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REGINA V. CAINE ARCHIVE

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| Before: | The Honourable Madam Justice Rowles<br>The Honourable Madam Justice Prowse<br>The Honourable Mr. Justice Braidwood |
| David Malmo-Levine | Appearing In-Person |
| J. Conroy, Q.C. | Counsel for the Appellant Victor Eugene Caine |
| S. David Frankel, Q.C. and W.P. Riley | Counsel for the Respondent |
| Place and Date of Hearing: | Vancouver, British Columbia<br>November 17 & 18, 1999 |
| Written Submissions Received: | December 10 & 16, 1999 |
| Place and Date of Judgment: | Vancouver, British Columbia<br>June 2, 2000 |

[1] These two appeals were argued together and the major issues are essentially the same. It must be determined whether the prohibition on marihuana possession in the ***Narcotic Control Act***, R.S.C. 1985, c. N-1 ("***NCA***"), infringes s. 7 of the ***Canadian Charter of Rights and Freedoms*** ("the ***Charter***").

[2] For the reasons that follow, I conclude that this appeal should be dismissed. The impugned provisions of the ***NCA*** do not deprive the appellants' right to life, liberty, or security of the person in a manner that is not in accordance with the principles of fundamental justice.

**I FACTS**

A. The Facts in ***R. v. Malmo-Levine***

[3] The appellant David Malmo-Levine described himself to the Court as a "marihuana / freedom activist." Beginning in October 1996, he helped operate an organization in East Vancouver known as the "Harm Reduction Club" which was a co-operative, non-profit association of its members. The stated object of the club was to

educate its users and the general public about marihuana and provide unadulterated marihuana to its users at club cost. The club had approximately 1800 members.

[4] The Club educates its members on a wide variety of "safe smoking habits" to minimize any harm from the use of marihuana. Members are required to sign a pledge not to operate motor vehicles or heavy equipment while under the influence of the substance.

[5] On 4 December 1996, police entered the premises of the Club and seized 316 grams of marihuana, much of it in the form of "joints." Mr. Malmo-Levine was charged with possession of marihuana for the purpose of trafficking contrary to section 4 of the ***NCA***.

B. The Facts in ***R. v. Caine***

[6] The facts in the ***Caine*** appeal are not in dispute. During the late afternoon of 13 June 1993, two R.C.M.P. officers were patrolling a parking lot at a beach in White Rock. They observed the appellant Victor Eugene Caine and a male passenger sitting in a van owned by Mr. Caine. The officers observed Mr. Caine, who was seated in the driver's seat, start the engine and begin to back up. As one officer approached the van, he smelled a strong odour of recently smoked marihuana.

[7] Mr. Caine produced for the officer a partially smoked cigarette of marihuana which weighed 0.5 grams. He possessed the marihuana cigarette for his own use and not for any other purpose.

**II RELEVANT LEGISLATION**

A. The ***Narcotic Control Act***

[8] Both appellants have challenged the constitutional validity of the ***NCA*** as it pertains to the simple possession of marihuana. The appellant Malmo-Levine was charged with possession for the purpose of trafficking, but his appeal is restricted to that part of the charge relating to possession.

[9] 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." The impugned provisions of the ***NCA*** 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

[1] 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

[2] on conviction on indictment, to imprisonment for a term not exceeding seven years.

> **22.** (1) The Governor in Council may amend the schedule by adding thereto or deleting therefrom any substance, the inclusion or exclusion of which, as the case may be, is deemed necessary by the Governor in Council in the public interest.

[10] Section 3 of the Schedule of the ***NCA*** lists marihuana in its various forms as one of the narcotics covered by this prohibition.

B. The ***Charter of Rights and Freedoms***

[11] Section 7 of the ***Charter*** states:

> 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.

**III TRIAL JUDGMENTS**

A. ***R.* v. *Malmo-Levine***, [1998] B.C.J. No. 1025 (QL) (S.C.)

[12] The case of the appellant Malmo-Levine was heard by the Honourable Mr. Justice Curtis. The learned trial judge, after a lengthy *voir dire*, refused to hear evidence which was essentially the same as the evidence tendered in ***R.* v. *Caine***, *infra*. He found that the proposed evidence was not relevant to an analysis under s. 7 of the ***Charter***.

[13] The appellant Malmo-Levine advanced several ***Charter*** arguments including freedom of expression and freedom of association, but it is only his s. 7 argument that is relevant to this appeal. The trial judge considered s. 7 at paragraph 10:

> The starting point for an analysis of this issue is to determine what it is that is intended to be constitutionally protected by the words life, liberty and security of the person in s. 7 of the ***Charter***. Constitutional protection is the highest level of protection our law allows, and when found to exist will be enforced in priority to all other interests. I interpret the word liberty in s. 7 to refer to the position of a person within Canadian society. Any society, by its very essence, has rules. No one within a society can be free to do absolutely anything which suits them and no member of Canadian society has ever had such freedom.

The trial judge referred to the definitions of "liberty" given by La Forest J. in ***B.(R.)* v. *Children's Aid Society***, [1995] 1 S.C.R. 315, and Wilson J. in ***R.* v. *Morgentaler***, [1988] 1 S.C.R. 30. He then stated:

> Interpreting the ***Charter*** in light of the common law and legal traditions of Canada, I find no basis for holding that freedom to use marihuana constitutes a matter of fundamental personal importance, such that it is included within the meaning of the word liberty in s. 7 of the ***Charter***. There being no right to use marihuana created by the

> right to life, liberty and security of the person, the question of the principles of fundamental justice need not be considered. The ***Narcotic Control Act*** does not infringe Mr. Malmo-Levine's or Mr. Rowsell's rights under s. 7. [Emphasis added]

[14] On this basis, the appellant Malmo-Levine was convicted of possession of marihuana and possession for the purpose of trafficking. He was given a conditional sentence of one year imprisonment. The aforementioned Rowsell was a Club member who was acquitted of possession of marihuana.

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

[15] In ***R.* v. *Caine,*** the appellant was tried before Howard P.C.J. At the commencement of his trial, he sought a declaration that the provisions of the ***NCA*** prohibiting the possession of marihuana infringed his rights under s. 7. The learned provincial court judge heard voluminous evidence on the alleged dangers of marihuana. In the end, she held that she was bound by the decision in ***Malmo-Levine*** that the ***NCA*** did not infringe s. 7 and entered a conviction.

1. Legislative Facts Found by the Trial Judge

[16] In order to provide a "sound factual foundation" relating to the purpose and background of the ***NCA***, including its "social, economic and cultural context," the learned trial judge analyzed a wide array of written material. She considered scientific findings, reports and studies and heard from six expert witnesses. Five expert witnesses were called by the appellant and one, Dr. Kalant, for the Crown.

[17] The learned trial judge noted that an estimated four to five million Canadians have tried marihuana. Statistics suggest that in 1993, 4.2% of Canadians over 15 years of age had used marihuana in the past year. In addition, statistics show that 95 per-cent of marihuana users are "low / occasional / moderate users," while 5 per-cent are "chronic users," meaning that they smoke more than one joint per day.

[18] On the basis of the evidence put before the court, the learned trial judge made the following findings of fact:

> 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, except in relation to the lungs. Reports of lung damage are limited to chronic, heavy users 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 causes alteration of mental function and 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. 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. Consequently, physical dependence is not a major problem. Psychological dependence, however, 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. 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.

These findings of fact are almost identical to those found by Ontario courts in ***R.* v. *Parker*** (1997), 12 C.R. (5th) 251 (Ont. Ct. Justice) and ***R.* v. *Clay*** (1997), 9 C.R. (5th) 349 (Ont. Gen. Div.).

[19] The trial judge also referred to the findings of the LeDain Commission of Inquiry into the Non-Medical Use of Drugs (1972-3), chaired by Gerard LeDain (later LeDain J. of the Supreme Court of Canada). 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 marihuana:

1. cannabis is not a "narcotic";
2. few acute physiological effects have been detected from current use in Canada;
3. few users (less than 1%) 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*** (Ottawa: Information Canada, 1972) pp.265-310]

2. The Harm Caused by Marihuana

[20] Despite these findings, the trial judge also concluded that marihuana is not a "completely harmless drug for all individual users." She referred to these findings of the LeDain Commission, summarized in ***Clay***, *supra*, at p. 361:

[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 psychomotor 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 a desire for drug experience and lowering inhibitions about drug experimentations.

[21] The learned trial judge also reviewed an Australian government report completed in 1994 known as "the Hall Report": Hall, Solowij, and Lemon, ***National Drug Strategy: The Health and Psychological Consequences of Cannabis Use***, (Canberra: Australian Government Publishing Service, 1994). On the authority of the Hall Report, Howard P.C.J. made the following conclusions about the "acute" effects of cannabis use:

> 1. Naive users should be careful and if they choose to smoke cannabis, they 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.
> 3. Pregnant women should not smoke cannabis.
> 4. The mentally ill or those with a family history of mental illness should not use cannabis.
> 5. No one should drive, fly or operate complex machinery while under the influence of marihuana.

[22] The trial judge also referred to what the Hall Report called "chronic effects": the adverse effects that might occur from the daily use of cannabis over many years.

Despite the "considerable uncertainty" regarding this research, the trial judge made a number of conclusions. She was satisfied that the "major probable adverse effects" for chronic use include respiratory diseases, the development of a "cannabis dependence syndrome," and "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."

[23] Howard P.C.J. also referred to the Hall Report's findings on "major possible adverse effects" from chronic use. These effects need to be confirmed by further research and, indeed, two of the Hall Report's findings had already been disproved by the time of trial. The trial judge listed the remaining findings:

> 1. an increased risk of developing cancers of the aerodigestive tract, i.e. oral cavity, pharynx, and oesophagus; and
> 2. a decline in occupational performance marked by underachievement in adults in occupations requiring high level cognitive skills, and impaired educational attainment in adolescents.

[24] The Hall Report also identified three traditional "high risk groups":

[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.

[25] The trial judge noted at paragraph 48 of her reasons for judgment that, apart from the "rare and transient" acute effects noted above, a healthy adult who is a low/occasional/moderate user of marihuana would not face significant health concerns from smoking marihuana.

[26] The trial judge also considered the "risk of harm to others or to society as a whole" from smoking marihuana. She found that the only such risk could be from a person in a state of intoxication should he or she drive, fly, or operate complex machinery. However, the trial judge noted that s. 253 of the ***Criminal Code*** already prohibits such activities.

[27] The trial judge also considered the "burden upon society" brought about by smoking marihuana. She concluded that current rates of marihuana consumption have not caused any burden on the health-care system, particularly when compared with the costs associated with alcohol or tobacco.

3. The Harm Caused by the Prohibition on Marihuana

[28] The learned trial judge also considered the harm caused by the prohibition of marihuana possession in the ***NCA***. She made the following summary at paragraph 63 of her reasons for judgment:

[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 remarkably 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.

4. Summary of "Harm"

[29] The trial judge summarized her findings on the "harm" posed by marihuana use at paras. 122-6 of her judgment:

> 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 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.
> 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 minuscule.
> 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. There is a risk that, with legalization, user rates will increase and so will these costs.

5. Application of s. 7 of the ***Charter***

[30] The trial judge first considered cases like ***Morgentaler****, supra,* and ***B.(R.)****, supra,* to determine whether the possession of recreational drugs like marihuana can be considered to be of "fundamental personal importance." She wrote at paragraph 98:

> ... According to the applicant, the right to possess and use marihuana is protected by s. 7 of the ***Charter***, not because the right to use marihuana is a matter of fundamental personal importance, but because the decision to consume marihuana, notwithstanding that it might be harmful to one's health, is nothing more nor less than an exercise of the fundamental right of autonomy over one's own health and bodily integrity. The ***Narcotic Control Act*** prohibition against the possession of marihuana for personal use deprives the individual of this fundamental right of autonomy.
> In my view, whatever thoughts I had on the above position of the applicant "went up in smoke," so to speak, with the arrival of the February 1998 decision of our Supreme Court in [***Malmo-Levine***]. Notwithstanding the applicant's position, noted above, Mr. Justice Curtis was clearly satisfied that the issue was more properly characterized as a question of whether s. 7 of the ***Charter*** guarantees the right to use marihuana. I am bound by this decision of Curtis J. The fact that the charge before him was possession of marihuana for the purpose of trafficking, rather than simple possession, is of no significance. It is clear from the decision that he was ruling on the question of simple possession, independent of any considerations about the trafficking aspect of the charge ...
> In view of the decision in [***Malmo-Levine***], I conclude that there has been no infringement of the applicant's liberty or security of person as these concepts relate to his right to make decisions regarding his own health and bodily integrity.

[31] Howard P.C.J. then recognized that the penal consequences of the ***NCA*** automatically engaged the "liberty" interest of s**.** 7. The Crown conceded this point. She then proceeded to the consider the "principles of fundamental justice."

[32] The trial judge considered whether the provisions of the ***NCA*** struck "the right balance" between the interests of the individual and the State. She wrote at paragraph 109:

> In considering the issue of fundamental justice, one must necessarily engage in a balancing process. The object of that process is to come to "a determination of the balance to be struck between individual rights and the interests of society" such as are engaged by the legislation in issue: ***Chiarelli* v. *Canada (Minister of Employment and Immigration*** (1992), 72 C.C.C. (3d) 214 (S.C.C.) at 220. The balancing process will involve a consideration of a number of issues, including the scope of the legislation, the rationale behind it, the nature of the societal and state interests that are being advanced, the applicable principles and policies that have animated legislative and judicial practice in the field, and the interests of the accused, in particular, the nature of the liberty he has lost.
> ...
> Thus, any analysis of legislation under s. 7 involves an assessment of state interests and individual interests to determine whether the balance between them does or does not offend the principles of fundamental justice. This is of particular importance to the applicant in the present case. The assessment of his interests necessarily requires that weight be given to the ultimate consequence for him, which is a loss of his liberty if convicted. However, the assessment also requires an assessment of the nature of the conduct which he is prohibited from engaging in. Here, the applicant might like to argue that the focus should be on the state's interference with the applicant's right to autonomy and his right to make decisions about his bodily integrity. That, in my view, is too abstract an approach for a s. 7 analysis. The specific conduct in issue is clearly the use of marihuana and I do not think the applicant can avoid that fact. When particularized, his complaint is that the legislation constitutes an unjustified interference with his right to possess and use marihuana. [Emphasis added]
> Of course, Curtis J. has already determined, in [***Malmo-Levine***] that the right to possession and use of marihuana is not a matter of fundamental, personal importance. Hence it is not conduct which is protected by s. 7 of the ***Charter***. This conclusion, which is binding on me, has significant consequences when it comes to a consideration of the principles of fundamental justice. It means that, in the balancing of state and individual interests, one cannot attach any weight to the applicant's interest, that interest being the right to possess and use marihuana without threat of imprisonment by the state. Moreover, it would appear, from the authorities, that considerations about overbreadth, and arbitrariness, and even the 'harm' principle proposed by the applicant are not principles that exist independent of the balancing process. Rather, they are aspects of that process, and as such, they too are affected by the fact that no weight can be given to the applicant's interests. In short, given the finding in [***Malmo-Levine***] that the right to possess marihuana is "not a matter of fundamental importance" and that it is not a protected interest under s. 7 of the ***Charter***, it is simply not possible to come to the conclusion that the interest of the applicant in possessing marihuana outweighs the interest of the state in prohibiting the same for the purpose of

> solving the health problems, if any, associated with its use. [Emphasis added]
> In conclusion, the applicant clearly faces the threat of imprisonment if he possesses marihuana contrary to the existing law. This amounts to a deprivation of 'liberty' under s. 7 of the ***Charter***. However, this deprivation of liberty does not offend the principles of justice.

[33] Mr. Caine was convicted of possession of marihuana and given an absolute discharge.

**IV CONSTITUTIONAL QUESTIONS**

[34] The constitutional questions in the case at bar are:

> 1. Does the inclusion of cannabis sativa, its preparations, derivatives and similar synthetic preparations, including all those substances set out in the Schedule under sections 3(1) to (6) to the ***Narcotic Control Act***, R.S.C. 1985, c. N-1, as amended to date, insofar as they relate to the personal possession and use contrary to sections 3(1) and (2) of the Act, violate the appellants' constitutional rights to life, liberty and the security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice as set out in section 7 of the ***Canadian Charter of Rights and Freedoms***.

[2] If the answer to question 1 is yes, is the limitation one that can be demonstrably justified in a free and democratic society?

[35] The appellant Malmo-Levine was also charged with possession for the purpose of trafficking under the ***NCA***, and he brought a similar constitutional challenge to that provision. However, the analysis in this appeal will be restricted to considering whether the prohibition on marihuana possession contained in s. 3 of the ***NCA*** breaches s. 7 of the ***Charter***. If s. 3 passes constitutional muster, there is no need for this Court to consider the trafficking provisions under s. 4.

**V ANALYSIS**

A. The Test Under Section 7

[36] In ***R. v. White***, [1999] 2 S.C.R. 417 at 436 *per* Iacobucci J., the Supreme Court of Canada stated that there are "three main stages" to the s. 7 test. Other cases have created sub-steps to each of these stages. The three basic stages are:

**STAGE ONE:** Has the applicant suffered a real or imminent deprivation of life, liberty, security of the person, or a combination of these interests? Is the deprivation sufficiently serious to attract ***Charter*** protection?
**STAGE TWO:** Identify and define the relevant principles of fundamental justice
**STAGE THREE:** Is the deprivation in accordance with the principles of fundamental justice?

[37] If a breach of s. 7 is found, then the analysis would proceed to s. 1 of the ***Charter***. The relationship between these two sections was recently clarified in the case of ***R.* v. *Mills*** (1999), 180 D.L.R. (4th) 1 at 40-1 (S.C.C.).

1. Stage One: Life, Liberty and the Security of the person

(a) Definition of "Liberty"

[38] The first stage in a s. 7 analysis is to determine whether the applicant has suffered a real or imminent deprivation of life, liberty, security of the person, or a combination of these interests.

[39] It is now well-established that an applicant need only prove a deprivation of one of these factors to pass this first stage: ***R.* v. *S. (R.J.)***, [1995] 1 S.C.R. 451 at 480. In our case, the appellants' arguments are based on the "liberty" interest.

[40] The most obvious engagement of the "liberty" interest is imprisonment. In ***Re B.C. Motor Vehicle Act***, [1985] 2 S.C.R. 486 at 515, the Supreme Court of Canada stipulated that when there is a threat of imprisonment, the "liberty" interest under s. 7 is automatically engaged. The analysis would then proceed directly to a consideration of the "principles of fundamental justice."

[41] When there is not a threat of imprisonment, courts must consider more closely whether the actions in question engage the liberty interest. The Supreme Court of Canada discussed this topic in the cases of ***R.* v. *Morgentaler***, [1988] 1 S.C.R. 30 at 166 *per* Wilson J., ***Rodriguez* v. *British Columbia (Attorney-General)***, [1993] 3 S.C.R. 591, ***B.(R.)* v. *Children's Aid Society***, [1995] 1 S.C.R. 315 at 368-9 *per* La Forest J., and ***Godbout* v. *Longeuil***, [1997] 3 S.C.R. 844 at 893 *per* La Forest J. This Court also discussed the question recently in ***Buhlers* v. *British Columbia (Superintendent of Motor Vehicles)*** (1999), 170 D.L.R. (4th) 344. The issue in these cases can be boiled down to essentially the question: is the activity of "fundamental personal importance"?

[42] For instance, in ***Buhlers***, *supra*, this Court considered whether the term "liberty" in s. 7 contained a "right to drive." The applicant in that case had his driver's license suspended. There was no threat of imprisonment, so the "liberty" interest was not automatically engaged. To succeed, therefore, the applicant had to demonstrate to the Court that the underlying activity (i.e. driving a motor vehicle) was protected by s. 7.

[43] The Court flatly rejected the idea that there is a "right to drive" contained within s. 7. Hinds J.A. referred to the cases of ***B.R.*** and ***Godbout*** and concluded at paragraph 108:

> It is recognized that the liberty interests protected by s. 7 may not necessarily be restricted to the physical liberty of the individual. In appropriate circumstances, those interests may embrace liberties that are fundamentally or inherently personal to the individual and go to the root of a person's dignity and independence.
> In my view, the broadened scope of the liberty interest protected by s. 7, as expressed by some of the members of the Supreme Court in

> ***B.(R.)*** and in ***Godbout***, does not extend to the driving of a motor vehicle on a public highway. It is not a matter that is fundamental or inherently personal to the individual. It is not a matter that goes to the root of a person's dignity and independence. To hold otherwise would trivialize the liberty sought to be protected by s. 7. [Emphasis added] In my view, the right or privilege to drive a motor vehicle on a public highway is not a liberty protected by s. 7.

[44] It should again be noted that the Court in ***Buhlers*** was forced to consider whether "the right to drive" was contained within the "liberty" interest of s. 7 due to the absence of a penal provision.

> (b) Is the Deprivation Sufficiently Serious to Attract ***Charter*** Protection?

[45] In ***Cunningham* v. *Canada***, [1993] 2 S.C.R. 143, the Supreme Court of Canada considered whether the deprivation of "liberty" was sufficiently serious to attract ***Charter*** protection. McLachlin J. stated at p. 151 that the "***Charter*** does not protect against insignificant or 'trivial' limitations of rights." In that case, she concluded that the difference between release on mandatory supervision and remaining in prison was significant enough to pass this first step of the s. 7 test.

2. Stage Two: Identify and Define the Relevant Principles of Fundamental Justice

[46] In ***White***, *supra*, Iacobucci J. stated that the second stage of the s. 7 test "involves identifying and defining the relevant principle or principles of fundamental justice."

[47] As a preliminary matter, it is useful to trace the common law and legislative history of the relevant offence: ***Rodriguez***, *supra,* at p. 591. This step essentially does two things: it defines the legislative purpose of the impugned provision; and, it allows the Court to identify the larger principles and rationales that underlie the impugned activity or statute to see how they have evolved over time. In ***Rodriguez***, the Court found that the purpose of the ***Criminal Code*** provision on assisted suicide was to protect vulnerable groups. Sopinka J. stated at p. 595:

> The issue here, then, can be characterized as being whether the blanket prohibition on assisted suicide is arbitrary or unfair in that it is unrelated to the state's interest in protecting the vulnerable, and that it lacks a foundation in the legal tradition and societal beliefs which are said to be represented by the prohibition.
> Section 241(b) has as its purpose the protection of the vulnerable who might be induced in moments of weakness to commit suicide. This purpose is grounded in the state interest in protecting life and reflects the policy of the state that human life should not be depreciated by allowing life to be taken. This policy finds expression not only in the provisions of our ***Criminal Code*** which prohibit murder and other violent acts against others notwithstanding the consent of the victim, but also in the policy against capital punishment and, until its repeal, attempted suicide. This is not only a policy of the state, however, but is part of our fundamental conception of the sanctity of human life. [Emphasis added]

(a) Determine the Relevant "Principles of Fundamental Justice"

[48] After identifying the purpose of the provision as well as the larger principles and policies that underlie it, it becomes possible to sketch out the principle or principles of fundamental justice at play in the case.

[49] In ***Rodriguez***, the Supreme Court of Canada identified "the sanctity of life" as being the relevant principle in the case. Sopinka J. then addressed whether this principle indeed constituted a "principle of fundamental justice" within the meaning of s. 7. He stated at p. 590-1:

> Discerning the principles of fundamental justice with which deprivation of life, liberty or security of the person must accord, in order to withstand constitutional scrutiny, is not an easy task. 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 in a manner which yields an understandable result. They must also, in my view, be legal principles. [Emphasis added]

Later, at p. 607, he concluded:

> The principles of fundamental justice cannot be created for the occasion to reflect the court's dislike or distaste of a particular statute. 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.

[50] A "principle of fundamental justice" therefore has at least three qualities:

1 it is a legal principle;
2. it is precise; and
3. there is a consensus among reasonable people that it is vital to our system of justice.

(b) Defining the Operative "Principle of Fundamental Justice"

[51] In ***S. (R.J.)***, *supra,* the Supreme Court of Canada concluded that the "right against self-incrimination" was a principle of fundamental justice. To define the principle for the purposes of a s. 7 analysis, the Court (at paragraph 49) drew on the following sources:

1. the common law;
2. the statutory environment;
3. other ***Charter*** provisions; and
4. a more expansive review of principles and policies that animate the rule.

[52] In ***Rodriguez**, supra*, the Court also considered such sources as the common law and statutes as well as reports of Law Reform Commissions and leading treatises on the law.

[53] The Supreme Court of Canada has emphasised that each principle of fundamental justice needs to be understood in the light of other principles of fundamental justice and other ***Charter*** rights. In the recent case of ***Mills**, supra*, for example, the Court defined the accused's right to full answer and defence in light of the complainant's right to privacy. In ***White**, supra*, Iacobucci J. wrote at p. 439:

> The contextual analysis that is mandated under s. 7 of the ***Charter*** is defined and guided by the requirement that a court determine whether a deprivation of life, liberty, or security of the person has occurred in accordance with the principles of fundamental justice. As this Court has stated, the s. 7 analysis involves a balance. Each principle of fundamental justice must be interpreted in light of those other individual and societal interests that are of sufficient importance that they may appropriately be characterized as principles of fundamental justice in Canadian society. [Emphasis in original]

[54] A practical result of this approach is the identification of legitimate exceptions to the relevant principle of fundamental justice. In ***Rodriguez***, Mr. Justice Sopinka considered the principle of the "sanctity of human life" but noted the following exceptions to this principle at pp. 595-6:

> As is noted in the above passage, the principle of sanctity of life is no longer seen to require that all human life be preserved at all costs. Rather, it has come to be understood, at least by some, as encompassing quality of life considerations, and to be subject to certain limitations and qualifications reflective of personal autonomy and dignity. An analysis of our legislative and social policy in this area is necessary in order to determine whether fundamental principles have evolved such that they conflict with the validity of the balancing of interests undertaken by Parliament. [Emphasis added]

Sopinka J. later stated at pp. 605-6:

> What the preceding review demonstrates is that Canada and other Western democracies recognize and apply the principle of the sanctity of life as a general principle which is subject to limited and narrow exceptions in situations in which notions of personal autonomy and dignity must prevail. However, these same societies continue to draw distinctions between passive and active forms of intervention in the dying process, and with very few exceptions, prohibit assisted suicide in situations akin to that of the appellant. The task then becomes to identify the rationales upon which these distinctions are based and to determine whether they are constitutionally supportable. [Emphasis added]

[55] In summary, the relevant principle of fundamental justice must be defined in light of the common law, the statutory environment, other principles of fundamental justice and ***Charter*** rights. By taking this approach, courts will often identify valid

"exceptions" to the operative principle of fundamental justice due to the presence of these other factors.

3. Stage Three: Is the Deprivation in Accordance with the Principles of Fundamental Justice?

[56] The third stage of the s. 7 analysis involves considering whether the deprivation of liberty in Stage One is in accordance with the operative principle of fundamental justice defined in Stage Two. Courts have phrased this test in many ways.

(a) Onus of Proof

[57] As a preliminary matter, it is necessary to address which party bears the onus of proof at this stage in the analysis. It was argued by the appellant Caine that the Crown bears the onus of proving that the impugned provisions are in accordance with the principles of fundamental justice. I do not agree. The Supreme Court of Canada has recently put this matter beyond doubt in the ***Mills*** decision. While explaining the differences between the "balancing process" in a s. 7 analysis as opposed to a s. 1 analysis, the majority stated at p. 41:

> 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.

(b) Is there a Rational Connection Between the Purpose of the Legislation and the Deprivation of Liberty?

[58] The purpose or rationale of the impugned legislation must be in accordance with the operative principle of fundamental justice. There must also be a rational connection between the deprivation of life, liberty or security of the person and the purpose of the law. In ***Rodriguez****, supra,* Sopinka J. stated at p. 596 that if the deprivation of the right "does little or nothing to enhance the State's purpose, then the deprivation is not in accordance with the principles of fundamental justice." Courts have often used the term "manifest unfairness" to describe such situations: ***R.* v. *Jones*,** [1986] 2 S.C.R. 284 at 304; ***Morgentaler****, supra* at p. 72 *per* Dickson C.J.C.; ***Rodriguez* v. *British Columbia (Attorney-General)*** (1993), 76 B.C.L.R. (2d) 145 at 160 *per* McEachern C.J.B.C.

(c) Does the Legislation Strike the "Right Balance" Between the Rights of the Individual and the Interests of the State?

[59] Another consideration at this stage is analogous to the proportionality step of the test in ***R.* v. *Oakes*,** [1986] 1 S.C.R. 103. A court may consider whether the impugned provision strikes the right balance between the rights of the individual and the interests of the State. The trial judge in ***Caine*** drew on this idea in her s. 7 analysis.

[60] The most authoritative statement of this balancing step was made by McLachlin J. in the ***Cunningham*** case at pp. 151-2:

> The principles of fundamental justice are concerned not only with the interest of the person who claims his liberty has been limited, but with the protection of society. Fundamental justice requires that a fair balance be struck between these interests, both substantively and procedurally ...
> The first question is whether, from a substantive point of view, the change in the law strikes the right balance between the accused's interests and the interests of society. The interest of society in being protected against the violence that may be perpetrated as a consequence of the early release of inmates whose sentence has not been fully served needs no elaboration. On the other side of the balance lies the prisoner's interest in an early conditional release. [Emphasis added]

Similar statements can be found in ***Thomson Newspapers Ltd.* v. *Canada***, [1990] 1 S.C.R. 425 at 539 *per* La Forest J., and in ***Rodriguez**, supra* at p. 593 *per* Sopinka J.

(d) The Factors to be weighed under the s. 7 "Balancing Process"

[61] There is considerable debate as to what factors should be weighed at the s. 7 stage: D. Singleton, "The Principles of Fundamental Justice, Societal Interests and Section 1 of the Charter" (1995) 74 ***Canadian Bar Review*** 446. In ***Re B.C. Motor Vehicle Act***, *supra*, Lamer J. concluded that only "legal principles" can be weighed in a s. 7 analysis. He stated at p. 503 that "the principles of fundamental justice" are to be found in "the basic tenets of our legal system" and "do not lie in the realm of general public policy." Later, at p. 517-8, he held that "the public interest" could only be a possible justification for a deprivation of liberty under s. 1, not s. 7. However, subsequent decisions have refined this rule, and it is now clear that "societal interests" should form part of this balancing process in certain cases. McLachlin J., in a dissenting opinion in ***Rodriguez***, *supra*, best summarized this idea. She stated at p. 622-3:

> 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 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.

[62] Therefore, "societal interests" may form part of the s. 7 analysis when the operative principle of fundamental justice necessarily involves issues like the protection of society. As will be discussed below, such interests must be weighed during the balancing process in this case due to the nature of the "harm principle." However, in other cases, "societal interests" must only be considered as part of a s. 1 analysis.

[63] Matters that can only be termed "social policy" - such as administrative concerns, strains on the tax base, or Canada's diplomatic relations with other countries - are always left to a s. 1 analysis. The recent ***Mills*** decision clarified this distinction between the balancing test under s. 1 and s. 7. The majority stated at p. 40-1:

> Because of these differences [between a s. 1 and s. 7 analysis], 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 the 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."

[64] The ***Mills*** decision therefore indicates that the values to be considered during the "balancing" under s. 1 are "broader" than the values under s. 7. I understand this passage to mean that during the s. 7 analysis, when the onus is on the individual, there are fewer values and principles that can be used to justify the deprivation of life, liberty or security of the person. Under s. 1, however, when the State has the onus, there are more values and principles available to justify the infringement of a right.

[65] This distinction makes sense and is true to the court's deferential role to Parliament. During a s. 1 analysis, when the onus is on the Crown, it should have more weapons at its disposal. This distinction also affords a better reading of s. 7. The phrase "in accordance with the principles of fundamental justice" should be restricted to principles and rules that are central to our legal system, just as Lamer J. stated in the ***Motor Vehicle Reference***.

4. Can a Breach of s. 7 Be Saved By s. 1?

[66] If a breach of s. 7 is found, the analysis then proceeds to s. 1. The relationship between these sections is not entirely clear. In the ***Motor Vehicle Reference***, *supra*, Lamer J. stated that a breach of s. 7 could only be saved by s. 1 in extraordinary situations like war. Wilson J. stated in several cases, most notably ***Morgentaler***, that a breach of s. 7 could never be saved by s. 1. Nonetheless, the Supreme Court of Canada will always consider s. 1 after finding a breach of s. 7. In two cases, judges in dissenting opinions found that a breach of s. 7 could be saved by s. 1: ***R.* v. *Penno***, [1990] 2 S.C.R. 865 *per* Lamer J.; ***R.* v. *Hess***, [1990] 2 S.C.R. 906 *per* McLachlin J. In the recent case of ***Suresh* v. *Canada (Minister of Citizenship and Immigration)***, [2000] F.C.J. No. 5 (QL) (C.A.), the Federal Court of Appeal ruled that a s. 7 breach could be saved by s.1 due to concerns about Canada becoming a "safe haven" for terrorists.

[67] As stated above, the recent ***Mills*** decision has clarified the uneasy relationship between s. 7 and s. 1. It seems plausible that a breach of s. 7 could be justified under s. 1 due to the wider range of principles and values at play in a s. 1 analysis, that are not at play during the s. 7 analysis.

B. The Section 7 Analysis in the Case at Bar

[68] I now turn to the s. 7 analysis in the case at bar. It should be noted that this discussion is based on the facts found by the trial judge in the ***Caine*** decision. During the appeal, the parties handed up materials to the Court on the subject of marihuana use, but they have not been considered. I refer in particular to a report submitted by the Crown entitled "CASA Releases Report: Non-Medical and Medical Uses of Marijuana" which is of dubious value.

1. Stage One: Life, Liberty and Security of the Person

[69] Due to the penal provisions of the ***NCA***, the "liberty" interests of the appellants are automatically engaged. The case law is clear on this point and the Crown concedes the argument. The trial judge in ***Malmo-Levine*** erred by applying the "fundamental personal importance" test of ***Morgentaler*** and ***B.(R.)***. It was not necessary for the Court to discern whether there is a free-standing "right to smoke recreational drugs" or a "right to control one's bodily integrity" contained within the meaning of "liberty" due to the presence of these penal sanctions. I contrast the case at bar with the ***Buhlers*** decision. In that case, there was no threat of imprisonment, forcing this Court to consider the "fundamental personal importance" test as it relates to the "right to drive."

[70] The analysis in this case, therefore, proceeds directly to the second stage of the test.

2. Stage Two: Identify and Define the Operative "Principle of Fundamental Justice"

[71] The next stage involves identifying and defining the relevant principle or principles of fundamental justice. As a preliminary matter, the legislative history of the ***NCA*** should be traced to identify the purpose of the prohibition and the larger ideas that surround it.

(a) Legislative History of the Prohibition of Marihuana Possession

[72] Parliament passed its first piece of legislation directed at the use of narcotics for non-medicinal purposes in 1908 with the ***Opium Act***, S.C. 1908, c. 50. This statute was passed in wake of new-found fears of the harm posed by opium to Canadian society: see R. Solomon & M. Green "The First Century: The History of Nonmedical Opiate Use and Control Policies in Canada, 1870-1970" (1982) 20 ***University of Western Ontario Law Review*** 307. This statute was replaced in 1911 by the ***Opium and Drug Act***, S.C. 1911, c. 17, which prohibited cocaine, morphine, and eucaine in addition to opium.

[73] During these years, Canada also became a signatory to a number of international agreements regarding drug trafficking, mostly involving hard drugs like

opium. These conventions include the ***International Opium Convention*** signed at The Hague on 23 January 1912, the ***Agreement concerning the Manufacture of, Internal Trade in and Use of Prepared Opium*** (11 February 1925), and the ***International Opium Convention*** (19 February 1925).

[74] Various court decisions in the first half of the century demonstrate that the purpose of Canada's narcotics laws was to stamp out the drug traffic due to the "evils" that these substances inflict on the nation's health and morality. The B.C. Supreme Court considered the purpose of the legislation in ***Ex parte Wakabayashi***, [1928] 3 D.L.R. 226. Macdonald J. stated at p. 227 that the drug traffic was:

> ... one of the greatest evils of modern times, and legislative efforts have been made in all civilized countries to control, and, if possible, destroy this evil.

In ***R.* v. *Mah Qun Non*** (1933), 47 B.C.R. 464, [1934] 1 W.W.R. 78 (C.A.), this Court referred to the "very terrible traffic in these very deleterious drugs." McPhillips J.A. stated at p. 80 (W.W.R.):

> It is a large traffic, a deleterious traffic, and one inimical to the health and mentality of our people, and the policy of the law is that it shall be destroyed.

Similar statements can be found in ***R.* v. *Venegratsky*** (1928), 49 C.C.C. 298 at 299-300 (Man. C.A.) and the later cases of ***Industrial Acceptance Corporation Ltd.* v. *The Queen***, [1953] 2 S.C.R. 273 at 278 *per* Rand J., and ***Beaver* v. *The Queen***, [1957] S.C.R 531 at 546-7 *per* Fauteux J.

[1] The Addition of Marihuana to the Schedule of Prohibited Substances

[75] The ***Opium and Drug Act*** contained a provision allowing Cabinet to add new substances to the schedule of prohibited drugs from time to time in the public interest. In 1923, Parliament enacted a consolidated ***Opium and Narcotic Drug Act***, S.C. 1923, c. 22, containing "Cannabis Indica (Indian Hemp) or Hasheesh" in the Schedule of prohibited drugs. As the trial judge in ***Caine*** noted, there was no discussion in the House of Commons to explain why marihuana was now prohibited, beyond the Minister of Health's comment that "[t]here is a new drug in the schedule": ***House of Commons Debates****,* 2nd sess., 14th Parl., 23 April 1923, at p. 2124.

[76] The appellants have argued that the addition of marihuana as a prohibited drug in 1923 was based on alarmist and scientifically false claims about the substance. They cite in particular the writings of Emily F. Murphy, an Edmonton magistrate, who wrote a series of lurid articles about Canada's drug problem in ***Macleans*** magazine under the name "Janey Canuck." Her writings were collected in a book entitled ***The Black Candle*** (Toronto: Thomas Allen, 1922). The trial judge in ***Caine*** quoted the following passage from that book about the effects of marihuana:

> The [marihuana] addict loses all sense of moral responsibility. Addicts to this drug, while under the influence, are immune to pain, and could be severely injured without having any realization to their condition.

> While in this condition they becoming [*sic*] raving maniacs and are liable to kill or indulge in any form of violence to other persons, using the most savage methods of cruelty without, as said before, any sense of moral responsibility.

The trial judge in ***Caine*** found that such writings created "a climate of irrational fear" about marihuana.

[77] In 1929, the ***Opium and Narcotic Drug Act*** was amended. The penalty for the offence of possession now included a minimum six-month sentence and $200 fine, and courts had the discretion to sentence offenders to hard labour or a whipping: S.C. 1929, c. 49, s. 4.

[78] Fears about the dangers of cannabis escalated in North America during the 1930's with various moral reformers railing against the "marihuana menace." A major proponent was H.J. Anslinger, the United States Commissioner of Narcotic Drugs, who made sensational claims about the effects of marihuana on young people: see H.J. Anslinger & C.R. Cooper, "Marihuana: Assassin of Youth" (1937) 124 ***American Magazine*** 19. The lobbying of moral reformers like Mr. Anslinger led to the passage of the ***Marijuana Taxation Act*** in the United States in 1937. Discussions about the "marihuana menace" were also held in the House of Commons during the 1930's: B.A. MacFarlane, ***Drug Offences in Canada***, 3d. ed. (Aurora: Canada Law Book Inc., 1994), p. 2-12.

[79] These false theories that marihuana transformed individuals into raving maniacs (hence the expression "reefer madness") found their way into one of the earliest reported convictions for possession of marihuana, the B.C. County Court decision of ***R.*** **v.** ***Forbes*** (1937), 69 C.C.C. 140. The trial judge stated at p. 141:

> This narcotic is now commonly used in the form of cigarettes, being comparatively new to the United States and still rarer in Canada and it is as dangerous to youth as a rattlesnake.
> [H.J. Anslinger] states that murders, suicides, robberies, criminal sexual assaults, hold-ups, burglaries and deeds of maniacal insanity are yearly being caused by the use of this deadly narcotic drug. [Emphasis added]

The Court sentenced Mr. Forbes to 18 months of hard labour at the Oakalla Prison Farm plus a $200 fine for possession of a small quantity of marihuana.

[80] Convictions for the offence of marihuana possession, such as the ***Forbes*** case, remained low until the 1960's: ***Clay***, *supra* at p. 357. Indeed, a Senate Committee stated in 1955:

> Marihuana is not a drug commonly used for addiction in Canada ... No problem exists in Canada at present in regard to this particular drug. ["Final Report and Recommendations" in ***Proceedings of the Senate Committee on the Traffic in Narcotic Drugs in Canada*** (Ottawa: Queen's Printer, 1955) p. xii.]

Dr. Kalant testified at the ***Caine*** trial that:

> ... the law which was passed in 1923 was not, in fact, in response to what was perceived as a large - statistically a large problem of use of cannabis in Canada. The evidence, such as it is, doesn't suggest there was widespread use, and secondly, any information about its consequences was not being gathered in a systematic way, so the - whatever the reasons were for passing the law, I don't think we can say they rested on a public health basis.

[2] The Amendments of 1954

[81] In 1954, Parliament amended the ***Opium and Narcotic Drug Act*** to better combat drug trafficking in Canada: S.C. 1954, c. 38, s. 3. The new offence of possession for the purpose of trafficking ("P.P.T.") was created, and penalties for trafficking were greatly increased. As courts have often stated, the harsh penalties for drug trafficking (as opposed to simple possession) that were enacted in 1954 indicate that Parliament's primary purpose was to stamp out the drug traffic and punish the traffickers: ***R. v. Ubhi*** (1992), 16 B.C.A.C. 1 at 12 (C.A.); ***R. v. Preston*** (1990), 47 B.C.L.R. (2d) 273 at 286 (C.A.); ***R. v. Shand*** (1977), 13 O.R. (2d) 65 (C.A.). John Diefenbaker, the future Prime Minister, characterized drug trafficking as "murder by instalments" during the 1954 debate: ***House of Commons Debates***, 1st Sess., 22th Parl., 1 June 1954 at p. 5312.

[82] The intent of Parliament regarding the offence of simple possession, however, is more opaque. The 1954 statute retained penal provisions for the offence of simple possession and specifically provided for a mandatory sentence of six months. The discretionary penalty of hard labour or a whipping, however, was removed. The debate in the House of Commons does not shed much light as to why Parliament chose to retain penal provisions for simple possession of a narcotic. The only discussion of this provision concerned why simple possession carried a mandatory sentence of six months, whereas the offences of P.P.T. and trafficking did not carry a similar mandatory minimum sentence. The following exchange took place:

> **Stanley Knowles (C.C.F. Member from Winnipeg)**: ... Looking at the matter as a layman, it appears to me that the offences in subclause 2 and 3 [P.P.T. and trafficking] are more serious than the offences in subclause 1 [simple possession]. If that is the case, why should there be that difference so far as the penalty is concerned?
> **Paul Martin (The Minister of National Health and Welfare)**: We are dealing in the first case with addicted people for whom we feel that a minimum of six months is desired.
> **Dr. W.G. Blair (Tory Member from Lanark)**: For the purpose of a cure.
> **Mr. Knowles**: It is clear, is it, that in the first case we are dealing with people who may be addicts.
> **Mr. Martin**: That is right.
> **Mr. Knowles**: Whereas in the second and third cases we are dealing with people who are, in one form or another, trafficking in dope.
> **Mr. Martin**: That is right. Our experience in the courts has a disposition [*sic*] to treat the addict more leniently than is otherwise the case, and that is why we are making sure we at least have a minimum of six months. Our experience has shown that often judges have a sympathetic heart, not fully appreciating the situation, and in some

> cases do not impose even the proposed minimum; but they generally do in the case of trafficking.
> **Mr. Knowles**: Is it the view of the minister, that the minimum sentences imposed upon those who have become addicts should not be subject to the discretion of the judge - after all addicts are sick people - but that discretion should be allowed in the case of traffickers or peddlers? It would seem to me that the provision I have quoted should be attached to the other two cases, rather than to the first class.
> **Mr. Martin**: Our view is just the opposite.
> [***House of Commons Debates***, 1st Sess., 22th Parl., 1 June 1954 at p. 5319]

Therefore, it would seem that the ***Opium and Narcotic Drug Act*** retained penal provisions for the offence of simple possession as part of some plan to treat drug addicts. However, there were few, if any, institutions to treat drug addiction at that time. See the testimony of Dr. G.H. Stevenson in ***Proceedings of the Senate Committee on the Traffic in Narcotic Drugs in Canada***, *supra,* at pp. 103-5.

[3] The ***Narcotic Control Act*** of 1961

[83] In March 1961, Canada became a signatory to the ***Single Convention on Narcotic Control*** at the United Nations, which replaced nine earlier treaties. As the Supreme Court of Canada noted in ***R. v. Hauser***,[1979] 1 S.C.R. 984, this agreement listed cannabis among four especially dangerous drugs like heroin. The preamble to the treaty describes the international community's concerns towards the harm inflicted by drug use:

> The Parties,
> *Concerned* with the health and welfare of mankind,
> *Recognizing* that the medical use of narcotic drugs continues to be indispensable for the relief of pain and suffering and that adequate provision must be made to ensure the availability of narcotic drugs for such purposes,
> *Recognizing* that addiction to narcotic drugs constitutes a serious evil for the individual and is fraught with social and economic danger to mankind,
> *Conscious* of their duty to prevent and combat evil,
> *Considering* that effective measures against abuse of narcotic drugs require co-ordinated and universal action,
> *Understanding* that such universal action calls for international co-operation guided by the same principles and aimed at common objectives ... [Underlining added]

Article 28(3) of the treaty states that the ratifying parties "shall adopt such measures as may be necessary to prevent the misuse of, and illicit traffic in, the leaves of the cannabis plant." Another noteworthy provision is Article 33 which states that the ratifying States "shall not permit the possession of drugs except under legal authority."

[84] Article 36 dealt with penal provisions. It stated:

> la. Subject to its constitutional limitations, each Party shall adopt such measures as will ensure that cultivation, production, manufacture, extraction, preparation, possession, offering, offering for sale, distribution, purchase, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation and exportation of drugs contrary to the provisions of this Convention, and any other action which in the opinion of such Party may be contrary to the provisions of this Convention, shall be punishable offenses when committed intentionally, and that serious offenses shall be liable to adequate punishment particularly by imprisonment or other penalties of deprivation of liberty. [Emphasis added]

[85] Soon after this treaty was signed, Parliament replaced the ***Opium and Narcotic Drug Act*** with the ***Narcotic Control Act***, S.C. 1960-1, c. 35. The debate in the House of Commons, as revealed in the ***Hansard***, was focussed on hard drugs like heroin. The Minister of National Health and Welfare discussed marihuana in terms of being a "gateway drug":

> The use of marijuana as a drug of addiction in Canada is fortunately not widespread. It, however, may well provide a stepping stone to addiction to heroin.
> (***House of Commons Debates***, 4th Sess., 24th Parl., 7 June 1961 at p. 5981)

The prohibition against marihuana in Canada therefore remained.

[86] The statute passed by Parliament in 1961 also contained a new approach to the "evil" of narcotics in Canada. Part II of the ***NCA*** was aimed at eliminating the drug traffic in Canada by treating and "curing" drug addicts. The Minister of Justice explained the rationale of this innovation by stating that it was necessary to remove "both the supply and demand" for narcotics in Canada. He stated that two of the legislative aims of the ***NCA*** are:

> ... to reduce the demand for illegal drugs by providing effective treatment for existing addicts ... [and] prevent[ing] the creation of additional demand by preventing, so far as possible, the creation of new addicts.
> (***House of Commons Debates***, 4th Sess., 24th Parl., 7 June 1961, at p. 5982)

He added that "[t]he drug traffic, after all, like any commercial activity obeys the laws of supply and demand."

[87] To accomplish this goal, Part II of the ***NCA*** created a legal regime to identify drug addicts and provide for their treatment. Parliament, wary of its constitutional constraints, envisioned the ***NCA*** as complementing provincial legislation aimed at treating drug addicts. Indeed, the Minister - drawing on the 1955 Senate Report mentioned above - distinguished between "criminal addicts" and "non-criminal addicts" and stated (at p. 5983 of the ***Hansard***) that provincial laws would likely cover non-criminal addicts. However, the legislators assumed that non-criminal addicts were few and far between, and any person found to be in possession of illegal drugs was likely a criminal addict.

[88] Section 16 of the ***NCA*** allowed persons convicted of simple possession to be remanded for observation to determine whether they are "drug addicts." If found to be a drug addict, a person convicted of simple possession could be remanded to a drug treatment institution by virtue of s. 17 of the Act.

[89] Another important feature of the ***NCA***, for the purposes of this discussion, is that Parliament removed the mandatory minimum sentence of six months for simple possession. However, the maximum sentence was raised from two to seven years.

[90] Following the passage of the ***NCA***, courts interpreted the statute as indicating that the simple possession of a narcotic, even marihuana, was not to be treated lightly. Indeed, in a number of cases during the late 1960's, individuals without a criminal record were sentenced to prison for the possession of a small amount of marihuana: ***R. v. Adelman*** (1968), 63 W.W.R. 294 at 303 (B.C.C.A.); ***R. v. Hartley*** (1967), 63 W.W.R. 174 (B.C.C.A.); ***R. v. Lehrmann*** (1967), 61 W.W.R. 625 at 631 (Alta. C.A.). In ***Hartley***, this Court discussed the "market" rationale underlying the prohibition on simple possession. Chief Justice Davey wrote at p. 179:

> This court in [***R. v. Budd*** (15 January 1965) (unreported)] said that the possession of marijuana is a serious offence and it must be punished severely. The purpose of course was to deter the use of marijuana, among other reasons, because users must obtain supplies, and the supply of the drug involves trafficking, and that, as the market increases, that traffic becomes organized, and the organized traffic tends to increase the use of the drug.

The Court in ***Adelman*** also referred to Parliament's decision to raise the maximum sentence for possession to seven years as indicative of the seriousness of the offence.

[91] During the 1960's, the recreational use of marihuana by Canadians increased substantially. In 1969, amendments to the ***NCA*** allowed offenders to be prosecuted by way of summary conviction instead of indictment: S.C. 1968-9, c. 41, s. 12. The maximum penalty for a first offence also dropped from 7 years to a maximum of 6 months. The combination of these two factors led to a significant increase in recorded convictions for marihuana possession, but also a reduction in the number of individuals actually being imprisoned for the offence.

[92] In 1972, the LeDain Commission published a preliminary report on marihuana use entitled ***Cannabis*** followed by its ***Final Report*** in 1973. As the appellants have argued, this Commission, after a long and thorough investigation of the use of recreational drugs in Canada, recommended that the prohibition on marihuana possession be lifted. In 1974, the Trudeau government introduced Bill S-19, which would have removed penal sanctions for possession of marihuana for a first offence and substituted a 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. [Emphasis added]
> (***House of Commons Debates***, 1st Sess., 32nd Parl., 14 April 1980, at p. 17.)

Nevertheless, governments in the 1980's did not remove the penal sanctions for marihuana possession.

[93] In 1988, Canada became a signatory to the ***United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances***. This treaty defined a "narcotic" drug as a substance listed in the Schedule to the 1961 Treaty, thereby including marihuana. Article 3 of this treaty stated that each signatory would adopt measures to criminalize the possession of a narcotic, subject to its constitutional limitations.

[94] In 1996, the ***NCA*** was merged with the ***Food and Drugs Act*** to create the ***Controlled Drugs and Substances Act***, S.C. 1996, c. 19. Parliament chose to retain the prohibition on the possession of marihuana in this new statute.

[95] Recently, decisions like ***Wakeford* v*. Canada*** (1999), 173 D.L.R. (4th) 726 (Ont. Sup. Ct.), have led to increased discussions about decriminalizing possession of marihuana for medical purposes. However, it should be repeated that in the three decades since the publication of the LeDain Report, the possibility of imprisonment for the simple possession of marihuana has remained.

[4] Summary

[96] Narcotics legislation in Canada has taken many twists and turns during the last century, but the overarching goal of stamping out drug trafficking has remained somewhat constant. Indeed, the efforts of Parliament to stamp out this problem has only grown more intense over time. The history of the offence of simple possession of narcotics, however, is not as focussed. The only part of this history that does seem clear is that the urgency to punish individuals for simple possession has waned over time. Mr. Justice Wood of this Court surveyed the history of narcotics legislation in ***Preston****, supra*, and stated at p. 286:

> Thus, if one has reference only to the will of Parliament over the past 80 years, it would seem that there has been a discernible trend towards placing more emphasis on the severity of the offences of trafficking and importing and less emphasis, at least in the last 30 years, on the severity of the offence of possession.

As seen in the above narrative, Parliament retained the offence of simple possession in the 1954 amendments to the ***Opium and Narcotic Drug Act*** and again in 1961 with the enactment of the ***Narcotic Control Act***. The purpose of retaining penal sanctions for simple possession, it seems, 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. The post-1954 laws, however, also contain a larger plan to treat and "cure" drug addicts to eliminate the "market" for drug traffickers in Canada.

(b) Relevant Principles of Fundamental Justice: The "Harm Principle"

[97] The appellants have argued that the so-called "harm principle" is the operative principle of fundamental justice in this case.

[98] The "harm principle" was articulated best 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 dealing 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. 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 someone 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.
> J.S. Mill, ***On Liberty***, ed. by Edward Alexander, (Peterborough: Broadview Press, 1999) pp. 51-2 [Emphasis added]

[99] In ***Jones***, *supra*, Madam Justice Wilson (in a dissenting opinion) considered the ideas of Mill in context of the ***Charter***. She stated at p. 318-9:

> I believe that the framers of the Constitution in guaranteeing "liberty" as a fundamental value in a free and democratic society had in mind the freedom of the individual to develop and realize his potential to the full, to plan his own life to suit his own character, to make his own choices for good or ill, to be non-conformist, idiosyncratic and even eccentric -- to be, in to-day's parlance, "his own person" and accountable as such. John Stuart Mill described it as "pursuing our own good in our own way." This, he believed, we should be free to do "so long as we do not attempt to deprive others of theirs or impede their efforts to obtain it." He added:
>
> > Each is the proper guardian of his own health, whether bodily *or* mental and spiritual. Mankind are greater gainers by suffering each other to live as seems good to themselves than by compelling each to live as seems good to the rest. [***On Liberty****, supra* at p. 55]
> >
> > Of course, this freedom is not untrammelled. We do not live in splendid isolation. We live in communities with other people. Collectivity necessarily circumscribes individuality and the more complex and sophisticated the collective structures become, the greater the threat to individual liberty in the sense protected by s. 7.

See also the statements of La Forest J. in ***B.R.,*** *supra* at pp. 365-6.

[100] To summarize, the appellants argue that the State has no right to interfere with the personal freedom and liberty of an individual unless that individual causes harm to other persons or to society in general. Therefore, the State has no right to imprison individuals for activities that only cause harm to themselves.

[101] The appellants argue that possessing or smoking marihuana may in some cases have harmful effects on the smoker, but it does not harm others. Imprisoning a person for possessing marihuana would thereby violate the "harm principle" in the same way as imprisoning somebody for consuming caffeine or fatty foods.

[102] The trial judge in ***Caine***, in considering the "harm principle," wrote as follows at paragraph 117:

> 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. See ***R.* v. *Butler*** (1992), 70 C.C.C. (3d) 129 at 165 per Sopinka, J. (S.C.C.)
>
> > ... The impugned provision is designed to catch material that creates a risk of harm to society. It might be suggested that proof of actual harm should be required. It is apparent from what I have said above that it is sufficient in this regard for Parliament to have a reasonable basis for concluding that harm will result and this requirement does not demand actual proof of harm.
>
> 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. ***Labatt Breweries of Canada* v. *A.G. Canada***, (*supra*) at 457. And at 456-7:
>
> > Parliament may not deprive an individual of the right to liberty or security of person in the absence of a compelling interest in curtailing these rights for the common good because it is necessary to protect public safety, order, health or morals or the fundamental rights and freedoms of others.
>
> 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 ***R.J.R. MacDonald Inc.* v. *Canada***, (*supra*) that Parliament may legislate under the criminal law power to protect Canadians from harmful drugs. In this case, La Forest J. notes, at p.473, that the evil targeted by the legislation was "the detrimental effects caused by tobacco consumption." He later notes:

> The harm tobacco consumption causes each year to individual Canadians, and to the community as a whole, is tragic.
>
> He subsequently held that the legislation in question, which was designed to prohibit tobacco manufacturers from inducing Canadians to consume tobacco, was valid legislation under the Criminal Law power (at 475). La Forest J. clearly suggests that, had Parliament chosen to prohibit the possession and use of tobacco as well, in order to protect individual Canadians from their own bad habits, this too would have been valid legislation under the Criminal Law power. He is, however, mindful of the impracticalities involved in attempting to prohibit the use of an addictive drug which is currently being used by one third of the population. (at 477)
>
> 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]

[103] The relevance of the harm principle was challenged by counsel during argument. It is now necessary to define this principle and determine its implications for the case at bar.

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

(i) The Common Law

[104] When criminal legislation was scanty, the common law determined whether an offence was "indictable" and should lead to penal sanctions: Sir James Fitzjames Stephen, ***A History of the Criminal Law in England***, Vol. 3 (London, 1883) p. 360. Common law courts often distinguished these "indictable" offences from activities that should be left to civil remedies based on the harm to society. For instance, Lord Mansfield stated in ***R.* v. *Wheatley*** (1761), 2 Burr. 1125 at 1127, 97 E.R. 746 at 748 (K.B.) that "[t]he offence that is indictable must be such a one as affect the public." Mr. Justice Lawrence stated in ***R.* v. *Higgins*** (1801), 2 East. 5 at 21, 102 E.R. 269 at 275 (K.B.), that "all offences of a public nature, that is, all such acts or attempts as tend to the prejudice of the community, are indictable."

[105] In ***Mogul Steamship Company Ltd.* v. *McGregor, Gow & Co*** (1889), 23 Q.B.D. 598 (C.A.), the English Court of Appeal considered whether "restraint of trade" could be considered an indictable offence at common law. Lord Esher (at p. 606) stated that an illegal act that is "a wrong against the public welfare seems to have the necessary elements of a crime." See also ***Young* v. *The King*** (1789), 3 T.R. 98 at 104, 100 E.R. 475 at 478-9 *per* Buller J. (K.B.); ***Jeffreys* v. *Boosey*** (1854), 4 H.L.C. 814, 10 E.R. 681 at 728-9 *per* Baron Pollock L.C. (H.L.).

[106] Courts in the United States have also defined a crime as an activity that is "injurious to the public": ***Commonwealth of Pennsylvania* v. *Shimpeno***, 50 A.2d 39 at 43-4 (Penn. S.C. 1946); ***Mossew* v. *United States***, 266 F. 18 at 22 (2d Cir.

1920). See also the discussion of Chief Justice Rehnquist in ***Payne* v. *Tennessee***, 501 U.S. 808 at 819-21, 115 L.Ed. 2d 720, 111 S. Ct. 2597 (1991).

(ii) Leading Treatises on the Criminal Law

[107] Leading treatises on the law also identify "harm to others" as being central to penal sanctions. ***Blackstone's Commentaries***, Volume 4, 21st ed. (London: Sweet & Maxwell, 1844), states at p. 6:

> In all case [*sic*] the crime includes an injury; every public offence is also a private wrong, and somewhat more; it affects the individual, and it likewise affects the community ...

Cesare Beccaria, the 18th century Italian criminologist who had a great influence over penal reformers in England, popularized the idea that "the punishment should fit the crime." He wrote in ***Dei delitte e delle pene*** (1764) that "the true measure of crimes is the injury done to society": C. Beccaria, ***On Crimes and Punishments*** (Indianapolis: Hackett Publishing, 1986) p. 17.

[108] Sir James Fitzjames Stephen, the pre-eminent criminal lawyer of Victorian England, defined the nature of crime and punishment in his three-volume work, ***A History of the Criminal Law in England*** (New York: Burt Franklin, 1883). He wrote at p. 78 (Vol. 2):

> In different ages of the world injuries to individuals, to God, to the gods, or to the community, have been treated as crimes, but I think that in all cases the idea of crime has involved the idea of some definite, gross, undeniable injury to some one. ...

While discussing the need for an *actus reus* in any criminal act, he stated at pp. 78-9 (Vol. 2):

> Criminal law ... 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.

It should be noted that Stephen was a prominent critic of J.S. Mill. In ***Liberty, Equality, Fraternity*** (1873), Stephen criticized the "harm principle" because it did not take into account the need for the State (through the use of criminal laws) to protect morality and religion. Stephen concluded that there was a "moral" basis for crime in the sense that it was morally right to hate criminals: ***History of the Criminal Law***, Vol. 2, pp. 81-2. However, the Supreme Court of Canada ruled in ***R.* v. *Butler***, [1992] 1 S.C.R. 452 at 498 *per* Sopinka J., that "morality" alone can no longer be a basis for criminal prohibition.

[109] Current textbooks on the nature of crime also identify the requisite of harm to others. ***Halsbury's Laws of England*** defines a "crime" in the following way at Volume 11(1), paragraph 1:

> Ordinarily a crime is a wrong which affects the security or well-being of the public generally so that the public has an interest in its suppression.

[110] In J. Smith & B. Hogan's ***Criminal Law,*** 8th ed. (London: Butterworths, 1996), a leading English text, the writers define "crime" at page 17 as "generally acts which have a particularly harmful effect on the public and do more than interfere with merely private rights."

[111] Sir C.K. Allen also tried to summarize the nature of a "crime" in his work ***Legal Duties and Other Essays in Jurisprudence*** (Oxford: Clarendon Press, 1931). He stated at pp. 233-4:

> Crime is crime because it consists in wrongdoing which directly and in serious degree threatens the security or well-being of society, and because it is not safe to leave it redressable only by compensation of the party injured.

[112] Scholars in the United States have also discussed the "harm principle" in the context of the criminal law. Herbert Packer wrote that "harm to others" must be a "limiting criteri[on] for invocation of the criminal sanction": H. Packer, ***The Limits of the Criminal Sanction*** (Stanford: Stanford University Press, 1968), p. 267. Another U.S. scholar, Joel Feinberg, has written an exhaustive four-volume work on this subject entitled ***The Moral Limits of the Criminal Law*** (Oxford: Oxford University Press, 1984). Volume One is subtitled "Harm to Others." At page 11 of this volume, Professor Feinberg states his thesis:

> ... it is legitimate for the state to prohibit conduct that causes serious private harm, or the unreasonable risk of such harm, or harm to important public institutions and practices.

Examples of "harm to the public," as opposed to harm to specific persons, includes smuggling, tax evasion, contempt of court, and pollution.

(iii) Law Reform Commissions

[113] The findings of Law Reform Commissions are another source for defining the principles of fundamental justice: ***Rodriguez***. I turn first to a report published by the Canadian Committee on Corrections in 1969 entitled ***Towards Unity: Criminal Justice and Corrections*** ("The Ouimet Report"). At the beginning of the work, the Committee set out the "basic principles and purposes of criminal justice" in Canada. The fourth principle, listed at page 12 of the report, states:

> No conduct should be defined as criminal unless it represents a serious threat to society, and unless the act cannot be dealt with through other social or legal means. [Emphasis added]

The Committee then adopted the following three criteria as "properly indicating the scope of criminal law":

> 1. No act should be criminally proscribed unless its incidence, actual or potential, is *substantially damaging to society*. [Emphasis in original]
> 2. No act should be criminally prohibited where its incidence may adequately be controlled by social forces other than the criminal process.
> 3. No law should give rise to social or personal damage greater than that it was designed to prevent.

[114] The LeDain Commission discussed earlier specifically discussed the ideas of John Stuart Mill and the harm principle. This discussion is included in the interim report ***Cannabis*** at page 275, and in the ***Final Report*** of 1973 beginning at page 933. The Commission found that the harm caused by marihuana use was so low that, following Mill's ideas, it should not be considered a true crime worthy of imprisonment.

[115] I also turn to a Law Reform Commission study on possible reforms to the ***Criminal Code***: LRC, ***Report 3: Our Criminal Law*** (Ottawa: Minister of Supply and Services, 1976). Two of the members of this Commission were Mr. Justice Antonio Lamer and Mr. Justice Gerard La Forest. The LRC report sets out some basic principles of criminal law and criminal justice. It listed the 'three features' of the criminal law regime at page 20:

> 1. stigma;
> 2. a solemn trial; and
> 3. "only real crimes deserve the pre-eminently shameful punishment of imprisonment"

The LRC then defined the nature of a "real crime." The report stated that criminal law "should be confined to wrongful acts seriously threatening and infringing fundamental social values." The Commission stated at p. 28:

> Before an act should count as a crime, three further conditions must be fulfilled. First, it must cause harm - to other people, to society or, in special cases, to those needing to be protected from themselves. Second, it must cause harm that is serious both in nature and degree. And third, it must cause harm that is best dealt with through the mechanism of the criminal law. [Emphasis added]

[116] The appellants also refer to ***The Criminal Law in Canadian Society*** (Ottawa: Government of Canada, 1982). This report largely surveys the findings of various Canadian and American law reform commissions such as the Ouimet Report discussed above. It makes the following conclusion at page 45:

> The basic theme, however, is important, in stressing that the criminal law ought to be reserved for reacting to conduct that is seriously harmful. The harm may be caused or threatened to the physical safety or integrity of individuals, or through interference with their property. It 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. Since many acts may be "harmful," and since society has many other means for controlling or responding to conduct, criminal law should be used only when the harm caused or threatened is serious, and when the other, less coercive or less intrusive means do not work or are inappropriate. [Emphasis added]

The Report later re-states its definition of the "purpose" of criminal law at page 52:

> The purpose of the criminal law is to contribute to the maintenance of a just, peaceful and safe society through the establishment of a system of prohibitions, sanctions and procedures to deal fairly and appropriately with culpable conduct that causes or threatens serious harm to individuals or society.

(iv) Canadian Federalism Cases

[117] Another source for this inquiry into "the harm principle" is the long jurisprudence on the federal government's criminal law power under s. 91(27) of the ***Constitution Act, 1867***. In these cases, courts have discussed the nature of a "crime" and made many statements that reflect the principle that the criminal law is meant to prevent individuals from harming other individuals or society at large.

[118] In ***Standard Sausage Co.*** **v.** ***Lee*** (1933), 47 B.C.R. 411, [1933] 4 D.L.R. 501 (C.A.), this Court considered whether a federal law regulating the food industry could be found *intra vires* under the criminal law power. The appellants in that case were making sausages using a quantity of sulphur dioxide that was not injurious to health. Macdonald J.A. concluded that the purpose of the impugned law was to preserve food purity. He stated at p. 504 (D.L.R.) that food purity is:

> so important and the need to preserve its purity so great to prevent widespread calamity that precautions of the most detailed character must be taken to ensure it.

He later re-iterated the purpose of the law at page 507:

> The primary object of this legislation is the public safety - protecting it from threatened injury ... Tampering with food by the introduction of foreign matter, however good the intentions, should properly be regarded as a public evil ... [Emphasis added]

Therefore, the federal law was a valid "criminal" law because it protected the public from harm.

[119] The ***Margarine Reference*** (1948), [1949] S.C.R. 1, has long been the leading case on the federal government's criminal law power. Mr. Justice Rand defined the proper use of the federal power under s. 91(27) as including a valid purpose, a prohibition, and penal sanctions. He also discussed the nature of a criminal offence in lucid terms. Rand J. wrote at p. 49:

> 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. [Emphasis added]

This passage has been frequently quoted in subsequent cases: ***Labatt Breweries of Canada* v. *Canada (Attorney-General)***, [1980] 1 S.C.R. 914 at 933. It confirms the principle that a crime - an offence with penal sanctions - must be aimed at activities that inflict harm on individuals or on the public.

[120] The case of ***RJR-MacDonald Inc.* v. *Canada (Attorney-General)***, [1995] 3 S.C.R. 199, dealt with both federalism and ***Charter*** issues. The appellant tobacco company argued that a federal law banning cigarette advertising was both an unjustified infringement of freedom of expression and an invalid use of the federal government's criminal law power.

[121] The Court was divided on both issues. The Court ruled 7:2 on the federalism issue, with Sopinka J. and Major J. dissenting, holding that the law was valid under s. 91(27) of the ***Constitution Act, 1867***. The Court split 5:4 on the ***Charter*** issue, with the majority ruling that the infringement of freedom of expression could not be saved under s. 1.

[122] La Forest J. discussed the scope of the criminal law power, drawing on the test set out by Rand J. in the ***Margarine Reference***. He also cited Estey J. in ***Scowby* v. *Glendinning***, [1986] 2 S.C.R. 226 at 237, to say that "some legitimate public purpose must underlie the prohibition." He considered the detrimental health effects of tobacco smoking and Parliament's attempt to stop people from taking up the habit. He wrote at p. 245:

> It appears, then, that the detrimental health effects of tobacco consumption are both dramatic and substantial. Put bluntly, tobacco kills. Given this fact, can Parliament validly employ the criminal law to prohibit tobacco manufacturers from inducing Canadians to consume these products, and to increase public awareness concerning the hazards of their use? In my view, there is no question that it can.

It must be noted that the "activity" that the law prohibited in the ***RJR-MacDonald*** case is the act of inducing people to smoke tobacco - not the act of smoking itself. Both McLachlin J. (at p. 335) and Major J. noted that the "purpose" of the impugned law should not be overstated. The trial judge in ***Caine***, however, makes the bold conclusion that La Forest J.'s decision is authority for the argument that Parliament can prohibit tobacco smoking regardless of harm caused to others. The judgement simply does not say this.

[123] La Forest J. then discussed the test set out by Rand J. in the ***Margarine Reference*** case. He found that the law in that case had been found *ultra vires* because it was not aimed at a "public evil" but only at regulating the dairy industry. However, the issue in the case before the Court did pass the constitutional test

because the effects of smoking were detrimental, and the activity of inducing people to become smokers was a "public evil."

[124] The case of ***R.* v. *Hydro-Quebec***, [1997] 3 S.C.R. 213, dealt with the validity of Part II of the ***Canadian Environmental Protection Act***, which created a cradle-to-the-grave legal regime for toxic substances. The appellant Hydro-Quebec argued that the statute was too regulatory in nature to be considered "criminal law." The Court split 5:4, with the majority holding that the law was valid under s. 91(27). La Forest J., who wrote the majority opinion, stated that pollution was an "evil" and constituted a "legitimate public purpose" within the meaning of the ***Margarine Reference*** test. He stated at p. 290:

> ... it is entirely within the discretion of Parliament to determine what evil it wishes by penal prohibition to suppress and what threatened interest it thereby wishes to safeguard...

Pollution is a public evil because of the potential harm to persons caused by toxic substances released into the environment. This decision, therefore, confirms the earlier view that for an offence to be deemed "criminal," it must harm or potentially harm others or the public at large. It other words, it must be an evil which potentially affects the security or well-being of the public generally. See also the discussion in ***R.* v. *Hinchey***, [1996] 3 S.C.R. 1128 at 1144-48 *per* L'Heureux-Dubé J.

(v) Leading ***Charter*** Cases

[125] The case of ***R.* v. *Butler***, [1992] 1 S.C.R. 452, dealt with whether the ***Criminal Code*** provisions on obscenity were a justifiable infringement on freedom of expression. The Court found that the purpose of these provisions was the "avoidance of harm to society" rather than Victorian morality about sexuality. The Court stated at p. 492 that "legal moralism" was no longer a valid purpose for legislation. Rather, the harm caused to society and to others was the basis for a criminal prohibition. Sopinka J. stated at p. 498:

> The 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***. [Emphasis added]

Sopinka J. then considered the impugned provisions under s. 1 of the ***Charter***. He found that there was a "rational connection" between the prohibition of extreme pornography and the prevention of harm to society. He then considered the "minimal impairment" stage of the ***Oakes*** test. He made the following conclusion at p. 505:

> [The impugned provision] is designed to catch material that creates a risk of harm to society. It might be suggested that proof of actual harm should be required. It is apparent from what I have said above that it is sufficient in this regard for Parliament to have a reasonable basis for concluding that harm will result and this requirement does not demand actual proof of harm. [Emphasis added]

[126] In ***R.* v. *Cuerrier***, [1998] 2 S.C.R. 371, the accused was charged with two counts of aggravated assault under the ***Criminal Code***. The accused had unprotected sex without telling his partners that he was HIV-positive. He was acquitted but the Supreme Court of Canada ordered a new trial.

[127] McLachlin J. (with Gonthier J. concurring) wrote one of the opinions in the decision. She stated at paragraph 50 that "[c]riminal liability is generally imposed only for conduct which causes injury to others or puts them at risk of injury." She later stated at paragraph 69:

> The courts should not broaden the criminal law to catch conduct that society generally views as non-criminal. If that is to be done, Parliament must do it. Furthermore, the criminal law must be clear. I agree with the fundamental principle affirmed in the English cases that it is imperative that there be a clear line between criminal and non-criminal conduct. Absent this, the criminal law loses its deterrent effect and becomes unjust.

[128] Cory J. (writing for 3 others) held at paragraph 95 that there was "no prerequisite that any harm must actually have resulted." He held that s. 268 of the ***Criminal Code*** only required a "significant risk" of harm. He repeats this conclusion at paragraphs 128-9.

[129] Cory J. considered the arguments that the criminal law was not the best tool for dealing with HIV transmission. He stated at paragraphs 141-2:

> It was forcefully contended that these endeavours may well prove more effective in controlling the disease than any criminal sanctions which can be devised. However, the criminal law does have a role to play both in deterring those infected with HIV from putting the lives of others at risk and in protecting the public from irresponsible individuals who refuse to comply with public health orders to abstain from high-risk activities. This case provides a classic example of the ineffectiveness of the health scheme. The respondent was advised that he was HIV-positive and on three occasions he was instructed to advise his partner of this and not to have unprotected sex. Nevertheless, he blithely ignored these instructions and endangered the lives of two partners. [Emphasis added]

This decision affirms the rule in ***Butler*** that actual harm is not necessary, but only a reasoned risk of harm.

[130] In ***R.* v. *Sharpe*** (1999), 175 D.L.R. (4th) 1, 127 B.C.A.C. 76, 136 C.C.C. (3d) 97 (C.A.), this Court considered the ***Butler*** test in light of the ***Criminal Code*** provisions dealing with the possession of child pornography. The appellant Crown argued that the impugned provisions were aimed at preventing the direct and indirect harm of children, as well as the harm to society caused by "desensitising and legitimizing attitudes concerning the sexualization of children." Madam Justice Rowles, who wrote one of the majority opinions, borrowed the phrase "reasoned apprehension of harm" from ***Butler*** to state the proper test. She held that the Crown succeeded in demonstrating that child pornography creates the requisite "reasoned apprehension of harm" to children and society. She stated at p. 65 (D.L.R.):

> Having shown a reasoned apprehension of harm based on the available social science evidence, Parliament is not constitutionally obligated to await exact proof on these issues before taking legislative action to protect children from these risks.

Rowles J.A., however, held that the impugned ***Criminal Code*** provisions did not pass the "minimal impairment" step of the ***Oakes*** test because the provisions were overbroad.

[6] Limits to the "Harm Principle"

[131] I note in passing that the "harm principle" is not absolute, and there would be legitimate exceptions to it. As discussed above, the Supreme Court of Canada has stipulated that courts should define principles of fundamental justice in light of other fundamental principles and ***Charter*** rights: ***Mills***. A limit to the harm principle would most likely arise in situations involving vulnerable groups. The LeDain Commission for instance, which quoted extensively from the writings of John Stuart Mill about the "harm principle," referred to the limitation that Mill put on it: that it does not apply to persons who do not have the requisite ability or maturity for the exercise of free choice. Mill expressed it this way:

> 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.
> [***On Liberty***, *supra* at p. 52]

The 1976 Commission discussed above also identified this limitation on the "harm principle." The Commission stated at p. 28:

> Before an act should count as a crime, three further conditions must be fulfilled. First, it must cause harm - to other people, to society or, in special cases, to those needing to be protected from themselves. Second, it must cause harm that is serious both in nature and degree. And third, it must cause harm that is best dealt with through the mechanism of the criminal law.
> [Emphasis added]

[132] This delineation of the boundaries of "the harm principle" is probably justified by the principle of the sanctity of human life. This principle of fundamental justice was affirmed in the ***Rodriguez*** case of 1993.

[133] However, I only note such limitations to the harm principle in passing as it is not pertinent to the case at bar. Both Mr. Malmo-Levine and Mr. Caine are healthy adults who do not fall in the category of "vulnerable groups."

(vii) Summary

[134] I conclude that on the basis of all of these sources - common law, Law Reform Commissions, the federalism cases, ***Charter*** litigation - that the "harm principle" is indeed a principle of fundamental justice within the meaning of s. 7. It 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.

3. Stage 3: Is the Deprivation of the Appellants' Liberty in Accordance with the Principles of Fundamental Justice?

[135] As discussed above, the learned trial judge in ***Caine*** focussed on the balancing of individual and state interests when deciding whether the ***NCA*** violated the appellant's s. 7 rights. She characterized Mr. Caine's s. 7 right in the following manner at paragraph 111:

> The assessment of his interests necessarily requires that weight be given to the ultimate consequence for him, which is a loss of his liberty if convicted. However, the assessment also requires an assessment of the nature of the conduct which he is prohibited from engaging in.

[136] With the greatest of deference to the learned trial judge's careful analysis, this assessment does not give a proper focus to Mr. Caine's s. 7 right. Namely, the focus should have remained on freedom from imprisonment or the threat of imprisonment rather than a free-standing "right to possess recreational drugs" or "the freedom over the integrity of one's person." If it were not for the penal sanctions contained in the ***NCA,*** this discussion of the appellants' s. 7 rights would not have passed the first stage of the analysis. It is an error to confuse the underlying activity - in this case, the possession of a recreational drug - with the s. 7 right of freedom from imprisonment.

[137] The s. 7 test set out by the Supreme Court of Canada makes it clear that courts should balance the right of the individual against the interests of the State. The right of the appellants in this case is the "liberty" interest of s. 7, which Howard P.C.J. had already defined as the right to be free from imprisonment. The third stage of the analysis should now be considered anew.

(a) Is the ***NCA*** in accordance with the "Harm Principle"?

[138] As set out above, the proper way of characterizing the "harm principle" in the context of the ***Charter*** is to determine whether the prohibited activities hold a "reasoned apprehension of harm" to other individuals or society: ***Butler,*** *supra* at p. 505; ***Sharpe,*** *supra* at p. 65. The degree of harm must be neither insignificant nor trivial.

[139] In setting the appropriate threshold for criminal sanctions at a reasoned apprehension of harm that is "not insignificant" or "not trivial" - as opposed to a higher test suggested by Madam Justice Prowse whose reasons I have read in draft that the potential harm be "serious" or "substantial" - it is important 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***. The ***Charter*** analysis is multi-faceted, as should be apparent by these Reasons for Judgment. The factors to be considered include the s. 7 interest that has been engaged, the content of the operative principle of fundamental justice, a consideration of societal interests, an "overbreadth" analysis, and the necessary deference to Parliament. In the context of a s. 7 analysis in ***Cunningham****, supra*,

McLachlin J. (as she then was) discussed what liberties are to be protected pursuant to the ***Charter***. She stated at p. 151:

> ... the ***Charter*** does not protect against insignificant or "trivial" limitations of rights.

The threshold test for individual rights and freedoms that she postulated was therefore the same as I have postulated here for the use of the criminal sanction: namely, that the liberty interest to be protected must not be insignificant or trivial.

[140] Criminal laws have a dual aspect. They punish the offender but they also may be considered to be a list of freedoms for our citizens in general and a potential victim in particular. Many of the same factors that are at play in a s. 7 analysis are also at play in regards to the proper use of the federal Criminal Law power. It follows that there should be a parallel, or balance, between the ***Cunningham*** analysis and the application of the harm principle as it relates to criminal sanctions. For these reasons, I have postulated a lower threshold test than my learned colleague with regards to the proper limit of the criminal sanction.

[141] I point out that it is well-established law that Parliament has a wide discretion to designate certain activities to be "criminal" and impose criminal sanctions: ***R. v. Hinchey***, [1996] 3 S.C.R. 1128 at 1146-48. Parliament's use of s. 91(27) is curtailed only by the test set out in decisions like the ***Margarine Reference***, *supra*, and since 1982, the ***Canadian Charter of Rights and Freedoms***. As stated earlier, in the discussion surrounding Canadian federalism cases, the Supreme Court of Canada has ruled that the "purpose" of a criminal law must be to suppress an "evil" that has the potential of inflicting harm to others. However, the Court has not specifically *quantified* this "evil" for the purposes of establishing a threshold standard of "harm." In ***Hinchey***, *supra*, the Court discussed the "proper limitations of the criminal law" but, as Madam Justice L'Heureux-Dubé stated at p. 1144, it was not necessary for the Court in that case "to exhaustively define the exact limits of the criminal law." Perhaps this case may make it necessary for the highest court to do exactly that.

[142] The findings of fact made by the trial judge in ***Caine*** show that marihuana indeed poses a risk of harm to others and society. She stated as follows at para. 121:

> 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 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.
> 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 minuscule.
> 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. There is a risk that, with legalization, user rates will increase and so will these costs.
> In view of these facts, I am satisfied that there is a reasonable basis for Parliament to have concluded that the possession and use of marihuana poses a risk to the health of users and to society as a whole. The risk is not large. It need not be in order for Parliament to be entitled to act. It is for Parliament to determine what level of risk is acceptable and what level of risk requires action.
> In conclusion, the legal prohibition against the possession of marihuana does not offend against any principle of fundamental justice that is related to the 'harm' principle asserted by the applicant.

[143] Therefore, I infer from the reasons of the learned trial judge that marihuana poses a risk of harm to others that is not insignificant nor trivial. I also infer that such a finding is supported by the evidence. Consequently, the deprivation of the appellants' liberty interest is in accordance with the "harm principle."

(b)Does the ***NCA*** Strike the Right Balance Between the Individual and the State?

[144] The next consideration is more thorny. It must be determined whether the impugned provisions of the ***NCA*** strike the "right balance" between the rights of individual Canadians and the interests of the State: ***Cunningham***. As pointed out above, the trial judge ultimately erred in her analysis by assigning no weight to the interests of the appellant Caine by virtue of confusing his s. 7 right to be free from imprisonment with the underlying activity of smoking recreational drugs, or the more abstract "freedom over the integrity of one's person." As a result, the "balancing process" in ***Caine*** inevitably favoured the interests of the State.

(i) The Rights of the Individual

[145] The appellants' right to be free from imprisonment should not be equated with the activity that could possibly lead to their imprisonment. The focus should remain on the effects to an individual's life when placed in prison. I refer to the Ouimet

Report, discussed above, which discussed the meaning of imprisonment in very bold language at p. 13:

> Men and women may have their lives, public and private, destroyed; families may be broken up; the state may be put to considerable expense; all these consequences are to be taken into account when determining whether a particular kind of conduct is so obnoxious to social values that it is to be included in the catalogue of crimes. If there is any other course open to society when threatened, then that course is to be preferred. The deliberate infliction of punishment or any other state interference with human freedom is to be justified only where manifest evil would result from failure to interfere. [Emphasis added]

[146] It is also appropriate to consider the many deleterious effects of prohibiting marihuana at this stage. The learned trial judge in ***Caine*** listed both the salutary and deleterious effects of the prohibition on marihuana possession in her reasons. I have repeated these findings at paragraph 28 of these reasons.

[147] As the trial judge in ***Caine*** found, the prohibition has lead to a palpable disrespect for the law among the million or so Canadians who continue to use the substance despite the risk of imprisonment. This disrespect and distrust for narcotics laws fostered by the prohibition is perhaps most concerning in regards to adolescents.

[148] Another factor listed by the trial judge that needs repeating is the stigma attached to Canadians who are left with a criminal record. These individuals may not actually serve jail time but, as the trial judge in ***Caine*** stated, they are "branded with criminal records for engaging [in] an activity that is remarkably benign." A criminal record may affect the liberty of an individual in the future such as when travelling abroad or when seeking employment.

[149] As discussed earlier, it is a fine line in determining what matters should be considered in the balancing analysis under s. 7 as opposed to a s. 1 analysis. I appreciate that there is an argument that the matter of "deleterious effects" should be left to a s. 1 analysis.

(ii) The Interests of the State

[150] The other side of the scale in this balancing test comprises the interests of the State and the community. The respondent Crown has argued that the following factors must be weighed in the balancing process as representing the "State Interest":

[1] The purpose of the cannabis prohibition is to minimize the potential harm to health, safety and personal development of the user and to society as a whole associated with the use of cannabis.

[1] The cannabis prohibition is part of a larger legislative scheme in Canadian law designed to control the use and distribution of drugs. The scheme implements a variety of sanctions to control a plethora of different substances only some of which have psychoactive properties: ***R.* v. *Hauser***, [1979] 1 S.C.R. 984 at 998, 999.

[1] In addition to the health concerns addressed by the cannabis prohibition, Canada has assumed international obligations respecting the possession and distribution of various narcotics and psychotropic substances, including cannabis products: ***United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances***, Art. 3(2)

[151] I am of the opinion that the last two matters are properly considered under a s. 1 analysis. Regarding the first point, I have already found that marihuana does pose a risk of harm to society, however small, and that the degree of harm is neither insignificant nor trivial.

[152] It is also to be noted that the ***NCA*** clearly indicates that the trafficking, growing, and importing of marihuana is unlawful. Although it is not a crime to obtain or buy marihuana, a lawful user does provide a market for the unlawful activity of others. See ***R.* v. *Greyeyes***, [1996] 9 W.W.R. 337 at para. 51 *per* Bayda C.J.S. (Sask. C.A.); ***R.* v. *Madigan***, [1970] 1 C.C.C. 354 (Ont. C.A.); ***R.* v. *Dyer*** (1972), 5 C.C.C. (2d) 376 (B.C.C.A.); ***R.* v. *Schartner*** (1977), 38 C.C.C. (2d) 89 (B.C.C.A.). This point distinguishes the situation at bar from the ***Sharpe*** case in which this Court ruled that certain provisions of the ***Criminal Code*** violated the ***Charter***. Rowles J.A., who was in the majority, found that the impugned provisions caught materials like drawings and stories within its scope. These activities fell outside the intended purpose of the provisions, which was to prevent direct or indirect harm to children through exploitation in the child pornography industry, making the provisions "overbroad." In the case at bar, a person cannot possess marihuana without providing a market for the very activities prohibited by other sections of the ***Criminal Code***.

[153] I turn next to how prosecutions under the ***NCA*** play out in reality. A review of the decided cases indicates that a person charged with simple possession of marihuana is sentenced to paying a minor fine or an absolute discharge unless the Court is dealing with a proven multiple offender. Indeed the appellant Caine in this case reviewed such a sentence.

[154] This point distinguishes this situation from the decision in ***R.* v. *Smith***, [1987] 1 S.C.R. 1045, in which there was a challenge to the mandatory provision in the ***NCA*** that a person serve a seven year sentence for drug trafficking. The ***Charter*** challenge in that case was levied at prosecutorial discretion. The point that is being made here is the reality of the sentences now rendered, particularly in British Columbia. However, the fact that the threat of imprisonment remains should not be understated. Yet, in balancing the rights of the individual and the interests of the State in this case, this reality should not be ignored.

(iii) Judicial Deference in Social Policy Cases

[155] The result of the "balancing test" in Stage Three of the s. 7 test is admittedly quite close and, as mentioned above, despite the fact that few Canadians ever go to jail for possession of marijuana, the threat remains. Additionally, there are the numerous other factors listed by the trial judge in ***Caine*** that should be considered and in particular I point to the fact that every year thousands of Canadians are branded with a criminal records for a "remarkably benign activity" such as smoking marihuana.

[156] On the other hand, the respondent Crown has adduced enough evidence of harm, or the "reasoned apprehension of harm," that is neither insignificant nor trivial caused by marihuana to support the prohibition. Once again, there is no clear winner in this "balancing test." In the end, I am reminded that a degree of judicial deference is owed to Parliament in matters of public policy. In ***Rodriguez***, *supra*, Sopinka J. stated at p. 589:

> On the one hand, the court must be conscious of its proper role in the constitutional make-up of our form of democratic government and not seek to make fundamental changes to long-standing policy on the basis of general constitutional principles and its own view of the wisdom of the legislation. On the other hand, the courts has not only the power but the duty to deal with this question if it appears the ***Charter*** has been violated . . . the principles of fundamental justice leave a great deal of scope for personal judgment and the court must be careful that they do not become principles which are of fundamental justice in the eye of the beholder only.

[157] Not much should be said concerning the deference shown by courts in the United States to their legislators in the realm of public policy mainly because they do not have an equivalent to s. 1 of the ***Charter***: see ***Marshall* v. *United States***, 414 U.S. 417 at 427, 38 L. Ed. 2d 618 (1974). In challenges to marihuana laws, U.S. courts repeated this idea of judicial deference: ***United States* v. *Kiffer***, 477 F. 2d 349 at 352 (2d Cir. 1973); ***N.O.R.M.L.* v. *Bell***, 488 F. Supp. 123 at 137 (D.D.C. 1980). In Canada, this deferential approach has also been taken to marihuana laws: ***Clay***, *supra* at para. 53; ***Parker***, *supra*.

(c) Conclusion to Stage Three of the s. 7 Test

[158] 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 significant or trivial. The appellants have not convinced me that such harm is absent in this case.

[159] Therefore, I find that the legal prohibition against the possession of marihuana does not offend the operative principle of fundamental justice in this case.

[160] 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. The LeDain Commission recommended the decriminalization of marihuana possession nearly thirty years ago based on similar arguments raised by the appellants in this case. Parliament has chosen not to act since then, although there are moves afoot to make exceptions for the medical use of marihuana in wake of recent decisions. Nevertheless, 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.

[161] As discussed earlier, the conviction in ***R.* v. *Malmo-Levine*** also related to possession of marihuana for the purpose of trafficking. It therefore follows, in the

totality of the analysis set forth above, that if the s. 7 challenge to the provisions relating to the simple possession of marihuana fails, then so too would a challenge relating to the possession of marihuana for the purpose of trafficking.

[162] Finally, it should be noted that the learned trial judge in ***Malmo-Levine*** refused to hear evidence that had been tendered by Mr. Malmo-Levine for the reason that it would be irrelevant. He convicted the appellant on the evidence tendered by the Crown. I am of the opinion that the learned trial judge should have admitted the evidence. However, the result would not have been different if the evidence had been admitted.

**VI Summary and Disposition**

[163] The provisions in the ***Narcotic Control Act*** prohibiting the possession of marihuana for personal use are not contrary to s. 7 of the ***Charter of Rights and Freedoms***. Accordingly, I would dismiss both appeals.

"The Honourable Mr. Justice Braidwood"

**I AGREE:**

"The Honourable Madam Justice Rowles"

**Reasons for Judgment of the Honourable Madam Justice Prowse:**

**CONCLUSION**

[164] I have had the privilege of reading, in draft form, the reasons for judgment of Mr. Justice Braidwood. I am in substantial agreement with his draft reasons up to and including para. 132. In particular, I agree that s. 7 of the ***Canadian Charter of***

***Rights and Freedoms*** is engaged in these circumstances (by virtue of the threat of imprisonment for those convicted of possession of marijuana); that the principle of fundamental justice which is at issue in this case is the "harm principle"; and that there must be a balancing of individual and state interests under s. 7 of the ***Charter*** in this case because the "harm principle" necessarily incorporates a consideration of societal interests.

[165] In the result, however, I am satisfied that the appellants have established that s. 3(1) of the ***Narcotic Control Act***, R.S.C. 1985, c. N-1 (the "***NCA***"), now s. 4(1) of the ***Controlled Drugs and Substances Act***, S.C. 1996, c. 19 (the "***CDSA***"), breaches their right to life, liberty and security of the person in a manner which is inconsistent with a principle of fundamental justice, in this case, the "harm principle". I base this conclusion on the findings of Judge Howard with respect to the extent of the harmful effects of marijuana, summarized by Braidwood J.A. at para. 142 of his reasons, and accepted by the Crown for the purpose of these appeals. In my view, and subject to a s. 1 analysis, the nature and extent of the harmful effects of marijuana as disclosed by the evidence are not sufficiently serious to justify the imposition of criminal law sanctions, including imprisonment. I would, therefore, allow the appeals to the extent of finding that the appellants have established a *prima facie* breach of their rights under s. 7 of the ***Charter*** insofar as s. 3(1) of the ***NCA*** is concerned. I would then adjourn the appeals to permit counsel to make further written submissions with respect to the application of s. 1 of the ***Charter***.

[166] For the reasons given at the conclusion of this judgment, I would decline to make a finding with respect to the constitutionality of s. 4 of the ***NCA*** (possession of marijuana for the purpose of trafficking), which issue arises only in the appeal by Mr. Malmo-Levine. (Apart from that issue, I have treated the two appeals as being based on essentially the same factual foundation.)

## POINTS OF DIVERGENCE

[167] Although I am in substantial agreement with the majority of Mr. Justice Braidwood's analysis of the issues in these appeals, I respectfully disagree with him on two interrelated points: (1) the formulation and significance of the "***Butler***" test; and (2) the "balancing of interests" under s. 7 of the ***Charter***, based on the findings of the trial judge.

## ANALYSIS

### (1) The "Butler" Test

[168] Mr. Justice Braidwood discusses the decision of the Supreme Court of Canada in ***R. v. Butler***, [1992] 1 S.C.R. 452, commencing at para. 125 of his reasons. In ***Butler,*** Mr. Justice Sopinka, speaking for the majority, concluded, *inter alia,* that Parliament was justified in utilizing its criminal law powers to legislate to prevent a reasoned risk of harm to society from a particular activity, even if actual harm could not be established. At p. 505 of ***Butler***, he states:

> [The impugned provision] is designed to catch material that creates a risk of harm to society. It might be suggested that proof of actual harm should be required. It is apparent from what I have said above that it is sufficient in this regard for Parliament to have a reasonable

> basis for concluding that harm will result and this requirement does not demand actual proof of harm.

(See also ***R. v. Sharpe*** (1999), 175 D.L.R. (4th) 127 per Madam Justice Rowles at para. 158.)

[169] Although the "reasoned apprehension of harm" test in both ***Butler*** and ***Sharpe*** was posited in the context of a discussion of the application of s. 1 of the ***Charter***, I agree with Mr. Justice Braidwood that it is an appropriate test to apply under s. 7 in this case where the "harm principle" is engaged. According to that test, if a particular activity creates a reasoned apprehension of harm to society or others, Parliament is justified in prohibiting the conduct by the imposition of criminal law sanctions, even if it cannot be established with certainty that the apprehended harm will result.

[170] As Mr. Justice Braidwood indicated at para. 138 of his reasons, however, ***Butler*** does not stand for the proposition that Parliament is entitled to criminalize conduct which creates a reasoned apprehension of harm, if the harm apprehended is "insignificant" or "trivial". He would interpret the ***Butler*** test as justifying Parliament in prohibiting conduct which creates a reasoned apprehension of harm which is not of a trivial or insignificant nature. Applying that test to the findings of the trial judge with respect to the risk of harm posed to society and to others by possession of marijuana for personal use, Mr. Justice Braidwood concludes, at para. 143:

> Therefore, I infer from the reasons of the learned trial judge that marihuana poses a risk of harm to others that is not insignificant nor trivial. I also infer that such a finding is supported by the evidence. Consequently, the deprivation of the appellants' liberty interest is in accordance with the "harm principle".

[171] While I agree with Mr. Justice Braidwood that the risk of harm to society from simple possession of marijuana is not insignificant or trivial, and that the evidence of the trial judge justifies the findings she made in that regard, I do not agree that this is the appropriate formulation of the test to be applied in these circumstances. Rather, I would interpret the ***Butler*** test as justifying Parliament in imposing criminal law sanctions to prohibit specified activity if there is a reasoned apprehension of harm of a "serious", "substantial" or "significant" nature, whether or not actual harm can be established.

[172] I find support for this formulation of the relevant test to be applied in this case in the detailed discussion of the "harm principle", and its relationship to the criminal law, set forth at paras. 97 to 130 of Mr. Justice Braidwood's reasons. He refers to numerous authorities in that regard, drawn from the common law, leading treatises on the criminal law, the work of law reform commissions, Canadian "federalism" cases, and leading ***Charter*** cases, including ***Butler*** and ***Sharpe***.

[173] In my view, one of the most useful statements of the legitimate "reach" of Parliament through the use of criminal law sanctions arising from that discussion is that set out in the ***Ouimet Report***. I refer, in particular, to the following passage from that report quoted at para. 113 of Mr. Justice Braidwood's reasons:

> 1. No act should be criminally proscribed unless its incidence, actual or potential, is *substantially damaging to society.* [Emphasis in original.]
> 2. No act should be criminally prohibited where its incidence may adequately be controlled by social forces other than the criminal process.
> 3. No law should give rise to social or personal damage greater than that it was designed to prevent.

[174] I also find compelling the following statement from the 1976 Report of the Law Reform Commission set forth at para. 115 of Mr. Justice Braidwood's reasons:

> Before an act should count as a crime, three further conditions must be fulfilled [in addition to the acts being wrongful acts seriously threatening and infringing fundamental social values]. First, it must cause harm - to other people, to society or, in special cases, to those needing to be protected from themselves. Second, it must cause harm that is serious both in nature and degree. And third, it must cause harm that is best dealt with through the mechanism of the criminal law.

[175] In my view, none of the cases referred to by either Judge Howard or by Mr. Justice Braidwood supports a finding that a lesser degree of harm than described in those passages would justify Parliament's intervention through the imposition of criminal law sanctions. In particular, the ***Cunningham*** decision (referred to at paras. 139, 140 and 144 of Mr. Justice Braidwood's reasons) does not address this issue, either in the passage quoted, or otherwise.

[176] Even the pre-***Charter*** cases referred to, such as ***Standard Sausage Co. Ltd. v. Lee*** (1933), 47 B.C.R. 411 (C.A.), and ***Reference Re: Dairy Industry Act, s. 5(a) (Canada)***, [1949] S.C.R. 1, aff'd [1951] A.C. 179 (J.C.P.C.) (the "***Margarine Reference"***), dealt with activities which were viewed as a public evil with potentially serious consequences for society. Thus, although Mr. Justice Rand in the ***Margarine Reference*** decision spoke of a crime as essentially an act which Parliament forbids by the use of criminal sanctions, he did not purport to suggest that such sanctions could be used to prohibit conduct which did not have, or threaten, a serious or detrimental effect on society. As Mr. Justice Braidwood stated at para. 134, after reviewing the relevant authorities, it is a common sense proposition that "you don't go to jail unless there is a potential that your activities will cause harm to others." I would qualify this statement only by saying that it is a common sense proposition that "you don't go to jail unless there is a potential that your activities will cause 'serious', 'substantial' or 'significant' harm to society or to others."

[177] In summary, it is apparent from Mr. Justice Braidwood's discussion of the "harm principle" in relation to Parliament's use of criminal law sanctions, that the level or degree of harm, or apprehended harm, which justifies Parliament's intervention through its use of such sanctions (whether under s. 91(27) of the ***Constitution Act, 1867*** (criminal law) or under the residual power to make laws for the peace, order and good government of Canada) must be harm of a "serious", "significant" or "substantial" nature. It is not sufficient to say that the apprehended harm be "non-trivial" or "insignificant". In my view, those words posit too low a threshold to justify Parliament's intervention through the imposition of criminal law sanctions.

[178] As earlier stated, the findings of Judge Howard, based on the evidence before her, do not amount to a finding of a reasoned risk of serious, substantial or significant harm to society or to others from the mere possession (or use) of marijuana. If there is evidence available which would gainsay this conclusion, it was not placed before the trial judge, nor is it before us on this appeal.

[179] I do not wish to be understood, however, as ignoring the risks of harm from use of marijuana which the trial judge has identified. There are risks, and it may be that further research will establish that these risks are more serious than we have been led to believe. But it is not every risk of harm which does, or should, justify the full weight of the law being brought to bear on the individual through the imposition of criminal law sanctions. If Parliament criminalizes an activity where the evidence indicates that the actual or threatened harm to society or others is not serious, substantial or significant, it leaves itself open to a challenge under the ***Charter***, such as that mounted here. Faced with such a challenge, the courts must examine whether the impugned law has struck a legitimate balance between individual and state rights. In most cases, this balancing process will be carried out primarily under s. 1 of the ***Charter***. But, in a case such as this, in which s. 7 of the ***Charter*** is engaged, and the principle of fundamental justice at stake is the "harm principle", the balancing process takes place, in the first instance, under s. 7. (See, for example, ***R. v. Mills***, ***R. v. Cunningham***, and ***Rodriguez v. British Columbia (Attorney-General)*** referred to at paras. 57, 60 and 61 of Mr. Justice Braidwood's reasons.)

[180] I turn, then, to the balancing of interests in this case.

**(2) <u>The Balancing of Interests</u>**

[181] Mr. Justice Braidwood discussed the balancing of the individual and state interests commencing at para. 135 of his reasons. Based on the findings of the trial judge, he determines that possession of marijuana poses a risk of harm to others "that is not insignificant or trivial". He concludes, therefore, that the deprivation of the appellants' liberty interest is in accordance with the "harm principle".

[182] Commencing at para. 144 of his reasons, Mr. Justice Braidwood then goes on to consider whether the impugned provisions of the ***NCA*** strike the appropriate balance between the rights of individual Canadians and the interests of the state. With respect, I agree with his analysis at paras. 144-151. However, I would place little weight on the fact that one cannot possess marijuana without creating a market for some other criminal activity. This fact was recognized, but rejected as a justification for criminalizing simple possession of marijuana, in the LeDain Commission Report, referred to at para. 92 of Mr. Justice Braidwood's reasons. Further, there are other instances in which a particular activity has not been criminalized, but conduct directly related to that activity has been criminalized. For example, prostitution *per se* is not illegal, but soliciting for the purposes of prostitution is; possession of obscene material is not illegal, but manufacture, sale and distribution of such material is illegal.

[183] Nor would I place much weight in the balancing process on the fact that it is rare for a person convicted of simple possession of marijuana to receive a sentence of imprisonment. While it is the threat of imprisonment which engages the liberty interest under s. 7 of the ***Charter*** in this case, the damning consequences for a significant number of people, particularly young people, of being branded with a

criminal record as a result of being convicted of simple possession of marijuana should not be underestimated in terms of its potential effect on their mobility and employability. Further, even a discharge remains as a form of "record" to be reactivated in the future if the individual comes into contact with the criminal justice system again.

[184] At para. 155 of his reasons, Mr. Justice Braidwood refers to the result of the balancing process as being "quite close"; and at para. 156 he states that "there is no clear winner in this 'balancing test'". In the result, he determines that it is appropriate to defer to Parliament's decision to criminalize the activity on the basis that, while the risk of harm posed by simple possession of marijuana is "not large", "it need not be large in order for Parliament to act". He concludes that it is up to Parliament to determine what level of risk is acceptable and what level of risk requires action through the imposition of criminal law sanctions.

[185] If I agreed with Mr. Justice Braidwood that the appropriate test to be applied in determining whether Parliament is justified in prohibiting conduct through the use of criminal sanctions is a reasoned apprehension of harm which is neither trivial nor insignificant, I would agree with his conclusion that, once this threshold is reached, it is up to Parliament to determine whether to criminalize the activity. But, as I have already stated, I am unable to accept that Parliament has such an untrammeled discretion based on such a *de minimus* threshold.

[186] In coming to this conclusion, I note that Madam Justice McLachlin expressed the view in ***RJR-MacDonald Inc. v. Canada (Attorney General)***, [1995] 3 S.C.R. 199, at para. 135, that greater deference may be accorded Parliament if the impugned law is concerned with competing rights between different sectors of society than if the contest is one between the individual and the state, as here. Although that comment was made in the context of a s. 1 analysis, I find that it has some relevance in a case such as this in which several of the factors which are generally discussed under s. 1 of the ***Charter*** are engaged in the s. 7 analysis because the principal of fundamental justice under consideration is the "harm principle".

[187] In the result, because the test I would apply is different from that applied by Mr. Justice Braidwood, I conclude that the balancing of interests under the third stage of the s. 7 analysis must be resolved in favour of the individual. In my view, the evidence does not establish that simple possession of marijuana presents a reasoned risk of serious, substantial or significant harm to either the individual or society or others. As a consequence of this finding, I conclude that the appellants have established that they have been deprived of their right to life, liberty and security of the person in a manner which is not in accordance with the principles of fundamental justice insofar as s. 3(1) of the ***NCA*** is concerned. I would not be prepared to make this finding with respect to the count of possession of marijuana for the purpose of trafficking under s. 4 of the ***NCA*** for several reasons: first, the trial judges did not address this issue; second, very little argument was addressed to this issue during the course of submissions; third, this issue would be moot if the Crown were able to justify s. 3(1) of the ***NCA*** under s. 1 of the ***Charter***; and, finally, these are dissenting reasons.

**RESULT**

[188] I would allow the appeal to the extent of finding that s. 3(1) of the ***NCA*** (and, by extension, s. 4(1) of the ***CDSA***) breaches the appellants' rights under s. 7 of the ***Charter***. I would direct the parties to file further written submissions directed to the question of whether those provisions can be saved under s. 1 of the ***Charter*** in these circumstances.

"The Honourable Madam Justice Prowse"