for concluding that it is necessary to criminalize conduct relating to personal consumption, possession and cultivation of cannabis." No process or forum for adjudication is suggested.)

84. Caine, in paragraph 24, similarly argues that the burden of proving a reasonable basis for penal legislation falls on the state. Under this thesis there would be, for all intents and purposes, a presumption of ***ultra vires*** with respect to every criminal, quasi-criminal, and regulatory offence punishable by imprisonment.

85. The Appellants' position is, in effect, that when a provision providing for imprisonment is challenged under the ***Charter***, the s. 1 analysis immediately collapses into s. 7. Indeed, they support their argument by reference to s. 1 cases. This, of course, ignores the fact that s. 1 considerations are not reached in these appeals unless, and until, the Appellants establish that the law prohibiting possession of marihuana violates a constitutionally protected right.

86. That the burden rests with the challenging party is clear from the judgment of McLachlin J. (as she then was) and Iacobucci J. in ***R. v. Mills***, [1999] 3 S.C.R. 688:

> 65 It is also important to distinguish between balancing the principles of fundamental justice under s. 7 and balancing interests under s. 1 of the ***Charter***. The s. 1 jurisprudence that has developed in this Court is in many respects quite similar to the balancing process mandated by s. 7. As McLachlin J. stated for the Court in ***Cunningham v. Canada***, [1993] 2 S.C.R. 143, at p. 152, regarding the latter: "The . . . question is whether, from a substantive point of view, the change in the law strikes the right balance between the accused's interests and the interests of society." Much the same could be said regarding the central question posed by s. 1.
>
> 66 However, there are several important differences between the balancing exercises under ss. 1 and 7. The most important difference is that the issue under s. 7 is the delineation of the boundaries of the rights in question whereas under s. 1 the question is whether the violation of these boundaries may be justified. The different role played by ss. 1 and 7 also has important implications regarding which party bears the burden of proof. If interests are balanced under s. 7 then it is the rights claimant who bears the burden of proving that the balance struck by the impugned legislation violates s. 7. If interests are balanced under s. 1 then it is the state that bears the burden of justifying the infringement of the ***Charter*** rights. [emphasis added]

See also: ***Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)***, [1995] 2 S.C.R. 97 @ para. 108 (per Cory J.)

87. In citing ***R. v. Bartle***, [1994] 3 S.C.R. 173, Caine would have this Court disregard the context of what is being discussed in the excerpt from the reasons set out in paragraph 23 of his

factum. Lamer C.J.'s comment (at p. 210) regarding the onus "shift[ing] back and forth", relates to matters relevant to whether evidence should be excluded under s. 24(2) of the ***Charter***; an issue that arises only after a breach has been found. For example, if a search is found to be unreasonable and the Crown advances "good faith" as militating in favour of admissibility, then it will have to establish this particular fact. The ultimate burden remains on the accused: p. 209. Neither ***Bartle*** nor any other decision of this Court supports the proposition that the onus is on the state in the first instance to establish that legislation does not violate the ***Charter***.

No Right to Get "Stoned"

88. As imprisonment is a potential penalty for possession of marihuana, it is accepted that the "liberty" interest protected by s. 7 is engaged. Whether such a restriction is in accord with the principles of fundamental justice is addressed below (at paras. 101ff). However, the Appellants go further, and submit that "liberty" and "security of the person" rights afford free standing constitutional protection to the recreational consumption of psychoactive substances. On this basis any restriction on the use of marihuana would ***prima facie*** infringe s. 7, even absent the possibility of incarceration.

89. All three Appellants seek to elevate a recreational pursuit to a constitutional right. Caine, in paragraph 30, describes the decision to use marihuana as one "of fundamental personal importance involving a choice made by the individual involving the individual's personal autonomy." Although Clay, in paragraph 22, is prepared to assume that smoking marihuana does not directly engage s. 7, he nonetheless refers in the following paragraph to the "constitutional values engaged by the personal and private consumption of cannabis". Malmo-Levine, in paragraph 25, citing the writings of 19th Century philosopher John Stuart Mill, takes the position that the right to use cannabis, or any substance, is "unqualified".

90. It is the Respondent's position that a law precluding an individual from possessing or ingesting his or her recreational drug of choice infringes neither "liberty" nor "security of the person". To characterize the smoking of marihuana as going to an individual's fundamental being is to trivialize these concepts. Simply put, there is no free standing right to get "stoned". While political theorists like Mill perhaps contributed to certain of the philosophical

underpinnings of the ***Charter***, it would be imprudent to elevate all of their thinking to the level of constitutionally enshrined principles. To do so would be inconsistent with this Court's jurisprudence holding that the principles of fundamental justice are the primary legal concepts underlying our system of justice.

91. Although liberty means more than freedom from physical restraint, constitutional protection does not extend to all personal choices. As Bastarache J. stated in ***Blencoe v. British Columbia (Human Rights Commission)***, [2000] 2 S.C.R. 307:

> 54 Although an individual has the right to make fundamental personal choices free from state interference, such personal autonomy is not synonymous with unconstrained freedom. [emphasis added]

See also: ***Godbout v. Longueuil (City)***, [1997] 3 S.C.R. 844 @ para. 66 (per La Forest J.): "the autonomy protected by the s. 7 right to liberty encompasses only those matters that can properly be characterized as fundamentally or inherently personal such that, by their very nature, they implicate basic choices going to the core of what it means to enjoy individual dignity and independence"

92. Security of the person in the criminal context has been held to apply to state interference with bodily integrity, and serious state-imposed psychological stress. The former is not relevant to these appeals. With respect to the latter the reasons of Bastarache J. in ***Blencoe***, ***supra***, again are apposite:

> 57 Not all state interference with an individual's psychological integrity will engage s. 7. Where the psychological integrity of a person is at issue, security of the person is restricted to "serious state-imposed psychological stress" (Dickson C.J. in ***Morgentaler***, ***supra***, at p. 56). I think Lamer C.J. was correct in his assertion that Dickson C.J. was seeking to convey something qualitative about the type of state interference that would rise to the level of infringing s. 7 (*G.(J.)*, at para. 59). The words "serious state-imposed psychological stress" delineate two requirements that must be met in order for security of the person to be triggered. First, the psychological harm must be state imposed, meaning that the harm must result from the actions of the state. Second, the psychological prejudice must be serious. Not all forms of psychological prejudice caused by government will lead to automatic s. 7 violations. These two requirements will be examined in turn. [emphasis added]

See also: ***New Brunswick (Minister of Health & Community Services) v. G.(J.)***, [1999] 3 S.C.R. 46 @ para. 60 (per Lamer C.J.): "For a restriction of security of the person to be made out, then, the impugned state action must have a serious and profound effect on a person's psychological integrity." [emphasis added]

93. ***Ravin v. State***, 537 P. 2d 494 (Alaska S.C., 1975) (cited by Clay in paragraph 24), which affords limited constitutional protection to the recreational use of marihuana, is distinguishable. It involves a provision of the ***Alaska State Constitution*** providing that, "the right of the people to privacy is recognized and shall not be infringed." Interpreting this guarantee the Court found that possession of marihuana for personal use by adults at home was constitutionally protected: pp. 504, 511. However, the Court also held (at page 502), that "there is not a fundamental constitutional right to possess or ingest marijuana in Alaska." In ***Belgarde v. State***, 543 P. 2d 206 (Alaska S.C., 1975), it held that ***Ravin*** does not apply to possession of marihuana in a public place: pp. 207, 208.

(Note: That ***Ravin*** rests on a specific constitutional language was recognized in ***R. v. Hamon*** (1993), 85 C.C.C. (3d) 490 (Que.C.A.) (at p. 495) (per Beauregard J.A.), leave refused, [1994] 1 S.C.R. viii, holding that the offences of possession and cultivation of marihuana do not infringe ss 7 or 15 of the ***Charter***.)

94. American courts have declined to follow ***Ravin***, ***supra***, in interpreting other constitutional "privacy" provisions: ***N.O.R.M.L. v. Gain***, 161 Cal.Rptr. 181 (C.A., 1st Dist., 1980) @ p. 184; ***Mallan v. State***, 950 P.2d 178 (Hawaii S.C., 1998) @ pp. 188, 189. They have, however, concurred in the conclusion that marihuana use is not fundamental, and is not entitled to free standing constitutional protection: ***N.O.R.M.L. v. Bell***, 488 F.Supp. 123 (Dist. Columbia, 1980) @ pp. 132, 133; ***Seeley v. State***, 940 P. 2d 604 (Wash.S.C., 1998) @ p. 612.

95. ***Re Sochandamandou*** (5 May 1994), Sentence No. C-221/94 (Columbian Constitutional Court), is also distinguishable. In this case the majority (5:4) struck down a prohibition on possession and use of cocaine (and marihuana and other drugs). The decision appears to turn on Article 16 of the ***Columbian Constitution (1991)*** (translation):

> All persons are entitled to their personal development without limitations other than those imposed by the rights of others and those which are prescribed by the legal system.

(Note: This decision is not cited in the Appellants' arguments, but is referred to in paragraph 68 of their Joint Statement. It also appears in the list of authorities in Caine's factum. A translation of the majority judgment is at Tab 47 of Caine's Book of Authorities.)

96. In reaching its determination the Court interpreted the ***Constitution*** as affording protection to personal liberty and autonomy on a significantly broader basis than ***Blencoe***, ***supra***. Indeed, it

held that the only thing the State can do regarding the personal consumption of drugs (translation), "is to offer its people possibilities to educate themselves": p. 13.

97. More in accord with Canadian constitution norms is the German Constitutional Court's ***Cannabis Case***, BverfGE 90, 145 (1994), a consolidation of several appeals involving charges of possession or trafficking in hashish (i.e., Cannabis resin) under the ***Intoxicating Substances Act***. These laws were found not to violate the ***Basic Law*** (i.e., the German Constitution).

98. One of the provisions considered was paragraph 1 of Article 2 [Personal Freedoms], which provides (translation), "Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law." In holding that the "right to be intoxicated", is not constitutionally protected, the Court stated (at page 171 (translation)):

> Article 2 para 1 of the ***Basic Law*** protects every form of human activity without consideration of the importance of the activity for a person's development (see BVerfGE 80, 137 at 152). However, only the inner core of the right to determine the course of one's own life is accorded absolute protection and thus withdrawn from interference by public authority (see BVerfGE 6, 32 at 41; BVerfGE 54, 143 at 146; BverfGE 80, 137 at 153). Dealings with drugs and, in particular the act of voluntary [sic] becoming intoxicated, cannot be reckoned as part of that absolute core because of the numerous direct and indirect consequences for society. Outside the core the general right to freedom of action is only guaranteed within the limits of second half of the sentence contained in Article 2 para 1 ***Basic Law***. This means that it is subject to the limits placed on it in accordance with the constitutional order [sic] ***Basic Law*** (see BVerfGE 80, 137 at 153). [emphasis added]

(Note: Although upholding the law prohibiting possession of cannabis for personal use, the Court found that, in some circumstances, prosecution for small quantities could amount to excessive state intervention, and thus infringe the constitutional principle of "proportionality". Having regard to statutory provisions dealing with prosecutorial discretion, and the principles of "equality" and "proportionality", it directed state officials, who are responsible for implementing the law, to develop guidelines for the uniform handling of such cases. The Respondent understands that such standardized non-prosecution policies do not yet exist.)

99. More recent is ***R. v. Morgan***, [2002] E.W.J. No. 1244 (QL) (C.A.(Crim.Div.)), dismissing an application for leave to appeal convictions for possession of 14 grams of marihuana, and one cannabis plant. It was argued unsuccessfully at trial that the law prohibiting possession of marihuana breaches Article 8 of the ***European Convention on Human Rights***, which forms part

of the law of England by virtue of the ***Human Rights Act 1998*** (U.K.). Article 8(1) provides that, "Everyone has the right to respect for his private and family life, his home and his correspondence." In affirming the trial judge's ruling, Cooke J. stated (in para. 11):

> A right to private life did not involve or include a right to self intoxication, nor the right to possession or cultivation of cannabis, whether for personal consumption within one's home or otherwise.

See also: ***R. v. Ham***, [2002] E.W.J. No, 2551 (QL) (C.A.(Crim.Div.)); refusing leave to appeal from the ruling followed by the trial judge in ***Morgan***

100. In conclusion, it is submitted that Rosenberg J.A. was correct in stating (at Clay Rec., Vol. 16, p. 3438):

> [18] I agree with the trial judge that the recreational use of marihuana, even in the privacy of one's home, does not qualify as a matter of fundamental personal importance so as to engage the liberty and security interests under s. 7 of the ***Charter***.

"Harm Principle" is not a Principle of Fundamental Justice

101. Given that a person charged with possession of marihuana faces a possible deprivation of liberty, s. 7 is engaged. The next stage in the analysis is to identify and define the relevant principles by which to measure whether such deprivation is in accord with fundamental justice.

102. In advancing the "harm principle" as an independent constitutional norm, the Appellants assert that s. 7 of the ***Charter*** empowers the judiciary not only to investigate whether a legislature has sought to address a harm, but also to pass judgment on such matters as whether the harm is of sufficient degree to permit law-making action, and its effectiveness. The Respondent does not accept this degree of oversight as a basic tenet of our democratic system of government. Rather, it is her position that the supervisory role of the courts is limited to ensuring that the sanction of incarceration is not utilized in an irrational or arbitrary manner.

(Note: The "harm principle" as formulated by Braidwood J.A. was applied in ***R. v. Turmel***, [2002] Q.J. No. 5875 (QL) (S.C.). Based on Dr. Kalant's evidence, Plouffe J. dismissed a challenge to the offences of production and possession of marihuana for the purpose of trafficking: paras. 123-126.)

103. What the Respondent would call the "rational basis" principle is already part of Canada's constitutional fabric. Apposite is ***Reference re: Anti-Inflation Act***, [1976] 2 S.C.R. 373,

upholding federal legislation under the "peace order and good government" power. In discussing the relevance of extrinsic evidence, and judicial notice, Laskin C.J. stated (at p. 423):

> In considering such material and assessing its weight, the Court does not look at it in terms of whether it provides proof of the exceptional circumstances as a matter of fact. The matter concerns social and economic policy and hence governmental and legislative judgment. It may be that the existence of exceptional circumstances is so notorious as to enable the Court, of its own motion, to take judicial notice of them without reliance on extrinsic material to inform it. Where this is not so evident, the extrinsic material need go only so far as to persuade the Court that there is a rational basis for the legislation which it is attributing to the head of power invoked in this case in support of its validity.

See also: p. 425 (per Laskin C.J.); ***Reference re: Validity of the Wartime Leasehold Regulations***, [1950] S.C.R. 124 @ pp. 135 (per Kerwin J., as he then was), 141 (per Taschereau J., as he then was), 151, 154 (per Kellock J.), 157 (per Estey J.), 166 (per Locke J.): "clear evidence" is required to establish there is "no justification" for continuation of emergency legislation enacted under p.o.g.g.

104. As evinced by ***Reference re: Provincial Court Judges***, [1997] 3 S.C.R. 3, this standard has been applied under the ***Charter***. After finding that judicial independence is guaranteed by s. 11(d), Lamer C.J. went on to hold that independent bodies must initially recommend changes in judicial salaries. The executive or legislature, as the case may be, is then obligated to respond. If it fails to implement a recommendation, then judicial review can be taken. However, the decision is not to be subjected to the "rigorous standard of justification" imposed under s. 1 of the ***Charter***. To the contrary, as the Chief Justice explained, citing ***re: Anti-Inflation Act***, ***supra***, the "standard of justification ... is one of simple rationality"; i.e., the government need only articulate a "legitimate reason": paras. 82, 83.

See also: ***R. v. Arkell***, [1990] 2 S.C.R. 695 @ 704 (per Lamer J.): challenge to ***Code***, s. 214(5) dismissed, classifying murder committed in certain circumstances as first degree "neither arbitrary nor irrational"; ***R. v. Heywood***, [1994] 3 S.C.R. 761 @ p. 792, 793 (per Cory J.): overbreadth analysis looks to whether rights have been limited for "no reason"

105. To accept a justiciable harm baseline is to accept that every offence with the potential of imprisonment is subject to curial reassessment on this basis. For example, a person charged under s. 253(b) of the ***Criminal Code*** with driving "over .08", could challenge the law on the basis that the statutory limit is lower than it needs to be to protect the public by keeping presumptively unsafe drivers off the road.

(Note: In some American states the permissible blood alcohol level is 1.0%.)

106. The recognition of a ***Charter*** principle precluding Parliament from criminalizing conduct unless it can demonstrate a potential for serious or substantial harm would be inconsistent with the well-established constitutional principle that the criminal law head of power can be used to enact legislation to address social, political, or economic interests: ***R. v. Hinchey***, [1996] 3 S.C.R. 1128 @ para. 29 (per L'Heureux-Dubé J.). It would also circumscribe the principle that a prohibition is valid if directed to "some legitimate public purpose": ***R. v. Hydro-Québec***, [1997] 3 S.C.R. 213 @ para. 121 (per La Forest J.). Apposite is the judgment of Estey J. in ***Reference re: Bill 30, An Act to Amend the Education Act (Ont.)***, [1987] 1 S.C.R. 1148 (at p. 1206):

> The role of the ***Charter*** is not envisaged in our jurisprudence as providing for the automatic repeal of any provisions of the Constitution of Canada which includes all of the documents enumerated in s. 52 of the ***Constitution Act, 1982***. Action taken under the ***Constitution Act, 1867*** is of course subject to ***Charter*** review. That is a far different thing from saying that a specific power to legislate as existing prior to April 1982 has been entirely removed by the simple advent of the ***Charter***. It is one thing to supervise and on a proper occasion curtail the exercise of a power to legislate; it is quite another thing to say that an entire power to legislate has been removed from the Constitution by the introduction of this judicial power of supervision.

See also: p. 1197 (per Wilson J.): "it was never intended …that the ***Charter*** could be used to invalidate other provisions of the Constitution"

And: ***re: Provincial Court Judges***, ***supra*** @ para. 107 (per Lamer C.J.): "the Constitution is to be read as a unified whole"

107. Even though there is a rational basis for a statutory or regulatory prohibition, the "harm principle" would call for judicial review of what are essentially policy decisions, such as risk assessments with respect to health and the environment. Take, for example, the concentration of dioxins and furans permitted in wastewater under s. 4 of the ***Pulp and Paper Mill Defoamer and Wood Chip Regulations***, SOR/92-268, ***Canada Gazette Part II***, Vol. 126, p. 1955, a breach of which is an offence punishable by imprisonment under s. 272 of the ***Canadian Environmental Protection Act, 1999***, S.C. 1999, c. 33. Under the theory advanced by the Appellants a court could be asked to decide whether discharges above the allowable limits raise concerns significant enough to warrant prohibition. Similarly, persons charged with selling products that do not meet standards set pursuant to the ***Hazardous Products Act***, R.S.C. 1985, c. H-3, or drugs that have

not been approved under the ***Food and Drugs Act***, R.S.C. 1985, c. F-27, could challenge the respective regulations as being unnecessarily stringent.

(Note: The ***Hazardous Products Act*** has been held to be criminal law: ***Reference re: Firearms Act***, [2000] 1 S.C.R. 783 @ para. 29 (per The Court); ***Hydro-Québec***, ***supra*** @ para. 150 (per La Forest J.). The regulatory framework for dealing with "new drugs" has been upheld under both criminal law and p.o.g.g.: ***C.E. Jamieson & Co. v. Attorney-General of Canada*** (1987), 37 C.C.C. (3d) 193 (F.C.T.D.) (per Muldoon J.).)

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108. Whether the courts or the public at large consider Parliament's choices to be good or bad, effective or ineffective, wise or unwise, popular or unpopular, are not yardsticks for measuring constitutionality. While such matters as efficacy, and the proportionality between the salutary and deleterious effects of an enactment, are factors under s. 1 of the ***Charter***, they are not relevant unless, and until, an infringement has been found.

20 See: ***Mills***, ***supra*** @ paras. 65, 66

109. In the non-***Charter*** context this was succinctly expressed by the Court in ***re: Firearms Act***, ***supra*** (at para. 57): "The efficacy of a law, or the lack thereof, is not relevant to Parliament's ability to enact it under the division of powers analysis." Although using different language, Dickson C.J. expressed the same opinion with respect to ***Charter*** review in ***Reference re: Criminal Code (Man.)***, [1990] 1 S.C.R. 1123 (at p. 1142): "The issue is not whether the

30 legislative scheme is frustrating or unwise but whether the scheme offends the basic tenets of our legal system."

See also: ***re: Anti-Inflation Act***, ***supra*** @ p. 425 (per Laskin C.J.): "[I]t is not for the Court to say in this case that because the means adopted to realize a desirable end, ..., may not be effectual, those means are beyond the legislative power of Parliament."; ***RJR-MacDonald Inc. v. Canada (Attorney General)***, [1995] 3 S.C.R. 199 @ paras. 44, 51 (per La Forest J.): the wisdom of Parliament's choice is not relevant to a division of powers analysis

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110. That it is not for courts to examine executive or legislature action at such a level of abstraction is evinced by the pre-***Charter*** decision in ***Berryland Canning Company Ltd. v. The Queen***, [1974] F.C. 91 (T.D.), involving an unsuccessful challenge to regulations under the ***Food and Drugs Act*** banning the use of cyclamates as an additive. A breach of these regulations is punishable by imprisonment (then s. 26, now s. 31.1).

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111. At trial differing expert opinions were tended as to the harmful effects of this substance, if any. Even though the Department of National Health and Welfare itself was of the view "that the danger to humans from cyclamates is undoubtedly very small", it decided to "follow a course of action that affords the greatest protection to the health of the Canadian public": p. 107. In dismissing various challenges to this decision Heald J. found that it had been taken "prudently, expeditiously and reasonably in the public interest": p. 108. In other words, it was rational in the circumstances. These parameters should apply equally under the ***Charter***.

112. Pertinent is the judgment of the South African Constitutional Court in ***Prince v. President, Cape Law Society***, 2002 (2) SA 764, in which the majority (5:4) decline to exempt Rastafarians from the marihuana laws on the basis of freedom of religion. In setting out the approach to be taken, Chaskalson C.J., Ackermann, and Kriegler JJ. stated:

> [108] In a democratic society the legislature has the power and, where appropriate, the duty to enact legislation prohibiting conduct considered by it to be anti-social and, where necessary, to enforce that prohibition by criminal sanctions. In doing so it must act consistently with the Constitution, but if it does that, courts must enforce the laws whether they agree with them or not.
>
> [109] The question before us, therefore, is not whether we agree with the law prohibiting the possession and use of cannabis. Our views in that regard are irrelevant. The only question is whether the law is inconsistent with the Constitution. The appellant contends that it is because it interferes with his right to freedom of religion and his right to practise his religion. It is to that question that we now turn.

113. American judicial oversight of legislative choices is in accord with the above submission. Although, as Gonthier J. noted in ***Ontario v. Canadian Pacific Ltd.***, [1995] 2 S.C.R. 1028 (at para. 75) some caution is to be exercised in considering American constitutional law, it is also true, as stated by Dickson C.J. in ***R. v. Keegstra***, [1990] 3 S.C.R. 697 (at p. 740), that "the practical and theoretical experience [in the United States of America] is immense, and should not be overlooked by Canadian courts."

114. American courts have long recognized that a margin of deference is owed to decisions taken by legislators who are generally better placed than judges to consider conflicting scientific and other evidence, to assess the needs of society, and to make difficult choices between competing considerations. Such deference is an integral characteristic of democratic

government. As Thomas J. stated in ***F.C.C. v. Beach Communications Inc.***, 508 U.S. 307 (1993) (at p. 313):

> Whether embodied in the Fourteenth Amendment or inferred from the Fifth, equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social or economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. [citations omitted] Where there are "plausible reasons" for Congress' action, "our inquiry is at an end." [citation omitted] This standard of review is a paradigm of judicial restraint. "The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process, and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted." [citation omitted] [emphasis added]

115. This approach has been taken repeatedly with respect to both state and federal marihuana laws. In ***People v. Shepard***, 431 N.Y.S. 2d 363 (C.A., 1980), the majority rejected the contention that marihuana is a harmless substance and that, therefore, the state has no legitimate interest in prohibiting its private use or possession (at p. 365):

> It is true that there is disagreement regarding the effects of marijuana. Indeed, there may be some members of this court who believe, based on the available scientific evidence and on the need to assess priorities and conserve the resources and integrity of the criminal justice system, that the private possession of marihuana should be decriminalized for personal use. The Legislature may well, in the near future, consider its use for medicinal reasons. However, the statute now before us represents the current and considered judgment of an elected Legislature acting on behalf of the people of this State. Empirical data concerning the vices and virtues of marijuana for general use is far from conclusive. Time and further study may prove the Legislature wrong, but the Legislature has the right to be wrong. The enactment of legislation, particularly in areas of legitimate controversy, is the business of the Legislature.

See also: p. 367

116. Similarly, in ***N.O.R.M.L. v. Bell, supra***, Tamm Cir. J. stated:

> Congressional action must be upheld as long as a rational basis still exists for the classification. The continuing questions about marijuana and its effects make the classification rational.
>
> Furthermore, judicial deference is appropriate when difficult social, political, and, medical issues are involved. Courts should not step in when legislators have made policy choices among conflicting alternatives. That this court might resolve the

> issues differently is immaterial. "When Congress undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation, even assuming, ***arguendo***, that judges with more direct exposure to the problem might make wiser choices." ***Marshall v. United States***, 414 U.S. 417, 427, 94 S.Ct. 700, 706, 38 L. Ed. 2d 618 (1974). Thus, this court should not substitute its judgment for the reasonable determination made by Congress to include marijuana under the ***CSA***.

See also: ***United States v. Kiffer***, 477 F. 2d 349 (2nd Cir., 1973) @ p.352; ***United States v. Brown***, 1995 WL 732803 (8th Cir.) @ p. 2, ***cert.*** denied, 517 U.S. 1174 (1996); ***United States v. Smith***, 2002 WL 2027233 (6th Cir.) @ p. 2, ***Seeley***, ***supra*** @ p. 618; ***Mallan***, ***supra*** @ pp. 189-192; ***N.O.R.M.L. v. Gain***, ***supra*** @ p. 184; ***Belgarde***, ***supra*** @ p. 208; ***Commonwealth v. Harrelson***, 14 S.W. 3d 541 (Kentucky S.C., 2000) @ p. 548

And: ***United States v. Alexander***, 673 F. 2d 287 (9th Cir., 1982) @ p. 288, ***cert.*** denied, 459 U.S. 876 (1982): classification of cocaine under federal legislation upheld

117. As reflected in the ***Cannabis Case***, ***supra***, such deference is also given under the German ***Basic Law*** (at p. 182 (translation)):

> 4. In undertaking repeated amendments to the ***Intoxicating Substances Act*** and in acceding to the 1988 ***Intoxicating Substances Convention*** the legislature has repeatedly re-considered its view and has repeatedly come to the conclusion that to achieve the aims of the ***Act*** it is necessary to have a prohibition of illegal dealings in Cannabis backed up by penalties. This view is also not objectionable from a constitutional point of view. Even on the basis of the current state of scientific knowledge, which is adequately revealed by the sources reviewed above (point 3), the view of the legislature, that there is no means other than criminal penalties which would be equally effective in attaining the ***Act's*** aims while being less intrusive, is arguable. It is not a satisfactory answer to say that the prohibition of Cannabis products to date has not been able to fully achieve the aims of the ***Act*** and that the unbanning of Cannabis would be a milder instrument with better chances of achieving those aims. The criminal policy discussion as to whether a reduction in the consumption of Cannabis can better be attained through the general preventative effect of the criminal law, or through the unbanning of Cannabis in the hope that this would lead to a separation in the markets for various types of drugs, remains open. There is no scientifically based information indicating firmly that the one view or the other is correct. ... In these circumstances if the legislature remains of the view that a general ban on Cannabis backed up by criminal penalties will scare off more potential users than will a suspension of the criminal penalties, and that therefore criminal penalties are better suited to protecting legal interests, then this must be accepted from a constitutional point of view. In making the choice between several potentially suitable means of attaining the aim of legislation the legislature has the prerogative of forming a view and making a decision (see BverfGE 77, 84 at 106). It is indeed possible in certain circumstances to imagine cases in which clear criminological evidence is so strong that, in examining the constitutionality of a

> particular piece of legislation, the court will conclude that the legislature is obliged by the constitution to follow a particular course in dealing with a problem, or at least that the course chosen by the legislature is unacceptable (see BverfGE 50, 205 at 212 and following). However the conclusions of the debate over a criminally sanctioned ban of all dealings with Cannabis products have not reached such a level of clarity. [emphasis added]

118. As in other western democracies, under our federal system the elected members of Parliament are charged with responsibility for passing laws that, in their considered view, are necessary for the governance of the nation. Apt is the judgment of Dickson C.J., Lamer and Wilson JJ. in ***Irwin Toy Ltd. v. Quebec (Attorney General)***, [1989] 1 S.C.R. 927. Although written with respect to s. 1 of the ***Charter***, the following comments apply ***a priori*** to the question of whether legislators have even encroached on a constitutionally protected area (at p. 993):

> When striking a balance between the claims of competing groups, the choice of means, like the choice of ends, frequently will require an assessment of conflicting scientific evidence and differing justified demands on scarce resources. Democratic institutions are meant to let us all share in the responsibility for these difficult choices. Thus, as courts review the results of the legislature's deliberations, particularly with respect to the protection of vulnerable groups, they must be mindful of the legislature's representative function.

While s. 7 of the ***Charter*** sets boundaries within which legislators must act it does not, in the present context, require more than a rational basis for the exercise of authority conferred by the ***Constitution Act, 1867***.

There is a Rational Basis for the Law

119. Given the parallel findings in ***Caine*** and ***Clay*** the Appellants have not met the burden of establishing that Parliament's decision to prohibit the recreational use of marihuana is irrational or arbitrary. Marihuana clearly is not a benign substance, and potentially is more harmful than presently known.

120. The state's objectives were succinctly stated by Rosenberg J.A. in ***Parker, supra***:

> [143] In the companion case of ***R. v. Clay***, I have reviewed at greater length the state's objectives in prohibiting marihuana. First, the state has an interest in protecting against the harmful effects of use of that drug. Those include bronchial pulmonary harm to humans; psychomotor impairment from marihuana use leading to a risk of automobile accidents and no simple screening device for detection; possible precipitation of relapse in persons with schizophrenia; possible negative effects on

> immune system; possible long-term negative cognitive effects in children whose mothers used marihuana while pregnant; possible long-term negative cognitive effects in long-term users; and some evidence that some heavy users may develop a dependency. The other objectives are: to satisfy Canada's international treaty obligations and to control the domestic and international trade in illicit drugs.

121. This Court expressed its concern regarding marihuana's effects on young persons in ***R. v. M.(M.R.)***, [1998] 3 S.C.R. 393, in supporting the ability of school officials to search for, ***inter alia***, this and other contraband. As Cory J. stated:

> 36 It is essential that our children be taught and that they learn. Yet, without an orderly environment learning will be difficult if not impossible. In recent years, problems which threaten the safety of students and the fundamentally important task of teaching have increased in their numbers and gravity. The possession of illicit drugs and dangerous weapons in the schools has increased to the extent that they challenge the ability of school officials to fulfill their responsibility to maintain a safe and orderly environment. Current conditions make it necessary to provide teachers and school administrators with the flexibility required to deal with discipline problems in schools. They must be able to act quickly and effectively to ensure the safety of students and to prevent serious violations of school rules.

(Note: M. was searched because his junior high school vice-principal had reason to believe he would be selling drugs at a dance. A baggie of marihuana was seized.)

122. In paragraph 27 of his factum Clay points to evidence that the majority of marihuana smokers are modest users who likely will not suffer any adverse effects. While this may be so, it ignores the fact that there is no way to distinguish one user from another. On this theory a company such as Berryland Canning could bring a ***Charter*** challenge to the ban on cyclamates on the basis that only a small percentage of persons would be affected.

123. Although McCart J. in ***Clay*** did not make any specific findings as to the number of high-risk users, Howard P.C.J. did so in ***Caine***. She found there were approximately 50,000 chronic users, and that this number would increase if the prohibition were removed: Caine Rec., Vol. 7, p. 1163. This can hardly be said to be so insignificant as to preclude Parliament from acting.

124. Both Clay (in paragraphs 31 and 35), and Caine (in paragraph 33), point to the availability of alcohol and tobacco as a reason for holding the marihuana prohibition unconstitutional. There is no legal or logical basis for this submission. In effect, they urge the adoption of an all or nothing ***Charter*** rule of legislative competence. That presently there are two harmful substances

in common social use in Canada does not preclude Parliament from prohibiting others. How to deal with each is purely a policy matter. An otherwise rational policy choice does not cease to be so because a different policy is applied in a closely related area.

See: ***RJR-MacDonald Inc., supra*** @ paras. 34, 35 (per La Forest J.)

125. The Court of Appeal for Quebec dealt with this in ***Hamon, supra***. After noting that political reality may well be a factor in why alcohol has not been prohibited, Beauregard J.A. stated (at p. 494):

> But, with respect to marijuana, we do not have a cultural tradition which would prevent the state from acting.
>
> Furthermore, while the state can prohibit both the use of alcohol and marijuana, it can, precisely because of our cultural traditions, prohibit the use of marijuana while still permitting the use of alcohol, without the prohibition against using marijuana being an "arbitrary, irrational, xenophobic, vague and racist" prohibition.

126. American courts have rejected the approach advocated by the Appellants. For example, in ***Kiffer, supra***, Feinberg Cir.J. stated (at p. 355):

> [5] Appellants also argue that marijuana is much less harmful than tobacco and alcohol; the legal availability of the latter substances, they say, proves the irrationality of singling out marijuana for criminal penalties. Our knowledge is not sufficient for us to accept or reject appellants' initial premise. But even if it is correct, see J. Kaplan, ***supra***, at 263-310 (as to alcohol), this does not render the statute here unconstitutional. If Congress decides to regulate or prohibit some harmful substances, it is not thereby constitutionally compelled to regulate or prohibit all. It may conclude that half a loaf is better than none. [emphasis added]

See also: ***N.O.R.M.L. v. Gain, supra*** @ p. 184; ***N.O.R.M.L. v. Bell, supra*** @ p. 138; ***United States v. Greene***, 892 F. 2d 453 (6th Cir., 1989) @ pp. 455, 456; ***Seeley, supra*** @ p. 619

127. The position in Germany is no different, as set out in the headnote of the ***Cannabis Case, supra*** (at p. 147 (translation)):

> 4. The principle of equality does not require that all drugs which are potentially equally harmful should be prohibited or permitted in the same way. The legislature can regulate dealings with Cannabis products differently from dealings with alcohol or nicotine without infringing the constitution.

128. In conclusion, the Respondent submits this Court should uphold the impugned legislation, and endorse the following statement by Rosenberg J.A. in ***Clay*** (at Clay Rec., Vol. 16, p. 3441):

> [36] Mr. Young also pointed to studies showing that cigarette smoking is more dangerous to the smoker's health than marihuana smoking and that alcohol abuse is associated with violent crime whereas marihuana use is not. In my view, this is not an apt comparison. The fact that Parliament has been unable or unwilling to prohibit the use of other more dangerous substances does not preclude its intervention with respect to marihuana, provided Parliament had a rational basis for doing so.
>
> [37] To conclude, given the harms identified by the trial judge and the other objectives of the legislation, I do not agree that there is no rational basis for the marihuana prohibitions. In terms expressed by Sopinka J. in ***Rodriguez***, the legislation is not arbitrary or unfair in that it is unrelated to the state's objectives and lacks a foundation in the legal traditions and societal beliefs that are said to be represented by the prohibitions.

CHARTER, SECTION 15(1)

129. Malmo-Levine asks this Court to hold that the offence of possession of marihuana for the purpose of trafficking infringes s. 15(1) of the ***Charter***, because it discriminates on the basis of "substance" and / or "occupation orientation". In paragraph 37, he contends that the characteristics of those who choose to use, grow, or traffic in marihuana are equivalent to their sexual orientation. In paragraph 38, he submits that, for equality rights purposes, "'orientation' is just a four-syllable word for 'taste'." These arguments are without merit.

(Note: The s. 15(1) constitutional questions only concern possession of marihuana for the purpose of trafficking. However, an affirmative answer on the threshold issue of equality rights infringement would, by a parity of reasoning, extend to all marihuana offences. Indeed, logically it would apply to all drug crimes.)

130. The main purpose of s. 15(1) is to protect against infringement of essential human dignity. When a violation is alleged the analysis focuses on three central issues: (a) whether a law imposes differential treatment between claimants and others, in purpose or effect, (b) whether one or more enumerated or analogous grounds of discrimination are the basis for this differential treatment, and (c) whether the law has a purpose or effect that is discriminatory with reference to such notions as prejudice, stereotyping, and historical disadvantage.

See: ***Law v. Canada (Minister of Employment & Immigration)***, [1999] 1 S.C.R. 497 @ paras. 39, 51 (per Iacobucci J.); ***Lovelace v. Ontario***, [2000] 1 S.C.R. 950 @ paras 53, 54 (per Iacobucci J.)

131. The provisions of the ***Narcotic Control Act*** relating to marihuana apply equally to all persons. The law does not, in either its purpose or effect, create a distinction that imposes differential treatment on anyone.

See: ***Hamon, supra*** @ p. 491 (per Beauregard J.A.); ***R. v. Hunter***, [1997] B.C.J. No. 1315 (QL) (S.C.) @ para. 16 (per Drake J.)

132. Further, as Malmo-Levine cannot rely on any of the enumerated grounds in s. 15(1), to succeed he must show that the law discriminates against him on the basis of an analogous ground, ***viz.***, one which targets "a personal characteristic that is immutable or changeable only at an unacceptable cost to personal identity."

See: ***Corbière v. Canada (Minister of Indian & Northern Affairs)***, [1999] 2 S.C.R. 203 @ para. 13 (per McLachlin and Iacobucci JJ.)

133. Malmo-Levine claims that prohibiting him from possessing and trafficking marihuana amounts to impermissible discrimination, and that his preference to engage in these activities is akin to sexual orientation. This is mere sophistry. He freely chooses to use and distribute this drug. His decision to do so is not an immutable personal characteristic.

134. Moreover, his choice, like the inclination or desire to commit other crimes, is not a group or individual characteristic which bears any resemblance to the anti-discriminatory purposes of s. 15(1). As Beauregard J.A. held in ***Hamon***, ***supra*** (at p. 491), "marijuana users do not constitute a class of persons protected by s. 15." This reasoning applies, ***a priori***, to those who traffic in this or any other prohibited substance.

See also: ***R.v. S.(M.)*** (1996), 111 C.C.C. (3d) 467 (B.C.C.A.) @ pp. 482, 483 (per Donald J.A.), leave refused, [1997] 1 S.C.R. ix: the offence of incest does not discriminate on the basis of sexual orientation

FAILURE TO HOLD A *VOIR DIRE*

135. Regardless of the disposition of his ***Charter*** grounds, Malmo-Levine submits, in paragraph 7, that he is entitled to a new trial on the basis that (a) Curtis J. erred in refusing to allow him to call evidence to support his constitutional challenges, and (b) the Court of Appeal erred in dismissing this ground because the result would have been the same in any event.

Although not referred to, it is implicit that Braidwood J.A. applied s. 686(1)(b)(iii) of the ***Criminal Code***: Malmo-Levine Rec., Vol. 2, p. 332, para. 162.

136. It was open to the trial Judge to control the proceedings as he did. Indeed, the manner in which he exercised his discretion is consistent with other judgments of the Court of Appeal for British Columbia. These hold, rightly in the Respondent's submission, that an accused raising ***Charter*** issues is not entitled to an evidentiary hearing if the trial judge is satisfied that the application cannot succeed in any event.

137. This arose in ***R. v. Vukelich*** (1996), 108 C.C.C. (3d) 193 (B.C.C.A.), leave refused, [1997] 2 S.C.R. xvi. At trial defence counsel applied for a ***voir dire*** to challenge a search warrant. The trial judge asked him to provide some basis, either through submissions or by means of an affidavit, that, if proven, would result in the warrant being ruled invalid. As counsel was unable to do so the trial judge refused to embark on a ***voir dire***, and the warrant was upheld.

138. In dismissing Vukelich's conviction appeal, McEachern C.J.B.C. stated:

> [17] Generally speaking, I believe that both the reason for having, or not having, a ***voir dire***, and the conduct of such proceedings, should, if possible, be based and determined upon the statements of counsel. This is the most expeditious way to resolve these problems: see ***R. v. Dietrich*** (1970), 1 C.C.C. (2d) 49 (Ont.C.A.) at 62; ***R. v. Hamill*** (1984), 14 C.C.C. (3d) 338 (B.C.C.A.); and ***R. v. Kutynec*** (1992), 70 C.C.C. (3d) 289(Ont.C.A.) at 301. I suggest that judges must be more decisive in this connection than they have been in the past because far too much judicial time is consumed by the conduct of these kinds of enquiries.

See also: ***R. v. Khuc*** (2000), 142 C.C.C. (3d) 276 (B.C.C.A.) @ paras. 22-28 (per McEachern C.J.B.C.): trial judge did not err in refusing to hold a ***voir dire*** with respect to the validity of a search in the absence of defence counsel indicating any basis for concluding the accused had "standing" to object; ***R. v. Paterson*** (1998), 122 C.C.C. (3d) 254 (B.C.C.A.) @ paras. 89-91 (per The Court): rather than hearing evidence on an application to ban publication of witnesses' names the trial judge should have proceeded on statements by counsel

139. Other Courts of Appeal have also accepted that ***Charter voir dires*** are not always necessary. As stated by Finlayson J.A. in ***R. v. Kutynec*** (1992), 70 C.C.C. (3d) 289 (at p. 301):

> If the defence is able to summarize the anticipated evidentiary basis for its claim, and if that evidence reveals no basis upon which the evidence could be excluded, then the trial judge need not enter into an evidentiary inquiry. In other words, if the facts as alleged by the defence in its summary provide no basis for a finding of a ***Charter*** infringement, or a finding that the evidence in question was obtained in a manner

which infringed the ***Charter***, or a finding that the test for exclusion set out in s. 24(2) was met, then the trial judge should dismiss the motion without hearing evidence.

See also: ***R. v. Dwernychuk*** (1992), 77 C.C.C. (3d) 385 (Alta.C.A.) @ p. 400 (per The Court), leave refused, [1993] 2 S.C.R. vii

140. The above decisions recognize that trial judges have the ability to perform a screening or gatekeeper function regarding the necessity for a ***voir dire***. This is precisely what Curtis J. did, and the Court of Appeal was wrong in holding that he erred.

141. In any case, the foundation for the challenge was in the record created before Howard P.C.J. in ***Caine***; i.e., what Malmo-Levine describes in paragraph 6 as "his best facts." If this Court dismisses Caine's appeal on those facts, then it follows that the procedure adopted by Curtis J. occasioned no substantial wrong or miscarriage of justice.

MARIHUANA PROHIBITION IS VALID FEDERAL LEGISLATION

142. Both Caine and Clay challenge the prohibition on possession of marihuana as being beyond the authority of Parliament under the ***Constitution Act, 1867***. They specifically ask this Court to reverse ***Hauser***, ***supra***, in which the majority held that the ***Narcotic Control Act*** is supportable under the peace order and good government power. Caine goes so far as to take the position, in paragraph 50, that, "possession [of marihuana] clearly falls into a class of matters of a merely local or private nature, namely the health concern of the user." Clay, in paragraph 46, submits that absent "a sound scientific basis for concluding that the consumption of cannabis is seriously harmful to a significant number of consumers and/or society at large, and that this threatens the Dominion as a whole", it is a matter of "provincial concern". Acceptance of these arguments would require the Court to overrule a longstanding line of authority holding that "health" is a subject that can animate federal legislative action.

143. It is the Respondent's position that ***Hauser***, ***supra***, should not be reversed but that, in any event, the ***Narcotic Control Act*** as a whole, and the marihuana provisions in particular, are supportable under the criminal law head of power (i.e., s. 91(27)).

(Note: In ***Hauser***, this Court held (5:2) that the Attorney General of Canada has authority to prosecute violations of the ***Narcotic Control Act***. Pigeon J., writing for four judges, held that the ***Act*** falls under p.o.g.g. Dickson J., as he then was, on behalf of two judges (dissenting in the result), found it to be criminal law. Spence J., who joined with the majority, agreed the ***Act*** is

valid federal legislation, but did not specify under which head(s) of power. The Court was, therefore, unanimous in holding the ***Act intra vires***.)

Peace, Order, and Good Government

144. Parliament's authority to enact the ***Narcotic Control Act*** (and its successor, the ***Controlled Drugs and Substances Act***) falls within the national concern branch of the federal residuary power. The importation, manufacture, distribution, and use of psychoactive substances are matters having an impact on the country as a whole, and which can only be dealt with on an integrated national basis. Additionally, the international aspects are such that these matters cannot be effectively addressed at the local level.

See: ***R. v. Crown Zellerbach Canada Ltd.***, [1988] 1 S.C.R. 401 @ pp. 431, 432 (per Le Dain J.)

145. As discussed in ***Hauser***, ***supra*** (at pp. 998, 999) there has been federal legislation in this area since 1908, with cannabis being prohibited in 1923. That drug abuse had not become a problem at the time of Confederation was a critical factor in this Court's affirmation of the ***vires*** of the ***Act*** more than 23 years ago. As Pigeon J. stated (at p. 1000):

> In my view, the most important consideration for classifying the ***Narcotic Control Act*** as legislation enacted under the general residual federal power, is that this is essentially legislation adopted to deal with a genuinely new problem which did not exist at the time of Confederation and clearly cannot be put in the class of "Matters of a merely local or private nature". The subject-matter of this legislation is thus properly to be dealt with on the same footing as such other new developments as aviation (***Re Aeronautics***), and radio communications (***Re Radio Communication***).

Criminal Law, Section 91(27)

146. Parliament's integrated approach to the health and social problems caused by psychoactive substances is also supportable under the criminal law power, as it possesses the three necessary prerequisites, ***viz.***, "a valid criminal law purpose backed by a prohibition and a penalty": ***re: Firearms Act***, ***supra*** @ para. 27.

147. The breadth of this power is evinced in the reasons of La Forest J. in ***Hydro-Québec***, ***supra***:

> 121 **The *Charter* apart, only one qualification has been attached to Parliament's plenary power over criminal law. The power cannot be employed colourably.** Like other legislative powers, it cannot, as Estey J. put it in ***Scowby v. Glendinning***,

[1986] 2 S.C.R. 226, at p. 237, "permit Parliament, simply by legislating in the proper form, to colourably invade areas of exclusively provincial legislative competence". To determine whether such an attempt is being made, it is, of course, appropriate to enquire into Parliament's purpose in enacting the legislation. As Estey J. noted in ***Scowby***, at p. 237, since the ***Margarine Reference***, it has been "accepted that some legitimate public purpose must underlie the prohibition". Estey J. then cited Rand J.'s words in the ***Margarine Reference*** (at p. 49) as follows:

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

I simply add that the analysis in ***Scowby*** and the ***Margarine Reference*** was most recently applied by this Court in ***RJR-MacDonald***, ***supra***, at pp. 240-41.

122 In the ***Margarine Reference***, ***supra***, at p. 50, Rand J. helpfully set forth the more usual purposes of a criminal prohibition in the following passage:

> Is the prohibition ... enacted with a view to a public purpose which can support it as being in relation to criminal law? Public peace, order, security, health, morality: these are the ordinary though not exclusive ends served by that law.... [underlining by La Forest J., bold added]

148. Also pertinent is La Forest J.'s judgment in ***RJR-MacDonald Inc.***, ***supra*** (in para. 32):

> Given the "amorphous" nature of health as a constitutional matter, and the resulting fact that Parliament and the provincial legislatures may both validly legislate in this area, it is important to emphasize once again the plenary nature of the criminal law power. In the ***Margarine Reference***, ***supra***, at pp. 49-50, Rand J. made it clear that the protection of "health" is one of the "ordinary ends" served by the criminal law, and that the criminal law power may validly be used to safeguard the public from any "injurious or undesirable effect". The scope of the federal power to create criminal legislation with respect to health matters is broad, and is circumscribed only by the requirements that the legislation must contain a prohibition accompanied by a penal sanction and must be directed at a legitimate public health evil. If a given piece of federal legislation contains these features, and if that legislation is not otherwise a "colourable" intrusion upon provincial jurisdiction, then it is valid as criminal law; see ***Scowby***, ***supra***, at pp. 237-38. [emphasis added]

(Note: Both Caine and Clay cite the ***Margarine Reference***, i.e., ***Reference re: Validity of Section 5(a) of the Dairy Industry Act***, [1949] S.C.R 1, affirmed, [1951] A.C. 179 (P.C.), as supportive of their position. It is discussed in detail below, beginning at paragraph 153.)

149. Provided Parliament perceives a risk to health or the public interest it can act. There is no baseline or threshold level of harm that must be reached. Apposite is ***Standard Sausage Co. v.***

Lee (1933), 60 C.C.C. 265 (B.C.C.A.), supplemented by ***addendum*** at (1934), 51 C.C.C. 95. At issue was the ***vires*** of certain sections of the ***Food and Drugs Act*** and regulations dealing with the adulteration of food. More particularly, the case concerned whether Parliament could prohibit the use of sulphur dioxide as a preservative in an amount not injurious to health. In upholding the provisions Macdonald J.A., as he then was, stated, ***inter alia*** (at p. 269):

> These considerations point to the conclusion that, granted the general subject of the adulteration of food may be the subject of legislation by the Dominion Parliament under the heading "criminal law," it must follow, reasonably and necessarily, that it may define precisely the ingredients that may or may not be used. Nor is it any less a crime because it may be shown scientifically that some of the ingredients prescribed may not, if used in proper quantities, be deleterious at all. It is not a ***sine qua non***, as many provisions of the ***Criminal Code*** show that injury to property or to the person must necessarily follow the commission of the unlawful act. This contingency is recognized inasmuch as the penalty is less severe if injurious results do not follow. [emphasis added]

See also: ***Berryland Canning Co., supra*** @ pp. 94-96 (per Heald J.): ban on cyclamates upheld as a valid exercise of the criminal law power, even though danger to humans is "very small"

(Note: ***Standard Sausage Co.*** has been accepted as correctly decided: ***re: Firearms Act, supra*** @ para. 29 (per The Court); ***Hydro-Québec, supra*** @ paras. 129, 150 (per La Forest J.); ***R. v. Wetmore***, [1983] 2 S.C.R. 284 @ p. 289 (per Laskin C.J.).)

150. Although the statute dealing with advertising upheld as criminal law in ***RJR-MacDonald Inc., supra***, was enacted against the background of overwhelming evidence that "tobacco kills" (see paras. 31, 32), there is no principle of constitutional law making anywhere near this degree of certainty a prerequisite to legislative action. As noted by La Forest J. (at para. 48) the health risks of tobacco only began to emerge in the 1950s, and did not become clear until much later. Had Parliament chosen to do so it could have prohibited possession and consumption of tobacco when the threat to the public first became apparent.

151. Caine, in paragraph 48, cites ***Schneider v. The Queen***, [1982] 2 S.C.R. 112, in support of his argument that the ***Narcotic Control Act*** does not fall within the residuary power, and that ***Hauser, supra***, should be overturned. While Laskin C.J., speaking for himself in ***Schneider***, disagreed with Pigeon J.'s reasoning in ***Hauser***, he did agree the ***Act*** is ***intra vires***. Where they diverged is that the Chief Justice would have upheld it under both the criminal law and trade and commerce powers: p. 115.

See also: ***R. v. Simpson, Mack, and Lewis***, [1969] 3 C.C.C. 101 (B.C.C.A.) (per Maclean J.A.): provincial legislation prohibiting possession of L.S.D. and marihuana ***ultra vires***, as matters within federal criminal law jurisdiction

(Criticism of the reasoning, but not the conclusion in ***Hauser***, ***supra***, is found in Hogg, ***Constitutional Law of Canada***, loose-leaf ed., Vol. 1, Scarborough, Ont.: Carswell, 1992, wherein the author states (at p. 18-9) that, "the ***Act*** appears to be the paradigm of a 'criminal' statute.")

152. To the extent that evidence of a health risk is necessary, it is present with respect to marihuana. It is clear from the findings in ***Caine*** and ***Clay*** that marihuana causes certain harms, and possibly others. Further, it impairs psychomotor skills, and thus increases the risk of accidents. Accordingly, a "legitimate public purpose" underlies the prohibition. It is, therefore, within Parliament's criminal law power, and is not a colourable invasion of provincial jurisdiction.

See also: ***Prince v. President, Cape Law Society, supra*** @ para. 114: "It must also be accepted that the [prohibition on marihuana] serves an important governmental purpose in the war against drugs."

Margarine Reference

153. Both Caine (in paragraphs 55 and 56) and Clay (in paragraph 44) cite the ***Margarine Reference*** for the proposition that validly enacted legislation may become invalid with the passage of time. Clay's position is that "a change in the social and political climate or a change in the scientific understanding of an activity can render a federal law ***ultra vires***, notwithstanding the fact that the law may have once been ***intra vires***." While this may be true with respect to legislation enacted under the emergency branch of p.o.g.g., it has no application to other federal heads of power. In any event, whatever changes have occurred since 1961, they are not such as to have moved the ***Narcotic Control Act*** in general, and the marihuana prohibition in particular, into exclusive provincial jurisdiction.

154. As noted by Professor Hogg, "there is one important limitation on the federal emergency power: it will support only temporary measures": p. 17-26. This is because this power permits Parliament to directly invade areas of provincial jurisdiction. Once the emergency passes, there is no longer justification for the encroachment. However, as discussed in ***re: Validity of the Wartime Leasehold Regulations***, ***supra***, citing ***Fort Francis Pulp & Power Co. v. Manitoba***

Free Press Co., [1923] A.C. 695 (P.C.) (at p. 706), "very clear evidence that the crisis had wholly passed away would be required to justify the judiciary … in overruling the decision of the government that exceptional measures were still requisite."

See also*: **re: Anti-Inflation Act, supra*** @ p. 439 (per Ritchie J.)

155. In ***re: Anti-Inflation Act, supra***, Laskin C.J., after upholding the legislation as an emergency measure, stated (at p. 427):

> It is open to this Court to say, at some future time, as it in effect said in the ***Margarine*** case, that a statutory provision valid in its application under circumstances envisaged at the time of its enactment can no longer have a constitutional application to different circumstances under which it would, equally, not have been sustained had they existed at the time of its enactment.

156. Given what was at issue in the case, the Chief Justice's remarks do not support a general proposition that changing circumstances can affect the ***vires*** of existing federal legislation, by shifting exclusive authority to a provincial head of power. For the purposes of a division of powers analysis, if a provision is validly enacted, then it remains so until repealed. There is no authority to the contrary.

157. The ***Margarine Reference, supra***, concerned federal legislation prohibiting the importation, manufacture, and distribution of any butter substitutes (e.g., margarine, oleomargarine). What came before the Court was a provision enacted in 1914, when, as noted by Rand J., there were no health concerns regarding the consumption of these products: p. 48. Rather, as reflected in the summary of the Crown's argument before the Privy Council, it was enacted solely "to give certain protection and encouragement to the dairy industry": p. 181. No attempt was made to support the prohibition on the basis of health. In the result, all but the restrictions on importing were declared ***ultra vires***.

158. As noted by Rand J. (at p.46), the history of the impugned provision is central to a proper understanding of the decision. The starting point is ***An Act to Prohibit the Manufacture and Sale of Certain Substitutes for Butter***, 49 Vict., c. 42 (1886), which applied to oleomargarine, and other substitutes containing animal fat (but not margarine, which is made from vegetable oil). The preamble to the ***Act*** stated that the prohibited products were "injurious to health".

Margarine was not included until the passage of the ***Butter Act, 1903***, 3 Edw. VII, c. 6, which did not contain a preamble. This ***Act*** was incorporated in the ***Inspection and Sale Act***, R.S.C. 1906, c. 5, under Part VIII - "Dairy Products".

159. In 1914, Parliament repealed Part VIII of the ***Inspection and Sale Act***, and re-enacted the prohibition as s. 5(a) of the ***Dairy Industry Act***, 4 & 5 Geo. V, c. 7. It became Chapter 45 of the Revised Statutes, 1927. Section 5(a) of the 1927 statute was referred to this Court for consideration in 1948.

160. Two other historical facts are significant. The first is that from 1917 to 1923, the prohibition was suspended, permitting the manufacture and importation of millions of pounds of oleomargarine. The second is that, as mentioned above, Parliament's purpose in 1914 was not to protect the health of Canadians.

161. Contrary to Clay's submission, this Court did not "invalidate the margarine prohibition as it **no longer** served the valid ends of criminal legislation" [emphasis by Clay]. Rather, it did so because when the section was passed it was, as stated by Lord Morton (at p. 195), "in pith and substance a law for the protection and encouragement of the dairy industry of Canada."

T.H.C. LEVELS ARE IRRELEVANT

162. According to Clay, proof that a substance is cannabis (marihuana) does not establish it is a "narcotic". In effect, he asks this Court to read s. 2 of the ***Narcotic Control Act*** as if the following underlined words had been included by Parliament:

> "marihuana" means ***Cannabis sativa L.*** containing sufficient T.H.C. to produce an intoxicating effect.

Similarly, Schedule II of the ***Controlled Drugs and Substances Act***, would have to be read as if the following underlined words had been added:

> Cannabis containing sufficient T.H.C. to produce an intoxicating effect.

(Note: If accepted, then the altered definitions would apply to all cannabis offences, including trafficking, possession for the purpose of trafficking, and importing.)

163. Both McCart J. and Rosenberg J.A. properly rejected this argument on the basis that ***Perka, supra***, is dispositive. The ***ratio*** of the case is that Parliament, in using the botanical term

Cannabis sativa L. in the ***Narcotic Control Act***, intended to prohibit all cannabis. The passing reference by Dickson J. to "intoxicating marihuana" (at p. 266) does not detract from this conclusion.

(Note: It is equally clear that the term "Cannabis" used in the ***Controlled Drugs and Substances Act***, applies to all forms of marihuana.)

164. In paragraph 52, Clay refers to various interpretative aids, ***viz.***, strict construction, ordinary meaning, contextual and purposive approach, drug policy, and treaties. Notably absent is any reference to the primary rule of statutory interpretation succinctly stated by Lamer C.J. in ***R. v. Multiform Manufacturing Co.***, [1990] 2 S.C.R. 624 (at p. 630):

> When the words used in a statute are clear and unambiguous, no further step is needed to identify the intention of Parliament.

165. Also germane is the recent statement by Iacobucci J., in ***Bell ExpressVu Limited Partnership v. Rex*** (2002), 212 D.L.R. (4th) 1, 2002 SCC 42:

> [28] Other principles of interpretation – such as the strict construction of penal statutes and the "***Charter*** values" presumption – only receive application where there is ambiguity as to the meaning of a provision.

See also: ***R. v. Dunn***, [1982] 2 S.C.R. 677 @ p. 683 (per McIntyre J.): as "the words employed are clear and unambiguous", the listing of Psilocybin as a "restricted drug" in Schedule H to the ***Food and Drugs Act*** also prohibits this substance in its naturally occurring state; i.e., "magic mushrooms"

166. The argument now advanced is but a variation of that rejected in ***Perka, supra***. There what was described as the "botanical defence" was grounded on the post-1961 opinion of some botanists that more than one species of the genus cannabis should be recognized. Based on this the defence unsuccessfully contended that only the ***sativa*** variety was prohibited. The present submission ignores the fact that both before and after 1961, low T.H.C. cannabis has not been recognized as a distinct species.

(Note: Dr. Small noted the irony in the fact that defence counsel in ***Perka*** were asking that ***Cannabis indica***, a subspecies with relatively high amounts of T.H.C., be excluded from the definition of "narcotic": Clay Rec., Vol. 1, pp. 159, 242-244.)

167. As discussed by Dickson J., in ***Perka, supra***, ***Cannabis sativa L.*** is a technical term that had an accepted meaning when the ***Narcotic Control Act*** was enacted, ***viz.***, it applied to all types of cannabis plants (at p. 265):

> [W]here, as here, the legislature has deliberately chosen a specific scientific or technical term to represent an equally specific and particular class of things, it would do violence to Parliament's intent to give a new meaning to that term whenever the taxonomic consensus among members of the relevant scientific fraternity shifted. It is clear that Parliament intended in 1961, by the phrase "***Cannabis sativa L.***, to prohibit all cannabis. The fact that some, possibly a majority, of botanists would now give that phrase a less expansive reading in light of studies not undertaken until the early 1970's, does not alter that intention. [emphasis added]

168. Also apposite is ***R. v. Snyder*** (1968), 65 W.W.R. 292 (Alta.S.C.A.D.), holding that even though marihuana seeds contain no psychoactive ingredients they are nonetheless prohibited. At this time the Schedule to the ***Narcotic Control Act*** read (chemical formulas omitted):

> 3. ***Cannabis sativa***, its preparations, derivatives and similar synthetic preparations, including:
> (1) Cannabis resin,
> (2) Cannabis (marihuana),
> (3) Cannabidiol,
> (4) Cannabinol,
> (5) Pyrahexyl,
> (6) Tetrahydrocannabinol

169. In speaking for the majority, Kane J.A. stated (at p. 294):

> What is forbidden is possession of ***cannabis sativa***, its preparations, derivatives and similar synthetic preparations. The ***Act*** is not speaking of one part of ***cannabis sativa*** that may contain narcotic and another part that may not. It is speaking of ***cannabis sativa*** and that takes in the whole plant as one entity and also any part of that entity. [emphasis added]

See also: ***R. v. Hunter*** (2000), 145 C.C.C. (3d) 528 (B.C.C.A.), leave refused, [2000] 2 S.C.R. ix: discussing the 1987 amendment to the Schedule specifically excluding non-viable cannabis seeds, and holding that viable seeds are prohibited

170. In ***Perka, supra***, Dickson J. referred to numerous American decisions rejecting the "botanical defence": pp. 266, 267. It is, accordingly, noteworthy, that those courts have also rejected the argument that only "intoxicating" marihuana is proscribed.

(Note: The "botanical defence" has as well been rejected in Australia: ***Yager v. The Queen***, (1976), 139 C.L.R. 28 (H.C.).)

171. American federal law, i.e., 21 U.S.C. § 802(16), defines "marijuana" as:

> [A]ll parts of the plant ***Cannabis sativa L.***, whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin. Such term does not include the mature stalks of such plant, fibre produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fibre, oil, or cake, or the sterilized seed of such plant which is incapable of germination.

§§ 841(b)(1)(A)(vii), (B)(vii), and (D), provide different penalties based on the number of plants involved in an offence.

172. In ***United States v. Traynor***, 990 F. 2d 1153 (9th Cir., 1992), Wallace C.J., rejected a submission that since male plants contain low levels of T.H.C. they should be excluded from consideration in sentencing an offender convicted of manufacturing (i.e., growing) marihuana (at p. 1160):

> [11] The language of the statute is plain. As the district court pointed out, "[a] marijuana plant is a marijuana plant." Tetrahydrocannabinol (THC), the psychoactive ingredient in marijuana, is more concentrated in the female plant's flower buds. It is not obviously irrational for Congress not to distinguish between male and female marijuana plants, regardless of THC level, any more than it is irrational for Congress not to consider the weight or size of the plants. It would be improper for us to delve into economic philosophy in order to circumvent the unambiguous language of this statute. We thus join the Eighth Circuit, which recently rejected the "argument that only the female marijuana plants may be counted in calculating" the base offence level. ***United States v. Curtis***, 965 F. 2d 610, 616 (8th Cir.1992). The issue is for Congress, not the courts, to consider further. [emphasis added]

173. More recently, in ***New Hampshire Hemp Council v. Marshall***, 203 F. 3d 1 (1st Cir., 2000), the court affirmed the dismissal of an application for declaratory and injunctive relief seeking to exempt hemp producers from prosecution. In so doing Boudin Cir.J. stated (at p. 6):

> [12] Statutory language is the starting point in statutory interpretation ... it is the ending point unless there is a sound reason for departure. ... Here, nothing in Owen's complaint or arguments warrants a narrower reading, nor have somewhat similar arguments persuaded the several other circuits in which they have been advanced, in attempts to carve out various exceptions for cannabis sativa plants with low THC levels. We take Owen's key arguments one by one.

> Owen's main argument is that plants produced for industrial products contain very little of the psychoactive substance THC. However, the low THC content is far from conclusive. *See, e.g.*, ***United States v. Proyect***, 989 F. 2d 84, 87-88 (2d Cir.), ***cert. denied***, 510 U.S. 822, 114 S.Ct. 80, 126 L.Ed. 2d 49 (1993); ***United States v. Spann***, 515 F. 2d 579, 583-84 (10th Cir., 1975). It may be that at some stage the plant destined for industrial products is useless to supply enough THC for psychoactive effects. But problems of detection and enforcement easily justify a ban broader than the psychoactive variety of the plant. Owen's own expert testified at the preliminary hearing that young cannabis sativa plants with varying psychoactive properties are visually indistinguishable. And the statute does not distinguish among varieties of cannabis sativa. [emphasis added]

See also: ***Harrelson***, ***supra*** @ pp. 546, 547: hemp seeds fall within the plain and unambiguous definition of "marijuana" under state law, ***viz.***, "all parts of the plant cannabis sp., whether growing or not; the seeds thereof ..."

174. ***D.P.P. v. Goodchild***, [1978] 2 All E.R. 161 (H.L.), cited by Clay in paragraph 52, warrants further comment. In that case it was held, having regard to the then wording of the ***Misuse of Drugs Act 1971*** (U.K.), that a charge of possessing a "cannabinol derivative", i.e., a Class A drug, was not made out by proof that the accused possessed cannabis stalk and leaves containing such a substance, namely T.H.C. This reasoning turned, in part, on the fact that "Cannabis", a less serious, Class B drug, was by definition restricted to "the flowering or fruiting tops of any plant of the genus ***Cannabis*** from which the resin has not been extracted, by whatever name they may be designated", i.e., the part of the plant containing the highest concentration of T.H.C. In essence, it was held that given the definition sections of the ***Act***, the prohibition on a drug listed by its scientific name did not extend to naturally occurring substances containing that drug.

175. That ***Goodchild***, ***supra***, is restricted to the statutory language under consideration is clear from ***Dunn***, ***supra***, in which this Court held that the Court of Appeal for British Columbia erred in finding that mushrooms containing Psilocybin are not a "restricted drug". Of note is the fact that the Court of Appeal had followed its previous decision in ***R. v. Parnell*** (1979), 51 C.C.C. (2d) 413 (B.C.C.A.), in which ***Goodchild*** had been applied.

(Note: "Psilocybin" is currently Item 12, in Schedule III to the ***Controlled Drugs and Substances Act***. To accept Clay's argument with respect to marihuana is to accept that it would not be an offence to possess, traffic in, import, etc. "magic mushrooms", unless they contain sufficient Psilocybin to produce a physiological effect. Indeed, all of the Schedules would have to be read this way, e.g., highly diluted heroin would not be a "controlled substance".

176. More pertinent to the present discussion is the decision of the Court of Appeal following Goodchild's first trial, and the legislative response to it. In ***R. v. Goodchild*** (1977), 64 Crim.App.R. 100 (C.A.), Goodchild's convictions for possession of cannabis, and possession of cannabis with intent to supply, were set aside because what was seized did not contain either the "flowering or fruiting tops" of the plant. The case was remanded for trial on the outstanding alternate charge of possession of a "cannabinol derivative". Although no appeal was taken from this decision, in the appeal arising from the second trial, Lord Diplock remarked (at p. 164) that the decision of the Court of Appeal on this point was "obviously right."

177. As noted by Lord Diplock (at p. 165), the definition of "cannabis" was amended in 1977. As a result it now reads:

> [A]ny plant of the genus ***Cannabis*** or any part of any such plant (by whatever name designated) except that it does not include cannabis resin, or any of the following products after separation from the rest of the plant, namely –
>
> (a) mature stalk of any such plant,
> (b) fibre produced from mature stalk of any such plant, and
> (c) seed of any such plant.

The clear effect of this is that, save for the exceptions, all cannabis is prohibited.

See: ***R. v. Harris & Cox***, [1996] 1 Crim.App.R. 369 (C.A.) @ pp. 373B, 374C

178. There is no ambiguity in the straightforward language used in proscribing cannabis in the ***Narcotic Control Act*** and, more recently, the ***Controlled Drugs and Substances Act***. Parliament's intention is clear, ***viz.***, regardless of its physical characteristics or chemical composition, a marihuana plant is a marihuana plant. Accordingly, what Clay sold and possessed is, by definition, a "narcotic" / "controlled substance".

PART IV

NATURE OF ORDER SOUGHT

179. That the within appeals be dismissed, and the constitutional questions answered as follows:

Malmo-Levine

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

   Answer: No.

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

   Answer: It is not necessary to answer this question.

3. Does prohibiting possession of Cannabis (marihuana) for the purpose of trafficking under s. 4(2) of the ***Narcotic Control Act***, R.S.C. 1985, c. N-1, by reason of the inclusion of this substance in s. 3 of the Schedule to the ***Act*** (now s. 1, Schedule II, ***Controlled Drugs and Substances Act***, S.C. 1996, c. 19), infringe s. 15(1) of the ***Charter*** by discriminating against a certain group of persons on the basis of their substance orientation, occupation orientation, or both?

   Answer: No.

4. If the answer to Question 3 is in the affirmative, is the infringement justified under s. 1 of the ***Charter***?

   Answer: It is not necessary to answer this question.

Caine

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

   Answer: No.

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

   Answer: It is not necessary to answer this question.

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

   Answer: Yes. The legislation is ***intra vires*** Parliament under both the peace order and good government, and criminal law heads of power.

Clay

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

   Answer: No.

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

   Answer: It is not necessary to answer this question.

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

   Answer: Yes. The legislation is ***intra vires*** Parliament under both the peace order and good government, and criminal law heads of power.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

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October 10, 2002

AUTHORITIES