the remaining good part can survive independently and would have been enacted by itself (see the *Alberta Bill of Rights* case, supra, at p. 518). Here there is no "remaining good part", since the foregoing analysis has shown that the pith and substance of the entire legislation taken together, Act and regulation alike, is criminal law. As Hogg says, "[f]or constitutional purposes the statute is one law, and it will stand or fall as a whole" (supra, p. 15-21); the same reasoning applies where, as here, two pieces of legislation are intertwined parts of a single legislative plan or scheme (see *Ontario (Attorney General) v. Reciprocal Insurers*, supra, *Alberta Bank Taxation Reference*, supra), two separate provisions or enactments "are so interconnected that they must be read together as expressing a single legislative purpose" (*Switzman v. Elbling*, supra, at p. 315, per Nolan J.), or the regulations "are so intertwined with the authorizing statute as to stamp it with their character" (*Central Canada Potash Co. v. Saskatchewan*, supra, at p. 64).

87 As a result, the Act and regulation are ultra vires in their entirety.

(4) Disposition

88 For the foregoing reasons, I would answer the constitutional questions as follows:

1. Is the *Medical Services Act*, R.S.N.S. 1989, c. 281, ultra vires the Legislature of the Province of Nova Scotia on the ground that the Act is legislation in relation to criminal law falling within the exclusive legislature jurisdiction of the Parliament of Canada under [s. 91\(27\) of the *Constitution Act, 1867*](#)?

Answer: Yes.

2. Is the *Medical Services Designation Regulation*, N.S. Reg. 152/89, made on the 20th day of July, 1989, pursuant to [s.8 of the *Medical Services Act*, R.S.N.S. 1989, c. 281](#), ultra vires the Lieutenant Governor in Council on the ground the regulation was made pursuant to legislation in relation to criminal law falling within the exclusive legislative jurisdiction of the Parliament of Canada under [s. 91\(27\) of the *Constitution Act, 1867*](#)?

Answer: Yes.

The appeal is therefore dismissed. I would award the respondent his costs of the appeal on a party and party scale.

Appeal dismissed.

Her Majesty the Queen v. Nestlé Canada Inc. et al.; Hershey Canada Inc. et al., Intervenor

[Indexed as: **R. v. Nestlé Canada Inc.**]

Please see in particular
paras. 29-30

Ontario Reports

Ontario Superior Court of Justice,

Nordheimer J. **As he then was**

February 4, 2015

124 O.R. (3d) 498 | 2015 ONSC 810

Case Summary

Criminal law — Evidence — Privilege — Accused charged with price fixing — Settlement privilege not attaching to information about alleged price fixing provided by intervenors to Competition Bureau pursuant to Immunity Program and Leniency Program — Intervenor not facing any prosecution or civil action arising from alleged price fixing — Scope of settlement privilege limited to attempts to use information in subsequent prosecution of person who provided it — Crown required to disclose information to accused even if settlement privilege applied as accused's right to make full answer and defence trumped public interest in encouraging settlement — Information subject to first party disclosure regime.

The accused were charged with price fixing contrary to the *Competition Act*, R.S.C. 1985, c. C-34 after an investigation by the Competition Bureau. The investigation began when one of the intervenors, Cadbury, provided information to the Competition Bureau under the bureau's Immunity Program. Cadbury was subsequently granted immunity from prosecution for the alleged price fixing. The intervenor Hershey also provided information to the bureau under the bureau's Leniency Program and entered into a plea agreement pursuant to which it was to receive lenient treatment in sentencing and its senior officers and employees were to obtain transactional immunity from prosecution. The accused sought disclosure of the information provided by the intervenors. The parties agreed that the information provided by the intervenors after the immunity agreement and the plea agreement were entered into was subject to disclosure. The Crown brought an application for a ruling about whether the information which was provided before the agreements were entered into was subject to settlement privilege. The intervenors took the position that it was, and Hershey also argued that it was subject to solicitor-client privilege.

Held, the application should be dismissed.

Solicitor-client privilege did not apply to the information. Hershey waived any solicitor-client privilege that might have attached to the information by providing the information to the Crown in the knowledge that the Crown could use it in prosecuting the accused. [page499]

The scope of settlement privilege is limited to attempts to use the information in any subsequent prosecution of the person who provided it. The intervenors were not facing any prosecution or civil action arising out of the alleged price fixing. Both intervenors knew, before their first contacts with the Competition Bureau under the Immunity Program and the Leniency Program, that any success they might achieve under those programs would be based on their ability to provide evidence that could be used against other persons. That was not an incidental aspect of the settlement negotiations; it was a critical aspect of them. Settlement privilege did not attach to the information in question.

Even if settlement privilege applied, there should be an exception to settlement privilege, so that factual information could be disclosed to the accused, on the basis of the right of the accused to make full answer and defence. An accused person's right to make full answer and defence must trump the public interest in encouraging settlement.

If settlement privilege applied and there was no exception for an accused's right to make full answer and defence, the immunity agreement and the plea agreement both contained clear waivers of the settlement privilege that would otherwise be found to attach to the information.

The information in question was subject to the first party disclosure regime. As the information was not clearly irrelevant, it should be disclosed to the accused.

R. v. Bernardo, [1994] O.J. No. 1718 (Gen. Div.); *R. v. Delorme*, [2005] N.W.T.J. No. 51, 2005 NWTSC 34, 198 C.C.C. (3d) 431, 32 C.R. (6th) 128; *Sable Offshore Energy Inc. v. Ameron International Corp.*, [2013] 2 S.C.R. 623, [2013] S.C.J. No. 37, 2013 SCC 37, 332 N.S.R. (2d) 1, 2013EXP-2138, J.E. 2013-1134, EYB 2013-223434, 37 C.P.C. (7th) 225, 446 N.R. 35, 359 D.L.R. (4th) 381, 22 C.L.R. (4th) 1, 228 A.C.W.S. (3d) 78; *Union Carbide Canada Inc. v. Bombardier Inc.*, [2014] 1 S.C.R. 800, [2014] S.C.J. No. 35, 2014 SCC 35, 457 N.R. 279, 55 C.P.C. (7th) 1, 373 D.L.R. (4th) 626, 2014EXP-1508, J.E. 2014-849, EYB 2014-236800, 239 A.C.W.S. (3d) 941, **consd**

Truscott (Re), [2005] O.J. No. 2667 (C.A.), **distd**

Other cases referred to

A. (L.L.) v. B. (A.), [1995] 4 S.C.R. 536, [1995] S.C.J. No. 102, 130 D.L.R. (4th) 422, 190 N.R. 329, J.E. 96-65, 103 C.C.C. (3d) 92, 44 C.R. (4th) 91, 33 C.R.R. (2d) 87, 29 W.C.B. (2d) 154; *Laudon v. Roberts*, [2009] O.J. No. 1824, 2009 ONCA 383, 249 O.A.C. 72, 77 M.V.R. (5th) 165, 308 D.L.R. (4th) 422, 66 C.C.L.T. (3d) 207, 178 A.C.W.S. (3d) 135; *Ohl v. Cannito*, [1972] 2 O.R. 763, [1972] O.J. No. 1794, 26 D.L.R. (3d) 556 (H.C.J.); *R. v. Egger*, [1993] 2 S.C.R. 451, [1993] S.C.J. No. 66, 103 D.L.R. (4th) 678, 153 N.R. 272, 141 A.R. 81, 82 C.C.C. (3d) 193, 21 C.R. (4th) 186, 15 C.R.R. (2d) 193, 45 M.V.R. (2d) 161, 19 W.C.B. (2d) 592; *R. v. Hawkins* (1996), 30 O.R. (3d) 641, [1996] 3 S.C.R. 1043, [1996] S.C.J. No. 117, 141 D.L.R. (4th) 193, 204 N.R. 241, 96 O.A.C. 81, 111 C.C.C. (3d) 129, 2 C.R. (5th) 245, EYB 1996-67709, J.E. 96-2285, 32 W.C.B. (2d) 388; *R. v. Leipert*, [1997] 1 S.C.R. 281, [1997] S.C.J. No. 14, 143 D.L.R.

(4th) 38, 207 N.R. 145, [1997] 3 W.W.R. 457, J.E. 97-357, 112 C.C.C. (3d) 385, 4 C.R. (5th) 259, 41 C.R.R. (2d) 266, 85 B.C.A.C. 162, 33 W.C.B. (2d) 229; *R. v. McClure*, [2001] 1 S.C.R. 445, [2001] S.C.J. No. 13, 2001 SCC 14, 195 D.L.R. (4th) 513, 266 N.R. 275, J.E. 2001-564, 142 O.A.C. 201, 151 C.C.C. (3d) 321, 40 C.R. (5th) 1, 80 C.R.R. (2d) 217, REJB 2001-22807, 48 W.C.B. (2d) 514; [page500] *R. v. Mills*, [1999] 3 S.C.R. 668, [1999] S.C.J. No. 68, 180 D.L.R. (4th) 1, 248 N.R. 101, [2000] 2 W.W.R. 180, J.E. 99-2312, 75 Alta. L.R. (3d) 1, 244 A.R. 201, 139 C.C.C. (3d) 321, 28 C.R. (5th) 207, 69 C.R.R. (2d) 1, 44 W.C.B. (2d) 124; *R. v. National Post*, [2010] 1 S.C.R. 477, [2010] S.C.J. No. 16, 401 N.R. 104, 211 C.R.R. (2d) 1, 262 O.A.C. 1, EYB 2010-173421, 2010EXP-1559, J.E. 2010-852, 254 C.C.C. (3d) 469, 318 D.L.R. (4th) 1, 74 C.R. (6th) 1, 188 A.C.W.S. (3d) 407; *R. v. O'Connor*, [1995] 4 S.C.R. 411, [1995] S.C.J. No. 98, 130 D.L.R. (4th) 235, 191 N.R. 1, [1996] 2 W.W.R. 153, J.E. 96-64, 68 B.C.A.C. 1, 103 C.C.C. (3d) 1, 44 C.R. (4th) 1, 33 C.R.R. (2d) 1, 29 W.C.B. (2d) 152; *R. v. Salituro*, [1991] 3 S.C.R. 654, [1991] S.C.J. No. 97, 131 N.R. 161, J.E. 92-16, 50 O.A.C. 125, 68 C.C.C. (3d) 289, 9 C.R. (4th) 324, 8 C.R.R. (2d) 173, 14 W.C.B. (2d) 407; *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, [1991] S.C.J. No. 83, 130 N.R. 277, [1992] 1 W.W.R. 97, 83 Alta. L.R. (2d) 193, 120 A.R. 161, 68 C.C.C. (3d) 1, 8 C.R. (4th) 277, 18 C.R.R. (2d) 210, 14 W.C.B. (2d) 266; *Unilever plc v. Procter & Gamble Co.*, [2001] 1 All E.R. 783, [2000] 1 W.L.R. 2436, [2000] F.S.R. 344, [1999] 44 L.S. Gaz. R. 40, 143 Sol. Jo. L.B. 268, [1999] All E.R. (D) 1166 (C.A.)

Statutes referred to

Canadian Charter of Rights and Freedoms, ss. 7, 11(d)

Competition Act, R.S.C. 1985, c. C-34, ss. 34, 45 [as am.], (1)(b), (c), (d)

Criminal Code, R.S.C. 1985, c. C-46, s. 551.1 [as am.]

Authorities referred to

Competition Bureau Canada, *Bulletin: Immunity Program under the Competition Act* (Gatineau, Que.: Competition Bureau Canada, 2010)

Competition Bureau Canada, *Bulletin: Leniency Program* (Gatineau, Que.: Competition Bureau Canada, 2010)

Organisation for Economic Co-operation and Development, *Policy Roundtables: Leniency for Subsequent Applicants* (Paris: Organisation for Economic Co-operation and Development, 2012)

Paciocco, David M., and Lee Stuesser, *The Law of Evidence*, 6th ed. (Toronto: Irwin Law, 2011)

APPLICATION for a ruling on whether settlement privilege applied to certain information.

C. Galligan and R. Morin, for applicant.

R. Kwinter and P. Schabas, for respondent Nestlé Canada Inc.

J. Rosen and J. Naster, for respondent Robert Leonidas.

S. Zucker and N. Turgis, for respondent Sandra Martinez de Arévalo.

B. Greenspan, S. Forbes and N. Reid-Ellis, for respondent Mars Canada Inc.

R. Hughes, for respondent ITWAL Limited.

G. Jennings, for respondent David Glenn Stevens.

S. Maidment and N. Campbell, for intervenor Hershey Canada Inc.

C. Naudie and M. Sheeley, for intervenors Kraft Canada Inc. and Mondelez Canada Inc. [page501]

[1] NORDHEIMER J.: — The Crown brings this application by which it seeks a ruling from this court whether certain information, that is in the hands of the Crown as a result of it having been provided to the Competition Bureau by Hershey Canada Inc. and Cadbury Canada Inc. (now Kraft Canada Inc./ Mondelez Canada Inc.), in circumstances that I will come to describe, is subject to settlement privilege. If so, the applicant seeks a ruling as to the threshold or standard that is to be applied in determining whether the respondents are entitled to that information under the Crown's duty of disclosure.

[2] Given that the information in question belonged to Hershey and Cadbury, the parties consented to them being granted intervenor status on this application. Cadbury and Hershey strongly oppose any disclosure of the information. Indeed, it is much more the intervenors, not the Crown, who assert that settlement privilege applies to the information at issue and thus prohibits disclosure.

[3] I should add that I heard this application in my capacity as the case management judge for this proceeding appointed by order dated June 26, 2014, pursuant to s. 551.1 of the *Criminal Code*, R.S.C. 1985, c. C-46.

Background

[4] In order to determine the issues raised, it is necessary to set out some of the background facts that have given rise to the disclosure issue.

[5] The respondents are charged on a direct indictment preferred on June 21, 2013 with a number of counts of "price fixing" contrary to ss. 45(1)(b), 45(1)(c) and 45(1)(d) of the *Competition Act*, R.S.C. 1985, c. C-34, following an investigation by the Competition Bureau.

[6] The investigation began on July 17, 2007, when Cadbury, through its counsel, contacted the Competition Bureau. The contact was made pursuant to the Competition Bureau's Immunity Program that is designed to encourage persons, who are involved in conduct contrary to the *Competition Act*, to come forward. The basic component steps of the Immunity Program are:

- (a) A "marker" is granted if a party, typically through their counsel, identifies, on the basis of a limited hypothetical disclosure, the nature of the criminal offence it had committed in respect of a specified product.
- (b) If the bureau provides a marker to the party, the party would then "proffer" to the bureau a detailed description of the illegal activity and disclosure of information it had. The [page502] proffer would typically be made in hypothetical terms by the applicant's legal representative. The bureau would generally require, with sufficient detail and certainty, the nature of any records the party could provide, what evidence potential witnesses could give and how probative the evidence is likely to be. In addition, the bureau could request an interview with one or more witnesses, or an opportunity to view certain documents, prior to recommending that the Director of Public Prosecutions of Canada grant immunity.
- (c) Subject to certain conditions, including full co-operation and disclosure, if the bureau was unaware of the offence, and the party was the first to disclose it, the commissioner would provide all of the relevant information and recommend to the Director of Public Prosecutions of Canada that immunity from prosecution be granted.

[7] Cadbury's counsel advised the Competition Bureau that a preliminary, but ongoing, internal investigation had revealed what appeared to be a domestic price-fixing cartel, that had been shut down in respect of Cadbury, but might be ongoing for other parties. Cadbury's counsel indicated that interviews with Cadbury employees had started but that their internal investigation would take some time, given the electronic nature and volume of information to review and the location of witnesses. Before Cadbury approached the bureau, the bureau had no knowledge of the alleged anti-competitive conduct reported by Cadbury and was not investigating, or contemplating investigating, the chocolate confectionery industry.

[8] On August 29, 2007, a "proffer" meeting took place at the bureau during which Cadbury's counsel disclosed to the bureau details of information they had gathered during the course of their investigation. The information disclosed by Cadbury's counsel included information obtained from interviews they had conducted of various Cadbury officers and employees, who divulged statements purportedly made by the respondents Leonidas and Martinez.

[9] Following the proffer meeting of August 29, 2007, Cadbury's counsel and bureau officers, along with counsel from the Public Prosecution Services of Canada ("PPSC"), frequently and extensively communicated as Cadbury's counsel continued to provide information to the bureau regarding the ongoing investigation. Cadbury's counsel provided insight into the meaning of records they provided to the bureau, as well as information regarding meetings and communications that had occurred between Cadbury representatives and the accused.

[page503]

[10] The bureau obtained search warrants and executed them against the corporate accused, along with Hershey, in November and December 2007. The first search warrants were granted upon the information to obtain ("ITO") of a bureau officer. This ITO had a confidential appendix with exhibits. The grounds for belief were based on information provided to the officer by Cadbury's counsel, bureau interviews of Cadbury employees, records received from Cadbury as part of Cadbury's application for immunity under the Immunity Program, and corporate information services and other public records.

[11] On October 19, 2007, Cadbury agreed to proceed under the Immunity Program. The Director of Public Prosecutions agreed to grant Cadbury immunity as of November 28, 2007. On May 13 and 14, 2008, an immunity agreement was executed by Cadbury and by counsel from the PPSC on behalf of the Director of Public Prosecutions. Under this agreement, Cadbury received transactional immunity from prosecution in this matter, as did its senior officers and employees.

[12] After the execution of the search warrants, on December 1, 2007, counsel for the intervenor, Hershey, spoke with the senior deputy commissioner, and head of the Criminal Matters Branch, of the bureau. Hershey's counsel was seeking a "second-in" marker for Hershey. Hershey was dealing with issues from the search and was still investigating whether it had been involved in an offence. If it had, Hershey wanted to co-operate, seek leniency and resolve the matter by way of settlement.

[13] In response to this inquiry, the senior deputy commissioner advised Hershey's counsel that the second-in status was confirmed. She described the bureau Leniency Program -- in particular that the bureau's recommendation to the Director of Public Prosecutions for leniency would be based on the timing and value of Hershey's co-operation. A further conversation regarding Hershey's intentions and the Leniency Program took place on December 4, 2007.

[14] On January 7, 2008, a proffer meeting took place at the bureau during which Hershey's counsel disclosed to the bureau details of information they had gathered during the course of their investigation of Hershey's role in this matter. The information disclosed by Hershey's counsel included information Hershey's counsel had obtained from interviews they had conducted of various Hershey officers and employees, which led them to believe that there was evidence implicating both Hershey and the accused. Following the proffer meeting, Hershey's counsel continued to provide information to the bureau. [page504]

[15] On June 11, 2010, Hershey and the PPSC concluded an agreement in principle, described as a memorandum of agreement. Subsequently, a plea sgreement was executed on February 2 and 4, 2011. Pursuant to the plea agreement, Hershey was to receive lenient treatment in sentencing and its senior officers and employees obtained transactional immunity from prosecution.

[16] Hershey pleaded guilty on June 21, 2013 to one count of price-fixing, contrary to s. 45 of the *Competition Act*, in connection with this matter. Hershey was fined \$4 million and the court issued a prohibition order against Hershey, under s. 34 of the *Competition Act*. A statement of admissions and agreed facts was filed at the proceeding.

[17] Throughout its investigation, the bureau has received information about the accused's participation in anti-competitive conduct through the co-operation of Cadbury and Hershey.

Cadbury's and Hershey's counsel provided information to the bureau, not only drawn from documents but also drawn from interviews that they had conducted with officers and employees of their respective clients. Cadbury and Hershey are contractually obligated to continue to co-operate throughout the prosecution of the accused, including providing the evidence of certain officers and employees, based on the agreements between the intervenors and the Crown, described above.

[18] The Crown first made disclosure to the accused pursuant to its disclosure obligations on June 19, 2013. Additional rounds of disclosure were given to the accused: September 5, 2013 (round 2), December 18, 2013 (round 3), February 24, 2014 (native files), March 20, 2014 (round 4), May 29, 2014 (round 5) and October 1, 2014 (round 6). Some of the disclosure provided was subject to editing. Some records were withheld because of various forms of privilege.

[19] During this disclosure process, the Crown realized that it had disclosed some documents over which settlement privilege ought to have been claimed, since the intervenors had not given a waiver of that privilege. On June 13, 2014, the Crown asked that the disclosed records over which there was a claim of settlement privilege be returned to the Crown, or deleted from the files of defence counsel, since the intervenors had asserted their privilege and asked that the Crown seek the immediate return or removal (or destruction) of the records from the databases of counsel for the accused.

[20] On June 18, 2014, the accused declined to return the documents or otherwise delete them. It is the position of the accused that they are entitled, not only to the material disclosed, [page 505] but also to other material held back from them by the Crown also on the ground of settlement privilege.

The Immunity Program and the Leniency Program

[21] Before turning to the issues and my analysis, I should set out some of the particulars regarding the Competition Bureau's Immunity Program and Leniency Program and how they led to the agreements that were signed by Cadbury and Hershey in this case.

[22] There is no issue that both of these programs are designed to encourage persons (normally corporations) to "come clean" about anti-competitive conduct in which they have been engaged. It is well recognized that the effective prosecution of anti-competitive activities, especially cartel activities directed at price-fixing and like anti-competitive conduct, can ordinarily only be discovered, and prosecuted, if a party to the cartel comes forward and reveals both the existence of the cartel and the parties to it. It is equally well recognized that, while distasteful on one level, it is nonetheless in the public interest, in terms of combatting these illegal activities, to offer people who participate in them either immunity, or a more lenient penalty, in order to get at the other parties who have also participated. In other words, there is a practical public interest in providing incentives to parties, who have engaged in anti-competitive activities, to reveal their actions and thus permit the successful prosecution of the other participants.

[23] This rationale for these types of programs has been adopted internationally. For example, the Organisation for Economic Co-operation and Development in its 2012 *Policy Roundtables: Leniency for Subsequent Applicants* (Paris: Organisation for Economic Co-operation and

Development, 2012) described the rationale, at p. 11:

The rationale for offering immunity to a cartel member who decides to break ranks, report the cartel to the authorities and co-operate by providing help to convict the other cartel members, is that the benefits for society derived from such co-operation outweigh the public interest in punishing the co-operating corporation. These benefits include increased detection rate, destabilising effects on cartels, cost savings in investigation and prosecution as a result of the applicant providing evidence directly from within the cartel, litigation savings and so on. All these benefits combined result in greater deterrence of cartel conduct by the competition authority without the need for corresponding resource investment.

[24] As a result of these realities, the Competition Bureau developed these two programs. While I do not consider it necessary to go into great detail regarding these programs, they both start with a party approaching the bureau with information [page 506] about anti-competitive activities. If the bureau is not otherwise aware of the anti-competitive activities involved, and is satisfied that the party will provide valuable information regarding those activities, the bureau will accept them into one or the other of these programs, depending at what stage the contact is made.

[25] As I referred to above, this process begins with a "proffer", that is, the providing of information from the party to the bureau regarding the activity in question. Usually, this information is provided by counsel for the party and is cloaked in "hypothetical" terms. While the hypothetical cloak may be a nice legal adornment for what is actually occurring, it is clear that the reality is that the party's counsel is engaged in providing very detailed information to the bureau about very real conduct.

[26] It is also clear that the bureau has at least two objectives in this proffer process. One is to get as much information as possible, and in as much detail as possible, respecting the activity in question. The other is to evaluate whether the information being provided is reliable and will be able to provide the foundation for a successful prosecution of the other parties involved. After all, there is no point, from the bureau's perspective, in providing immunity to a party if the result of that immunity is not going to lead to the bureau's positive ability to secure convictions for the other offenders. This point is clearly made in the bureau's information bulletin for the *Immunity Program under the Competition Act* (Gatineau, Que.: Competition Bureau Canada, 2010), at para. 24: "The Bureau will need to know with sufficient detail and certainty the nature of any records the applicant can provide, what evidence or testimony a potential witness can give and how probative the evidence is likely to be."

[27] As a consequence, both programs require the party seeking immunity or leniency to agree to undertake certain obligations. Two of those obligations are of particular importance. One is that the party receiving immunity or leniency must provide full, frank and truthful information including all "non-privileged evidence, information and records" in its possession or control. The other is that the party receiving immunity or leniency must use all reasonable and lawful measures for the purpose of securing the ongoing, complete, timely and truthful co-operation of any individuals who receive immunity or leniency as a consequence of the agreements entered into with that party. In this case, the agreements entered into by Cadbury

and Hershey both accorded immunity to all current and former officers, directors and employees of those corporations. [page507]

The Issues

[28] The central issue is whether settlement privilege applies to the information in question. If settlement privilege does apply, then there are secondary issues to be addressed; namely, (i) has the settlement privilege been waived or (ii) is there an exception to the settlement privilege such that the accused are entitled to the otherwise privileged information. I say that this is the central issue while recognizing that there are disagreements between the Crown and the intervenors as to the proper basis upon which the information is protected from disclosure, there are disagreements between the intervenors themselves as to the privilege that attaches to the information and, of course, there are disagreements between the Crown and the intervenors, on the one hand, and the accused, on the other, about virtually every aspect of the issues raised. I will address those disagreements when I come to deal with the various positions advanced.

[29] I should make it clear that the information that is at issue is the information provided by counsel for the intervenors during the proffer process. It is the proffer process that leads to the completion of either an immunity agreement or a plea agreement depending on whether the proffer process takes place under the Immunity Program or the Leniency Program. There is no issue that any information provided subsequent to the entering into of the immunity agreement (in the case of Cadbury) or the plea agreement (in the case of Hershey) must be disclosed to the accused under the Crown's duty of disclosure.

[30] That duty of disclosure is set out in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, [1991] S.C.J. No. 83. In summary, the Crown must disclose to an accused person all information in its possession, whether exculpatory or inculpatory, unless the information is "clearly irrelevant" or is protected from disclosure by privilege. Subsequently, the Supreme Court of Canada explained why the test for relevance is a very broad one. In *R. v. Egger*, [1993] 2 S.C.R. 451, [1993] S.C.J. No. 66, Sopinka J. said, at p. 467 S.C.R.:

One measure of the relevance of information in the Crown's hands is its usefulness to the defence: if it is of some use, it is relevant and should be disclosed -- *Stinchcombe*, *supra*, at p. 345. This requires a determination by the reviewing judge that production of the information can reasonably be used by the accused either in meeting the case for the Crown, advancing a defence or otherwise in making a decision which may affect the conduct of the defence such as, for example, whether to call evidence.

[31] I should at this point outline the respective positions taken on this application: [page508]

- (a) Crown: The Crown submits that settlement privilege applies to the information and should only be disclosed to the accused if it meets the appropriate test for an exception to the privilege. While the Crown initially submitted that the appropriate test for an exception is the test set out in *R. v. Mills*, [1999] 3 S.C.R. 668, [1999] S.C.J. No. 68, by the conclusion of the application, the Crown had altered its position to submit that the appropriate test is what I would say is more in line with the test set out in *R. v. O'Connor*, [1995] 4 S.C.R. 411, [1995] S.C.J. No. 98.

- (b) Cadbury: Cadbury also submits that settlement privilege applies to the information. However, Cadbury submits that the appropriate test for an exception from the privilege is the "innocence at stake" test set out in *R. v. McClure*, [2001] 1 S.C.R. 445, [2001] S.C.J. No. 13.
- (c) Hershey: Hershey submits that it is solicitor/client privilege that applies to the information and, consequently, also submits that the appropriate test is the "innocence at stake" exception that was established as the exception for that privilege by the decision in *McClure*.
- (d) Accused respondents: Collectively, the accused submit that settlement privilege does not apply to the information. However, if it does, the accused say it must be disclosed to them, either because the privilege has been waived, or because their rights to make full answer and defence outweigh the policy reasons for the existence or application of settlement privilege. The respondents submit that none of the exceptions proposed, either by the Crown or by the intervenors, apply in this case. Rather, the respondents say that the Crown's duty of disclosure under *Stinchcombe* requires the disclosure of this information to the accused because the information is already in the hands of the Crown.

[32] The parties say that there are only two Superior Court (and no appellate) decisions that address this issue in the criminal context. They are *R. v. Bernardo*, [1994] O.J. No. 1718 (Gen. Div.) and *R. v. Delorme*, [2005] N.W.T.J. No. 51, 2005 NWTSC 34. It is said that these two decisions conflict in their approach. It is also said that considerable time has passed, and the law has developed (notably by the Supreme Court of Canada) since these decisions were reached, such that they cannot now be safely applied to determine this issue. On that latter point, particular reference is made to two recent decisions of the Supreme Court of Canada. [page509] One is *Sable Offshore Energy Inc. v. Ameron International Corp.*, [2013] 2 S.C.R. 623, [2013] S.C.J. No. 37 and the other is *Union Carbide Canada Inc. v. Bombardier Inc.*, [2014] 1 S.C.R. 800, [2014] S.C.J. No. 35, both of which discuss settlement privilege, albeit in the context of civil proceedings.

Solicitor/client privilege

[33] Before I turn to what I have said is the central issue, namely, the application of settlement privilege, I will first address the submission of Hershey that solicitor/client privilege applies to this information. I see no merit to that submission. Even assuming that solicitor/client privilege could have attached to the information as it was gathered by Hershey's counsel, for the purpose of advising Hershey on this matter, once Hershey chose to instruct its counsel to approach the Competition Bureau, and reveal that information to the bureau for the purpose of entering into a plea agreement pursuant to the Leniency Program, Hershey must be seen as having waived any solicitor/client privilege that attached to the information.¹

[34] Generally speaking, a party who reveals solicitor and client information to a third party will be found to have waived the privilege that would otherwise attach to the information. That is certainly true when the information is being revealed to an adverse party, especially a prosecuting authority such as the Competition Bureau. This point was succinctly made in

Bernardo, where LeSage J. said, at para. 15:

Solicitor-client privilege applies to communications between counsel and the client and to communications that are necessarily incidental to the client's representation. They would not normally apply to a situation such as this where it has been divulged to a party adverse in interest, i.e. the Crown.

[35] The only authority to which Hershey points, that it submits contradicts this conclusion, is *Truscott (Re)*, [2005] O.J. No. 2667 (C.A.). In that case, the Kaufman report had been provided to the Court of Appeal for the limited purpose of assisting the case management of the reference that the Minister of Justice had directed to the Court of Appeal. The copy of the report, deposited with the court, had been sealed. Some parties to the reference, and some media organizations, sought access to the report on the grounds that the Minister of Justice had waived [page510] the solicitor/ client privilege, that everyone acknowledged had originally attached to the report, by delivering a copy to the court. The Court of Appeal dismissed the application, holding that the Minister of Justice had not waived solicitor/client privilege. The Court of Appeal said, at para. 8:

In our view, the context and circumstances under which copies of the Report were provided to the court and the parties belies the moving parties' submission that the Minister of Justice intended to and did, in fact, waive solicitor and client privilege over the Report. The strictly controlled production of the Report to the court and the parties, for the limited purposes of determining whether the Report should be made public and for case managing the Reference process, hardly attests to a clear and unequivocal intention on the Minister's part that the Report should be made available to the public at large.

[36] There is no comparison between the facts underlying the decision in *Truscott* and the situation that is before me. Among all of the other distinctions between the two cases, in *Truscott*, the privileged material was not provided to a person who was adverse in interest to the privilege holder. Rather, the report had been provided to the court and for the specific purpose I have mentioned. Hershey's reliance on this decision is simply misplaced.

[37] I would also note that, while I have assumed that solicitor/client privilege applied to this information originally, that does not mean that the privilege would continue for all purposes. It has long been held that solicitor/client privilege cannot be relied upon to refuse to disclose factual information, once the party who claims the privilege comes under a duty to disclose at, for example, an examination for discovery. Consequently, information obtained by counsel for a party, in preparation for litigation, cannot be withheld in the discovery process on the basis of solicitor/ client privilege, insofar as factual information has been conveyed to the party by a witness.²

[38] In this case, of course, Hershey knew that a fundamental purpose of the Leniency Program was to obtain information from it that the Crown could use in prosecuting the accused. With that knowledge, Hershey provided this information to the Crown. That act would suggest either that Hershey did not view the information as privileged, or that it was content to waive the privilege in order to achieve its goal of receiving lenient treatment. As I have said, Hershey did so with full knowledge that the Crown would use the information provided by it in [page511] furtherance of the prosecution against the accused. Given that context, Hershey must also have

provided the information with full knowledge of the Crown's general duty of disclosure that accompanies a prosecution, which I mentioned earlier. In these circumstances, it is difficult to see how solicitor/client privilege has any opportunity to cling to the information that was placed into the hands of the Crown by Hershey.

Settlement privilege

[39] I turn then to the issue of settlement privilege. I begin with some basic considerations. First is a definition of settlement privilege, that I take from *Union Carbide*, where Wagner J. said, at para. 31:

Settlement privilege is a common law rule of evidence that protects communications exchanged by parties as they try to settle a dispute. Sometimes called the "without prejudice" rule, it enables parties to participate in settlement negotiations without fear that information they disclose will be used against them in litigation.

[40] The second consideration is the nature of the privilege, that is, whether it is a class privilege or a case-by-case privilege. There was some implication in past cases that there were only two class privileges, namely, solicitor/client privilege and informer privilege.³ However, spousal privilege is also treated as a class privilege: *R. v. Hawkins* (1996), 30 O.R. (3d) 641, [1996] 3 S.C.R. 1043, [1996] S.C.J. No. 117. This is a matter of some importance because class privileges are of a higher quality than are case-by-case privileges. Is settlement privilege, then, a class privilege?

[41] While there may have been some doubt on that issue in the past, that doubt was clearly removed by the decision in *Sable Offshore*, where Abella J. said, at para. 12: "Settlement privilege promotes settlements. As the weight of the jurisprudence confirms, it is a class privilege."

[42] The effect of a privilege being a class privilege is set out in *R. v. National Post*, *supra*, where Binnie J. said, at para. 42:

Once the relevant relationship is established between the confiding party and the party in whom the confidence is placed, privilege presumptively cloaks in confidentiality matters properly within its scope without regard to the particulars of the situation. [page512]

[43] A class privilege has equal effect whether the proceeding is civil or criminal in nature. As noted by L'Heureux-Dubé J. in *A. (L.L.) v. B. (A.)*, [1995] 4 S.C.R. 536, [1995] S.C.J. No. 102, at para. 39:

A class privilege entails a *prima facie* presumption that such communications are inadmissible or not subject to disclosure in criminal or civil proceedings and the onus lies on the party seeking disclosure of the information to show that an overriding interest commands disclosure.

[44] All of that said, it nonetheless appears that all class privileges are not created equal. If one reviews the various cases that speak of the different class privileges, it becomes apparent to the reader that solicitor/client privilege and informer privilege occupy a position in the

hierarchy of class privileges that is considerably elevated over that occupied by either spousal privilege or settlement privilege. The nature and content of the language used to describe these various privileges reinforces that conclusion.

[45] Both solicitor/client privilege and informer privilege are described in terms of the privileges being essentially absolute and subject only to the very narrow "innocence at stake" exception -- an exception, I would add, that is very difficult to establish. Spousal privilege, on the other hand, has seen its application consistently narrowed over the past few decades. That narrowing is reflected, among other places, in *R. v. Salituro*, [1991] 3 S.C.R. 654, [1991] S.C.J. No. 97 and was justified by Iacobucci J. when he said, at p. 670 S.C.R.:

These cases reflect the flexible approach that this Court has taken to the development of the common law. Judges can and should adapt the common law to reflect the changing social, moral and economic fabric of the country. Judges should not be quick to perpetuate rules whose social foundation has long since disappeared.

[46] Similarly, settlement privilege is expressed in fundamentally different terms. For one, whereas solicitor/ client privilege and informer privilege allow for only one exception -- innocence at stake -- settlement privilege has numerous exceptions. As the English Court of Appeal said, in *Unilever plc v. Procter & Gamble Co.*, [2001] 1 All E.R. 783, [2000] 1 W.L.R. 2436 (C.A.), *per* Walker L.J. at p. 791 All E.R.: "Nevertheless there are numerous occasions on which, despite the existence of without prejudice negotiations, the without prejudice rule does not prevent the admission into evidence of what one or both of the parties said or wrote."

[47] Another difference is that the application of the rule depends very much on the use to which the asserted privileged communication is sought to be put. The purpose of the privilege [page513] is to protect the negotiating parties from prejudice or risk. If the use of the information will not cause prejudice or risk to the party whose information it is, then the rationale for the privilege tends to disappear. This point is aptly put by Paciocco, David M. and Lee Stuesser in *The Law of Evidence*, 6th ed. (Toronto: Irwin Law, 2011), at p. 251:

On the other hand, where the communication sought is not to be used against its maker and there is little or no prejudice, then the compelling public policy purpose underlying the rule is not triggered and courts are more inclined to override the privilege.

[48] It is clear to me, therefore, that settlement privilege is not to be approached, or treated, in the same fashion as solicitor/client privilege or informer privilege. It does not occupy the highest rank of privilege in terms of its inviolate nature nor can the rationales employed to justify the very narrow "innocence at stake" exception garner the same support.

[49] The above quotation from Binnie J. in *National Post* leads into the first issue to be determined and that is the extent or scope of settlement privilege. The situation here is different from the situations that presented themselves in *Sable Offshore* and *Union Carbide*, both of which arose out of civil proceedings. Here, we have a criminal proceeding, where the accused have certain constitutionally guaranteed rights. One of those guaranteed rights is the right to make full answer and defence under s. 7 of the *Canadian Charter of Rights and Freedoms*.

[50] I turn then to the two cases where this issue has arisen and that I mentioned earlier, namely, *Bernardo* and *Delorme*. In *Bernardo*, the issue was whether the Crown had to disclose to the accused, who was charged with first degree murder, the information that had passed between the Crown and counsel for Ms. Homolka, who had reached a plea agreement with the Crown and was to be a key Crown witness against Mr. Bernardo. The Crown resisted disclosure of the information on the basis that it was irrelevant and inadmissible.

[51] LeSage J. disagreed. He found that the information, while it might not be admissible, was nonetheless relevant under the *Stinchcombe* standard for relevance in terms of the Crown's duty to disclose. As I earlier noted, LeSage J. rejected the argument that the information was subject to solicitor/client privilege. He then went on to consider the argument put to him by the Crown that the information was subject to "public interest" privilege. LeSage J. agreed that there should be a privilege that attaches to negotiations between the Crown and an accused over a possible plea. He specifically found that "settlement negotiation privilege ought to exist" with respect to any such discussions. [page514]

[52] Having determined that such a privilege should attach to plea negotiations, LeSage J. nonetheless found that any such privilege would not attach to the information that the Crown had received from counsel for Ms. Homolka. He found that the privilege would only attach to information that was sought to be used against the accused who reached a plea agreement and not with respect to another accused. Specifically, LeSage J. said, at para. 17 [of *Bernardo*]:

Although I readily accept the Crown's position that a privilege ought to exist in the sense that the information should not be used against her in a subsequent prosecution, I do not conclude that the "privilege" ought to extend when that person, i.e. Ms. Homolka, is not an accused nor is at any risk of prejudice. In this circumstance, it is intended that she testify on behalf of the Crown, putting another at penal risk.

He continued, at para. 18:

Assuming that a privilege does attach to these negotiations, that privilege ought not to extend to an agreement that requires the person to be a witness against another when, as here, she will be a witness for the Crown.

[53] It is clear, therefore, that the decision in *Bernardo* did not extend the scope of settlement privilege to the situation where information was provided to the Crown in furtherance of a plea agreement that was relevant to another accused person and his or her right to make full answer and defence. Rather, LeSage J. restricted the scope of the privilege to any attempt to use the information, in any subsequent prosecution against the person who provided it. I believe that it is implicit, in that finding, that the privilege would also extend to any use of the information, against the person who provided it, in another type of proceeding, such as a civil claim.

[54] Eleven years later, the issue arose again in *Delorme*. In that case, three co-accused had reached various plea arrangements with the Crown. Mr. Delorme was left alone as the last accused. Mr. Delorme sought production of the information that had passed between the Crown, and each of his three co-accused, as part of the negotiations for the plea bargains. One of the co-accused was to be called as a witness against Mr. Delorme, another co-accused was not

going to be called as a witness, and it was uncertain whether the third co-accused would, or would not, be called.

[55] Vertes J. considered whether any of three possible privileges applied to the information -- solicitor/client privilege, work product privilege or settlement privilege. Interestingly, Vertes J. also rejected the argument that solicitor/client privilege could attach, using language very similar to that used by LeSage J. in *Bernardo*. He said, at para. 11 [of *Delorme*]: "Solicitor-client [page515] privilege is not an issue on this application. Any communications disclosed by the lawyers for the three individuals to the Crown lost the privilege since, at the time, the Crown was a party adverse in interest."

[56] Vertes J. did not specifically address work product privilege. Rather, he chose to turn to settlement privilege and determine whether it precluded disclosure of the information. In doing so, Vertes J. took a different approach to that taken by LeSage J. He began by finding that LeSage J. had "set aside" the privilege. That is not, in fact, what LeSage J. did. Rather, it is clear, from his reasons, that LeSage J. found that the privilege did not apply.

[57] Vertes J. concluded that settlement privilege (or plea negotiation privilege as he called it) applied to the information. He then considered whether an exception to the privilege would nonetheless make the information subject to disclosure. In his analysis, Vertes J. chose to apply the test from *R. v. O'Connor* as the appropriate test for finding an exception to the privilege. It appears that he viewed this as a middle ground between the broader *Stinchcombe* test for disclosure and the much narrower *McClure* test for disclosure. He said, at para. 47:

While the plea negotiation privilege is also based on policy reasons, it does not share the same fundamental position as does solicitor-client privilege. Thus I think there is justification for a less stringent test.

[58] Having decided on the test for an exception, Vertes J. then reviewed the actual information that was at issue. He decided that the information relating to the co-accused, who would be called as a witness, and the co-accused that might be called as a witness, should be disclosed. He decided that the information relating to the co-accused, who was not being called as a witness, would not have to be disclosed. It is worth noting, however, that in reaching that conclusion, Vertes J. found, at para. 52, that there was "nothing in them which, in my opinion, could compromise Delorme's ability to make full answer and defence".

[59] I accept that there is a conflict in the approaches taken in *Bernardo* and *Delorme*. That said, when one looks at the factual determination that Vertes J. made regarding the usefulness of the information at issue to Mr. Delorme, it is not clear to me that there is an actual conflict in the result.

[60] What then is the proper approach? Let me begin by making a couple of general comments. One is that it seems to me that the necessary first step is to determine whether the privilege applies to the information, before turning to any issue regarding exceptions that may be applicable. The other is that I believe that it is risky to simply transfer and apply the [page516] approach, analysis and results, where settlement privilege has been applied in civil cases, to criminal cases. I say so because, as I noted earlier, there are different constitutional dimensions to a criminal proceeding over a civil proceeding.

[61] In that regard, I would note that the decision in *Union Carbide* did not deal with the issue that is presented here, that is, the right of another person to have access to information exchanged between the parties to a settlement. Rather, *Union Carbide* dealt with the ability of the parties to a settlement to use that information to prove and enforce a settlement agreement. As a result, I find the decision in *Union Carbide* to be of very limited assistance to the determination of the issue that is before me.

[62] The decision in *Sable Offshore* did involve a person, outside of the settlement, seeking to have access to information that was part of the settlement. However, it was a very discrete aspect of the information that was sought. Indeed, it was a single piece of information, namely, the dollar amount of the settlement, that was in issue. It is therefore important in reading the decision in *Sable Offshore*, and in understanding its conclusion, to remember the very salient fact that all of the information, that the settling defendants had provided to the plaintiff, had already been turned over to the non-settling defendants. As Abella J. said, at para. 25: "The non-settling defendants have in fact received all the non-financial terms of the Pierringer Agreements. They have access to all the relevant documents and other evidence that was in the settling defendants' possession."

[63] Abella J. then went on to find that withholding the dollar amount of the settlement from the non-settling defendants did not occasion any prejudice to them. In that regard, she pointed out that the plaintiff had already agreed that it would reveal the dollar amount of the settlement to the trial judge once the issue of liability for the non-settling defendants had been determined. The non-settling defendants could not point to any other valid reason for needing this information. That conclusion is the equivalent of a finding, in the criminal context, of the information not being relevant. Consequently, none of the "full answer and defence" issues, that arise in this case, were present in *Sable Offshore*.

[64] In this case, the situation is reversed. The Crown admits that the information that is sought to be covered by settlement privilege is likely relevant to the accused. At the same time, neither Cadbury nor Hershey can point to any concrete or specific prejudice that would be occasioned to them from the disclosure [page 517] of the core information that the accused seek. Indeed, neither Cadbury nor Hershey placed any evidence before this court of any risk or prejudice to them arising from the possible disclosure of this information. It is also relevant, as the accused pointed out, that neither Cadbury nor Hershey are currently facing any criminal prosecution elsewhere, nor are they facing any civil proceedings, arising from the events that underlie this prosecution.

[65] Another distinguishing feature of this case from the usual context of a civil proceeding, where settlement negotiations take place, is the fact that it was front and centre to both Cadbury and Hershey that the fundamental purpose, of both the Immunity Program and the Leniency Program, was to obtain evidence that would allow the Competition Bureau to prosecute other persons involved in the anti-competitive activities. In other words, both Cadbury and Hershey knew, before their first contact with the Competition Bureau under either of these programs, that any success that they might achieve under these programs would be based on their ability to deliver up evidence that could be used against other persons. This was not an incidental aspect of the settlement negotiations. It was a critical aspect of them.

[66] A consequence of this reality is that it does not lie comfortably in the mouths of Cadbury or Hershey to now complain that the disclosure of information (that was provided by them to the bureau in these circumstances and that has evidentiary value), to persons who are accused, is somehow unfair to them or is an unexpected result. Not only should Cadbury and Hershey have known, from the start, that that would be the result, they are, in fact, contractually bound to the bureau to provide such information, both in documentary and testimonial forms, for that very purpose.

[67] In that regard, the distinction that the intervenors seek to draw between information provided to the Crown before the immunity agreement or the plea agreement was signed, and the information provided to the Crown after those agreements were signed, finds no support on any principled basis. Given the acknowledgement by the intervenors that they can raise no objection to the disclosure of relevant information provided by them to the Crown, after their respective agreements were signed, there is no principled basis to which they can point for why the selfsame information, provided before those agreements were signed, should be protected.

[68] In my view, the cases that have dealt with, and applied, settlement privilege have never done so with the intention that [page 518] settlement privilege would be used to deny other persons, who are part of the same proceedings, or the activities that underlie those proceedings, from access to evidence relevant to those proceedings. My conclusion, in that regard, is reinforced by the approach taken in another civil context, namely, where Mary Carter agreements are entered into.⁴ Courts have consistently rejected the efforts of settling defendants to keep Mary Carter agreements secret.⁵ The analysis undertaken by courts in ordering Mary Carter agreements to be disclosed reflects the emphasis on full disclosure of relevant evidence, in the same way that the Supreme Court of Canada stressed the fact, in *Sable Offshore*, that the non-settling defendants had [at para. 25] "access to all the relevant documents and other evidence that was in the settling defendants' possession".

[69] I conclude, therefore, that settlement privilege does not apply to prohibit the disclosure of factual information provided to the Crown in respect of a proposed criminal prosecution in circumstances where the person providing that information does so with the knowledge that the Crown intends to rely on some or all of that information for the purposes of that criminal prosecution. I would say that that is especially so where the person who is providing the information has committed to providing evidence, in the future, against the accused in that prosecution.

Exceptions to settlement privilege

[70] If I am wrong in that conclusion, and all such information is *prima facie* covered by settlement privilege, then, in the circumstances of a case such as this, where factual information provided would be potentially useful to the accused persons, I would conclude that there should be an exception to settlement privilege, so that factual information can be disclosed to the accused, on the basis of the right of the accused to make full answer and defence.

[71] It is clear that settlement privilege allows for exceptions. That point was made in *Sable Offshore* by Abella J., where she said, at para. 19:

There are, inevitably, exceptions to the privilege. To come within those exceptions, a defendant must show that, on balance, "a competing public interest outweighs the public interest in encouraging settlement". [page519]

[72] It is well established that there is a public interest in an accused's right to make full answer and defence. As I earlier noted, it is an interest that is constitutionally protected by s. 7 of the *Charter*. It is also a component of the right to a fair trial that is constitutionally protected by s. 11(d) of the *Charter*. Thus, it will be seen that the right to make full answer and defence is not only a public interest, it is a very important public interest. Indeed, it is established that the right to make full answer and defence can override even the most important privileges. As McLachlin J. said, in *R. v. Leipert*, [1997] 1 S.C.R. 281, [1997] S.C.J. No. 14, at para. 24: "To the extent that rules and privileges stand in the way of an innocent person establishing his or her innocence, they must yield to the *Charter* guarantee of a fair trial."

[73] In my view, an accused person's right to make full answer and defence must trump the public interest in encouraging settlement. We ought not to allow for the possibility of a wrongful conviction just to reach the desirable goal of achieving resolutions, especially in situations where the right to make full answer and defence can be accomplished through the disclosure of information that will not occasion risk or prejudice to the person who has provided that information to the Crown. I note that my conclusion in this regard would appear to find support in the discussion about exceptions to settlement privilege found in Paciocco and Stuesser, *The Law of Evidence*, *supra*, at p. 252:

There is no definite list of compelling interests such as to override the privilege. Certainly in criminal cases accused persons can rely upon the need to make full answer and defence.

[74] The intervenors assert that to reach that conclusion will have the effect of making any person pause and seriously examine whether they will want to engage in either of the bureau's programs, if that is to be the price of their participation. I do not accept that such an effect will result. I begin by noting that this concern was not advanced by the Crown on behalf of the bureau. If there is such a potential negative impact on the bureau's programs that will arise from such a conclusion, I would have expected that it would have been front and centre in the Crown's submissions.

[75] I also assume that any person, who decides to participate in one of these programs, only does so after serious consideration and analysis, in any event. Even without the conclusion I have reached regarding the exception to settlement privilege, any person who participates in the Immunity Program knows that it must reveal all of its non-privileged documents and make available all of its employees as potential witnesses. Anyone who participates in the Leniency Program does so with the same [page520] knowledge, and with the additional understanding that it will be subject to some penalty. For example, in this case, Hershey paid a significant fine as part of its plea agreement. Given all of those considerations, it seems to me that the additional consequence that pre-agreement disclosure will be added to all of the post-agreement disclosure will be unlikely to materially affect a person's decision to participate, or not, in these programs.

[76] Having concluded that there should be an exception to settlement privilege for the purposes of an accused person making full answer and defence, I have also concluded that

neither of the tests advanced by the intervenors, or by the Crown, is the appropriate test to apply. That is, neither the test in *McClure* nor the test in *Mills* nor, for that matter, the test in *O'Connor* is the appropriate test for determining what information does, and does not, have to be disclosed, pursuant to this exception. That is because all of those tests relate to third party disclosure.

[77] Here we are not dealing with third party disclosure, but with first party disclosure. The information at issue is already in the hands of the Crown. The test that applies for disclosure of information in the possession of the Crown is set out in *Stinchcombe*, and all of the decisions that have since considered and elaborated on that test. There is no need to define yet another test for the purposes of determining what information forms an exception to settlement privilege. The Crown is well familiar with its obligations regarding disclosure under *Stinchcombe* and is well able to apply it to the information that is at issue here. That said, for what additional assistance it may provide, I will make some general comments, at the end of these reasons, as to what is required, and is not required, to be disclosed.

Waiver of settlement privilege

[78] Finally, I will briefly address one other reason why, in the circumstances of this case, the pre-agreement information should be disclosed by the Crown to the accused and that is the issue of waiver. On that point, the immunity agreement signed by Cadbury contained the following provision, in para. 6:

The DPP and the Commissioner shall not disclose to any third party the identity of Cadbury or the related immunity recipient, except where:

- (a) Disclosure is required by law, including:
 - (i) in response to an order of a Canadian court of competent jurisdiction;
 - (ii) to a person charged with an offence in Canada relating to the anticompetitive conduct. [page521]

The immunity agreement continues thereafter to provide:

The DPP and the Commissioner shall not disclose to any third party information obtained from Cadbury or any related immunity recipient, subject only to the exceptions listed above or where disclosure of such information is otherwise for the purpose of the administration or enforcement of the Act.

[79] In my view, the provision in para. 6(a)(ii) expressly contemplates that the Crown will, as part of its *Stinchcombe* disclosure obligations, be required to disclose to an accused person any of the factual information that it receives from the person who is given immunity. Assuming that settlement privilege applies, and that there is no exception for an accused's right to make full answer and defence, it is my view that this provision constitutes a clear waiver of the settlement privilege that would otherwise be found to attach to the information.

[80] A similar provision is contained in the plea agreement signed by Hershey except that the term in that agreement refers to information provided "pursuant to this agreement". Hershey

contends that the provision, consequently, only applies to information provided after the agreement was signed. I do not accept that contention. For one, it is inconsistent with what the bureau agreed to in the immunity agreement. There would be no logical reason to have a broader disclosure requirement apply to Cadbury than would be the case for Hershey. For another, both the Immunity Program and the Leniency Program contain the same exceptions to the pledge of confidentiality including an exception where disclosure of information is for "the purpose of the administration or enforcement of the Act". For yet another, it is acknowledged that the information is provided, in the first place, for the purpose of achieving either an immunity agreement or a plea agreement. The information would only have to be disclosed, of course, if an agreement is reached. It follows logically that, whether the information is provided before or after the actual agreement is signed, it is all information that is being provided pursuant to the agreement.

[81] I will add that I find support for my conclusion, in this regard, in the contents of the Competition Bureau's 2010 *Bulletin: Leniency Program* (Gatineau, Que.: Canadian Competition Bureau, 2010) that states, in para. 38:

As part of the leniency applicant's ongoing cooperation obligations, once the plea agreement is concluded, all information provided by the leniency applicant *prior and pursuant* to the plea agreement may be used by the Bureau in its investigations and by the PPSC in any subsequent prosecution against other parties to the offence.

(Emphasis added) [page522]

[82] Finally, on the point of waiver, it should be noted that the information provided by Cadbury was used by the Crown to obtain search warrants. The information to obtain recounts the information that Cadbury (unnamed in the ITO), and its unnamed employees, had given to the bureau. That information, having been put into a court document filed for the purpose of obtaining a court authorization, must be disclosed to any person who is the subject of that court authorization. Cadbury says that it did not know that its information had been used in this ITO. While that may be, Cadbury did not take any steps before this, or any other court, to address that problem. It is only now, almost eight years after the search warrants were obtained and executed, that Cadbury raises the issue. In my view, it is too late for Cadbury to complain. The use of the information, and the passage of time, would also constitute a waiver of any privilege that attached to Cadbury's information.

[83] Before concluding, I should explain why I have, at various points in the course of these reasons, referred to "factual information". I have done so purposely. My conclusion that factual information, that was provided by the intervenors to the Crown, must be disclosed to the accused is intended to be exactly so restricted. Factual information, that was provided prior to the execution of the immunity agreement or the plea agreement, must be disclosed. However, other information, such as legal opinions that may have been offered, or negotiations over the precise wording of the agreements, or views expressed over the relative importance of one thing or another, do not have to be disclosed.

[84] I reach that conclusion for two reasons. One is that those types of information do not constitute facts. The other, which follows from the first, is that they are not relevant. While

counsel for the accused attempted to justify disclosure of this information on the basis that it would be "useful" or "helpful", they were unable to articulate, in any substantive way, how it would be so. By way of one example only, the opinion of counsel for Cadbury, or for Hershey, that there was or was not a conspiracy, at a given point in time, or that there was or was not an agreement, at a given point in time, is of no consequence and of no relevance. Both the Crown and the defence are capable of reaching their own opinions on those matters. In any event, the only opinion that will ultimately count is that reached by the trier of fact.

[85] I attach one proviso to that conclusion. I have expressed it without the benefit of having reviewed the information that is at issue. For good reasons, it was agreed by all parties that this application would not engage a review of each of the many pieces of information that form the subject matter of this [page 523] application. It was further agreed that, if the court provided general principles as to any information that had to be disclosed, the parties would hopefully be able, on their own, to decide what information then had to be disclosed and what did not. Should any disagreements arise, they would be dealt with at a later date.

[86] I allow for the possibility that some of the information that I may have suggested falls into the non-factual, and therefore not to be disclosed, category might, on a specific review, be properly categorized differently. My conclusions in this regard are, therefore, provisional and can be revisited, if the circumstances necessitate it.

Conclusion

[87] In the end result, I conclude that settlement privilege does not apply to the factual information provided by the intervenors to the Crown before the immunity agreement and plea agreement were entered into and, hence, that information must be disclosed by the Crown to the accused.

Application dismissed.

Notes

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- ¹ I should note that I will, in these reasons, refer alternately to the Competition Bureau and to the Crown. For the purposes of the issues before me, in terms of to whom the information was disclosed, I do not draw any distinction between the two.
 - ² *Ohl v. Cannito*, [1972] 2 O.R. 763, [1972] O.J. No. 1794 (H.C.J.).
 - ³ See, for example, *R. v. National Post*, [2010] 1 S.C.R. 477, [2010] S.C.J. No. 16, at para. 42.
 - ⁴ Mary Carter agreements and Perringer agreements are different forms of the same basic settlement document.
 - ⁵ See, for example, *Laudon v. Roberts*, [2009] O.J. No. 1824, 2009 ONCA 383.