

**CRIMINALIZING PLEASURE:  
CANNABIS PROHIBITION IN CANADA**

**Or, An Inquiry into the Themes of Prohibition  
And the Power of the Status Quo**

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# ABSTRACT

Cannabis prohibition is a contentious issue that has been studied extensively by government and the courts. The empirical evidence, in both forums and over time, is remarkably consistent. Cannabis use poses little or no threat of harm to the typical user. Some members of vulnerable groups, however, may be at risk of harm from cannabis use.

Whether prohibition is justified on the basis of protecting these vulnerable groups from self-inflicted harm is a question that tests the proper boundaries of criminal law and requires analysis of certain legal philosophies including paternalism and liberalism as evidenced by John Stuart Mill's harm principle. This paper reviews the major government studies of cannabis use and policy. In addition, the paper reviews the main *Charter* challenge to cannabis prohibition that were recently decided by the Supreme Court of Canada.

Ultimately, the government inquiries all call for reform of Canada's cannabis laws. Despite this, Canada's policy toward cannabis has remained virtually unchanged since its inception in 1923. The Supreme Court recently rejected the *Charter* challenge, leaving any hope of reform in the hand of Parliament. Reform seems unlikely because certain themes of prohibition, such as the assumption that it has a deterrent effect, continue to find resonance despite empirical evidence to the contrary. The power of the status quo, it seems, is very difficult to overcome.

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# TABLE OF CONTENTS

ABSTRACT.....	I
ACKNOWLEDGEMENTS .....	II
TABLE OF CONTENTS.....	III
INTRODUCTION.....	1
CANNABIS AND THE BOUNDARIES OF CRIMINAL LAW.....	1
OUTLINE OF THESIS.....	5
CHAPTER I: FROM THE HEMP FIELDS TO THE BULLY PULPIT.....	8
INTRODUCTION .....	8
OF SHAMANS, FOLK MEDICINES AND THRILL-SEEKERS .....	8
TRUTH AS THE FIRST CASUALTY OF PROHIBITION .....	15
FROM PROHIBITION TO THE PRESENT: A BRIEF CANNABIS CHRONOLOGY.....	16
CONCLUSION.....	22
CHAPTER II: REPORTS FROM STATE: GOVERNMENT INQUIRIES INTO CANNABIS .....	25
INTRODUCTION .....	25
THE LE DAIN COMMISSION.....	27
<i>Introduction</i> .....	27
<i>Guiding Principles</i> .....	31
<i>Empirical Bases of Cannabis Policy</i> .....	32
<i>Harms of Prohibition</i> .....	36
<i>Policy Options</i> .....	37
<i>Policy Recommendations</i> .....	39
<i>Conclusion</i> .....	40
THE DEPARTMENT OF NATIONAL HEALTH AND WELFARE REPORT.....	41
<i>Introduction</i> .....	41
<i>Empirical Bases of Cannabis Policy</i> .....	42
<i>Harms of Prohibition</i> .....	47
<i>Policy Options</i> .....	48
<i>Policy Recommendations</i> .....	49
<i>Conclusion</i> .....	51
THE SENATE SPECIAL COMMITTEE REPORT .....	52
<i>Introduction</i> .....	52
<i>Guiding Principles</i> .....	53
<i>Empirical Bases of Cannabis Policy</i> .....	55
<i>Policy Options</i> .....	56
<i>Policy Recommendations</i> .....	58
<i>Conclusion</i> .....	59
THE HOUSE OF COMMONS REPORT .....	59
<i>Introduction</i> .....	59
<i>Legislative Options</i> .....	60
<i>Empirical Conclusions</i> .....	62
<i>Policy Recommendations</i> .....	62
<i>Conclusion</i> .....	65
CONCLUSION.....	66

CHAPTER III: IN THE JUDICIAL ARENA.....	68
INTRODUCTION .....	68
WHERE IT ALL BEGINS.....	69
TRIAL COURT DECISIONS.....	71
THE COURTS OF APPEAL.....	73
THE SUPREME COURT .....	74
<i>The Appellants' Argument</i> .....	74
<i>The Harm Principle</i> .....	81
<i>Overbreadth</i> .....	88
<i>Moral Neutrality</i> .....	90
THE DECISION .....	90
CONCLUSION.....	103
CONCLUSION .....	104
THE POWER OF THE STATUS QUO.....	104
GLIMMERS OF HOPE .....	109

# INTRODUCTION

## Cannabis and the Boundaries of Criminal Law

Why write a paper about pot? It is a fair question, and one worthy of a response. Because, at bottom, scholarly works about cannabis – no matter how detailed, annotated and researched – still concern themselves with a drug used primarily for the sheer enjoyment that users derive from its consumption. But cannabis, and particularly the legal situation surrounding cannabis, is a subject that deserves serious consideration – even if one accepts the Crown’s rhetoric in the principal cannabis cases explicitly deeming users’ position as merely an argument for a “right to get ‘stoned’.”<sup>1</sup> This is because the criminalization of cannabis use and cultivation tell a story about the proper role of the criminal law in the personal conduct of citizens in a democratic, free, nation.

Cannabis law and the debates surrounding cannabis prohibition are a paradigmatic example of the edges of the proper boundaries of criminal law and state control. They are at the fringe because the principal activity, use of the plant, is likely harmful to the actor but not to society at large.<sup>2</sup> Even the

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<sup>1</sup> This characterization evidences a certain moralistic mindset that runs through Respondent’s argument and, indeed, most prohibitionist rhetoric.

<sup>2</sup> Some may argue that current cannabis enforcement focuses on cultivation – the scourge of grow-ops – or on large scale trafficking, and that personal users are by-and-large ignored by law enforcement. They would be wrong. Cannabis offences made up approximately three-quarters of all drug offences in and seventy percent of arrests are for simple possession. Make no mistake – the effect of cannabis prohibition, whether explicit or implicit as a goal, is to penalize the user. Ironically, recent research suggests that public policy is irrelevant to patterns of use.

harm to the user is either slight, or speculative. Cannabis is used for highly personal reasons, mostly in by adults in private, with little or no negative ramifications to the user. Personal use, cultivation for that use and non-commercial distribution does very little harm to society. Yet criminal prohibitions have existed in Canada since 1923 – despite the conclusion, reached by repeated government commissions, that our policy choice in this area does more harm than good and should be reformed.

I argue that this issue – cannabis use – involves key issues of personal autonomy and free choice. As noted in “*Cannabis: Our Position for a Canadian Public Policy*” a September, 2002 Report of the Senate Special Committee on Illegal Drugs: “[a]ny discussion on the role of criminal law as concerns illegal drugs, here being a question of cannabis, in effect poses questions regarding principles of the appropriateness of turning to criminal law.”<sup>3</sup> In the case of cannabis prohibition, the state employs its most punitive sanction – the criminal law and imprisonment – to unsuccessfully coerce citizens into refraining from engaging in relatively harmless behavior.<sup>4</sup> Ultimately, if cannabis use can be properly criminalized under the Charter, the substantive boundaries of permissible state coercion are wide, and the

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<sup>3</sup> Report of the Senate Special Committee on Illegal Drugs, “*Cannabis: Our Position for a Canadian Public Policy*” (September, 2002) [Senate Report] at 38.

<sup>4</sup> The empirical evidence supporting this, perhaps startling, claim will be discussed below. It is safe to say that even the Crown’s argument fails to delineate any significant harm to society caused by personal use of cannabis. Indeed, as will be shown, the Crown must argue that the legislature is entitled to criminalize behavior if it carries any appreciable risk of harm, as opposed to any significant risk of harm.

criminal law may be employed as a tool of social policy irrespective of its efficacy.<sup>5</sup>

That most experts (excepting those with a vested interest in continued prohibition) and the general public agree criminalization is wrongheaded, and yet the laws do not change, tells us something very interesting about the structure of our legal and political systems. That the government itself has concluded, repeatedly, that our approach to cannabis should be reformed yet nothing changes legislatively tells us something about politicians' reluctance to effectively engage issues perceived to be politically sensitive. Cannabis policy can teach us many things. There are many messages sent by our current approach and, I argue, most of them are negative.<sup>6</sup>

The issue of cannabis prohibition is, to say the least, a controversial subject. Much has been written about pot – on both sides of the debate. Some material is quite good and some is no better than rhetoric or propaganda – again, on both sides of the debate. Opponents of cannabis use focus on its harms, real or perceived. Users describe its benefits, again, real or perceived. This paper can not possibly begin to capture all aspects of cannabis use and prohibition. I will, therefore, not try. Instead, after a brief introduction to the plant itself, I will provide a history of Canadian prohibition and paint a picture of the current state of the cannabis law.

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<sup>5</sup> I don't suggest that Parliament will criminalize the potato chip simply because it can, but this is because society appears to be trending toward more liberal policies with respect to individual decision making.

<sup>6</sup> And, as we will see, sending a message is one of the main themes of prohibition.

The picture will be composed of several layers. This is because cannabis law in Canada has been, until recently, in a state of significant flux. The Criminal Code intersects with the Charter. The constitutionality of the prohibition was recently decided by the Supreme Court and that decision makes clear that any change in cannabis policy will come, if at all, from Parliament. But the likelihood of real cannabis reform being enacted by the government appears small.

Repeated government commissions have called for reform, yet nothing occurs. Even the legislation that is tabled is criticized heavily by prohibitionists and reformers alike – and only lukewarmly supported by its proponents within the federal government. In many ways, the debates around the issue are static, and have been so for over thirty years. There is a significant amount of polarization of opinion, but the empirical evidence is surprisingly undisputed, creating a situation that has elements of the surreal. For example, recent court decisions temporarily did away with the offense of possession, creating a situation in which Parliament was actively debating a “decriminalization” bill *while cannabis was completely legal* with virtually no official comment on the absurdity of the situation.

The aim of this paper will be to review the legislative and judicial aspects of cannabis policy. An overarching theme is the static nature of cannabis policy and the debates underlying that policy. The system of control in place today – prohibition – has remained virtually unchanged since first

enacted, without discussion, in 1923. Moreover, the debates over the consequences of cannabis use – both to the user and to society – have also remained fairly static since the Le Dain Commission gave the issue its first serious study in the early 1970s. Finally, prohibition itself has certain themes, and these themes have also remained static, despite significant change in the empirical evidence. The more things change, it seems, the more they remain the same. As we will see, the strength of the status quo permeates the history of parliamentary and judicial treatment of cannabis policy.

### **Outline of Thesis**

I begin with a brief history of the cannabis plant, and the uses to which it had been put prior to prohibition. Chapter one lays out a brief history of cannabis use from the early agricultural aspects of hemp through the dawn of prohibition. A detailed pharmacology is omitted as beyond the scope of the discussion, but some basic information about the cannabis plant is necessary to place prohibition in a historical context. It is important to remember that prohibition is a relatively modern phenomenon, while the use of the plant stretches back for millennia. Next, a brief chronology of key events in cannabis' legal history is provided. I then discuss the criminalization of cannabis and the early history of law enforcement efforts directed against it. I conclude the chapter by setting the stage for the discussions in chapters two

through four, which contain an in-depth review of recent legislative studies, judicial decisions and political developments.

Chapter Two summarizes the leading government reports on cannabis. I begin with *Cannabis*, the first, and most comprehensive, study by Canada's government – that of the Commission of Inquiry into the Non-Medical Use of Drugs (more commonly known as the Le Dain Commission) – completed in 1972. Next, a 1979 report of the Department of National Health and Welfare is analyzed. Following that discussion, I review the findings of the Senate Special Committee on Illegal Drugs, which completed an exhaustive analysis of cannabis use and policy in 2002. Finally, the 2002 report of a House of Commons committee is discussed. I conclude by discussing certain themes that recur in the public policy debate.

Chapter Three describes certain aspects of the history of legal challenges to cannabis prohibition in Canada. Beginning with the events giving rise to the trio of Supreme Court cases challenging the constitutionality of cannabis prohibition, the history of those cases is outlined. From trial, to appeal to the Supreme Court the arguments and decisions are laid out and scrutinized. We see how the themes underlying the public policy debate also find resonance in the legal arguments. The chapter ends with a discussion of the Supreme Court's 2003 decision to essentially leave the issue in the hands of Parliament.

Finally, Chapter Four analyzes the response of Canada's elected officials to the various studies, court cases and evolution of public opinion. Reform, or laws that purport to reform, Canada's approach to cannabis have been proposed and the debates surrounding these legislative proposals are analyzed. Ultimately, we learn that Parliament has not substantively altered the way Canada deals with cannabis use since the plant was first prohibited. Chapter Four also concludes the paper and makes suggestions for reform.

# CHAPTER I

## FROM THE HEMP FIELDS TO THE BULLY PULPIT

### Introduction

The cannabis plant has been part of human history for many thousands of years. Indeed, the first known use of the plant dates back to sometime “between 10,000 and 3000 BC” and the discovery of hempen cords pressed into pottery as decorations.<sup>7</sup> Hemp, a species of the cannabis plant that does not produce psychoactive effects, has been cultivated for its seeds and fiber since at least then. The origins of the use of the plant for its medicinal and psychoactive properties, however, are less clear.

In this chapter, I provide a brief overview of pharmacology and history of cannabis. I disregard the history of hemp because it is, while interesting, beyond the scope of this paper. Instead, I focus on the recreational and medicinal use of cannabis. I also describe certain events leading to its prohibition and the rhetoric used to ultimately criminalize, and demonize, the plant. Finally, I conclude the chapter by recapping this brief history and laying out certain themes that recur after cannabis is prohibited.

### Of shamans, folk medicines and thrill-seekers

While cannabis has been used for millennia, it defied early attempts to classify it.<sup>8</sup> Originally thought to be a relative of the nettle, then the fig,

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<sup>7</sup> Booth, Martin “Cannabis: A History” p. 17.

<sup>8</sup> Indeed, as we will see, confusion over the plant remained the norm, even among lawmakers, through and beyond the imposition of prohibition.

today cannabis makes up its own botanical group along with hops – an ingredient of most beers. The designation *cannabis sativa* was coined by Swede Carolus Linnaeus in 1753. Linnaeus, the “father of botany,” based his name on the Greek word for hemp (“kannabis”) combined with *sativa*, which is Latin for “cultivated.”<sup>9</sup> Today cannabis remains the generic name, but it has three subcategories: *cannabis ruderalis* (non-psychoactive hemp) and the psychoactive plants *cannabis sativa* and *cannabis indica*.

Even these designations are doubtful: cannabis can adapt to its environment quite readily, and indicas grown in traditionally sativa climates displays traits of a sativa over time. Indeed, *sativa* was a designation reserved for the European species of the plant, while *indica* became the term used for the type of plant originally found growing in India. Modern usage amongst professional cultivators of the psychoactive plant tends to be based on the traits shown by the plant itself; both physical and psychoactive. Sativas, for example, grow loose bud clusters and “the highs are described as soaring, psychedelic, thoughtful and spacy.”<sup>10</sup> Indicas, on the other hand, grow tight bud clusters and their effects tend to be “heavy, body-oriented and lethargic.”<sup>11</sup>

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<sup>9</sup> Green, Jonathon, “Cannabis” Thunder’s Mouth Press NY 2001 at p. 13.

<sup>10</sup> Quick America Archives, 2001 pub. “The Big Book of Buds: Marijuana Varieties from the World’s Greatest Seed Breeders”.

<sup>11</sup> Id. See also Green at p. 13. Cultivated cannabis is also often a hybrid of the two. Cannabis breeding is a highly developed art, with cultivators increasingly selecting for desired traits and matching varieties to achieve certain desired outcomes.

Cannabis has been used for these, and other, pharmacological properties for millennia. The earliest scientific investigation may have come from China's Emperor Shen Nung, whose plant based knowledge "was said to have been collected in the *Pen Ts'ao Ching*, a Chinese pharmacopoeia of which the earliest known version dates only to the first century AD."<sup>12</sup> In that work, cannabis is advised for use for a "wide range of ailments."<sup>13</sup> Given the widespread use of hemp, it is not surprising that recordings of psychoactive use of cannabis, in ritualistic and shamanistic forms, took place in the same timeframe both in China and throughout the Indian sub-continent and the Arabic world.

Medicinal and ritualistic cannabis use was widespread in the Arabic world during Roman times, and non-medical use spread with the "expansion of the Islamic faith in the late seventh century."<sup>14</sup> The early popularity of cannabis amongst the faithful is explained as a reaction to the specific prohibition against alcohol in the Koran. Later interpretations of that sacred text, however, were read to prohibit cannabis use because the word used, *khamr*, "is open to interpretation" and could include anything with an intoxicating effect.<sup>15</sup> Nevertheless, despite official condemnation that included martial law and mass burning of crops, cannabis use remained an

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<sup>12</sup> Booth at p. 19.

<sup>13</sup> *Id.*

<sup>14</sup> Booth at p. 39.

<sup>15</sup> *Id.*

“integral part of Arab life [that] would not be suppressed.”<sup>16</sup> The use of hasheesh was memorialized in one of the most well-known pieces of Arab literature in the West, *The Thousand and One Nights*.

The immense popularity of *The Thousand and One Nights* in Europe in the mid-nineteenth century piqued the interest of some Europeans in cannabis use – and particularly hasheesh. A small number of writers, artists and others began to experiment with cannabis use, mostly with a desire to unlock creative doors within their own minds. Perhaps the most important of these early devotees was a French group ostensibly organized by writer Pierre Jules Theophile Gautier. The club deemed themselves *Le Club des Hachichins* and accounted amongst its loose members such luminaries as Alexandre Dumas, Charles Baudelaire and Victor Hugo.<sup>17</sup>

Booth describes the club as “...the first true cannabis experimenters who looked both subjectively and objectively at it, their opinions forming those still prevalent one-and-a-half centuries later.”<sup>18</sup> Once a month, the club of hash eaters met to ingest cannabis – usually in the form of a paste made with “hashish, almond paste, pistachio nuts, sugar, orange or tamarind peel, cloves and other spices....”<sup>19</sup> Members, including Gautier, Baudelaire and Dumas, wrote of their experiences, which included hilarity, hallucinations

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<sup>16</sup> *Id* at p. 41.

<sup>17</sup> Ernest L. Abel, “Marijuana: The First Twelve-Thousand Years” 1980 (cite).

<sup>18</sup> *Id* at p. 66.

<sup>19</sup> Booth at p. 68 (find/cite original?).

and synesthesia.<sup>20</sup> It is worth noting, however, that these effects were based on varying, and often quite high, levels of use, and some produced experiences that would not be common to today's average cannabis users.<sup>21</sup>

The popularity of cannabis in the Arab world affected more than the European interest in the plant. One of the first recordings of North American contact with cannabis comes from the accounts of an American traveler to the East.<sup>22</sup> Baynard Taylor, who traveled extensively in the East in the mid 1800s, is said to be the first to document his cannabis experiences while traveling in the region. There, Taylor twice experimented with “hasheesh.” He explained his desire to use the drug in the first words of his Chapter X, titled “The Visions of Hasheesh” in terms that resonate to this day:

During my stay in Damascus, that insatiable curiosity which leads me to prefer the acquisition of all lawful knowledge though the channels of my own personal experience, rather than in less satisfactory and less salubrious ways, induced me to make a trial of the celebrated Hasheesh – that remarkable drug which supplies the luxurious Syrian with dreams more alluring and more gorgeous than the Chinese extracts from his darling opium pipe.<sup>23</sup>

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<sup>20</sup> The blending of senses, so that one “hears” colors or “sees” music.

<sup>21</sup> Early cannabis use utilized ingestion as the primary, or sole, delivery method. Ingestion is a less controllable form of use because the effects are delayed. Unlike smoking or vaporizing the plant, which allows for easy titration of dose – the user smokes until the desired effects are produced – eating cannabis often yields unpredictable results. Much depends on the method by which the active ingredients are extracted and the amount ingested. Early accounts, then, must be viewed as often describing the extreme ends of the plant's psychoactive effects.

<sup>22</sup> Arabic trade is credited with bringing cannabis use to Africa, though some dispute exists over the proper timeframe. The use of the plant, primarily for medicinal purposes similar to its use today, however, was established by the time Europeans reached Africa. *See* Booth at pp. 43 – 47.

<sup>23</sup> Baynard Taylor, “The Lords of the Sarcen” NY NY, G.P. Putnam & Co., 1855 at p. 133.

Unfortunately for Taylor, his inexperience led him to take far more than a typical dose. Taylor describes an experience that included major hallucinations and high levels of paranoia, a “bad trip” in today’s parlance. By way of contrast, he had once previously taken hasheesh in Egypt with a much more pleasant outcome. Even so, the brief description of this “slight” first use describes effects, such as mild hallucinations and bouts of laughter, consistent with fairly large doses.<sup>24</sup> Unsurprisingly, Taylor warns future experimenters to “...take the portion of hasheesh which is considered sufficient for one man, and not, like me, swallow enough for six.”<sup>25</sup>

Both medicinal and recreational cannabis use began to become more popular in North America toward the end of the nineteenth century. Most historical accounts come from the United States, where, for example, Fitz Hugh Ludlow published “*The Hasheesh Eater: Being Passages from the Life of a Pythagorean*” anonymously in 1857. In that work, Ludlow recounts his own experiences with cannabis products, describing effects such as synesthesia and fits of laughter, as well as unquenchable thirst.

Cannabis as medicine was also becoming popular: “[i]n the second half of the eighteenth century, cannabis started to appear in dispensatories, textbooks referred to by pharmacists and physicians in much the same way

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<sup>24</sup> Taylor at p. 148.

<sup>25</sup> *Id.*

as modern chemists or doctors might consult The British National Formulary or the US National Library of Medicine MEDLINE website.”<sup>26</sup>

Unsurprisingly, early recommendations lauded cannabis’ analgesic effects, though reports of usage for a wide variety of purposes abound. Indeed, the 1850 version of the *United States Pharmacopoeia* deemed cannabis appropriate to treat:

“...neuralgia, tetanus, typhus, cholera, rabies, dysentery, alcoholism and opiate addiction, anthrax, leprosy, incontinence, snake bite, gout, virtually any disease that induced convulsions, tonsillitis, insanity, menorrhagia (excessive menstrual bleeding) and uterine haemorrhaging.”<sup>27</sup>

It appears that cannabis was truly considered a cure-all as recently as 150 years ago.

In 1857, John Bell, an American physician, noted in the *Boston Medical and Surgical Journal* that “the various periodicals of this country have abounded, during the last few years, with accounts of hashish; every experimenter giving the history of the effect it has had upon himself.” More importantly, perhaps, was that Bell’s tests of “hasheesh” he obtained for research revealed that it contained 25% opium – perhaps explaining some of the atypical cannabis effects often associated with hasheesh experiences in that period.

Bell’s article also “seemed to imply that there were, following in Ludlow’s wake, an increasing number of his fellow American citizens

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<sup>26</sup> Booth at p. 89.

<sup>27</sup> Booth at p. 93.

experimenting with the drug.”<sup>28</sup> Along with the rise in popularity – characterized by cannabis’ inclusion in various folk medicines and confections designed to stimulate the user – came an interest in hearing a seedier tale. In Canada, this interest would be sated by the writings of an Edmonton magistrate bent on bringing the public’s attention to the “menace” of cannabis.

### **Truth as the first casualty of prohibition.**

In 1922, Police Magistrate and Judge of the Juvenile Court Emily F. Murphy (also known by her penname, “Janey Canuck”) published Canada’s first prohibitionist manifesto, *The Black Candle*.<sup>29</sup> After being “astonished” to learn of the extent of drug trafficking upon her ascension to the bench, Judge Murphy claimed that “year by year, this traffic has steadily grown....”<sup>30</sup> Chapter 23 of her anti-drug polemic is titled “Marahuana – A New Menace” and begins with a complaint about “authorities and police officials generally being woefully ignorant of [marijuana’s] nature or extraordinary menace.”<sup>31</sup> Thereafter, she sets out to enlighten the public about this purported menace.

Among the evils of cannabis use, according to Judge Murphy, is the account of Los Angeles Police Chief Charles A. Jones, that “[p]ersons using this narcotic, smoke the dried leaves of the plant, which has the effect of

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<sup>28</sup> Booth at p. 98.

<sup>29</sup> Murphy, Emily, *The Black Candle*, Thomas Allen Publisher, Toronto 1922. Jan

<sup>30</sup> Murphy at p. 5.

<sup>31</sup> *Id* at p. 331.

driving them completely insane.”<sup>32</sup> Indeed, cannabis users “...become raving maniacs and are liable to kill or indulge in any forms of violence to other persons...”<sup>33</sup> According to Judge Murphy, cannabis addiction can only be ended by insanity, death or abandonment.<sup>34</sup>

Janey Canuck’s hyperbole, unfortunately, became the apparent basis for Canadian cannabis prohibition shortly after the publication of *The Black Candle*.<sup>35</sup> Unlike politicians, who moved swiftly, police officials seemingly paid little heed to Judge Murphy’s call to action. It was not until 1966 that cannabis-related offences in Canada exceeded 100 for the first time.<sup>36</sup> That cannabis appeared not to be a social problem at all, however, did not prevent Parliament from banning it.

### **From Prohibition to the Present: A Brief Cannabis Chronology**

The framework for the criminalization of cannabis was contained in the Opium and Narcotic Act of 1908 (the “Opium Act”). Principally concerned with combating the use of opium, this legislation was the first piece of Canadian law directed at the personal use of drugs for essentially recreational purposes. The Opium Act’s chief proponent was then-Deputy of Labour (and soon to be Prime Minister) Mackenzie King.

Subsequent to witnessing a race riot following an anti-Chinese demonstration, King returned to Parliament determined to put an end to

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<sup>32</sup> *Id* at p. 332.

<sup>33</sup> *Id* at p. 333.

<sup>34</sup> *Id* at p. 337.

<sup>35</sup> *See*, Le Dain Report at p. 230.

<sup>36</sup> “*Canadian Cannabis Chronology*” The Calgary Herald, March 7, 2004.

opium use.<sup>37</sup> At the time, opium traffic was a major international issue because of China's efforts to stamp out its internal trade and the United States' desire to establish beneficial trade relations with that nation. Moreover, anti-Chinese racism had a strong hold in North America following the influx of cheap labor used to build, predominately, railroads.

Cannabis, however, did not appear in the original Opium Act. In Canada, this is likely because cannabis use for recreational purposes was relatively rare – except if one considers the taking of tinctures or cannabis candies in folk medicines designed to “increase vitality” as recreational use. In any event, for our purposes it is sufficient to note that, while cannabis was not part of the Opium Act, that legislation “still today forms the basis for Canadian legislation on drugs; the amendments that were made later would apply solely to the process of enforcing the laws and the number of drugs involved.”<sup>38</sup>

The Opium Act was amended in 1923 to include cannabis, codeine and heroin. The inclusion of cannabis took place without any substantive discussion in Parliament. Some theorize that the inclusion of cannabis in the schedule of prohibited drugs was prompted by Judge Emily Murphy's

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<sup>37</sup> Ironically, in his second term as Prime Minister King would become involved in a customs scandal involving bribes and the illegal traffic in alcohol during prohibition in the United States. This scandal led to King requesting the governor-general dissolve Parliament; a request that was refused, prompting King's resignation (and eventual re-election).

<sup>38</sup> BEAUCHESNE, L. (1988). *L'origine des lois canadiennes sur les drogues, L'usage des drogues et la toxicomanie*, edited by P. Brisson, Boucherville: Gaétan Morin éditeur, 126-136; cited in Dion, Guy “The Structure of Drug Prohibition in International Law and Canadian Law” available online at <http://www.parl.gc.ca/37/1/parlbus/commbus/senate/Com-e/ille-e/Presentation-e/dion-e.htm>.

hysterical writings in *The Black Candle*. According to the Le Dain

Commission:

...the decision was made without any obvious scientific justification or even any real awareness of a social problem, to place cannabis, as the Act is worded on the same level as opiate drugs such as heroin, and this is why it has been included in legislation ever since then.<sup>39</sup>

Indeed, a review of drafts of the schedule of prohibited drugs to be added reveals several copies that do not contain any reference to cannabis, with one carbon copy onto which “Cannabis Indica (Indian Hemp) or Hasheesh” had been typed.<sup>40</sup> A mere clerical act may have begun Canada’s prohibition of cannabis.<sup>41</sup>

As noted above, the first confiscation of cannabis cigarettes came in 1932. A decade after prohibition, police began to very slowly take up Judge Murphy’s admonition to beware the “extraordinary menace” posed by the cannabis plant. And, as we will see, early rhetoric about those at primary risk from the “menace” – youth – began a theme that continues through the present day.

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<sup>39</sup> “*Cannabis*”, A Report of the Commission of Inquiry into the Non-Medical Use of Drugs, 1972 [Le Dain Report]. This Commission is most commonly referred to as the Le Dain Commission, after its Chair, Gerald Le Dain.

<sup>40</sup> Giffen, Endicott and Lambert, *Panic and Indifference: The Politics of Canada's Drug Laws* (Canadian Centre on Substance Abuse, 1991), p. 179.

<sup>41</sup> Curiously, even nine years later, Parliamentarians appear to have been ignorant of the existence of the prohibition. Giffen recounts an exchange between members, including the Minister of Health, coming during a debate on adding preparations containing cannabis sativa to the list of permissible over-the-counter medications. Reference is made by the Minister of Health to sativas relationship with “hashish” yet the Minister goes on to add that “[t]here is no objection to the use of it, and therefore permission will hereby be granted for its use.” Giffen at p. 182.

Apparently, and unsurprisingly, given youthful curiosity, those deemed to be at most risk from the cannabis menace were Canada's young. Early newspaper accounts describe the peddling of "marijuana cigarettes" in night clubs, cabarets and dance halls frequented by young people. Finally, in the late 1930's – a time when the United States was deeply embroiled in proliferating "reefer madness" – cannabis hit the Canadian media.

The *Toronto Daily Star* headline said it all: "Marijuana Smokers Seized with Sudden Urge to Kill" and went on to describe the "menace" posed by the cross-border trade in the plant. This publicity came at a time when Parliament was debating the inclusion of cannabis cultivation as a criminal offence – Canada's first substantive legislative discussion about cannabis policy.

In general, Giffen suggests, the "tone of the debate was generally supportive of the amendment to make cultivation of marijuana an offence."<sup>42</sup> US propaganda about cannabis undoubtedly influenced Canadian policy – an early indication of a trend that persists today. Members of Parliament expressed concern over reports that marijuana was the "assassin of youth" a term made popular by US prohibitionist and propagandist extraordinaire, Harry J. Anslinger.<sup>43</sup> The preeminent role of youth in debates around cannabis policy is a theme that continues through the present day.

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<sup>42</sup> Giffen at p. 185.

<sup>43</sup> *Id.*

Notably, the political response to this supposed assassin of youth was to continue proposing the use of the criminal law as the primary, or sole, tool of control – this despite that law enforcement appeared either uninterested or unwilling to make arrests for cannabis.<sup>44</sup> Suggestions for an educational campaign were rejected out of hand.<sup>45</sup> The attitude, then as now, was tinged with war mentality, with *Macleans Magazine* suggesting that as a result of the legislation, “Canada is now prepared to fight this latent drug menace to a finish.”<sup>46</sup>

If it was a war, it was one that would claim few casualties early but many over its history. And it was one that was doomed to failure. However, despite early doomsday prognostications, the marijuana menace appeared to pose little threat to Canadian society. Indeed, substantial numbers of Canadians didn’t begin to use cannabis until the late 1960’s.<sup>47</sup>

The late 1960’s and early 1970’s were times of fairly turbulent social change. Cannabis became, in many ways, a symbol of youth and youthful freedom. If the menace of cannabis was that it made young people enjoy growing their hair, spending time in parks listening to music and actively participating in debates over social issues, the menace reached a zenith during the hippie era. And it was against this backdrop that Canada’s

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<sup>44</sup> By the end of 1938, there had only been 8 total arrests for cannabis. See, Giffen at Appendix 6.

<sup>45</sup> Giffen at p. 185.

<sup>46</sup> Mosher, Jack, “Look Out for Mary Jane” *Macleans Magazine* 51 (12) June 1938, beginning at p. 11; *quoted in* Giffen at p. 185.

<sup>47</sup> Le Dain Report at pp. 187 – 188.

government undertook its first extremely comprehensive review of cannabis use and policy – the inquiry of the Le Dain Commission.

Between the time of Le Dain and the next government foray into cannabis policy – which occurred in 1979 – use continued to grow. Canada’s approach of prohibition and enforcement using the criminal law did not change. Momentum for reform had been growing throughout the decade and the Department, like the Le Dain Commission, recommended that reforms be made. Shortly thereafter, however, Nancy Reagan launched her “Just Say No” campaign in the United States and the politicians took the message to heart, saying no to any change in cannabis policy in Canada.

Reforms would continue to be debated, but no substantial progress occurred in the 1980’s. The status quo had considerable force, having outlasted the convincing findings and conclusions of the Le Dain Report and the Department of National Health and Welfare. Cannabis prohibition, it seemed, was becoming ingrained in Canadian policy. This virtual deadlock would last until the mid-1990s, when three judicial challenges to prohibition began their path to Canada’s Supreme Court. Relying on the *Charter*, these court battles sought to define the limits of the criminal law and prove the invalidity of cannabis prohibition.

While the recreational-use cases made their way through the system, the governing legislation was changed once – from the *Narcotic Control Act* to the *Controlled Drugs and Substances Act*. Medical users also began turning

to the courts for relief, with ramifications that extended far beyond therapeutic cannabis use. Indeed, for a brief time in 2003, cannabis possession was entirely legal. This period was aptly-named the “Summer of Legalization” by activists.

Meanwhile, the federal government undertook two studies; an exhaustive Special Senate Committee investigation into cannabis and a less robust inquiry by a special committee of the House of Commons.

While the Senate ultimately recommended legalizing cannabis – removing the criminal aspects entirely and establishing a regulated marketplace – the House determined that decriminalization – best understood as imposing fines in lieu of prison sentences for certain cannabis offences – was a more apt, and more manageable, alternative. Ultimately the governing Liberal party submitted legislation that established a system of fines for possession of small quantities, and cultivation of three or less plants, and dramatically ramped up penalties for other cultivation and trafficking offences. This legislation has yet to be implemented and, it appears, may never be. Once again, despite overwhelming evidence that change is needed, prohibition remains the status quo.

## **Conclusion**

The history of cannabis use is long. From dimly recorded origins as a major agricultural product, through discovery of the medical benefits and psychoactive effects, cannabis has attracted a myriad of devotees and

detractors. Historical accounts, of varying degrees of credulity, abound. Then, as now, sharp differences of opinion existed. Some claim cannabis to be a beneficial plant with little or no harmful effects. Other demonize the weed, attributing to it effects ranging from dementia to uncontrollable violence.

Unfortunately, these exaggerated accounts have, at times, made rational discussion of cannabis difficult. Even the linguistic origins of terms used for cannabis become rhetorical battlefields. For example, it is often assumed that the word “hasheesh” is a derivative of “hashashin” – assassins that fortified themselves by using the drug prior to killing their enemies.

Booth, among others, refutes this tale, claiming that:

So it was that, gradually, by association with the Assassins, about whom little was really known and who had been inaccurately tarred with a barbarous brush by their enemies, hashish came to be considered a drug capable of generating bedlam, undermining society, creating chaos and turning otherwise merciful men into merciless murderers. And this grossly erroneous myth has been perpetuated ever since, right up to the modern day, by those who would proscribe or prohibit anything to do with cannabis.<sup>48</sup>

Why the hyperbole and exaggeration by those who would prohibit cannabis? Perhaps it is because the plant itself presents little to be feared. It is generally accepted that moderate cannabis use among healthy adults poses little or no risk of physical, emotional or psychological harm. Cannabis is not physically addictive and it is not possible to ingest a lethal dose. Even

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<sup>48</sup> Booth at p. 55.

the fearsome experiences recounted by early dabblers, such as Taylor, lasted only a few hours and produced no long-lasting negative effects. Most recreational users report varying levels of euphoria – the typical effect associated with the plant. With so little to fear, cannabis prohibition initially needed to rest on other than factual underpinnings. Unfortunately, it still does. And, despite years of calls to reform, little or no change in Canada’s social policy of prohibition of cannabis has occurred since its inception.

In this chapter, I have provided a brief overview of cannabis use and prohibition. The account could not be, and was not intended to be, exhaustive. However, it sets the stage for the remainder of the paper, in which I describe the progress of cannabis policy in Canada through the lens of governmental inquiries and the courts. Certain key themes recur throughout this history. Some, such as the spectre of cannabis as the assassin of youth and the static nature of the debate about cannabis policy, have already been presented. Special attention will hereafter be paid to those that persist through the present day.

## CHAPTER II

### REPORTS FROM STATE: GOVERNMENT INQUIRIES INTO CANNABIS

#### Introduction

As we saw earlier, it was not until 1966 that cannabis arrests exceeded 100 annually – 112 to be precise. After reaching that mark, however, enforcement of cannabis prohibition grew exponentially.<sup>49</sup> The number of arrests quadrupled in 1967 (447 total) and doubled that in 1968 (817 total). By 1972, over 10,000 Canadians were arrested annually (10,695 total in 1972).<sup>50</sup> This number would continue to grow reaching 47,234 in 1996 and skyrocketing to 70,624 by 2001.<sup>51 52</sup> Overall, cannabis offences have consistently made up approximately 70% of all drug crimes in Canada over the last decade. Most of the arrests are for possession. The fight against cannabis, whether purposefully or out of practicality, is not being waged against large dealers and organized criminals; it is being directed at users.<sup>53</sup>

Perhaps because cannabis is the most enforced drug crime, and perhaps because of the fact that use of cannabis among the otherwise-law-abiding population is widespread, it has attracted considerable attention

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<sup>49</sup> Undoubtedly, the rise in arrests correlates with a sharp increase in use – or, at least, perceived levels of use.

<sup>50</sup> Giffen at Appendix 6, *citing* Bureau of Dangerous Drugs, Health Protection Branch, Health and Welfare Canada statistics from 9/3/1973.

<sup>51</sup> R. Logan, “Crime Statistics in Canada, 2000,” *Juristat*, Statistics Canada, Canadian Centre for Justice Statistics, 85-002-xie, Vol. 21, No. 8, 2001, p. 11.

<sup>52</sup> <http://www.statecan.ca/Daily/English/020717/d020717b.htm>.

<sup>53</sup> This fact is worth noting because much of today’s anti-cannabis rhetoric involves complaints about organized crime, “dangerous” commercial grow operations and large scale traffickers.

from government. This chapter addresses four government inquiries. I begin with an analysis of *Cannabis*, the report the Le Dain Commission. This comprehensive study, completed in 1972, remains one of the most in-depth analyses of cannabis and cannabis policy ever conducted in Canada. The Le Dain Commission recommended reform.

Following the discussion of the Le Dain Report, I review a little-known, but fairly detailed 1979 report of the Health Protection Branch of the Department of National Health and Welfare. This paper, titled “*Cannabis Control Policy: A Discussion Paper*” arose out of a directive to prepare a major Cabinet briefing in advance of “a major shift in cannabis control policy.”<sup>54</sup> The National Health Report was, at the time, a “systematic review of the medical, social-scientific and legal aspects of cannabis use.”<sup>55</sup> The National Health Report recommended reform.

Next, I move to an analysis of the report of the Senate Special Committee, finalized in September, 2002. This report built upon the work done by the Le Dain Commission. It also incorporated the current state of the knowledge about cannabis – combined with an additional 30 years of futile efforts at criminal prohibition – and is the most recent comprehensive account of the ramifications of cannabis use, policy and law enforcement in Canada. The Senate Report recommended reform.

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<sup>54</sup> *Cannabis Control Policy: A Discussion Paper*, 1979 report of the Health Protection Branch of the Department of National Health and Welfare [National Health Report] (from the 1998 foreword by Mike Bryan, the policy analyst who coordinated the preparation of the brief).

<sup>55</sup> *Id* at p. 1.

Shortly after the Senate issued its report, the House of Commons tabled a report titled “Policy for the New Millennium: Working Together to Redefine Canada’s Drug Strategy.” Despite its august title and the fact that cannabis reform was before the House, this document contains little substantive analysis of cannabis policy. It is included, however, because it is the most recent study conducted by our *elected* officials on the issue of cannabis policy in Canada. Like its predecessors, the House Report recommended reform.

These four governmental reports are not the only times cannabis has been studied at the federal level. For example, the Special Senate Committee on the Traffic in Narcotic Drugs reported, in 1955, that “[m]arijuana is not a drug commonly used for addiction in Canada....No problem exists in Canada at present in regard to this particular drug....”<sup>56</sup> The reports described in this chapter, however, can be said to be the most comprehensive Canadian government inquiries dealing directly with the issue of cannabis policy. They represent nearly thirty-five years of study and calls for reform – none of which have ever been implemented.

## **The Le Dain Commission**

### **Introduction**

In 1972, the Le Dain Commission tabled a report titled, simply, *Cannabis*. This 400-page document was a part of an overall inquiry into non-

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<sup>56</sup> The Senate of Canada: Proceedings of the Special Committee on the Traffic in Narcotic Drugs in Canada, 1955 at p. xii., *cited in* Le Dain Report at p. 230.

medical drug use in Canada and, at the time, was the most comprehensive government inquiry into cannabis ever undertaken. The Commission relied on information provided by scientists and other experts, but also took into account the “opinions, attitudes and experience” of ordinary Canadians from all parts of the country.<sup>57</sup>

This canvassing of the citizen attitudes proved to be comprehensive. The Commission held 46 days of public hearings, took 365 submissions, visited 27 cities and 23 university campuses, received 500 letters and estimated that 12,000 Canadians directly participated in the process.<sup>58</sup> In addition to public input, the Commission gathered a library of over 2,600 documents – published and unpublished papers – dealing directly with the various aspects of cannabis. And these 2,600 documents were only those that the Commission “felt necessary to acquire for further study.”<sup>59</sup> The members of the commission reviewed many more than these.

In a bit of irony, one of the first things said by the Commission was that “[i]n the past decade, the controversy surrounding cannabis in North America has reached epidemic proportions.”<sup>60</sup> According to the Commission, “[a]lleged authorities have taken diametrically opposed positions regarding the drug, not only on moral and social policy issues, but on the supposedly

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<sup>57</sup> Le Dain Report at p. 4.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> Le Dain Report at p. 15. These words could apply to every decade since.

hard scientific facts as well.<sup>61</sup> This polarization is an important theme that continues to permeate Canadian cannabis policy.

By polarization, I mean that the debate over prohibition often appears to exist irrespective of the state of knowledge about the use and effects of cannabis. Government reports do not seem to be able to influence legislative policy. Even if the evidence was unclear in 1972 – itself a questionable proposition, given the thousands-of-years of human use – it certainly cannot be the case today. Yet prohibition-supporting authority figures, such as law enforcement officials and Parliamentarians, continue to cling to arguments that have long-since been refuted in support of the status quo.

Indeed, the Commission noted that, despite a lack of hard and fast scientific knowledge, the then-major government reports into cannabis came to “surprisingly similar conclusions” about the “use and effects of cannabis.” The effect of these findings on government policy had “generally been limited.”<sup>62</sup> Perhaps a prescient statement, given that *Cannabis* itself would have little or no impact on cannabis policy.

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<sup>61</sup> *Id.*

<sup>62</sup> Le Dain Report at p. 16. The reports cited by the Commission: “include the British Indian Hemp Drugs Commission Report (1893-4); Mayor La Guardia's report on The Marihuana Problem in The City of New York (1944); the South African Dagga Report (1952); the United States President's Commission on Law Enforcement and Administration of Justice Task Force Report: Narcotics and Drug Abuse (1967);... the British Advisory Committee on Drug Dependence Cannabis (1968), a report prepared under the chairmanship of the Baroness Wootton of Abinger; our own Interim Report o the Commission of Inquiry Into the Non-Medical Use of Drugs (1967); the Swedish Government's official investigations on The Narcotic Problem: Part III, Coordinated Measures (1964); the First Report of the Board of Health Committee on Drug Dependency and Drug Abuse in New Zealand (1970);411 the United States Department of Health, Education, and Welfare report Marihuana and Health (1971);611 the Australian Drug Trafficking and Drug Abuse report (1971);14 and the World Health Organization technical report on The Use of Cannabis (1971).”

Ultimately, the Commission set out three separate conclusions. Three of the five members joined the majority opinion, and the remaining two wrote separate conclusions. All agreed, in the main, with the findings of fact made by the majority. One member thought that the majority's reforms did not go far enough, and one thought that they went too far. Only the majority conclusion will be addressed in this paper.

In short, the majority determined that the principal criterion for developing social policy was harm.<sup>63</sup> It concluded that the prohibition on cannabis should be reformed. The suggested reform was to “repeal the prohibition against the simple possession of cannabis” and to remove any punishment for cultivation, unless it was for the purpose of sale. Trafficking, importing and exporting cannabis would remain illegal, but subject to fines or prison terms of less than 5 years maximum.<sup>64</sup> These reforms were never implemented.

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<sup>63</sup> Le Dain Report at p. 265.

<sup>64</sup> Le Dain Report at p. 302.

## Guiding Principles

In the context of analyzing legislative options, the majority discussed whether, in principle, criminal law ought to address itself to non-medical drug use. This discussion focused on the proper role of criminal law in society and began with an explanation of the harm principle articulated most clearly by John Stuart Mill.<sup>65</sup>

The majorities' analysis of Mill does no favors to those who argue that the harm principle prevents government from using the criminal law to regulate cannabis use. While recognizing freedom as a central tenet of Mill's view, the majority questioned whether this requires a non-prohibitory approach. Noting that Mill "took it to be obvious that the principle, that the state does not have the right to interfere with an individual in order to prevent him from causing harm to himself, does not apply to" youth it was unclear how Mill would "propose to allow adults freedom while providing adequate protection for the young."<sup>66</sup>

Ultimately, the majority believed it unhelpful to set theoretical limits on the use of the criminal law. In principle, the criminal law "may be properly applied...to restrict the availability of harmful substances, to prevent a person from causing harm to himself or to others by the use of such

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<sup>65</sup> The harm principle is discussed in greater detail below, within the context of the analysis of the Senate Report and, again, in the review of the Supreme Court *Charter* challenge in Chapter Three. I do not discuss Mill's theories in detail here because the Le Dain Commission ultimately decided that theoretical considerations were not particularly helpful in forming their policy recommendations.

<sup>66</sup> Le Dain Report at pp. 277 – 278.

substances, and to prevent the harm caused to society by such use.”<sup>67</sup> Of course, this description is a form of theoretical limit-setting, but the limits encompass a great deal of state action. In effect, the Commission favored a cost-benefit analysis that balanced the harm arising from the conduct with the harm caused by using the criminal law to deal with the conduct.<sup>68</sup> In order to reach its conclusions, then, the Le Dain Commission conducted a review of the then-existing empirical evidence.

### **Empirical Bases of Cannabis Policy**

The majority asked two key questions: first, whether there was a legitimate social concern about cannabis use and, second, how social policy should address that concern.<sup>69</sup> In evaluating responses to these questions, and despite its rejection of the harm principle, the majority believed that harm should be the guiding criterion.<sup>70</sup> Therefore, the findings of the majority begin with a discussion of the bases of social concern about cannabis use.

Long-term consequences of use were difficult to determine, according to the majority. This was an area that needed further study, including analysis of the development of patterns of use and the results of chronic use in the long term. However, the “short term physical effects of cannabis (apart from those which affect psychomotor activity) are relatively insignificant on

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<sup>67</sup> *Id.* at p. 282. Contrast this explication of principles with that of the Senate in 2002, *infra*.

<sup>68</sup> *Id.* at p. 282 – 283.

<sup>69</sup> *Id.* at p. 265.

<sup>70</sup> *Id.*

normal persons, and there is as yet no evidence of serious long-term physical effects from use at current levels of consumption in North America.”<sup>71</sup>

The Commission thought it reasonable to assume that excessive smoking of cannabis could cause or aggravate bronchial pulmonary disorders, lung cancer and other respiratory diseases. Moreover, it was concerned about possible effects on the human fetus, and thus while there was “no clear evidence of adverse effect” it would be “prudent for women not to use cannabis during pregnancy.”<sup>72</sup> A chief concern, however, was the effect of cannabis use by youth.

The Commission concluded that “the regular use of cannabis by adolescents has, in all probability, a harmful effect on the maturing process and that this should be the chief focus of our social concern.”<sup>73</sup> That the Commission lacked “experimental evidence for this conclusion” has not been an obstacle in the development of this theme.<sup>74</sup> And, despite decades of fairly significant cannabis use, youthful experimentation has yet to blossom into a long-term social problem – though use by youth remains central to the policy discussions today.<sup>75</sup>

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<sup>71</sup> *Id* at p. 267.

<sup>72</sup> *Id.* Note that cannabis use to quell morning sickness or as an analgesic during pregnancy was common in pre-prohibition times. This use appears to be making a small renaissance and recent research has been unable to find any evidence of danger to the fetus.

<sup>73</sup> *Id* at p. 268.

<sup>74</sup> *Id.*

<sup>75</sup> I do not mean to suggest that concerns about youth using cannabis are foolish, or misplaced. Certainly there exists some evidence that high levels of cannabis use by young people has the potential to cause harm. But that potential harm is nothing like the assassin of youth characterization that still finds resonance today and, moreover, the ability of prohibition to affect usage by youth appears negligible.

Another key theme of modern prohibition is next on the majority list of concerns: the effect of cannabis on driving. Here, again, the evidence is muddled. While cannabis does cause some psychomotor effects that may impair the skills associated with driving, it had not been shown to be a significant causal factor in automobile accidents. Moreover, there exist difficulties in effectively determining whether someone is under the influence of cannabis.<sup>76</sup> These difficulties pose problems both for enforcement of the law against impaired driving, and collection of empirical evidence to determine whether a problem exists. The link between cannabis policy and incidents of driving while impaired, however, rests on assumptions that are tenuous at best.<sup>77</sup>

The Commission also expressed concern over the impact of cannabis on the mental health of the user. Included among these mental health issues is the potential that long term cannabis use can “cause serious mental disorders” or that chronic users might be subject to an “amotivational syndrome” that results in “apathy and a loss of goals.”<sup>78</sup> The fear of the lazy stoner would remain a theme of prohibition for many years, despite the

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<sup>76</sup> Le Dain Report at p. 269.

<sup>77</sup> This is because the link rests on assumptions. First, that prohibition deters overall cannabis use. Next, that this presumed decrease in overall use equates to a decrease in the number of driving while impaired incidents. Empirical evidence fails to the first assumption. See, for example, Craig Reinerman, PhD, Peter D. A. Cohen, PhD, and Hendrien L. Kaal, PhD “*The Limited Relevance of Public Policy: Cannabis in Amsterdam and San Francisco*”, *American Journal of Public Health*, 2004;94:836–842.

<sup>78</sup> Le Dain Report at p. 270.

evidence being “inconclusive”<sup>79</sup> at the time of Le Dain and essentially non-existent today.

Finally, the Commission discussed whether cannabis would act as a “stepping stone” that may “lead individuals into a pattern of multiple-drug use.”<sup>80</sup> Rejecting a purely causal theory (cannabis use causes the individual to use other drugs) as too simplistic, based on “faulty logic” and impossible to prove statistically, the majority nevertheless thought it “reasonable to assume that many would not engage in certain kinds of drug use if they did not use cannabis.”<sup>81</sup> This assumption is based on the theory that using cannabis predisposes the user to experiment with other drugs.<sup>82</sup>

In sum, the majority found four “major grounds for social concern” which, because they form a sort of template for the themes of prohibition, are worth recounting in full:

**the probably harmful effect of cannabis on the maturing process** in adolescence; **the implications for safe driving** arising from impairment of cognitive functions and psycho motor abilities, from the additive interaction of cannabis and alcohol and from the difficulties of recognizing or detecting cannabis intoxication; **the possibility**, suggested by reports in other countries and clinical observations on this continent, **that the long term, heavy use of cannabis may result in a significant amount of mental deterioration and disorder**; and **the role played by cannabis in the development and spread of multi-drug**

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<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at p. 271.

<sup>81</sup> *Id.* at p. 271 – 272.

<sup>82</sup> *Id.* at p. 271. It begs the question, however, of whether the individual used cannabis because her personality type predisposed her to drug use in general.

use by stimulating a desire for drug experience and lowering inhibitions about drug experimentation.<sup>83</sup>

These concerns, according to the majority, called for a social policy deigned to “reduce the availability and demand of cannabis as much as possible, if that can be done at an acceptable cost.”<sup>84</sup> Whether the criminal law was the proper tool for achieving this policy goal would depend on effectiveness, cost and the availability of alternate measures.

### **Harms of Prohibition**

Just as the Commission’s discussion of social concerns laid out a framework for prohibitionist arguments, its discussion of the costs of applying the criminal law read like a reformer’s primer. The majority identified ten discrete costs of prohibition:

- (1) the effect of criminal conviction, particularly on young people;
- (2) encouraging the development of an illicit market, with possible involvement of organized crime;
- (3) obliging people to engage in crime or at least to deal with criminal types to supply themselves with the drug;
- (4) exposing people to other, more dangerous, drugs by forcing them to have contact with traffickers who handle a variety of drugs;
- (5) encouraging the development of a deviant subculture;
- (6) undermining the credibility of drug education and, in particular, information about more dangerous drugs;
- (7) the use of extraordinary methods of enforcement;
- (8) creating disrespect for law and law enforcement generally;
- (9) diverting our law enforcement resources from more important tasks; and
- (10)

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<sup>83</sup> *Id* at p. 274 (emphasis supplied).

<sup>84</sup> *Id* at p. 275.

adversely affecting the morale of law enforcement authorities.<sup>85</sup>

As we will see, many of these costs remain key issues in the cannabis policy debate today.

### **Policy Options**

The Commission took a pragmatic approach to the question of whether the criminal law was an effective tool to achieve a reduction in the availability of and demand for cannabis. In the choice between prohibition and some form of administrative regulation (the two alternatives considered by the majority), the major issues “are whether criminal law prohibition exercises a more effective control upon availability and demand, and if so, whether this margin of control justifies the cost of criminal law prohibition in the form of the various adverse effects upon individuals, the law enforcement processes and society generally.”<sup>86</sup>

According to the majority, replacing prohibition with administrative regulations would increase availability to both adults and youth. Citing the example of age restrictions on alcohol as ineffective in preventing widespread use of alcohol by youth, the conclusion that age limits on cannabis would be similarly ineffective was inferred. Prohibition, despite the fact of “widespread availability” at the time of the Le Dain Report, was assumed to

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<sup>85</sup> *Id* at p. 292. The various costs are explored in slightly greater detail by the Commission at pages 292 – 298. The Commission’s chief concern was that these “special costs” of prohibition fall most heavily on youth, an ironic fact given the predominance that prohibitionists place on the theme of protecting youth. The Commission also correctly noted that, while organized crime was not yet heavily involved in the cannabis industry, it was reasonable to assume this would change given the profitability of the illicit market.

<sup>86</sup> *Id* at p. 283.

place some obstacles in the paths of sellers and cultivators, leading to “some limitation on availability.”<sup>87</sup>

The Commission’s optimism about prohibition’s impact on availability did not extend to its effect on demand. Here, the majority expressed that “prohibition against simple possession has a much less significant impact upon demand.”<sup>88</sup> Though the criminal law and the fear of detection appeared to have little deterrent effect, the Commission believed that the mere fact of illegality and the implicit stigmatization of the conduct was a deterrent to some. Absent prohibition, people would be more likely to “try the drug out of curiosity....”<sup>89</sup> This thinking no longer seems supported by empirical evidence.

The Commission was also sensitive to the concept of messaging. Cannabis policy does not begin with a clean slate – a firm prohibitory stand had been taken, and departing from that stand could “give people the impression that there was nothing to fear from cannabis and would encourage the use of it.”<sup>90</sup> The majority did not altogether accept this view, however, because “the present legal characterization of cannabis” as a

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<sup>87</sup> Presciently, the majority noted that domestic cultivation was becoming a greater source of supply to the Canadian market, which was said to potentially have “serious” long-term implications for law enforcement. *Id* at p. 284 – 285. Its assumptions, however, about the impact of prohibition on availability proved not to be quite as accurate as its assessment of the burgeoning domestic cultivation scene.

<sup>88</sup> *Id* at p. 288.

<sup>89</sup> *Id* at p. 290 – 291.

<sup>90</sup> *Id* at p. 291.

harmful drug in the same category as heroin “is simply not believed” by the general public.<sup>91</sup>

Accordingly, the legislative treatment of cannabis was “generally recognized to be erroneous and indefensible” and changes to that policy designed to bring it in line with the facts might “command much more respect and careful attention...lead[ing] people to treat cannabis more seriously, if that is what the facts indicate.”<sup>92</sup> In other words, the message sent by reforming cannabis law may not be the sky-is-falling scenario postulated by some prohibitionists.

Ultimately, however, the majority determined that relaxing the cannabis laws would send a signal that the plant was “less dangerous than official policy had previously given people to understand.”<sup>93</sup> Repealing the prohibition against possession, but leaving in place offences targeting distribution, would act to ameliorate this signal, according to the Commission.<sup>94</sup>

### **Policy Recommendations**

Ultimately, of course, the Commission’s mandate was to make policy recommendations. Recognizing that enforcing the criminal prohibition – particularly against simple possession – resulted in very severe negative

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<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at p. 292.

<sup>93</sup> *Id.* To be sure, cannabis was, and is, less dangerous than official policy indicates.

<sup>94</sup> *Id.*

consequences to youth and overburdened the criminal justice system, the Commission did not believe:

...that the known, probable and possible effects of cannabis, and the marginal effect which a prohibition against simple possession may have on availability, perception of harm, and demand, justify these costs of continuing to attempt to enforce it against greatly increasing numbers of users...[i]t is simple not a feasible policy in the long run.<sup>95</sup>

While doing away with the offence of simple possession, the majority suggested keeping distribution illegal. This was hoped to have the effect of demonstrating the state's concern with cannabis use. Reducing the penalties for distribution, however, was recommended in order to make the law more reasonable. Cultivation would remain punishable if for the purpose of trafficking, but not if the cannabis were grown solely for personal use. Finally, the definition of trafficking would be modified to exempt small, non-commercial exchanges. In sum, the criminal law would no longer concern itself with personal use of cannabis, except on the commercial supply side of the transaction.<sup>96</sup>

Despite the relatively modest nature of the Commission's suggested reforms, none of these recommendations have ever been implemented.

### **Conclusion**

The Le Dain Report was, at the time, the most comprehensive account of cannabis use and policy in Canada. It drew from a multitude of sources

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<sup>95</sup> *Id* at p. 299.

<sup>96</sup> *Id* at p. 301 – 302.

and the best available evidence of the time. In hindsight, the Report can be viewed as providing a roadmap to future debates over cannabis policy.

Prohibitionists cling to some of the themes articulated by the Commission – whether or not they are supportable given the state of today’s knowledge and the lessons of the last three decades. Reformers continue to point at many of the social costs identified by the Commission in their arguments for reform, noting that the situation has worsened in the intervening years. The principal effect, then, of the Commission’s findings was not to prompt legislative reform. The status quo would prove too powerful. Instead, the Le Dain Report set the stage for future discussions about cannabis policy.

## **The Department of National Health and Welfare Report**

### **Introduction**

The National Health Report began with an interesting caveat: stating that defining goals was the job of those “who bear political responsibility for social policy.” Nevertheless, the Department believed that a “primary goal [of cannabis policy] is to minimize the harms resulting from cannabis use and a prohibitory response to such use.”<sup>97</sup> Two global objectives emerged from this approach: (a) minimizing individual and social risks associated with use; and, (b) minimizing the adverse consequences of using the criminal law to deal with cannabis-related conduct.

The Department realized, much like Le Dain, that these goals could appear contradictory. According to it, attempts to minimize health risks by

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<sup>97</sup> National Health Report at p. 2.

ramping up prohibition “*will* exacerbate” the social costs of enforcement. Interestingly, however, the Department was unwilling to be as definitive on the corollary, saying only that minimizing enforcement “*may* result” in increased unhealthy conduct. Nevertheless, the Department’s ultimate goal mirrored that of Le Dain, coming up with a scheme in which the punishment isn’t worse than the crime.<sup>98</sup>

### **Empirical Bases of Cannabis Policy**

The National Health Report contains a consideration of the empirical bases of cannabis control policy. From this analysis, five discrete areas of discussion emerged: “(a) health concerns; (b) safety concerns; (c) the cannabis market; (d) extent of use; and (e) patterns of use.”<sup>99</sup> We will review each of these in turn.

The Department first noted the relative inadequacy of the scientific literature and, as did the Le Dain Commission, bemoaned the lack of objectivity in the debates surrounding cannabis policy. In contrast to the Le Dain Commission’s opinion of the empirical data, however, by 1979 the Department believed that there was “a considerable body of reliable knowledge” about cannabis. In some ways, the National Health Report serves as an answer to certain empirical questions that could not be answered by the Le Dain Commission.

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<sup>98</sup> *Id.* Or, fashioning a “legislative response...designed to avoid a situation where the harm that flow from our cannabis control policy are greater than those attributable to the conduct the policy is intended to curtail.”

<sup>99</sup> *Id.* at p. 3.

Early on, however, we see a narrowing of the focus of the Department's empirical analysis in a statement that foreshadows a key theme of prohibition:

Since there is little evidence of any significant health problems caused by moderate use of cannabis by normal young adults, attention in this review is placed primarily on possible effects of heavy, chronic use, and on use by particular subgroups of Canadian society who may have specific susceptibilities to any potential health problems.<sup>100</sup>

The Department is essentially forced to narrow the focus of the inquiry in order to find something worthy of societal concern. This would give rise to another key theme of prohibition, the paternalistic focus on the protection of the chronic user and/or the vulnerable group.<sup>101</sup>

Despite this narrowed focus, the empirical evidence led the chief medical researcher to conclude that "...general toxicity studies of cannabis and its constituents lead to the inescapable conclusion that it is one of the safest drugs ever studied in this way."<sup>102</sup> Many of the commonly-believed negative effects attributed to cannabis use were examined and essentially rejected. Amotivational syndrome, for example, was "difficult to attribute

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<sup>100</sup> *Id* at p. 4.

<sup>101</sup> The vulnerable groups, to the Department, were pregnant women, diabetics and pubescent boys. Large doses of THC were thought to aggravate diabetes, but no clinical evidence was found. Fears about changes to the male reproductive system also lacked solid empirical support. Finally, one of the key participants in the review, a Dr. Hollister, noted that "...current admonition against using cannabis during pregnancy is based more on ignorance than on definite proof of harm." *Id.*

<sup>102</sup> *Id.*

directly to cannabis” and “little empirical evidence” existed that cannabis use could cause “sociopathic, depressive or schizophrenic states.”<sup>103</sup>

In sum, the Department concluded that major health concerns had not “readily appeared in either field studies or clinical practice...”<sup>104</sup> Just like that, the Department brushed aside two of the key concerns (physical and mental health) that figured prominently into the Le Dain Commission’s analysis.

After discussing health issues, the Department moved to a consideration of safety. This involved, primarily, a consideration of driving under the influence of cannabis. The report makes a clear philosophical delineation here, pointing out that “direct ‘harm to others’ describes” a class of acts that all legal philosophies agree can be regulated by using the criminal law power, thus the increased attention to that particular concern.<sup>105</sup> The tone of the report is cautionary, though no direct conclusions as to the dangers of driving while high are reached.

The next concern, a discussion of the cannabis market, begins with a statement that could easily hold true each year since: “[d]espite intensive efforts to eradicate the cannabis trade, marijuana, hashish and hash oil are probably more readily available now than at any other time in Canadian history.”<sup>106</sup> This, despite that “[d]uring the last ten years, Canadian law

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<sup>103</sup> *Id* at p. 6.

<sup>104</sup> *Id.*

<sup>105</sup> *Id* at p. 8.

<sup>106</sup> *Id* at p. 10.

enforcement resources devoted to cannabis have probably increased twentyfold.”<sup>107</sup> The Canadian experience, according to the Department, “strongly suggests that the Canadian cannabis market is largely immune to increasing arrests, raids, and other law enforcement methods.”<sup>108</sup> The impotence of prohibition had been revealed, contrasting with a key assumption of the Le Dain Commission – that prohibition had some non-negligible ability to affect availability.

But would the Department find that prohibition had impacted usage rates?<sup>109</sup> After all, a strategy that targets the end-user of the product should be expected to have some impact on consumer demand. Even the Le Dain Commission, which had expressed doubt over prohibition’s ability to impact demand, believed that the stigmatizing effects of criminality would dissuade some use. And demand had changed in the years since the Le Dain Commission sponsored the first nationwide survey of cannabis use (which found that 3.4% of the population had “ever used” cannabis in 1970). In fact, use had apparently skyrocketed with “just over 17%” of the population – or 2,750,000 Canadians – having reported ever using the plant.<sup>110</sup> This represented an increase of over 500% among the adult population.

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<sup>107</sup> *Id.* This heavy enforcement “increased cannabis arrests by more than 1000 percent” with “no significant increase in the price of cannabis...no sustained shortages of marijuana, and only temporary regional shortages of hashish.”

<sup>108</sup> *Id.* at p. 12.

<sup>109</sup> Or, in the Le Dain Commission’s terminology, demand.

<sup>110</sup> *Id.*

But what of protecting Canada's youth – one of the themes of prohibition and a matter of central importance to the Le Dain Commission? Use of the criminal law appears to have been unsuccessful in curbing youthful experimentation in cannabis. Statistics in this area were not as readily available, but the Department gleaned enough to conclude that “this decade has, indeed, seen a dramatic increase in cannabis use by teenagers.”<sup>111</sup> Certainly much of the increase in use is explainable by sociological phenomena – it is not seriously suggested that prohibition *causes* increased overall societal use – but clearly prohibition had not achieved much in the way of reducing either supply of or demand for cannabis in the years since Le Dain.

The National Health Report concluded its discussion of the empirical evidence surrounding cannabis use by suggesting that, while the full ramifications of use patterns in Canada required “further research and the passage of several more years” the marijuana menace was more fanciful than real:

One might postulate...that we have already passed through the period in which the most, at least short-term, consequences of cannabis use could have been expected to reveal themselves....However, remarkably few “victims” of cannabis use have emerged over the past fifteen years....Despite the widespread availability of cannabis...the majority of users maintain casual or

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<sup>111</sup> *Id* at p. 13. In fact, the NHR cites statistics from Vancouver secondary school students suggesting that the rate of increase amongst teens mirrored that of adults at approximately 500% (from 8% reporting that they had ever tried cannabis in 1970 to 47% reporting use in 1978).

occasional patterns of use. Bearing these considerations in mind, perhaps we can anticipate future dissemination of cannabis use in Canada with cautious reserve, but with minimal trepidation.<sup>112</sup>

In other words, increased use – assuming it occurred – was not to be overly feared.

### **Harms of Prohibition**

The next section dealt with the empirical research into the effects of prohibition, or, as the Department put it, “our present response to cannabis use.”<sup>113</sup> Several consequences, predominately negative, were discussed. So, for example, the Department was concerned about then-existing special powers of arrest, search and seizure for drug offences under the *Narcotic Control Act*,<sup>114</sup> as well as the use of “unorthodox” investigation tactics such as “wiretaps, paid informants, undercover agents, entrapment, trained dogs, strip-searches and massive surprise raids...[that have] been criticized as bringing the administration of criminal justice and the police into disrepute.”<sup>115</sup>

Another consequence, and one that continues to be a hot-button topic today, is the potentially significant punitive consequences of a criminal

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<sup>112</sup> *Id* at p. 15.

<sup>113</sup> *Id.*

<sup>114</sup> For example, the NCA allowed the issuance of *writs of assistance* which were, essentially, general warrants issued to police officers that allowed them to search any dwelling-house in which they reasonably believed drugs to be present. In particular, the Department expressed concern that “a large measure of our freedom has been surrendered on the assumption that it has been offset by effective enforcement. Unfortunatley, the assumption appears unwarranted...” *Id* at p. 17.

<sup>115</sup> *Id* at p. 25. Of course, today these tactics are far from unorthodox. They have become the norm.

conviction and record.<sup>116</sup> This, of course, had been identified by the Le Dain Commission as the most serious social cost of cannabis prohibition in that report's list of ten such consequences.<sup>117</sup> The National Health Report noted that “[a]dditional social costs include the provision of an economic base for organized crime, health risks flowing from the consumption of unregulated, herbicide-contaminated products, the inhibition of research into therapeutic uses of cannabis, the erosion of civil liberties, and the criminal socialization of young persons through custodial sentences.”<sup>118</sup> Many of these costs are “a product of our current approach to non-medical drug use in general and cannabis in particular.”<sup>119</sup>

### **Policy Options**

So, what did the Department suggest be done about the cannabis situation? It sought a solution that best achieved the overall objectives of minimizing the consequences of use and prohibition or, in today's terminology, harm reduction. Noting that use of the criminal law was extreme, the National Health Report criticized a “blanket prohibition” because doing so “criminalized some relatively inoffensive conduct and tens of thousands of otherwise law-abiding persons; yet we have failed to effectively address those public health matters of genuine concern.”<sup>120</sup>

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<sup>116</sup> *Id* at pp. 22 – 25.

<sup>117</sup> For a complete list of the ten social costs identified by the Commission, see page 36, *supra*.

<sup>118</sup> *Id* at p. 30.

<sup>119</sup> *Id* at p. 32.

<sup>120</sup> *Id* at p. 34.

Having rejected the status quo, the Department addressed messaging. According to the Department, *prohibition* sent the wrong message (that cannabis use is “*per se...a hazardous activity....*”) and therefore undermined the credibility of the criminal justice system particularly among Canadian youth.<sup>121</sup> By contrast, today’s theme is that *reform* would send the wrong message.<sup>122</sup>

In addition, the National Health Report noted that the public had already been given the incorrect message that police concentrate on traffickers, not those simply in possession, and that the consequences of possession convictions are minor and easily expunged.<sup>123</sup> Today, political rhetoric resounds with calls to crack down on the organized criminals and warnings that major trafficking and cultivation gangs dominate the industry, yet possession still accounts for most arrests and convictions.

The Department believed that reform necessary and, moreover, that reform would send the right message to the Canadian public. It remains to be seen only what shape that recommended reform would take.

### **Policy Recommendations**

The Department began by defining terms. Legalization (licit commercial distribution) and prohibition are easily understood as the opposite ends of the spectrum. In the middle lie a series of potential options that the Department lumped together as some form of the amorphous

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<sup>121</sup> *Id* at p. 35.

<sup>122</sup> This was also a concern of the Le Dain Commission.

<sup>123</sup> *Id* at pp. 35 – 36.

“decriminalization” of cannabis. In total, the National Health Report lists eight models of control, some of which were based on earlier, proposed, pieces of cannabis reform legislation.<sup>124</sup>

Only four of the options warranted consideration. Prohibition was rejected for its lack of public support and “disproportionately punitive approach....”<sup>125</sup> One of the prior legislative models was dismissed. Federal withdrawal from the area of cannabis policy was deemed impossible, along with legalization – which, according to the Department, would necessitate ceding control over cannabis to the provinces.<sup>126</sup> Moreover, legalization would require altering or withdrawing from international obligations and was assumed to “lead to increased consumption....”<sup>127</sup>

Two preferred options existed. These were *dispensation* (treating cannabis possession as a crime, but providing for procedures to remove the collateral consequences of a conviction) and *depenalization* (possession is not treated as a crime).<sup>128</sup> Of the two, the Department concluded that depenalization, taking the form of a semi-prohibition, was the best option.

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<sup>124</sup> *Id* at p. 47 – 56.

<sup>125</sup> *Id* at p. 56.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* The assumption about a rise in use is less supportable today.

<sup>128</sup> *Id* at pp. 51 – 55, 57. Ironically, *depenalization* is a term that was more recently used to describe the effects of “decriminalization” legislation proposed in 2003, because that legislation *retained* the criminal offence of possession but punished it by imposition of a fine only.

This model was “founded on the fundamental distinction between consumption-related and commercial conduct.”<sup>129</sup>

Semi-prohibition would “eliminate[e] the offence of simple possession...while retaining general confiscatory provisions and strict sanctions for commercial activities.”<sup>130</sup> The model employed a “buffer zone” concept, in which possession of a certain quantity or less (30 grams) would not be a crime; possession of amounts in the buffer zone (30 to 120 grams) would be an offence only if the Crown were able to prove an intent to traffic; and possession of over the upper limit of the buffer zone (120+ grams) would be a crime but the accused would be given a chance to prove that the possession was not for the purpose of trafficking. In all cases, the cannabis would be confiscated.<sup>131</sup> This was called a “uniquely Canadian” alternative.<sup>132</sup>

### **Conclusion**

The National Health Report was yet another call for substantial reform in cannabis policy. And it was a call that went unheeded, despite the promise of substantial reform being in the works. This may have been because, globally, or more precisely, in the United States, a sea change in political attitudes toward drug use in general, and cannabis in particular, was underway. Jimmy Carter, the President of the United States, had

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<sup>129</sup> *Id* at p. 52. The Department did not explain how consumption could be disconnected from the commercial market.

<sup>130</sup> *Id* at p. 52 – 53.

<sup>131</sup> *Id* at p. 53.

<sup>132</sup> *Id* at p. 54. Notably, this option was similar to that proposed by the Le Dain Commission.

proposed decriminalizing cannabis in the late 1970s but his inability to successfully resolve a hostage crisis in Iran led to the election of Ronald Reagan in 1980. Shortly thereafter, Nancy Reagan launched the “Just Say No” campaign and any thought of real reform dissipated. It would be many years until Canada next grappled substantively with the issue of cannabis use and policy.

## **The Senate Special Committee Report**

### **Introduction**

In March, 2001, the Senate Special Committee on Illegal Drugs was struck, with a mandate to examine:

- the approach taken by Canada to cannabis, its preparations, derivatives and similar synthetic preparations, in context;
- the effectiveness of this approach, the means used to implement it and the monitoring of its application;
- the social and health impacts of cannabis and the possible consequences of different policies;<sup>133</sup>

The Senate Committee studied cannabis policy for 18 months, issuing its report in September, 2002. Its conclusions were surprising.

Anti-prohibitionists were shocked because, at best, they hoped that the Senate Report would re-emphasize the thirty-year-old conclusions of the Le Dain Commission: decriminalization of personal use. Instead, the Senate Commission went further, concluding that cannabis ought to be legalized and regulated in a manner similar to alcohol: “...the Committee recommends that the Government of Canada amend the *Controlled Drugs and Substances*

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<sup>133</sup> Senate Special Committee on Illegal Drugs, *Cannabis: Summary Report* (“Summary Report”) at 8.

Act to create a criminal exemption scheme, under which the production and sale of cannabis would be licensed.”<sup>134</sup>

### **Guiding Principles**

The Senate Committee’s empirical conclusions appear below. First, and critically, the Senate rejected certain philosophical justifications for prohibition that were accepted by the Le Dain Commission (and, by default, by the Department), namely legal paternalism and moralism. Instead, the Committee concluded that:

**The public policy regime we propose expresses the fundamental premise underlying our report: *in a free and democratic society, which recognizes fundamentally but not exclusively the rule of law as the source of normative rules and in which government must promote autonomy as far as possible and therefore make only sparing use of the instruments of constraint, public policy on psychoactive substances must be structured around guiding principles respecting the life, health, security and rights and freedoms of individuals, who, naturally and legitimately, seek their own well-being and development and can recognize the presence, difference and equality of others.***<sup>135</sup>

Three key liberal principles flowing from the philosophy of, among others, John Stuart Mill, appear in this statement. First, the desire for promotion of individual autonomy. Second, the limited role of state coercion. Finally, the need to respect the individual rights and freedoms of Canadian citizens. All three principles are strongly infringed by the prohibition on personal cannabis use.

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<sup>134</sup> Summary Report at 45 – 46.

<sup>135</sup> Summary Report at 7 (emphasis in original). For the consideration of paternalism, moralism and liberalism, *see, generally*, Senate Report Chapter 3.

The Senate Report also explored the empirical evidence surrounding cannabis use but explicitly rejected pure empiricism as a proper basis for formulating criminal policy. Recognizing that drug policy debate often distances itself from the principles underlying the proper role of criminal law, instead turning into a debate about “justifications” (whether a particular exercise of the criminal law is empirically justified), the Committee clarified that its inquiry was concerned with identifying “the criteria that will help us decide in what circumstances society can – or must – turn to criminal law.”<sup>136</sup>

According to the Senate: “**...only offences involving significant direct danger to others should be matters of criminal law.**”<sup>137</sup> This conclusion accords with a version of the harm principle that had been considered and rejected by the Le Dain Commission.

The public policy approach recommended by the Committee is distinctly liberal, and a striking contrast to that previously articulated by the government. It has key liberal features, such as respect for individual autonomy, limited use of state coercion and a harm principle. Specifically, the Senate Committee “...opted for a concept whereby public policy **promotes and supports freedom for individuals and society as a whole ...[t]his concept of the role of the State is based on the principle of autonomy and individual and societal responsibility.**”<sup>138</sup> Flowing from this concept of the proper role of the state is the conclusion that criminal law

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<sup>136</sup> Senate Report at p. 38.

<sup>137</sup> *Id* at p. 45 (emphasis in original).

<sup>138</sup> *Id* at p. 610 (emphasis in original).

has a limited role to play in cannabis policy. In particular, “[a]s far as cannabis is concerned, **only behaviour causing demonstrable harm to others shall be prohibited**: illegal trafficking, selling to minors, impaired driving.”<sup>139</sup>

### **Empirical Bases of Cannabis Policy**

According to the Senate Committee, one reason that the debate over cannabis policy had, in some ways, become divorced from guiding principles was due to the polarization first noted by the Le Dain Commission. The Senate described the dialogue as “both sides hurling their arguments at the other, claiming they are recognized ‘truths’.”<sup>140</sup> Given this situation, the empirical conclusions reached by the Committee are extensive.

As for the potential harm to the users, The Senate Committee stated that:

In total, based on all the data from the research and the testimony heard regarding the effects and consequences of cannabis use, **the Committee concludes that the state of knowledge supports the belief that, for the vast majority of recreational users, cannabis use presents no harmful consequences for physical, psychological or social well-being in either the short or the long term.**<sup>141</sup>

This conclusion confirms that, if the prohibitionist rationale for criminalization is concern for the health of the average user, that concern is

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<sup>139</sup> *Id* at p. 611 (emphasis in original). Indeed, later the Senate Committee makes an even bolder statement – that even if cannabis had demonstrable and significant harmful effects, it would still be questionable whether the criminal law ought to be used to limit those effects. *Id* at p. 615.

<sup>140</sup> *Id* at p. 45.

<sup>141</sup> *Id* at p. 165 (emphasis in original).

misplaced. Accordingly, even those who advocate a paternalistic view of the role of criminal law ought to acknowledge that, with respect to cannabis, the argument is quite weak. In some ways, this acknowledgment is implicit in the modern focus on potential health risks to vulnerable groups.

Prohibitionists also argue that personal use of cannabis has harmful effects on society. Recall that one of the Le Dain Commission’s guiding objectives had been to minimize the social costs of cannabis use. The Senate Committee reviewed the evidence and concluded that, in the case of cannabis “...more than for any other illegal drug, we can safely state that **its criminalization is the principal source of social and economic costs.**”<sup>142</sup>

Indeed, the Senate was even more specific: “**In effect, the main social costs of cannabis are a result of public policy choices, primarily its continued criminalization, while the consequences of its use represent a small fraction of the social costs attributable to the use of illegal drugs.**”<sup>143</sup> In other words, the principal harm to “societal interests” is caused by prohibition.

### **Policy Options**

The Senate began its discussion of policy options by noting that the overemphasis on criminal legislation as the primary, or sole, tool of drug policy was problematic. An overall public health approach was vastly

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<sup>142</sup> *Id* at p. 582 (emphasis in original).

<sup>143</sup> *Id* at p. 435 (emphasis in original).

preferable to “tinkering with criminal legislation.”<sup>144</sup> The emphasis on criminal law was explained as resulting from the fact that most believe, as did the Le Dain Commission, that prohibition had some deterrent effect. The Senate rejected this thinking, concluding that: **“if the aim of public policy is to diminish consumption and supply of drugs, specifically cannabis, all signs indicate complete failure.”**<sup>145</sup>

What, then, did the Senate suggest? Legislation, while perhaps only part of an overall approach to cannabis policy, nevertheless dictates the tenor of that approach. As with the Department of Health, the Senate Committee began its legislative consideration by defining various legislative responses.

According to the Committee, there are only two basic policies: prohibition and legalization. All forms of regulatory control of cannabis fall within these two paradigms. Prohibitionist systems “may be subdivided into criminal and medical prohibition.”<sup>146</sup> In both, the user becomes the subject of paternalism emanating from the physician or the justice system, respectively. Prohibition is conceptually based on the idea that “all use poses a danger to the user and society and must be strictly controlled.”<sup>147</sup> In this sense, decriminalization of use, the reform suggested by the Le Dain Commission and the Department of National Health and Welfare, is merely a form of prohibition and, indeed, is the “worst-case scenario, depriving the State of a

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<sup>144</sup> *Id* at p. 581.

<sup>145</sup> *Id* at p. 590 (emphasis in original).

<sup>146</sup> *Id* at p. 600.

<sup>147</sup> *Id* at p. 601.

regulatory tool...and delivering a rather hypocritical message at the same time.”<sup>148</sup>

The other regulatory system, legalization, also encompasses a range of policy options. In picking one, the Senate recognized that ultimate decision would necessarily be political<sup>149</sup> Moreover, the absence of empirical data on the consequences of legalization made it difficult to choose any particular option, even though public policy decisions in the area of cannabis “are not defined on the basis of scientific knowledge alone.”<sup>150</sup> Nevertheless, the Committee “believe[d] that a **system of regulated access** is most likely to reduce the negative consequences for both users and society.”<sup>151</sup> A regulatory model also best fulfilled the guiding principles of respect for autonomy and limiting the use of the criminal law to situations involving direct harm to others.

### **Policy Recommendations**

The Senate recommended significant and sweeping reform. In particular, the Committee urged the government to create a “criminal exemption scheme for the production and sale of cannabis under the authority of a license.”<sup>152</sup> In other words, a regulatory system much like that employed for alcohol would replace the prohibitory provisions in the CDSA –

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<sup>148</sup> *Id* at pp. 598 – 601.

<sup>149</sup> *Id* at p. 603.

<sup>150</sup> *Id.*

<sup>151</sup> *Id* (emphasis in original).

<sup>152</sup> *Id* at p. 618.

except that the Committee recommended the age limit be sixteen years.<sup>153</sup>

Criminal penalties for activity falling outside the exemption scheme would be retained, as would strict penalties for driving under the influence of cannabis.<sup>154</sup> Otherwise, cannabis would be effectively legalized.

### **Conclusion**

The Senate Report represents Canada's most current comprehensive review of cannabis use and policy. For the first time, a governmental body had recommended the legalization of cannabis. And the evidence supporting its conclusion was substantial. In some respects, the Senate Report was a challenge directed at Canada's elected officials – who just happened to be contemporaneously studying the issue of cannabis reform. What would the House make of the Senate's bold plan? As it turned out, not much – the status quo would prove too strong to overcome.

### **The House of Commons Report**

#### **Introduction**

A Special Committee of the House of Commons also spent eighteen months studying the issue of drugs in Canada.<sup>155</sup> The Commons focus, however, was not restricted to cannabis. Indeed, while it would be inappropriate to denigrate their efforts, it is accurate to describe their

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<sup>153</sup> *Id* at p. 624. Interestingly, the Committee also recommended, without explanation, that existing tobacco companies be barred from producing and selling cannabis. *Id* at p. 618.

<sup>154</sup> *Id* at p. 618 – 620.

<sup>155</sup> Notably, the creation of the Special Committee on Non-Medical Use of Drugs came as the result of a motion by Langley-Abbotsford (BC) MP Randy White, perhaps the most vocal prohibitionist in Parliament.

treatment of cannabis as quite surface-level. This is, perhaps, due to a blend of necessity (MPs are unable to devote as much of their time to one issue as Senators) and political expediency (MPs must ultimately cast votes on legislation and to endorse a report calling for major reforms would force the MP to vote for such change or face difficult questions). The Special Committee tabled its report in December, 2002, just a few months after the Senate reached its conclusions.<sup>156</sup>

The House Report, cover emblazoned with newspaper clippings with typical fearful headlines, contains less than 10 pages discussing cannabis despite an explicit early acknowledgment that “[f]orty-two percent of Grade 10 students reported having used marijuana three or more times in 1998” and data from 1994 concluding that cannabis was “[t]he most commonly used illicit substance [in Canada].”<sup>157</sup> Moreover, the House had expanded the Special Committee’s mandate to include a private member’s bill proposing to decriminalize cannabis.<sup>158</sup>

### **Legislative Options**

Chapter 9 of the House Report deals specifically with cannabis and Parliament’s legislative options. After acknowledging that a wide variety of views – from outright legalization to clamping down on trafficking – were

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<sup>156</sup> *Policy for a New Millennium: Working Together to Redefine Canada’s Drug Strategy*, a Report of the Special Committee on Non-Medical Use of Drugs, 2002 [House Report].

<sup>157</sup> House Report at p. 7.

<sup>158</sup> *Id* at 127. The bill referred to was Bill C-344, proposed by Dr. Keith Martin, Canadian Alliance MP from Esquimalt – Juan de Fuca in 2002.

presented, the Committee defined two key terms; decriminalization and legalization. Essentially, legalization was “the removal of all criminal sanctions prohibiting the production, sale or possession” and decriminalization the “removal of *criminal* sanctions for certain activity while retaining legal prohibitions.”<sup>159</sup>

Arguments in favor of legalization were said include that a “strong majority” of Canadians did not support imposing criminal sanctions – thus leading to general disrespect for the law. The blending of the markets for cannabis and other, more dangerous, drugs was another reason to legalize. Finally, legalization would permit the government to regulate and tax the market, perhaps leading to an “ability to limit access on the basis of age.”<sup>160</sup>

The arguments against legalization tracked common prohibitionist themes. Unsurprisingly, “send[ing] the wrong message by normalizing use, especially for young people” topped the list of two of the “most common” objections.<sup>161</sup> The second fear was of the so-called gateway effect, with an oblique acknowledgement that cannabis itself may not be the gateway, but rather it might contribute to future drug use “...indirectly, through the social milieu and risk-taking aspects of the behaviour.”<sup>162</sup>

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<sup>159</sup> House Report at p. 128 (emphasis in original). Even these definitions are cursory – indeed, the only apparent difference between the definitions is that legalization covers production and sale while decriminalization impliedly does not.

<sup>160</sup> *Id.* at p. 129.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

## **Empirical Conclusions**

The House Report contained little in the way of substantive empirical conclusions. In reference to youth, the Committee was afraid that young people might “misperceive legislation as evidence that Parliament is not concerned about the widespread use of cannabis” and wanted to be clear that “nothing could be further from the truth.”<sup>163</sup> Worries about chronic (“frequent and prolonged”) use were also expressed.<sup>164</sup> Finally, the Committee was “not convinced that legalization accompanied by regulation would remove the profit from illegal production and sale of cannabis or in any significant way discourage criminals currently involved in distribution.”<sup>165</sup>

The House Report does not contain any reasons for this lack of conviction, nor does it seem to recognize that while legalization *might not* remove the criminal element from the market, continued prohibition surely would not do so. Nevertheless, most of “the members of the Committee are persuaded that there is a need to reform the legislation respecting cannabis” because the law is erratically enforced and the penalties disproportionate to the potential harms “associated with personal use.”<sup>166</sup>

## **Policy Recommendations**

Ultimately, the Committee majority suggested the retention of cannabis offences in the Criminal Code, with simple possession only – but not

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<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Id.*

any aspect of trafficking – designated as a contravention and punishable only by a fine.<sup>167</sup> It was willing to accept, also, that “logical consisten[cy]” required some consideration of decriminalization for personal use – perhaps recognizing that removing criminal sanction from one side of a voluntary market transaction while leaving the other criminalized flew in the face of logic.<sup>168</sup>

A final prohibitionist theme made a late appearance in the House Report. Criminal penalties for possession offences in “aggravated” circumstances, such as when “linked to impaired driving offences” should, according to the Committee, continue to be treated criminally.<sup>169</sup> One was beginning to wonder whether the spectre of stoned-out drivers flying down Canada’s roadways was even going to appear in the House Report. If so, it would have been a surprising omission.

The official opposition – headed by Canadian Alliance MP Randy White – issued a supplementary report on marijuana. This four paragraph statement does reference the Senate report in passing – noting that the House Report lacked the detail of the Senate’s findings and admitting that the Committee’s decision was “more political than practical” – but, curiously, makes no mention of the Senate’s conclusions. Instead, the opposition

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<sup>167</sup> *Id* at p. 130.

<sup>168</sup> While reforming the law on personal cultivation is certainly preferable to the current situation, it is far from an ideal way to eliminate individual involvement in the black market. Most users will not grow their own cannabis, just as most people do not brew their own beer, grow their own tobacco or even cultivate their own tomatoes.

<sup>169</sup> *Id* at p. 130.

concluded that the House Report’s omission of detailed recommendations concerning fines, and the suggestion that 30 grams be the amount punishable as a contravention, was evidence that the “committee is disguising its motives and is legalizing marijuana not just to possess but to grow.”<sup>170</sup> This conclusion should surprise anyone advocating for real reform – the House Report’s tepid call for reform is as far from legalizing cannabis as the status quo.

The New Democratic Party also issued a supplementary report, authored by Vancouver East MP Libby Davies. On the issue of cannabis, the NDP “sees decriminalization as only a partial solution” that “leaves intact the other harms associated with our current system of criminal prohibition.”<sup>171</sup> For example, “simply handing a ‘joint’ to a friend” constitutes trafficking under the Criminal Code.<sup>172</sup> The NDP urged the federal government to consider the analysis of the Senate and to “introduce non-criminal and non-punitive regulatory approaches for adult use, as a preferable direction of public policy....”<sup>173</sup>

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<sup>170</sup> *Id.* at p. 173.

<sup>171</sup> *Id.* at p. 182.

<sup>172</sup> *Id.* Those who scoff at the idea that police would charge someone with trafficking as a result of passing a joint should take note that exactly this situation has recently occurred in Canada. On March 24, 2004, Marc Emery, a prominent cannabis activist, was arrested in Saskatoon and charged with trafficking on the basis of allegedly passing joints to fans outside of his hotel room. Emery was kept in jail for three days (the Crown sought a longer stay) and ultimately only released after agreeing to onerous conditions, such as allowing police to conduct warrantless searches of his person at any time.

<sup>173</sup> *Id.*

## **Conclusion**

The House Report, as far as can be determined, relied on three of the central prohibitionist themes to reject legalization, or even substantial reform, as a viable option. It also failed to provide any factual underpinnings or empirical evidence supporting the conclusion that legalization would fail to take the criminal element out of the marketplace. The Senate's conclusions on these various issues, despite being released three months earlier, were not referenced at all in the majority report.

This review of the House Report was critical of the conclusions and the means by which the Committee reached those conclusions. Reliance on discredited gateway theories and vague fears of sending the wrong message is not the way to build coherent public policy. Certainly MPs must be cognizant of political reality, yet the report itself notes that a strong majority of Canadians favor reform. While an appeal for legalization was likely an unrealistic hope, the relatively minor reforms recommended by the Committee – which led to a Liberal-government-sponsored “decriminalization” bill – are too easily susceptible to criticism from prohibitionists and reformers alike.

For example, perhaps there is some reason that legalization would fail to eliminate, or dramatically reduce, the black market. However, the House Report fails to flesh out any such rationale. Similarly, the rejection of the decriminalization of trafficking in amounts destined for personal use is done

in an almost offhand manner. No reasons are provided, and readers are left to guess what might, or might not, be the Committee's thinking on this topic. At the end of the day, the House Report is an unsatisfying and essentially cursory review of cannabis policy in Canada.

## **Conclusion**

At least one thing is clear from the four reports analyzed in this chapter: reform is necessary. While the various committees, and members thereof, differed on the means by which reform should be achieved and the structure of a reformed cannabis environment, the majority of each body looking at the issue recommended some form of reform of our cannabis policies. Unfortunately, despite these repeated calls for reform from government, prohibition remains the status quo.

In the years between the Le Dain Commission Report and the Senate Report, one critical development in Canadian law overshadows all others. This was the enactment of the *Charter of Rights and Freedoms*. Many of the specific protections enshrined in the *Charter* embody a liberal legal philosophy that is focused on protecting the rights of the individual from encroachment by the state. In contrast to the Le Dain Report, and its acceptance of the role of the state, the Senate Report can be seen as a natural product of the way of thinking about criminal law in post-*Charter* Canada. Given parliamentary apathy for cannabis reform, it was only natural that the other major factor influencing cannabis policy in Canada would be the

*Charter.* This influence came in the form of three constitutional challenges to cannabis prohibition, to which we turn in the next chapter.

# CHAPTER III

## IN THE JUDICIAL ARENA

### Introduction

This chapter focuses on a trio of cases challenging cannabis prohibition on *Charter* grounds. Ultimately, the three cases would reach the Supreme Court of Canada, with a decision being rendered on December 23, 2003. The review of these cases has several components. First, I describe the factual background and the decisions of the trial courts that set the stage for the appellate challenges. I then review the arguments made by both sides in the Supreme Court, with consideration of the provincial Court of Appeal decisions intermixed where appropriate. Finally, I analyze the Supreme Court majority opinion, using, where appropriate, the three dissenting Justices' opinions to point out flaws in the majority reasoning.

A principal focus of the chapter is on the harm principle discussed in Chapter Two in the context of the Le Dain Commission and Senate Reports. As it would unfold, the Appellants' arguments were based primarily on whether the harm principle should be considered a principle of fundamental justice for purposes of section 7 of the *Charter*. In this sense, the Supreme Court decision is seen as much more than a decision about cannabis prohibition. Instead, it reflects the current judicial thinking on the proper role of the exercise of the criminal law power.

Another important focus is the structure of the Court’s analysis, and the built-in difficulties that structure would create for the challenge to prohibition. As we will see, the themes of prohibition that permeated Chapter Two’s review of the government’s study of cannabis policy also crept into the judicial arena. These themes would, in a very real sense, inform the entire opinion of the majority rejecting the *Charter* challenge to cannabis prohibition.

### **Where It All Begins**

In 1993 Randy Caine was sitting in a van next to the Pacific Ocean. He was with a friend, and they were smoking a joint. It is doubtful, even after police approached the van, that Caine could have suspected that he would be embarking on a decade-long legal fight to end cannabis prohibition in Canada. Yet, this is where it all began. The police, not surprisingly, smelled the cannabis and Caine produced a “partially smoked cigarette” (a roach, in common parlance) that was later determined to weigh one-half of a gram. Caine was charged with simple possession of marijuana under the prohibition then in force – the *Narcotic Control Act*.<sup>174</sup>

Caine brought a constitutional challenge to the prohibition on simple possession in the Narcotic Control Act. He admitted the facts, but argued that the law violated his rights under section 7 of the *Charter of Rights and Freedoms*. His trial, at which expert testimony on the effects of cannabis was

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<sup>174</sup> *Narcotic Control Act*, R.S.C. 1985, c. N-1 (repealed S.C. 1996, c. 19, s. 94, effective May 14, 1997 (SI/97-47)).

adduced, lasted 12 days – spread out over 15 months. Day one was November 27, 1995 and the final day of argument didn't occur until the last day of January, 1997. The decision itself, delivered – somewhat ironically – on April 20, 1998<sup>175</sup>, was unfavorable to Caine and set the stage for his appeal, ultimately to the Supreme Court of Canada.

While this challenge was underway in B.C., activists further east were also mounting judicial battles. In 1995, Chris Clay operated a store, “The Great Canadian Hemporium” located in London, Ontario. He openly campaigned for legalization of cannabis, hosted a library of cannabis-related literature and sold hemp and cannabis-related products. He also sold small marijuana cuttings and, pertinently, sold some to an undercover police officer on May 17, 1995. When the store was raided the next day, police found marijuana seedlings and close to six grams of dried cannabis. Clay was charged with possession, possession for the purpose of trafficking, trafficking and cultivation offences. Ultimately, however, only the possession charge became the subject of Clay's eventual appeal to the Supreme Court of Canada.

While Caine was awaiting trial in British Columbia, and Clay in Ontario, David Malmo-Levine, another cannabis activist, was busy operating a Vancouver non-profit co-operative association devoted to the reduction of any harms associated with the use of cannabis. The club was raided in

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<sup>175</sup> April 20 can be written as 4-20, a number (420) that signifies cannabis use amongst members of the cannabis culture.

December 1996, just one month before Caine's trial eventually concluded, and police confiscated approximately 10 ounces of marijuana, mostly in pre-rolled joints. Malmo-Levine was charged with possession and with possession for the purpose of trafficking under the *Narcotic Control Act*. He, like Caine, resolved to challenge the constitutionality of the prohibition. Malmo-Levine would represent himself all the way to Canada's highest court.

### **Trial Court Decisions**

Chris Clay was the first. On the 14<sup>th</sup> of August, 1997, Judge McCart of the Ontario Court (General Division) handed down his decision in Clay's constitutional challenge. Clay had been tried over 12 days in April and May, 1997, and had presented extensive evidence. Judge McCart's decision reflected that proof, and set out extensive findings of fact which would be mirrored, almost exactly, in each trial court decision:

1. Consumption of marijuana is relatively harmless compared to the so-called hard drugs and including tobacco and alcohol;
2. There exists no hard evidence demonstrating any irreversible organic or mental damage from the consumption of marijuana;
3. That cannabis does cause alteration of mental functions and as such, it would not be prudent to drive a car while intoxicated;
4. There is no hard evidence that cannabis consumption induces psychoses;
5. Cannabis is not an addictive substance;
6. Marijuana is not criminogenic in that there is no evidence of a causal relationship between cannabis use and criminality;
7. That the consumption of marijuana probably does not lead to "hard drug" use for the vast majority of marijuana consumers, although there

appears to be a statistical relationship between the use of marijuana and a variety of other psychoactive drugs;

8. Marijuana does not make people more aggressive or violent;
9. There have been no recorded deaths from the consumption of marijuana;
10. There is no evidence that marijuana causes amotivational syndrome;
11. Less than 1% of marijuana consumers are daily users;
12. Consumption in so-called "de-criminalized states" does not increase out of proportion to states where there is no de-criminalization.
13. Health related costs of cannabis use are negligible when compared to the costs attributable to tobacco and alcohol consumption.<sup>176</sup>

The Clay trial court continued:

Having said all of this, there was also general consensus among the experts who testified that the consumption of marijuana is not completely harmless. While marijuana may not cause schizophrenia, it may trigger it. Bronchial pulmonary damage is at risk of occurring with heavy use. However, to be fair, there is also general agreement among the experts who testified that moderate use of marijuana causes no physical or psychological harm. Field studies in Greece, Costa Rica and Jamaica generally supported the idea that marijuana was a relatively safe drug - not totally free from potential harm, but unlikely to create serious harm for most individual users or society.

These facts, like the thirteen listed above, would for the most part be accepted at each level of court. In some crucial respects they also mirror the conclusions of the government inquiries into cannabis policy.

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<sup>176</sup> *R v. Clay*, Ontario Court of Justice (General Division) (1997), 9 C.R. (5th) 349, [Clay Trial Court] at ¶25. *See also R. v. Caine*, [1998] B.C.J. No. 885 (QL)(Prov. Ct.).

All three challengers raised *Charter* arguments in the trial courts. These arguments focused, in the main, on deprivations of the section 7 right to life, liberty and security of the person. At trial, none of the arguments prevailed. All three appellants would seek review, Clay in the Ontario Court of Appeal, and Caine and Malmo-Levine in the British Columbia Court of Appeal.

### **The Courts of Appeal**

The respective Court of Appeal decisions were delivered in 2000. In a pair of lengthy analyses (Caine and Malmo-Levine's cases were consolidated for purpose of appeal), the respective appellate courts rejected the *Charter* challenges. One dissenting judge, in British Columbia, would have accepted the challenge and stricken the prohibition.

Though the decisions of the appellate courts are interesting, because the matter was decided by the Supreme Court, a detailed analysis of the Courts of Appeal opinions would be redundant. For our purposes, it is worth noting that the facts found by the trial courts were accepted by the Courts of Appeal and that both appellate courts were willing to accept that the harm principle was a principle of fundamental justice for purposes of section 7 of the *Charter*.<sup>177</sup> Both Courts of Appeal concluded, however, that cannabis use carries enough of a risk of harm – to the

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<sup>177</sup> See *R v. Clay*, (2000) 49 O.R. (3d) 577 [*Clay OCA*] at ¶¶29 – 34. See also *R v. Malmo-Levine*, *R v. Caine*, (2000) 138 B.C.A.C. 218 [*Malmo-Levine BCCA*] at ¶¶18 – 28.

member of the vulnerable group and society in general – to allow Parliament to criminalize the activity.

## **The Supreme Court**

### **The Appellants' Argument**

This section both synthesizes and expands on the Appellants' arguments. I attempt to ground the argument in liberal legal philosophy, particularly in a discussion of the harm principle, mirroring the policy approach advocated by the Senate Committee. The *Charter* argument is confined to Section 7 considerations because they are those that most closely track the themes of prohibition.

Appellants argued that the prohibition against personal use and possession of cannabis (and, in the case of Malmo-Levine, trafficking) violated their rights to liberty and security of the person and, moreover, was inconsistent with the principles of fundamental justice. The reasons that Canadians choose to use cannabis were explored in an effort to demonstrate that the prohibition impacts more than just one's liberty interest in remaining free from imprisonment.

People use cannabis for pleasure. In addition, "...it is clear that the reasons why individuals choose to use marijuana go beyond physical pleasure, and include relaxation, social connection and interaction, enhancement of the senses, enhancement of creativity and enhancement of their perception and appreciation of culture, discovering unusual associations

of ideas, and spirituality.”<sup>178</sup> These are important personal interests that go beyond either the “right to get ‘stoned’”<sup>179</sup> or the simple right not to be incarcerated.

The personal interests engaged by the decision to use cannabis are examples of individual autonomous decision making. As noted above, autonomy and free choice are hallmarks of liberalism. According to Ronald Dworkin, a guiding principle of liberalism is that government should not use its coercive power to impose a conception of how it is best for people to live.<sup>180</sup> By prohibiting cannabis use, which means many different things to different people, government is essentially making a moral judgment that it is best for people to live without those experiences.

This is akin to the state deciding that people should not eat sweets, or should not rock climb, for example. Criminal prohibitions against these activities would surely provoke public outrage. And, yet, both of those activities arguable pose greater risks to the health of the individual – and to society in general – than moderate cannabis use.

Even if, for example, the right to engage in relatively harmless pleasure-producing activity does not constitute a “liberty” interest protected by section 7 – the interest may still be sufficiently important to inform the

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<sup>178</sup> Supreme Court of Canada Factum of the Intervenor, British Columbia Civil Liberties Association at ¶37 [BCCLA Factum].

<sup>179</sup> Supreme Court of Canada Factum of the Respondent, the Government of Canada, at ¶90 [Respondent Factum].

<sup>180</sup> Ronald Dworkin, *Liberalism in A Matter of Principle* (Cambridge: Harvard University Press, 1985) at 191-192.

balancing exercise conducted under the rubric of the fundamental justice inquiry. In other words, that a criminal prohibition deprives citizens of important personal interests, even if those interests are not protected “liberty” or “security of the person” rights, ought to be considered when deciding whether principles of fundamental justice have been violated.<sup>181</sup> In this sense (and also in the first stage of the inquiry), prior judicial recognition of the interests is a relevant criteria, as are other sources of such principles, such as academic writings and government reports.<sup>182</sup> This is true even if the interests were recognized in a context other than Section 7.

So, for example, the Supreme Court has recognized that privacy and overbreadth considerations were relevant in determining whether, on balance, prohibiting the private possession of “child pornography” was consistent with the *Charter*.<sup>183</sup> Though this analysis was conducted largely in relation to section 2(a) and section 1, the principles at issue are fundamental to the conception of individual freedom embodied by the *Charter* as a whole.<sup>184</sup> Any balancing exercise conducted in respect to cannabis prohibition, therefore, should also involve these considerations.

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<sup>181</sup> This approach conforms to the fairly muddled state of section 7 fundamental justice analysis jurisprudence that existed before the Supreme Court’s decision (and, indeed, continues to exist despite the majority’s attempt to clarify the process).

<sup>182</sup> BCCLA Factum at ¶42, *citing Rodriguez v. British Columbia (Attorney General)*, [1993] 3 S.C.R. 519 [*Rodriguez*].

<sup>183</sup> *R. v. Sharpe*, [2001] 1 S.C.R. 45 [*Sharpe*]

<sup>184</sup> In addition, at least with respect to *Sharpe*, the appellant argued that Section 7 had also been infringed. The Court found it unnecessary to consider this argument because “...it wholly replicates the overbreadth concerns that are the central obstacle to the justification of the s. 2(b) breach....” *Sharpe* at ¶18.

The most obvious engagement of section 7, however, exists because violating the criminal law carries with it the potential for imprisonment – a significant deprivation of liberty.<sup>185</sup> The right to security of the person is also infringed, however, because the legislation seriously restricts the exercise of one’s control over one’s own body and psychology. In other words, one’s personal autonomy is drastically restricted. The jurisprudential basis of the right to control one’s own body was articulated in *R. v. Morgentaler*.<sup>186</sup>

*Morgentaler*, an early section 7 decision, dealt with a provision of the Criminal Code making it a crime to obtain an abortion without first obtaining a certificate from a therapeutic abortion committee of an accredited hospital. A group of doctors, including Morgentaler, openly conspired to violate the law and were charged.<sup>187</sup> They challenged the law as a violation of section 7. Ultimately, the Supreme Court upheld the challenge, finding that section 7 had been violated and that the infringement was not justified under section 1.

A majority (5:4) of the Court agreed that the impugned law violated the right to security of the person.<sup>188</sup> A common thread, permeating two of the three written opinions finding such a violation, was “that state interference with bodily integrity and serious state-imposed psychological

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<sup>185</sup> The potential of imprisonment would form a major component of Justice Arbour’s dissenting opinion.

<sup>186</sup> *R. v. Morgentaler*, [1988] 1 S.C.R. 30 [*Morgentaler*].

<sup>187</sup> By comparison, Malmo-Levine and Clay also openly conspired to break the cannabis laws.

<sup>188</sup> Prior caselaw established that each of the three enumerated rights (life, liberty and security of the person) are independent interests. See, *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 at 500.

stress, at least in the criminal law context, constitute a breach of security of the person.”<sup>189</sup> Wilson, J. also found a further violation of the right to liberty.

Wilson, J. was unsatisfied with the security of the person reasoning because “...to commence the analysis with the premise that the s. 7 right encompasses only a right to physical and psychological security and to fail to deal with the right to liberty in the context of ‘life, liberty and security of the person’ begs the central issue in the case” which was a woman’s right to obtain an abortion.<sup>190</sup> That right, according to Wilson, J. is concerned with “...a particular conception of the place of the individual in society.”<sup>191</sup>

Following this view, the *Charter* sets out the boundaries of the state’s ability to control individual decision making with respect to one’s own body. Because of this, the right to liberty and, indeed all of the *Charter* rights, are examples of the basic theory underlying the *Charter*, namely, “...**that the state will respect choices made by individuals and**, to the greatest extent possible, **will avoid subordinating these choices to any one conception of the good life.**”<sup>192</sup>

Liberty, then, is profoundly concerned with personal autonomy:  
“Liberty in a free and democratic society does not require the state to approve the personal decisions made by its citizens; it does, however, require the state

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<sup>189</sup> *R. v. Morgentaler*, [1988] 1 S.C.R. 30 at ¶25, Dickson, C.J.C. [*Morgentaler*].

<sup>190</sup> *Morgentaler* at ¶282.

<sup>191</sup> *Morgentaler* at ¶284.

<sup>192</sup> *Morgentaler* at ¶288 (emphasis supplied). Note that this language is remarkably similar to that used in the Senate Report.

to respect them.”<sup>193</sup> This linkage of section 7 to personal autonomy (and, thus, liberalism) was later accepted in the context of security of the person, not liberty, by a majority of the Court in *Rodriguez*, another case relied upon by Appellants.

In *Rodriguez*, decided in 1993, the Court determined that a ban on assisted suicide did not violate the *Charter*. Importantly for Appellants, however, was that a majority of the Court agreed that, based on *Morgentaler*:

There is no question, then, that personal autonomy, at least with respect to the right to make choices concerning one's own body, control over one's physical and psychological integrity, and basic human dignity are encompassed within security of the person, at least to the extent of freedom from criminal prohibitions which interfere with these.<sup>194</sup>

The majority went on to decide that Rodriguez had been deprived of her right to make these choices but that the deprivation did not conflict with principles of fundamental justice.

In so doing, the majority engaged in a fundamental-justice-balancing exercise. Specifically, the Court accepted that rights deprivations that do “little or nothing to enhance the state's interest” are invalid because they are “arbitrary and unfair”.<sup>195</sup> The societal interest in “protecting the vulnerable” and the “sanctity of life” was balanced against this concept, with the Court concluding that fundamental justice was not violated by the prohibition

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<sup>193</sup> *Morgentaler* at ¶290.

<sup>194</sup> *Rodriguez v. B.C.(A.-G.)*, [1993] 3 S.C.R. 519 at ¶21.

<sup>195</sup> *Rodriguez* at ¶32.

against assisted suicide because of, in part, the heavy weight given to the sanctity of life.<sup>196</sup>

Problematically, however, is that *Rodriguez* opinion lacks a clear explanation of why a societal interest in protecting the vulnerable rises to the level of a principle of fundamental justice. That this interest is important is undisputed – but the proper forum for balancing important state objectives with infringements of rights is section 1, not section 7.<sup>197</sup> The Court’s willingness to balance societal interests in the context of finding (or delineating) principles of fundamental justice in section 7 would play an important role in the eventual outcome of the cannabis cases.

Appellants identified multiple principles of fundamental justice that are infringed by prohibition. Principally, the law violates the harm principle. Also identified as infringed by cannabis prohibition are the principles of moral neutrality and overbreadth. By contrast, the Crown directly offered no principle supporting infringement except, perhaps, that the courts should defer to Parliament when a criminal sanction has any rational basis.<sup>198</sup>

Implicitly, however, Respondent embraces legal paternalism as consistent

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<sup>196</sup> *Id* at ¶¶ 33, 53, 60.

<sup>197</sup> *Id* at ¶¶97-98 (McLachlin, J., arguing that the prohibition is arbitrary, and thus violative of fundamental justice because Sue Rodriguez is forced to be the scapegoat for the potential improper actions of others and that the societal justification for this arbitrariness ought to be considered in Section 1, not Section 7). Unfortunately, Justice McLachlin’s concern with scapegoating appears to have disappeared by the time she, now as Chief Justice, joined the majority in rejecting the challenge to cannabis prohibition.

<sup>198</sup> Based on the trial court findings of fact, combined with the empirical evidence reviewed in Chapter Two, cannabis prohibition fails to meet even this low threshold because a criminal prohibition that causes more harm than it seeks to prevent is irrational.

with fundamental justice by arguing that cannabis prohibition is justified because it protects the vulnerable from themselves. Explicitly, the Respondent rejects the harm principle, which we now consider.

### **The Harm Principle**

The harm principle, as the Senate Report recognized, arguably originates in John Stuart Mill's "*On Liberty*". Mill, as noted earlier, was profoundly concerned with the proper role of state control over the individual:

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 is warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.** His own good, either physical or moral is not a sufficient warrant ... In the part, which merely concerns him, his independence is, of right, absolute. **Over himself, over his own body and mind, the individual is sovereign.**<sup>199</sup>

In other words, harm to others is the only sufficient basis for the exercise of state coercion. Harm to self, and, thus, legal paternalism, is simply inadequate to justify state intervention. Mill believed that the harm principle was absolute. To him, *no* other justification for state coercion sufficed. This absolutist thinking is less accepted today, but the harm principle remains one of the pillars of liberalism.

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<sup>199</sup> John Stuart Mill, *On Liberty*, (Cambridge: Cambridge University Press, 1989) Stefan Collini, ed. at page 5.

Though Mill did not address the use of cannabis in connection with the harm principle, he did comment on somewhat analogous behaviour; alcohol intoxication.<sup>200</sup> Mill also commented on what, perhaps, the Respondent would argue is analogous; sale of poisons.<sup>201</sup> Mill's views on these two products are consistent – neither should be prohibited.

First, Mill sets out the potential danger of the sale of poison. These are the potential for accident (analogous, perhaps, to the potential harm to unidentified members of vulnerable groups) and the potential that crime will result from the use of the poison (analogous, perhaps, the danger of driving under the influence of cannabis). In the latter case, Mill argues that society is concerned with preventing crime, as opposed to punishing past crime, but that caution must be taken because:

The preventative function of government, however, is far more liable to be abused, to the prejudice of liberty, than the punitory function; for there is hardly any part of the legitimate freedom of action of a human being which would not admit of being represented, and fairly too, as increasing the facilities for some form or other of delinquency.<sup>202</sup>

If cannabis was used solely for the purpose of becoming intoxicated before driving a vehicle (and poison solely used for murder), Mill might accept that prohibition was valid. “They may, however, be wanted not only for innocent but for useful purposes, and restrictions cannot be imposed in the

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<sup>200</sup> *On Liberty*, pp. 98-102. Note that alcohol prohibition has been attempted in Canada, with less-than-spectacular results.

<sup>201</sup> *On Liberty*, pp. 96.

<sup>202</sup> *Id* at 96. Notably, it is the arguably preventative function of cannabis prohibition that serves as the primary theme justifying the policy, despite empirical evidence to the contrary.

one case without operating in the other.”<sup>203</sup> Cannabis is used by many people who never drive while intoxicated. Justifying an outright prohibition on the basis that a minority of users pose a risk to others, or to themselves, is an overbroad application of the law and invalid.

In terms of intoxication, Mill states unequivocally that “[d]runkenness, for example, in ordinary cases is not a fit subject for legislative interference....”<sup>204</sup> He does, however, contemplate that individuals who become voluntarily intoxicated and act violently as a result (not a fear with cannabis use) can both be punished for the violence and placed under a special restriction prohibiting further intoxication. Essentially, Mill believed that becoming intoxicated when one knows that violence is more likely to result is “a crime against others.”<sup>205</sup> It is not, then, becoming intoxicated that is prohibited but rather the known increased propensity for violence.

Mills’ view of harm-to-others, however, may be criticized as lacking a precise definition.<sup>206</sup> For example, what is “harm” in this context? The contours of the harm principle, then, must be explored if it is to have any practical use. Joel Feinberg, a modern proponent of the harm principle, does an excellent job building an argument for its proper scope and a synopsis of his approach is set out below.

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<sup>203</sup> *Id.* In a sense, this is an argument against the overbreadth of the cannabis prohibition.

<sup>204</sup> *Id.* at 98.

<sup>205</sup> *Id.*

<sup>206</sup> This would be a formidable problem for the Supreme Court majority.

First, Feinberg distinguishes between states of harm (or being in a harmed condition), which are not a primary focus of criminal law, and acts of harming, which properly are subjects of criminal sanction. This difference is important because, for example, it is not the role of the criminal law to reduce harm in general (other agencies, such as public health authorities, are better suited to this task).<sup>207</sup>

Instead, the criminal law is designed to stop people from harming each other and, in the view of paternalists, to stop them from harming themselves.<sup>208</sup> If the criminal law were an appropriate tool for harm reduction in general, criminal sanction could attach to an amazing array of activity – from overeating to skydiving and all risky behaviour in between. Unfortunately, Respondent’s position allows this type of state overreaching.<sup>209</sup>

The foregoing distinction, however, does little to define harm, used in the sense of acts of harming. Feinberg analyzes this issue in depth in volume one of his work, titled *Harm to Others*. As the title suggests, Feinberg’s analysis focuses on harm to persons other than the actor. A critical theme of prohibition, and the Crown case, is that cannabis use does cause harm to others by harming society in general.<sup>210</sup> Feinberg’s conception of harm is

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<sup>207</sup> This line of thinking closely mirrors the Senate’s conclusion that the criminal law has been given undue primary emphasis in the debates surrounding cannabis policy.

<sup>208</sup> Joel Feinberg, *The Moral Limits of the Criminal Law*, vol. 1 (New York: Oxford University Press, 1988) at 31.

<sup>209</sup> As does the Supreme Court’s ultimate decision.

<sup>210</sup> The empirical evidence, however, provides little support for this theory.

useful in parsing out this theme. It is important to understand whether the harm to “society” identified by Respondent meets Feinberg’s definition of harm.

A complete explanation of Feinberg’s view of harm is beyond the scope of this work. Fortunately, Feinberg himself provides a synopsis of his definition of harm. Harm exists when:

1. A acts (...)
2. in a manner which is defective or faulty in respect to the risks it creates to B, that is, with the intention of producing consequences for B that follow, or similarly adverse ones, or with negligence or recklessness in respect to those consequences; and
3. A's acting in that manner is morally indefensible, that is, neither excusable nor justifiable; and
4. A's action is a cause of a setback to B's interests, which is also
5. a violation of B's rights.

In short, A wrongs B (defined by conditions 1,2,3 and 5) and harms his interests (condition 4).<sup>211</sup>

Respondent argues that cannabis use causes harm to “society” because of, for example, increased health care costs.<sup>212</sup> This type of harm, however, fails the fifth prong of Feinberg’s test because it violates no individual’s rights, nor does it violate some type of societal right. There is no right to the cheapest possible health care and, moreover, the decision to provide universal health care can be seen as the cause of the harm, not an individual’s use of that service.

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<sup>211</sup> *The Moral Limits of the Criminal Law*, vol. 4 at 105-106.

<sup>212</sup> Despite the empirical evidence to the contrary.

Driving while impaired (and, presumably, causing an accident as a result) is another alleged harm to others. But here, it is not the use of cannabis that is the faulty act – it is the act of driving while impaired that is blameworthy. Accordingly, the use of cannabis fails to meet prongs 2 and 4 – it is neither a faulty act nor does it cause a setback to the interests of another. The other harms identified by Respondent are all harms to self, and thus are not justified under any application of the harm principle.

As noted in Chapter Two, above, the Senate Committee endorsed the harm principle as the only proper justification for involving the criminal law.<sup>213</sup> In addition, after an exhaustive review of available literature, the British Columbia and Ontario Courts of Appeal were prepared to recognize the harm principle as an aspect of fundamental justice.<sup>214</sup>

The appellate courts, however, required only a very low threshold of possible harm, necessitating the state to have simply a “reasonable apprehension of harm” that is “not insignificant” or “not trivial.”<sup>215</sup> Appellants urged, and one appellate justice agreed, that in order to justify an

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<sup>213</sup> Senate Report at p. 45, discussed at page 8, above. There are examples of paternalistic laws on the book, of course. For example, the requirement that motorcycle riders wear helmets. In my view, these laws are illegitimate. Some liberals, such as Feinberg, accept these restrictions under a broad view of the offense principle; the helmetless rider risks offending other motorists who might view a grotesque (and, thus, offensive) accident. Others argue that the restriction does not impact a significant liberty interest and, therefore, that the restriction violates the harm principle is relatively inconsequential to the analysis.

<sup>214</sup> See *Malmo-Levine BCCA* at ¶¶107-116, 173.

<sup>215</sup> *Malmo-Levine BCCA* at ¶¶138-139; *Clay OCA* at ¶¶27-28. Notably, the appellate decisions also fail to distinguish between harm to other and harm to self.

absolute criminal prohibition<sup>216</sup> the risk of harm must be serious, substantial, or significant. This formulation, requiring the state to meet a higher burden, is arguably more consistent with *Charter* jurisprudence emphasizing the need to respect the autonomy of the individual, liberal philosophy and common sense.

The Court of Appeal based the decision to enact a low threshold, in part, on the rule that the *Charter* “does not protect against insignificant or 'trivial' limitations of rights.”<sup>217</sup> Relying on this language to support a low threshold for harm, however, misinterprets the principle:

It is respectfully submitted that this principle of “triviality” relates to the impact on one’s *Charter* rights and not the impact of the conduct in issue. In other words, the British Columbia Court of Appeal turned this principle on its head. In *Jones and Cunningham*, the reference was to the trivial or insignificant impact of the law on *Charter* rights. In the case at Bar, the *Charter* rights in issue are “liberty and security of the person” and the threat of imprisonment for the possession of marijuana clearly threatens liberty and security of the person in more than a trivial or insignificant way.<sup>218</sup>

A low harm threshold for justifying criminal prohibition allows the state too much leeway. Borrowing an example from Appellants, the consumption of overly fatty foods poses a risk to society in the form of increased health care costs (one of the risks identified by Respondent as associated with cannabis use). This risk cannot be said to be “insignificant” because health care cost associated with poor diet dwarfs the cost associated

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<sup>216</sup> Returning to the motorcycle helmet example, the rule may be justified as part of a licensing regulatory scheme, as opposed to being an absolute criminal prohibition.

<sup>217</sup> *R. v. Cunningham*, [1993] S.C.R. 143 ¶15.

<sup>218</sup> Supreme Court Factum of Appellant Caine at ¶10 [Caine Factum].

with cannabis use (which *is* “insignificant” according to the trial court).

Nevertheless, it seems ludicrous to suggest that the state may criminalize the use and possession of, say, potato chips.

This suggestion seems ludicrous because the right to eat food that one likes engages significant interests such as pleasure, control over one’s body, personal autonomy and free choice.<sup>219</sup> Personal use of cannabis implicates the same concerns. Use of the criminal law is simply not justified when the prohibited activity carries extremely low risks of harm. Moreover, where the harm principally (or solely) falls on the actor, the state’s use of criminal sanctions is an affront to the autonomy of the citizen and a violation of the principles of fundamental justice, including the harm principle. But the harm principle is not the only principle of fundamental justice offended by cannabis prohibition.

### **Overbreadth**

The Appellants also argued that the prohibition of cannabis was overbroad because it restricts individual rights without achieving any societal benefit. This principle of fundamental justice has been recognized by the Supreme Court: “the effect of overbreadth is that in some applications the law is arbitrary or disproportionate’ because, in cases of overbreadth, ‘the individual’s rights will have been limited for no reason.’”<sup>220</sup> The overbreadth

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<sup>219</sup> Putting aside, for the moment, the rather extreme example of cannibalism.

<sup>220</sup> BCCLA Factum at ¶69 quoting *R. v. Heywood*, [1994] 3 S.C.R. 761 at ¶49.

analysis requires a determination of the purported goal of the legislation.<sup>221</sup> For purposes of this inquiry, the harms posited by the Respondent and the Courts of Appeal will be used.

These harms fall into two main categories. First, the risk that some will operate a motor vehicle (or similar machinery) while impaired, thus causing harm to others. Second, the possible risk that vulnerable groups, such as chronic long-term users (who comprise at most 5% of the using population) will suffer some adverse health consequences.

In the former case (driving while impaired), the law is overbroad because existing laws against impaired driving already “address this harm in a targeted and proportionate way.”<sup>222</sup> In the latter situation (health effects on vulnerable groups), the law is overbroad because it acts to “threaten the basic liberty of the at least 95% of marijuana users in Canadian society for whom no health effects arise from marijuana use....”<sup>223</sup> In other words, even if the prohibition is legitimate because it prevents some harm (despite that the empirical evidence does not support this conclusion), it is a disproportionate response, and thus overbroad, because the vast majority of the activity it criminalizes causes no harm and because the harm caused by prohibition is greater than the harm it seeks to prevent.

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<sup>221</sup> In the case of cannabis, this is a problematic exercise because cannabis prohibition was founded on hysterical views about cannabis use, none of which are accepted today. Moreover, the Supreme Court has ruled that justifications for a law must come from its original purpose, not later rationale (this is often referred to as the no “shifting purpose” rule). The lower court, however, believed that re-enactment of prohibition laws demonstrated new purposes; preventing harm to society. *Malmo-Levine* at ¶96.

<sup>222</sup> BCCLA Factum at ¶70.

<sup>223</sup> BCCLA Factum at ¶72.

## Moral Neutrality

This principle holds that the state may not use the criminal law solely to enforce a particular conception of morality. Echoes of legal moralism exist in the Respondent’s argument, where Appellants are characterized as seeking merely a right to get stoned – as if there were something inherently distasteful about altering one’s perception of the world by using cannabis instead of, say, legal substances like alcohol or caffeine.<sup>224</sup>

The moral neutrality principle finds support in other *Charter* decisions. For example, in *Morgentaler*, Wilson, J. said that “the state will respect choices made by individuals and, to the greatest extent possible, will avoid subordinating those choices to any one conception of the good life.”<sup>225</sup> And, in *Butler*, the Court held that “to impose a certain standard of public and sexual morality, solely because it reflects the conventions of a given community, is inimical to the exercise and enjoyment of individual freedoms, which form the basis of our social contract.”<sup>226</sup> Put bluntly, the state may not, in the absence of significant harm, prohibit personal use of cannabis because it is deemed “wrong.”

## The Decision

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<sup>224</sup> Respondent cites, with approval, a Court of Appeal for Quebec decision in which the court relied on a lack of a “cultural tradition” of cannabis use to explain why criminalizing cannabis and not alcohol was not an arbitrary situation. In this sense, cultural tradition is akin to morality – society does not believe that it is “wrong” to drink whereas it (less and less) believes that cannabis use is “wrong.”

<sup>225</sup> *Morgentaler* at ¶229.

<sup>226</sup> *R. v. Butler*, [1992] 1 S.C.R. 452 at ¶79. [*Butler*]

Five justices of the Supreme Court joined in the majority opinion, rejecting Appellants' constitutional challenge.<sup>227</sup> They did so without clarifying the problems inherent in the section 7 fundamental-justice-balancing analysis, discussed above, and by relying on a heavy dose of prohibitionist themes, sprinkled with some tortuous analogies.

Because of the focus on harm that flows out of the Appellants' section 7 arguments, the Court first canvassed the empirical evidence, coming to the conclusion that:

There is no doubt that Canadian society has become much more skeptical about the alleged harm cause by the use of marijuana since the days when Emily Murphy, an Edmonton magistrate, warned that persons under the influence of marijuana “lose[e] all sense of moral responsibility...are immune to pain...becom[ing] raving maniacs...liable to kill...using the most savage methods of cruelty” (*The Black Candle* (1922) [Toronto: Thomas Allen]. a pp. 332-3). However, to exonerate marijuana from such extreme forms of denunciation is not to say that it is harmless.<sup>228</sup>

Rather, on a review of the evidence and after accepting the findings of the trial courts, the majority staked its claim to the role of protector of the vulnerable: “psychoactive and health effects [of cannabis use] can be harmful, and in the case of members of vulnerable groups the harm may be serious and substantial.”<sup>229</sup> Protecting chronic users and “adolescents who

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<sup>227</sup> Gonthier and Binnie, JJ wrote the opinion (McLachlin C.J.C., Iacobucci, Major and Bastarache JJ. concurring).

<sup>228</sup> *Malmo-Levine* at ¶43.

<sup>229</sup> *Id* at ¶61.

may not yet have become chronic users” from “self-inflicted harm” was, in the view of the Court, a legitimate goal of the criminal law.<sup>230</sup>

Appellants, of course, did not argue that cannabis was completely harmless. Instead, “they argue[d] that the only permissible target of the criminal law is harm to others.”<sup>231</sup> Before considering this argument, the Court discussed the muddled approach to the section 7 determination of whether a particular principle was a matter of fundamental justice.

Unfortunately, the majority’s treatment of this issue does little to clarify the analysis. The Court first rejected an approach that requires courts to engage in “free-standing” inquiries into whether a law “‘strikes the right balance’ between individual and societal interests in general....”<sup>232</sup> This would, according to the majority, improperly collapse the section 1 inquiry into section 7.

Some balancing, however, is appropriate within section 7. In particular, courts appropriately balance societal and individual interests only “when elucidating a particular principle of fundamental justice.”<sup>233</sup> Societal values, according to the majority, should play a limited role confined to setting out the boundaries of any principles of fundamental justice that are in

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<sup>230</sup> *Id* at ¶77. Though this language came in a discussion of federal jurisdiction, the paternalism inherent in the quoted language signaled clearly that it would be difficult to convince the Court to apply the harm principle. In addition, the assumption of harm defeated the moral neutrality argument.

<sup>231</sup> *Id* at ¶91.

<sup>232</sup> *Id* at ¶96.

<sup>233</sup> *Id* at ¶98.

question.<sup>234</sup> It is unclear how this clarifies the balancing process in section 7, as a balancing of societal interests involved in setting out the boundaries of a principle seems quite similar to determining whether the law strikes the right balance vis-à-vis deprivations of individual rights. Moreover, the Court itself took into account certain societal interests in the course of its analysis, albeit mostly those argued by the government.

In any event, the Court next turned to a direct analysis of the contention that the harm principle was one of fundamental justice:

In short, for a rule or principle to constitute a principle of fundamental justice for the purposes of s. 7, it must be a legal principle about which there is significant societal consensus that it is fundamental to the way in which the legal system ought fairly to operate, and it must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person.<sup>235</sup>

According to the majority, the harm principle failed at each step,.

First, it was neither a legal principle (but, rather, an “important state interest”) nor one upon which there was consensus that it “is the sole justification for criminal prohibition.”<sup>236</sup> The Court went on to cite examples of crimes that did not cause harm to others to support its decision. These examples are, perhaps, the best illustration of the tortured logic of the majority decision. So, for example, the crimes of cannibalism, bestiality, cruelty to animals, dueling and incest are, to the Court, illustrative of crimes

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<sup>234</sup> *Id* at ¶¶98 – 99.

<sup>235</sup> *Id* at ¶113.

<sup>236</sup> *Id* at ¶114, 115.

that are prohibited not because of harm to others but rather because of “fundamental social and ethical considerations...[their] offensiveness to deeply held social values...[or because they are] integral to our ideas of civilized society.”<sup>237</sup>

Two problems with this approach exist. First, certain of the examples do encompass harm-to-others. Dueling clearly involves harm to others, as do the crimes of bestiality and cruelty to animals (harm to the animal). Cannibalism arguably involves harm to the family of the consumed. Incest often involves very difficult issues of intra-family power relationships and one’s inability to truly consent to the activity as a result – meaning that direct harm-to-others can be found. But even assuming that none of these crimes violate the harm principle, the majorities’ reliance on such extreme examples is telling in another, more important, way.

Pointing out that some exceptions to a principle exist is quite different than saying that the principle itself doesn’t find general agreement. Indeed, that the Court must strain to find examples of laws that conflict with the harm principle augers in favor of a determination that the harm principle *is* generally accepted. The exceptions are so extreme – involving prohibited activity that is deeply offensive to our social values and fundamental ethical makeup – that they prove the rule. No one seriously argues that using cannabis offends deeply held social values or our fundamental societal

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<sup>237</sup> *Id* at ¶117 – 118.

ethics.<sup>238</sup> Cannabis use is not cannibalism, bestiality or incest. Those activities are, instead, the very rare exceptions to the general notion that our criminal law is designed to prevent activity that causes harm to others.<sup>239</sup>

The Court's second criticism of the harm principle is a bit more compelling, but ultimately unconvincing. A principle of fundamental justice must be a manageable standard and, according to the majority, the harm principle is not. This critique boils down to a problem with semantics: defining what "harm" is. Noting, quite correctly, that harms can take many forms, the majority give the example that "the respondents put forward a list of "harms" which they attribute to marihuana use. The appellants put forward a list of "harms" which they attribute to marihuana prohibition. Neither side gives much credence to the "harms" listed by the other. Each claims the "net" result to be in its favour."<sup>240</sup> This complaint, of course, mirrors that made by the Le Dain Commission.<sup>241</sup>

But to complain that opposite sides disagree about the conclusions to be reached from the evidence, and to cite that disagreement as the basis for

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<sup>238</sup> Indeed, the majority recognized that moralism was a legitimate basis for criminal prohibition but did not justify cannabis prohibition on this basis, implying that cannabis use itself does not violate important issues of social morality.

<sup>239</sup> As are the "crimes" cited by the majority as examples that the criminal law concerns itself with harm to self – seatbelt and motorcycle helmet laws. These laws, however, appear more like regulations than criminal prohibitions. For example, as the dissent points out, they are not punishable by imprisonment.

<sup>240</sup> *Id* at ¶128.

<sup>241</sup> The Senate Report also acknowledged this problem, but did away with it by concluding that it was empirically unquestionable that prohibition was the source of the vast majority of harm, and that cannabis use itself posed little or no harm to society or the user.

rejecting harm as a criterion, seems an abdication of the judicial role.<sup>242</sup> As Justice Arbour notes in her dissent, the Court had an evidentiary record and the findings of fact below upon which to make its determination about harm.<sup>243</sup> And, on the facts, the majority was unable to find tangible evidence of direct harm to the user, instead relying on a fairly murky conception of harm to society based on the potential effects of cannabis on certain vulnerable groups, or the potential risk of driving while under the influence of cannabis.

Moreover, the majority opinion fails to take into account the harms caused by prohibition in its determination of whether the harm principle is a manageable standard. This omission seems to flow from the majorities' view of the role of "societal interests" in the section 7 fundamental-justice-balancing exercise; that such interests should only be used to delineate the boundaries of a proposed principle of fundamental justice. But given that the harm of cannabis use is predominately an amorphous harm to society – and the majority considered that harm in its analysis – it seems contradictory that the harms of prohibition should not be considered at all.

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<sup>242</sup> Keep in mind that both Courts of Appeal, below, accepted the harm principle and were able to make a determination about the propriety of cannabis prohibition that was consistent with their view as to the level of harm at which the state is entitled to use the criminal law. Appellants, of course, argued that the appellate courts either set the bar incorrectly or were wrong that the empirical evidence met the level of harm required.

<sup>243</sup> *Id* at ¶201 (Arbour, J. dissenting). Justice Arbour determined that "s. 7 of the *Charter* requires...that the prohibited act be harmful or pose a risk of harm to others. A law that has the potential to convict a person whose conduct causes little or no reasoned risk of harm to others offends the principles of fundamental justice and, if imprisonment is available as a penalty, such a law then violates a person's right to liberty under s. 7 of the *Charter*." *Id* at ¶190.

Justice Arbour points out this contradiction, noting that “[s]ocietal interests’ may indeed form part of the s. 7 analysis where the operative principle of fundamental justice necessarily involves issues like the protection of society.”<sup>244</sup> According to her:

Societal interests in prohibiting conduct are evaluated by balancing the harmful effects on society if the conduct in question is not prohibited by law against the effects of prohibiting the conduct in question. I would indeed be misleading to engage in an assessment of the state’s interest in prohibiting conduct by evaluating solely the collective harm that the state wishes to prevent without also evaluating the collective costs incurred by preventing such harm....<sup>245</sup>

In this sense, the majority can be seen as having engaged in a balancing exercise conducted under the rubric of section 7 that wholly ignores the factors on one side of the balance, focusing solely on the state’s justifications for the prohibition. Small wonder that it reached the conclusion that it did.

The majority opinion’s focus on the protection of vulnerable groups also drew disdain from Justice Arbour. She acknowledged that the caselaw cited by the majority illustrated that the state had an interest in protecting the vulnerable – from others – but rejected the conclusion that “the vulnerable ones...should be sent to jail for their self-protection.”<sup>246</sup>

Sending the vulnerable to jail to protect them from self-inflicted harm violates the harm principle and is overbroad because “the state cannot

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<sup>244</sup> *Id* at ¶248.

<sup>245</sup> *Id* at ¶249.

<sup>246</sup> *Id* at ¶257 (emphasis in original).

prevent the general population, under threat of imprisonment, from engaging in conduct that is harmless to them, on the basis that other, more vulnerable persons may harm themselves if they engaged in it....”<sup>247</sup> In other words, to paraphrase the language of McLachlin, J. (as she then was) in *Rodriguez*, it is not permissible to scapegoat millions of responsible users because of potential harm to the very few who may be members of vulnerable groups.

After dismissing the harm principle, the majority turned to another section 7 consideration – the rule against arbitrary or irrational state action (characterized by Appellants as the overbreadth principle). Ironically, cannabis prohibition survived the application of this rule because, despite the stated inability of “harm” to provide a measurable standard for purposes of finding principles of fundamental justice, the majority allowed “harm” to provide the impetus for legislation, holding that “there is nevertheless a state interest in the avoidance of harm to those subject to its laws which may justify parliamentary action.”<sup>248</sup> Once activity is demonstrated as involving more than *de minimis* harm, Parliament has an interest in legislating in relation to that conduct.<sup>249</sup> Making a determination about a level of harm, apparently, was a manageable concept after all.

Prohibition, according to the majority, was neither arbitrary nor irrational. Cannabis use causes harm, or potential harm, because of the

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<sup>247</sup> *Id* at ¶258.

<sup>248</sup> *Id* at ¶130. Once again, the only harm considered was that attributed to cannabis use, not that attributed to prohibition.

<sup>249</sup> *Id* at ¶133 (rejecting the concept that harm must be serious or substantial in order for Parliament to act).

potential health consequences to chronic users and vulnerable groups, and the risk that some will drive while impaired. The existence of these potential harms allows parliament the “legislative capacity to respond.”<sup>250</sup> The chosen response, criminalization:

is a statement of society’s collective disapproval of the use of a psychoactive drug such as marihuana...and, through Parliament, the continuing view that its use should be deterred. The prohibition is not arbitrary but is rationally connected to a reasonable apprehension of harm. In particular, criminalization seeks to take marihuana out of the hands of users and potential users, so as to prevent the associated harm and to eliminate the market for traffickers. In light of these findings, it cannot be said that the prohibition on marihuana possession is arbitrary or irrational, although the wisdom of the prohibition and its related penalties is always open to reconsideration by Parliament itself.<sup>251</sup>

Notably, the analysis is devoid of any suggestion that prohibition actually achieves the aim of deterring use.

The Court seems to have missed the point entirely. Cannabis prohibition is not arbitrary and irrational because preventing harm is an irrational or arbitrary parliamentary goal. Cannabis prohibition is irrational because it not only fails to reduce harm but instead causes more harm than it prevents.<sup>252</sup> Parliament’s decision to criminalize, then, is an irrational and

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<sup>250</sup> *Id* at ¶135.

<sup>251</sup> *Id* at ¶136.

<sup>252</sup> The Court was aware of this fact, having before it the results of the Le Dain Commission study and the report of the Senate Committee.

arbitrary response to the perceived problems of cannabis use.<sup>253</sup> The majority does not deal at all with prohibition's ineffectiveness in the context of irrationality, but instead does so in its treatment of Appellants' disproportionality argument.

In 2002, the Court had "accepted that the means taken to achieve an objective can be so disproportionate to the desired end so as to offend the principles of fundamental justice."<sup>254</sup> Appellants argued prohibition was a disproportionate response to its desired end (reducing use and thus overall societal harm) because of the punitive consequences of criminalization on the accused, such as the availability of imprisonment and the imposition of a criminal record. They also noted that prohibition was ineffective and caused more harm than it prevented. The majority would seize on the imprisonment argument to import a new, and more difficult, standard into the section 7 disproportionality analysis.

This standard would come from section 12 of the *Charter*, which protects against "cruel and unusual treatment or punishment."<sup>255</sup> Section 12 jurisprudence required not just disproportionality, but "gross disproportionality" before a sentence or punishment became

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<sup>253</sup> On this point, see the dissenting opinion of Lebel, J. holding that "a legislative response which is disproportionate to the societal problems at issue...is thus arbitrary and in breach of s. 7 of the *Charter*." *Id* at ¶280.

<sup>254</sup> *Id* at ¶142, citing *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, 2002 SCC 1, at para. 47.

<sup>255</sup> *Charter* §12. Justice Arbour criticized the use of section 12 in the disproportionality analysis because of its irrelevance: imprisonment, while a disproportionate response to the purported harm of cannabis use, is neither cruel nor unusual punishment in Canada's legal system. *Malmo-Levine* at ¶260.

unconstitutional.<sup>256</sup> The majority determined that utilizing a different standard for section 7 would be unacceptable. In effect, the section 7 guarantee was merely to be regarded as a general statement of the specific right accorded by section 12.<sup>257</sup> According to the majority, the *availability* of imprisonment for simple possession is not a grossly disproportionate response to the minimal threat posed by use because no mandatory minimum sentencing policies exist, very few people are imprisoned for simple possession and anyone imprisoned has the right to appeal that sentence as unfit.<sup>258</sup>

The Court, however, never explained how this view of the section 7 protection against disproportionality accorded with its 2002 decision in *Suresh*, an immigration case that did not arise in the context of a sentencing challenge. It simply stated, without discussion, that the gross disproportionality test should also apply to Appellants' three remaining arguments on the topic, none of which had to do with sentencing.

The first argument deals with the primary social cost identified by Le Dain; the punitive consequences flowing from the imposition of a criminal record. The majority accepted that these consequences are serious – pointing out that the policy chosen by parliament embodies the idea that the

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<sup>256</sup> *Malmo-Levine* at ¶159.

<sup>257</sup> *Id.*

<sup>258</sup> *Id.* at ¶¶153 – 168. Small consolation, but this language suggests strongly that the Court would take a different view if the law were amended to be more punitive.

consequences of cannabis possession should be serious.<sup>259</sup> But the penalties are not grossly disproportionate because they are a product of deliberate lawbreaking and more properly considered a cost of the criminal justice system itself, not of cannabis prohibition in particular.<sup>260</sup>

Next, the majority rejects the argument that “the adverse effects on accused persons...are grossly disproportionate to any legitimate state interest because the prohibition is simply ineffective.”<sup>261</sup> Accepting this proposition, according to the majority, would be a repudiation of the rule of law, because the prohibition is only ineffective as a result of “the refusal of people in the appellants’ position to comply with the law.” The Court preferred to accord “some deference...to Parliament in assessing the utility of its chosen responses to perceived social ills.”<sup>262</sup>

Finally, the Court punted the issue of whether prohibition causes more harm than good. Factors such as the financial costs of enforcement, the engendered disrespect for the law produced by prohibition, the lack of quality control and the mixing of the cannabis and hard drug markets were to be considered in a section 1 analysis, not in section 7.<sup>263</sup> And, of course, finding no violation of section 7 meant that the Court did not need to engage in that analysis at all. It would not need to consider these things – evidencing a

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<sup>259</sup> *Id* at ¶¶172 – 175.

<sup>260</sup> *Id*. The majority failed to explain how its decision on this point accorded with the fact that *Charter* challenges often result from deliberate disobedience of the law. *See, for example, Morgentaler* (in which a group of doctors set out to deliberately break the law at issue).

<sup>261</sup> *Id* at ¶176.

<sup>262</sup> *Id* at ¶¶177 – 178.

<sup>263</sup> *Id* at ¶¶179 – 183.

curious reluctance to now ponder “societal interests” after utilizing those very interests (in protecting society against impaired drivers, the vulnerable groups and chronic users) to justify Parliament’s use of prohibition. Almost 200 paragraphs into the opinion, one gets the impression that the Court may simply have been tired of coming up with convoluted justifications for cannabis prohibition.

### **Conclusion**

Cannabis prohibition had survived the ultimate judicial test – a *Charter* challenge in the Supreme Court of Canada. In many respects, it did so as a result of the power of the themes of prohibition that had become ingrained in the dialogue. The concept of deterrence, for example, runs throughout the majority opinion, as does the assumption that prohibition is effective at protecting the vulnerable. The Court’s rejection of the harm principle, and acceptance of paternalism, may have ramifications extending beyond cannabis prohibition, including an implicit refutation of the Senate Report’s conclusions on the proper scope of the criminal law power. In the end, the Court’s decision leaves any hope for reform in the hands of the legislature and there, as yet, the power of the status quo has proven insurmountable.

# CONCLUSION

## **The Power of the Status Quo**

Cannabis prohibition has been the status quo in Canada for over eighty years. It was birthed in a climate of fear and irrationality, and all the evidence collected since then argues for reform. As we saw in Chapter One, cannabis has been used for a variety of purposes for millennia, without any significant negative effects. Once considered a virtual cure-all – as recently as 150 years ago – cannabis was demonized by prohibitionists and, as a result, became a prohibited substance. This occurred even though no evidence existed supporting its prohibition.

The legal situation surrounding cannabis has not changed significantly since prohibition was enacted over eighty years ago. Indeed, we have seen that the status quo has considerable staying power. Beginning in 1973, with the recommendations of the Le Dain Commission and continuing through the present day, every government study of cannabis policy in Canada has suggest reform.

The Le Dain Report based its call for reform on a cost/benefit analysis, not any particular conception of the proper role of the criminal law. In many ways, the Le Dain Commission drew a blueprint of argument for reformers and prohibitionists alike. The paternalistic view of criminal law – that the criminal law power should be used to protect people from themselves and to

protect society in general – ran throughout the Le Dain Report but was never an explicit theme of that analysis.

Paternalism, however, would become a key theme of prohibition, as would other concerns identified – but not empirically supported – by the Le Dain Commission. These include the concern for youth, the fear of the impaired driver and the assumption that criminalization has some deterrent effect. These concerns led the Le Dain Commission to conclude that mild reform was preferable. It suggested only that possession for personal use be decriminalized. This reform was not implemented and, unfortunately, as the body of evidence grew, and many of the Le Dain Report's fears failed to be supported, the themes would prove to have significant staying power irrespective of whether they were based in fact or mistaken assumptions.

By the time the Department of Health and Welfare looked into the issue, the evidence related to the effects of cannabis use was more robust. While the Department did not directly set out its view on the proper role of the criminal law, it implicitly accepted the paternalistic viewpoint of the Le Dain Commission. Certain of the key themes of prohibition also appeared in the National Health Report, though, again, the empirical evidence on which those themes relied was questionable, at best. Nevertheless, as with the Le Dain Commission, the Department was concerned with harm to the user and to society.

The Department, however, was able to conclude that cannabis use did not seem to cause much in the way of overall harm to society. Unfortunately, this fact caused the Department to narrow its focus and to concentrate on harm to certain vulnerable groups. Though it did not use that terminology – the vulnerable group – the Department’s focus on harms to specific at-risk users comprising a small fraction of all cannabis consumers would begin a theme of protecting the vulnerable. That theme has proven to have considerable staying power, even in the absence of evidence that cannabis prohibition actually achieves the goal. Nevertheless, despite its concerns, the Department recommended reforms quite similar to those suggested by the Le Dain Commission, with similar result. The reforms were never made.

The issue of cannabis reform was not studied again by Canada’s government until recently. In 2002, the Senate and House took up the issue of cannabis use and policy in Canada. The Senate conducted an exhaustive study over the course of eighteen months, and issued a report that stands as the most comprehensive review ever conducted in Canada. On a purely empirical level, the Senate was able to refute some of the assumptions made by the Department and the Le Dain Commission. Most notably, the Senate put to rest the concept of prohibition as deterrent. The bottom line, according to the Senate, is that prohibition does not deter use and does not prevent societal harm. In fact, prohibition is the principal source of such harm.

Perhaps unsurprisingly, given the enshrinement of the *Charter*, the Senate Report also took a different view of the proper role of the criminal law in Canadian society than either the Le Dain or National Health Report. In particular, the Senate endorsed a version of the harm principle, concluding that the criminal law should not be used to prevent harm-to-self. In other words, empirical evidence aside, paternalism was not a proper philosophical justification for prohibition. This rejection of paternalism and acceptance of the harm principle would resonate with the arguments that were, at the time of the Senate Report, pending in the Supreme Court.

But before the Court issued its decision, the government of Canada issued one last report, that of the Special Committee of the House of Commons. The House Report did not deal solely with cannabis, and its review was, in many respects, cursory. Even on this limited basis, however, the Committee recommended minor reforms that appear to have little chance of being implemented.

Unfortunately for proponents of reform, the legislature may be the only remaining venue for change. The Supreme Court ended an eight-year legal battle by determining that the *Charter* does not provide a basis on which to strike cannabis prohibition. The Appellants argued that the harm principle was a matter of fundamental justice, but the Court majority rejected that analysis. Claiming that the harm principle was neither the subject of general consensus (on the basis of strained comparisons to existing crimes like

cannibalism) nor a manageable standard, the Supreme Court sounded a death knell for opponents of the paternalistic use of the criminal law power.

In addition, the Court tacitly accepted a key theme of prohibition, that of its deterrent effect. Despite empirical evidence strongly supporting the conclusion that cannabis policy has no effect on either supply or demand, the Court refused to find that the prohibition was either arbitrary or irrational. Instead, the Court continued a trend set in the National Health Report by fixating on the potential harms of cannabis use to members of vulnerable groups and assuming that prohibition had some ability to reduce those harms. These mistaken assumptions, unfortunately, also serve to provide Parliament with reasons to maintain the status quo.

Despite gaining some ammunition from the fact that three Supreme Court justices strongly disagreed with cannabis prohibition (and that the majority never endorsed prohibition, despite finding it constitutional), proponents of cannabis reform have little reason for optimism. The only remaining hope for reform comes from Parliament. And it seems clear that Parliament has no appetite for change. Empirical evidence seems to have little relevance to the discussion. The state of the knowledge today argues strongly in favor of repealing prohibition. Indeed, the evidence is so strong that it seems unlikely that future research could enhance the case for reform in any substantial way. The power of status quo has proven, thus far, to be an insurmountable barrier to reform

## **Glimmers of Hope**

Despite this gloomy picture, there are some glimmers of hope. One of Canada's major political parties, the New Democratic Party, has adopted cannabis legalization as an official plank of their platform in the 2004 federal elections. Some of the smaller parties, such as the Green Party, have also come out in favor of legalization. The Liberal Party lukewarmly supports minor reform, and Senator Pierre Claude Nolin, the Chair of the Senate Committee and the leading proponent of legalization in the Senate is a Conservative. The activist base is strong throughout Canada and shows no sign of giving up. The editorial boards of many of Canada's major newspapers have endorsed reform, some going so far as to suggest legalization. And, perhaps most importantly, the general public overwhelmingly supports some change, and a substantial minority believes that legalization is the correct policy.

There is much to be learned from cannabis prohibition. Thus far, the lessons have not been positive. Hope, however, springs eternal. Perhaps one day, in the not-too-distant future, the lesson of cannabis prohibition will not be that a law birthed in ignorance and irrationally supported on the basis of mistaken assumptions has such amazing staying power. Instead, the lesson will be that perseverance and truth can overcome even the power of the status quo.