

INFORMATION TO USERS

This manuscript has been reproduced from the microfilm master. UMI films the text directly from the original or copy submitted. Thus, some thesis and dissertation copies are in typewriter face, while others may be from any type of computer printer.

The quality of this reproduction is dependent upon the quality of the copy submitted. Broken or indistinct print, colored or poor quality illustrations and photographs, print bleedthrough, substandard margins, and improper alignment can adversely affect reproduction.

In the unlikely event that the author did not send UMI a complete manuscript and there are missing pages, these will be noted. Also, if unauthorized copyright material had to be removed, a note will indicate the deletion.

Oversize materials (e.g., maps, drawings, charts) are reproduced by sectioning the original, beginning at the upper left-hand corner and continuing from left to right in equal sections with small overlaps. Each original is also photographed in one exposure and is included in reduced form at the back of the book.

Photographs included in the original manuscript have been reproduced xerographically in this copy. Higher quality 6" x 9" black and white photographic prints are available for any photographs or illustrations appearing in this copy for an additional charge. Contact UMI directly to order.

UMI

A Bell & Howell Information Company
300 North Zeeb Road, Ann Arbor MI 48106-1346 USA
313/761-4700 800/521-0600

NOTE TO USERS

The original manuscript received by UMI contains pages with slanted print. Pages were microfilmed as received.

This reproduction is the best copy available

UMI



Université d'Ottawa • University of Ottawa

**DECRIMINALIZATION BY DEFAULT:
THE SOCIAL CONSTRUCTION OF CANNABIS HARM
AND POLICY IN CANADA**

David C. Hicks

**Submitted to the Department of Criminology, University of Ottawa,
in partial fulfillment of the requirements for
the degree of Master of Arts**

1998

Copyright © David C. Hicks 1998



National Library
of Canada

Bibliothèque nationale
du Canada

Acquisitions and
Bibliographic Services

Acquisitions et
services bibliographiques

395 Wellington Street
Ottawa ON K1A 0N4
Canada

395, rue Wellington
Ottawa ON K1A 0N4
Canada

Your file / Votre référence

Our file / Notre référence

The author has granted a non-exclusive licence allowing the National Library of Canada to reproduce, loan, distribute or sell copies of this thesis in microform, paper or electronic formats.

L'auteur a accordé une licence non exclusive permettant à la Bibliothèque nationale du Canada de reproduire, prêter, distribuer ou vendre des copies de cette thèse sous la forme de microfiche/film, de reproduction sur papier ou sur format électronique.

The author retains ownership of the copyright in this thesis. Neither the thesis nor substantial extracts from it may be printed or otherwise reproduced without the author's permission.

L'auteur conserve la propriété du droit d'auteur qui protège cette thèse. Ni la thèse ni des extraits substantiels de celle-ci ne doivent être imprimés ou autrement reproduits sans son autorisation.

0-612-28428-X

Canada

This is the patent age of new inventions
For killing bodies, and for saving souls,
All propagated with the best intentions.

Lord Byron

Notre civilisation est avant tout une civilisation de moyens; dans la réalité de la vie moderne il semblerait que les moyens l'emportent sur la fin. Toute autre appréciation de la situation n'est que pur idéalisme.

Jacques Ellul
La Technique, 1954

TABLE OF CONTENTS

Acknowledgements.....	i
Abstract.....	ii
Chapter 1: Introduction and Statement of Purpose.....	1
Chapter 2: Theoretical Orientation.....	12
2.1 The Development of the Interactionist Perspective Towards Deviance, Social Problems and Social Control.....	12
2.2 Social Constructionism and Social Problems.....	15
2.3 Theoretical Applications to Analyses of the Drugs Issue.....	22
2.3.1 Interactionist, Labelling, and Conflict Accounts.....	22
2.3.2 Contextual Constructionist Accounts.....	29
Chapter 3: Methodology.....	35
3.1 The Methodological Utility of Essentialism and Constructionism.....	35
3.2 The Road to Extermination — The Methodological and Analytical Significance of the Constructionist View.....	38
3.3 Contextual Constructionism and the Cannabis Issue.....	42
3.4 Definition of Terms.....	48
Chapter 4: Historical and Analytical Overview of Cannabis Harm and Policy in Canada — Late 19th Century to 1997.....	54
4.1 The Early Period of Drug Prohibition, 1908-1961.....	54
4.1.1 Introduction.....	54
4.1.2 Constructing the Drug Problem — An Historical Overview.....	56

4.1.3	From Social Problem to a Reductionist Intervention Strategy.....	61
4.1.4	Iatrogenesis and Drug Prohibition.....	64
4.1.5	Bureaucratic Lawmaking, Class Politics, and the Ontological Status of ‘Illicit Drugs’.....	68
4.2	Harm Based Cannabis Reformism and the Emergence of Harm Reduction as a Federal Policy Position.....	72
4.2.1	The LeDain Era of Canadian Drug Policy.....	72
4.2.2	The Rise and Decline of Canada’s Drug Strategy, 1987-1997.....	78
4.2.2.1	Canada’s War on Drugs.....	78
4.2.2.2	Harm Reduction as a Key Concept in Canada’s War on Drugs.....	81
Chapter 5:	The Social Construction of Contemporary Canadian Cannabis Harm and Policy.....	84
5.1	Common-Sense, Cannabis Harm, and the Legislative Response.....	84
5.2	Symbolic Aspects of the Controlled Drugs and Substances Act.....	91
5.2.1	Agent Issues.....	91
5.2.1.1	A Gateway Drug?.....	93
5.2.1.2	Crime and Violence?.....	100
5.2.1.3	Driving While Intoxicated (DWI)?.....	105
5.2.2	Host Issues.....	109
5.2.3	Environmental Issues — Harm Reduction Rhetoric and Drug Policy.....	110
5.2.3.1	Scheduling, Harm, Response and the United Nations Drug Conventions.....	115

5.3 Environmental Issues in Context: The Non-Symbolic and Explicitly Technical Focus of the Controlled Drugs and Substances Act.....	123
5.3.1 Decriminalization By Default — Refining Drug Prohibition Technique.....	131
Chapter 6: The Master Patterns in Canadian Cannabis Policy: Technological Morality in Operation.....	137
6.1 An Overview of Key Findings.....	138
6.2 The Master Patterns and Technological Morality — The Cruel Ironies of ‘Drug Law Reform’ Under the C.D.S.A.	144
6.3 A Balanced Legal-Philosophical and Practical Basis for Drug Policy.....	154
6.3.1 The Constitutionality of Prohibiting Cannabis Possession in Canada.....	157
6.4 Conclusions and Implications.....	164
Bibliography.....	168
Appendix A: The Health and Psychological Consequences of Cannabis Use: The Australian National Task Force on Cannabis Overview	185
Appendix B: <u>R. v. Clay</u> (1997): Decision of Justice McCart.....	190
Appendix C: <u>R. v. Parker</u> (1997): Decision of Justice Sheppard.....	213

ACKNOWLEDGEMENTS:

I would like to thank Mr. John Kiedrowski for encouraging me to continue my academic career, and for his insight in identifying the skills and experience I needed — and when I needed them — to extract more out of what University studies have to offer.

Dr. Pete Conley deserves a considerable amount of credit for his efforts in shaping my understanding of the ‘illicit drug’ issue, and of harm reduction in particular. I sincerely thank him for the invaluable opportunity of working with him at Canada’s Drug Strategy.

My thesis supervisor, Dr. Michael Petrunik, is acknowledged for his dedication in working with me to refine the conceptual focus and analysis presented in this thesis. He also deserves special credit for continuously encouraging my pursuit of somewhat unorthodox lines of research inquiry.

I also wish to express my appreciation for the efforts of the two examiners for my thesis: Professor Daniel Dos Santos who generously offered very helpful comments and suggestions; and Professor Line Beauchesne who provided an extensive and detailed set of comments and suggestions which enhanced both the precision and subtleties of this analysis.

This thesis is dedicated to my parents, L. David and Vera Hicks. Their unwavering support, encouragement, and intellectual curiosity has played a crucial role in my having reached this particular point in my academic career. It is also dedicated to Laddie who passed away on December 9, 1996. Time and time again, he taught me the value of persistence in pursuing the things in life that matter most to you.

ABSTRACT:

This thesis provides a contextual constructionist study on the social construction of cannabis harm and policy in 20th century Canada. In particular, it examines constructions of cannabis harm at various points in history and their relationship to policy aimed at controlling the use and trade in this drug. This analysis covers the period from the introduction of the Opium Act in 1908 to the contemporary period with the enactment of the Controlled Drugs and Substances Act in 1996.

In Chapter two, I explore the historical antecedents of contextual constructionism — the theoretical structure employed in this essay — which is rooted in the development of symbolic interactionism and labelling theory. I identify and discuss some key works in the development of interactionist, labelling, and constructionist theory. I also devote attention to an overview of selected interactionist, labelling, conflict, and contextual constructionist accounts of the ‘illicit drug’ issue. I illustrate how early interactionist and more recent contextual constructionist studies have demonstrated that claims-making against ‘illicit drugs’ are typically based on soft or non-existent evidence, and that such claims-makers have engaged in moral crusades against ‘illicit drugs’, not to address ‘objective’ harmful conditions, but rather for bureaucratic interests and to promote certain moral positions.

In Chapter three, I examine the methodological approach used by Goldhagen (1996) in his provocative account of the causes underlying the nature and magnitude of the Holocaust. This quasi-constructionist analysis clearly exemplifies the power of symbolic communication in the social construction of definitions of problematic conditions and the development of intervention strategies. I adopt Goldhagen’s general methodological

stance and argue that — parallel to the social construction of putative Jewish perniciousness in Nazi Germany — neither direct social intercourse with cannabis, nor ‘objectively’ demonstrated cannabis harm have formed the basis for the common-sense conceptions of cannabis harm. Instead, these common-sense conceptions are primarily derived from the societal conversation surrounding this issue, and specifically those surrounding the claims-making activities of moral crusaders and representatives of powerful bureaucracies whose views form the bedrock for conceptions of cannabis harm, and the consequent necessity of prohibitionist intervention to tackle this problem.

In Chapter four, I analyse the social context and claims-making activities which gave rise to the genesis of prohibition with the 1908 Opium Act, the prohibition of cannabis in 1923, and developments leading up to the 1961 Narcotic Control Act. I also examine the emergence of harm-based cannabis reformist claims-making during the LeDain era of Canadian drug policy (1969-1974), and the emergence of claims-making activities with respect to harm reduction as a federal policy position during the rise and decline of Canada's Drug Strategy (1987-1997). I explore how moral crusaders and emerging government bureaucracies discovered ‘illicit drugs’ during a period of moral rectitude and often explicitly racist politics. I demonstrate their insistence that ‘illicit drugs’ were the cause of innumerable actual and potential social problems, not the least of which was the corruption of the white race by the Chinese via the spread of their disease — i.e., opium use. I also detail, in Chapter four, a clear movement away from the issue of the enforcement of morality as the basis for drug control and an increasingly greater focus on the issue of harm evident in the legal-philosophical claims-making activities of the LeDain Commission (1969-1974), and their

and their partial rejuvenation in the concept of harm reduction associated with the rise and decline of Canada's Drug Strategy (1987-1997).

In Chapter five, I address the contemporary social construction of cannabis harm and policy deriving from the debates in the Sub-Committee hearings on the Controlled Drugs and Substances Act. I follow the lines of argument presented and the specific issues raised related to cannabis and its control. I also counterpose arguments about cannabis harm against the 'objective' evidence found in existing research literature. Additionally, I argue that both the reasons behind the decriminalization of cannabis possession under the Controlled Drugs and Substances Act, and the nature of what change could (and eventually would) take place (and be acceptable to the primary interest groups) were clearly explicated in the Sub-Committee hearings.

In the sixth and final Chapter, I provide a discussion of the key findings of this thesis, an overview of the master patterns in Canadian cannabis policy since the turn of the century, an explication of a philosophical and practical framework for balanced drug control policy, and the conclusions and implications of my analysis. I discuss how the institution of drug prohibition continually manages to succeed in the enhancement of its bureaucratic and economic power, not in spite of its failures, but, rather paradoxically, because of its failures. Furthermore, I illustrate that by diverting attention from the issue of harm related to specific drugs, proponents of prohibition continuously manage to obfuscate the nature of the relationship between the psycho-pharmacological harm of cannabis, drug policy, as well as their role in shaping both public conceptions about cannabis harm and the precise nature of the prohibitionist enterprise.

LIST OF TABLES:

Table 1: Use of Marijuana.....	110
Table 2: Incidence of Recorded Cannabis Offences.....	114
Table 3: Cannabis Convictions and Dispositions for Simple Possession: British Columbia and Ontario.....	134

CHAPTER 1

INTRODUCTION AND STATEMENT OF PURPOSE:

In recognition of the goal of harm reduction, we do wish to clarify that the CACP [Canadian Association of Chiefs of Police] does not support nor do we endorse the legalization or the decriminalization of marijuana or other illicit substances beyond the current boundaries.

Mr. Barry V. King

Chief, Sault Ste. Marie Police

Chairman, Drug Abuse Committee,

Canadian Association of Chiefs of Police¹

In 1996, a new Canadian drug law, the Controlled Drugs and Substances Act (Bill C-8) replaced the previous Narcotic Control Act and parts III and IV of the Food and Drugs Act. Though there are many interesting facets of this new legislation, such as the expansion of prohibition to include the introduction of controls on precursor chemicals and designer or look-alike drugs, there is perhaps nothing which will promote more public debate than the

¹ House of Commons (1994c: 98).

decriminalization² of possession of small amounts³ of cannabis under Section 4 (5) of the Controlled Drugs and Substances Act (C.D.S.A.). This liberalization of drug laws with respect to cannabis is rather curious in a country which has been a world leader in the introduction and expansion of prohibitionist drug control. That decriminalization has occurred despite the objections to it by powerful interest groups such as the Canadian Association of Chiefs of Police, and that the Bill itself represents a sizable expansion of the prohibitionist agenda, makes this change even more enigmatic. Some may conclude that the “voices of reason” — those who advocate that cannabis possession be treated less severely because of its relatively benign nature as compared with other drugs, both illicit and licit — have finally won a victory over the reactionary views and measures against cannabis which have been promulgated by politicians, and bureaucrats of the health and enforcement communities. Such a view is a decidedly oversimplified interpretation of a complex socially

² Decriminalization is a controversial term subject to many meanings which I elaborate in chapter 3, pages 50-52. As a constructionist analyst concerned primarily with the viability of definitions rather than with issues of validity (Schneider, 1985: 224), I will give particular attention to the most widely accepted definition among members of the health and enforcement communities rather than definitions provided by academic analysts of drug policy (Beauchesne, 1997: 9; Bertrand, 1990: 534). This definition is a minimalistic one — that of a reduction in the severity of punishment — as opposed to more comprehensive notions which refer to the total abolition of penalties. While I agree with those who argue that such a minimalistic interpretation is analytically imprecise, it is the members definition (i.e., members of the health and law enforcement communities) which must be given priority in a constructionist analysis.

³ Under the previous Narcotic Control Act persons charged with possession of cannabis, regardless of quantity, were liable to prosecution by summary conviction (maximum penalty for a first offence of a \$1,000 fine and/or six months imprisonment, and for a subsequent offence \$2,000 fine and/or 1 year of imprisonment) or by indictment (maximum penalty of seven years imprisonment). Under the C-7 version of the Controlled Drugs and Substances Act (C.D.S.A.) the penalties for possession would remain the same, save a \$1,000 increase in the maximum fine which could be imposed for a first offence and a \$3,000 increase in the maximum fine which could be imposed for subsequent offences. Under the enacted C-8 version of the C.D.S.A. persons charged with possession of small amounts of cannabis (e.g., 1 gram or less of cannabis resin, or 30 grams or less of marijuana) are liable to prosecution by summary conviction only (maximum penalty of a \$1,000 fine and/or six months imprisonment). The principal benefit of this change for individuals prosecuted for small-scale cannabis possession is the absence of the prospect of being prosecuted by indictment, and the consequent absence of fingerprinting (e.g., previously possession was a hybrid offence which allows prosecution by summary conviction or indictment and thus automatically requires fingerprinting) which is the basis for a criminal record on Canada's Centralised Police Information Computer System (C.P.I.C.). The absence of a centralised criminal record on C.P.I.C. does not imply that there is no record of the offence held at a local police station or within a local and/or provincial court registry. However, the utility of records not computerized and entered into the C.P.I.C. system is significantly constrained by the decreased accessibility such records offer for foreign/domestic police investigations or routine record sharing, and for employer security checks on prospective employees.

constructed phenomenon. The present study seeks to develop an understanding, not only of the nature and import of this change in drug policy, but also, to contextualize the change in terms of the history of 'illicit drug' control in Canada, and the views and interests which prohibition engenders.

My interest in this topic stems from my work in developing a Cannabis Policy Discussion Paper with Dr. Pete Conley at Canada's Drug Strategy (C.D.S.), Health Canada; a paper produced for the Canadian Centre on Substance Abuse National Working Group on Drug Policy. I was struck by the profound divergence between popular rhetoric with respect to the harm of cannabis, and the lack of demonstrated psycho-pharmacological harm evident in the research literature. While the Cannabis Policy Discussion Paper was largely a technical document, whose scope of analysis precluded all but superficial engagement in the rhetoric surrounding this topic, I became interested in connecting such debates to the controversy and developments in Canadian cannabis policy with specific reference to the C.D.S.A.. Theoretically, this topic is of considerable interest because the cannabis issue exemplifies the social constructionist dictum that deviance is a socially constructed phenomenon which is not simply a reflection of 'objective' conditions, but rather a product of their subjective interpretation. I will argue that the relationship between cannabis harm and cannabis policy is elusive, and ultimately, illusory from an 'objective' perspective. In order to develop a better understanding of this relationship, one needs to examine how the harm of cannabis has been socially constructed, both historically and at present, and how conceptualizations of the harm of cannabis are associated with the type of intervention employed to control the use and trade in this drug.

Readers should note that Chief King's statement, which introduces this chapter, denotes a certain amount of tension between the application of the concept of harm reduction (a C.D.S. concept to which the C.A.C.P. subscribes, despite the ambiguity as to its precise meaning) and its relationship to the legalization/decriminalization debate. This statement also signifies the C.A.C.P.'s concern to demonstrate that, from their perspective, harm reduction is not synonymous with the legalization or decriminalization of currently 'illicit drugs', and that the goals of harm reduction cannot be achieved through the liberalization of drug laws. The cannabis legalization/decriminalization issue is a source of mounting controversy, not just in Canada, but internationally. Among our neighbours to the South, cannabis and 'illicit drugs' generally are a source of prolific debate and controversy. Indeed, concern about the views of those who advocate reform of drug laws led, in the United States, to the convening of an Anti-Legalization Forum held at the Federal Bureau of Investigation (F.B.I.)/Drug Enforcement Administration (D.E.A.) Training Academy in August 1994. Based on discussions held at this forum, a guide entitled How to Hold Your Own in A Drug Legalization Debate (1994) was produced and disseminated among law enforcement officials. This guide contained a particularly interesting statement regarding the burden of proof in discussions on drug policy. Prohibitionist readers were warned not to assume the defensive position, and to remember that the burden of proof is on the proponents of drug policy reform (D.E.A., 1994: 33).

This burden of proof argument forms one of the central problematics discussed in this paper. The burden of proof, both historically and at present, has been unjustly placed upon cannabis (and other drug) users and drug policy reformers, and, in this country, the

government of Canada has continually absconded on its moral and its current legal responsibility — under the Charter of Rights — to promote balanced social control policy in the case of cannabis. Proponents of drug policy reform have long promoted alternative systems of legalization and decriminalization and defended their positions while attacking prohibition and its effects. However, from a policy perspective, the burden of proof in demonstrating harm in need of remedial action must lie with those who have the power to enact drug control policy, not on those who would advocate its reform (based on a lack of harmfulness) but who lack the power to do so. This obfuscation of the onus of responsibility and the confusion it entails manifests itself in discourse on the seemingly complex relationship between the concept of harm reduction and the legalization/decriminalization debate. This relationship is a reflection of a contest for definitional control of the concept of harm reduction in which bureaucratic and organizational interests are paramount and the issue of harm is, either secondary, or, as this study will demonstrate, an inherent assumption without foundation.

In this study, I argue first that governmental responsibilities with respect to demonstrating the harmfulness of cannabis have not been met and that the current law and its reform under Bill C-8 represents a continued avoidance of the government's responsibility to design balanced social policy in a democratic society. Second, I undertake to explain the power interests which have obfuscated governmental responsibility in this regard. Finally, I examine how the social construction of Canadian cannabis policy is an exemplar of reductionist conceptualizations of the nature of cannabis harm which have become the "*common-sense*" views of both the prohibitionist interest groups and of the public generally.

My aim is not simply to apply the concept of false consciousness to debunk⁴ prohibitionist mystification of the cannabis issue; rather, I will present a contextual constructionist study of the symbolic creation of images and understandings about cannabis and their relation to the interests and application of power in the realm of social control. Following the dictate that, *"One of the chief attributes of power is not having to say what it is, not having to reveal its true identity, not having to give up its secrets to even the most diligent search"* (George & Sabelli, 1994: 247), I undertake to identify the source of the power of prohibitionism, and how the exercise of this power maintains and regenerates itself despite the repeated 'objective' failures of prohibitionist intervention.

My central thesis is that cannabis possession under the C.D.S.A. has been decriminalized by default. That is, cannabis has been decriminalized, not because it is recognized as being less harmful than previously thought, but instead because, quite paradoxically, this change neither threatens the interests of the enforcement community at present nor in the future, and this change may actually suit enforcement interests in the very near future. I will argue that decriminalization of cannabis possession, while providing the appearance of a harm reduction or more humane approach to low-level cannabis offenders, is best explained as a compromise which only gives the appearance of enlightened reformism or acquiescence to drug policy reformers. In all likelihood, this reform will be illusory. It will simply serve to streamline cannabis possession enforcement and its alleged benefits (e.g., the lack of a centralized criminal record) will be minimal, and inevitably dissipate. In expounding

⁴ Debunking is a crude form of analysis and antithetical to the goals of constructionist analysis because it carries with it the implicit or explicit assumption that the analyst has superior knowledge of the actual nature of 'objective reality' (Best, 1989: 246).

my central thesis, I will employ a contextual constructionist theoretical and methodological framework to analyse the social construction of cannabis (and to a certain extent ‘illicit drug’) harm and policy since the genesis of drug prohibition in Canada with the enactment of the Opium Act of 1908, and the subsequent major developments leading up to the enactment of Canada’s current drug law, the Controlled Drugs and Substances Act.

In Chapter two, I will explore the historical antecedents of contextual constructionism which is rooted in the development of symbolic interactionism and labelling theory. I will identify and discuss some key works in the development of interactionist, labelling, and constructionist theory. Attention will also be devoted to an overview of selected interactionist, labelling, conflict, and contextual constructionist accounts of the ‘illicit drug’ issue. Lindesmith’s (1938; 1940) work in positing a sociological theory of drug addiction, and his assertions about the creation of the “dope fiend mythology” used by the enforcement community to bolster the power and financial resources of their bureaucracies will be highlighted as the pioneering interactionist studies on the ‘illicit drug’ issue. In congruence with Lindesmith’s study of “dope fiend mythology”, I will illustrate how early interactionist and more recent contextual constructionist studies have demonstrated that claims-making against ‘illicit drugs’ are typically based on soft or non-existent evidence, and that such claims-makers have engaged in moral crusades against ‘illicit drugs’, not to address ‘objective’ harmful conditions, but rather for bureaucratic interests and to promote certain moral positions.

In Chapter three, I will examine the methodological approach used by Goldhagen (1996) in his provocative account of the causes underlying the nature and magnitude of the

Holocaust. This quasi-constructionist analysis clearly exemplifies the power of symbolic communication in the social construction of definitions of problematic conditions and the development of intervention strategies. Goldhagen inverts the Marxian precept that conceptions and consciousness are derived from material social intercourse, and argues that ordinary German conceptions of putative Jewish perniciousness during the Nazi period were based largely upon what they had heard about Jews while listening to, and partaking in, the societal conversation. In seeking to validate his hypothesis, Goldhagen embarks upon an exhaustive and virtually fruitless attempt to identify incidents where common-sense conceptions of putative Jewish perniciousness were challenged, either through communication or through refusal to kill unarmed and innocent human beings.

I will adopt Goldhagen's general methodological stance and argue that neither direct social intercourse with cannabis, nor 'objectively' demonstrated cannabis harm, have formed the basis for the common-sense conceptions of cannabis harm. Instead, these common-sense conceptions are primarily derived from the societal conversation surrounding this issue, and specifically those surrounding the claims-making activities of moral crusaders and representatives of powerful bureaucracies whose views form the bedrock for conceptions of cannabis harm, and the consequent necessity of prohibitionist intervention to tackle this problem. Obviously, I will not be drawing some moral comparison between the perpetrators of the Holocaust, and those responsible for prohibitionist drug intervention. Rather, I will be drawing a comparison between the two in terms of their responsibility for the development and exercise of the intervention strategies which they have rather zealously pursued without regard to establishing the 'objective' harm they are ostensibly attempting to resolve.

In Chapter four, I will analyse the social context and claims-making activities which gave rise to the genesis of prohibition with the 1908 Opium Act, the prohibition of cannabis in 1923, and developments leading up to the 1961 Narcotic Control Act. I will also examine the emergence of harm-based cannabis reformist claims-making during the LeDain era of Canadian drug policy (1969-1974), and the emergence of claims-making activities with respect to harm reduction as a federal policy position during the rise and decline of Canada's Drug Strategy (1987-1997). Rather than attempting to provide an exhaustive and definitive account of the evolution of drug prohibition in Canada — a subject which has been thoroughly tackled by others (e.g., Giffen et al., 1991; and LeDain, 1973) — my analysis will focus on the theoretical and philosophical underpinnings of the social construction of 'illicit drug' and cannabis harm and drug policy. I will explore how moral crusaders and emerging government bureaucracies discovered 'illicit drugs' during a period of moral rectitude and often explicitly racist politics. I will demonstrate their insistence that 'illicit drugs' were the cause of innumerable actual and potential social problems, not the least of which was the corruption of the white race by the Chinese via the spread of their disease — i.e., opium use. I will also illustrate how the identification of 'illicit drugs' as the cause of social problems was intimately intertwined with the reductionist logic which pervaded the Social Darwinist era of the late 19th and early 20th century. Within such a conceptual framework, claims-making about the harm of 'illicit drugs' were readily accepted as sufficient evidence of harm, and the intervention strategy designed to tackle the complexity of such social problems was drug prohibition with the ultimate goal of eradicating the availability of 'illicit drugs'.

I will also detail, in Chapter four, a clear movement away from the issue of the enforcement of morality as the basis for drug control and an increasingly greater focus on the issue of harm evident in the legal-philosophical claims-making activities of the LeDain Commission (1969-1974), and their partial rejuvenation in the concept of harm reduction associated with the rise and decline of Canada's Drug Strategy (1987-1997). The majority report of the LeDain Commission argued that it was acceptable for the criminal law to be used for the enforcement of morality, but not without regard to potential for harm which truly threatens social interests. After conducting an extensive cost-benefit analysis of the harm of cannabis and the potential harm associated with various control options, the majority position of the LeDain Commission recommended a lessening of penalties related to cannabis offences due to the relatively low demonstrable harm and toxicity of the drug. While the LeDain Commission recommendations on cannabis were never adopted through legislative reform, I will illustrate how their focus on the issue of cannabis harm re-surfaced as a central topic of discussion with the emergence of Canada's Drug Strategy in 1987 and its policy shift towards harm reduction. I will elucidate how the harm reduction position taken by Canada's Drug Strategy helped to generate a focal point for critics of drug prohibition, particularly with respect to cannabis; a drug which many considered not to be harmful enough to justify the harm induced by measures aimed at controlling use of this drug.

In Chapter five, I will address the contemporary social construction of cannabis harm and policy deriving from the debates in the Sub-Committee hearings on the C.D.S.A. Rather than provide an exhaustive review of witness evidence with respect to drug policy, which would be too detailed for the purposes of this thesis, I will follow the lines of argument

presented and the specific issues raised related to cannabis and its control. I will also counterpose arguments about cannabis harm against the ‘objective’ evidence found in existing research literature. I will not provide a comprehensive overview of media coverage of the C.D.S.A. related to the cannabis issue, however, I will cite a selection of notable journalistic articles. My reasons for excluding an extensive overview are centred on a principal conclusion which this analysis will substantiate. Specifically, while media coverage denouncing the new drug law was an integral component in pushing the government to decriminalize cannabis possession under the C.D.S.A., I will argue that both the reasons behind this reform and the nature of what change could (and eventually would) take place (and be acceptable to the primary interest groups) were clearly explicated in the Sub-Committee hearings.

In the sixth and final chapter, I will provide a discussion of the key findings of this thesis, an overview of the master patterns in Canadian cannabis policy since the turn of the century, an explication of a philosophical and practical framework for balanced drug control policy, and the conclusions and implications of my analysis. In examining the macro-level changes in the social construction of cannabis harm and policy, I will assess how the overt failure of drug prohibition operates as a veil for the covert success of drug prohibition. I will discuss how institutions promoting drug prohibition continually manage to succeed in the enhancement of their bureaucratic and economic power, not in spite of their failures, but, rather paradoxically, because of their failures. Furthermore, I will illustrate that by diverting attention from the issue of harm related to specific drugs, proponents of prohibition continuously manage to obfuscate the nature of the relationship between the psychopharmacological harm of cannabis, drug policy, and their role in shaping both public conceptions about cannabis harm and the precise nature of the prohibitionist enterprise.

CHAPTER 2

THEORETICAL ORIENTATION

...[W]ith the acquisition of language, human reactions to the external social and physical worlds become increasingly complex and indirect as they are increasingly mediated by ideas about those worlds. Humans act not in terms of things as they really are, but according to the ideas or conceptions of things that they acquire from their society. These conceptions of the world may be said to constitute symbolic environments.

Alfred R. Lindesmith & Anselm L. Strauss

Social Psychology¹

2.1 THE DEVELOPMENT OF THE INTERACTIONIST PERSPECTIVE TOWARDS DEVIANCE, SOCIAL PROBLEMS AND SOCIAL CONTROL:

The origins of symbolic interactionism can be traced to the work of University of Chicago philosopher George Herbert Mead.² Mead argued that society is best understood as an organization which constitutes an ongoing process of communicative social acts — a process wherein social transactions between individuals, particularly in the form of linguistic symbols which carry a similar content and meaning for different individuals, shape the form of society and people's understanding of the world and of themselves (Coser, 1977: 334). Mead's work provided the impetus and underpinnings not only for the development of the

¹ Lindesmith & Strauss (1968: 42).

² The phrase symbolic interaction was actually coined in 1937 by Herbert Blumer, a student of George Herbert Mead.

interactionist perspective in the social psychological writings of Blumer (1937) and Lindesmith (1938), but also for an incipient societal reaction perspective in the early work of Tannenbaum (1938) on delinquency, and Lindesmith's (1947; 1965) studies of opiate addiction and narcotics laws. However, it was not until Edwin Lemert's 1951 book Social Pathology³ that the societal reaction perspective was systematically developed. Combining interactionist influences with influences from social anthropology and the work of W.F. Cottrell (1955; 1972), Lemert's particular focus was on the relationship between social control and deviance. More specifically, he inverted the traditional focus on social control as a response to deviance and social problems, and posited that efforts at social control are a major factor in the persistence of deviance and the creation of new problems. For Lemert, deviant incidents, and particularly persistent careers in deviance, are generated processually from the interaction of numerous highly variable factors including individual behaviour, individual and collective values, environmental influences, technology, and societal reaction (Petrunik, 1991: 9-15).

The interactionist perspective towards deviance and social problems and its societal reaction or labelling theory offshoots gained considerable prominence during the social and political unrest of the 1960's, and were in part an attempt to take on the role of the powerless underdog, the deviant, and to see how they interpret the world and their own behaviour (Jeffery, 1990: 267). Proponents of societal reaction or labelling theory inverted the

³ The title of Lemert's landmark book carried with it a considerable amount of irony in that his approach was a challenge to the dominant pathology perspective which ascribed deviant and criminal behaviour to the malfunctioning of individuals or society. Although his book was markedly different from the "*social pathology*" textbooks which dominated this period, Edwin Lemert acknowledged that the title was a marketing decision of the publisher who viewed the book as a text for courses on social pathology (Petrunik, 1991: 3-4).

predominant correctionalist focus on the etiology of deviant acts and the treatment of deviant actors and concentrated their attention on the labels applied individually and collectively to individuals and groups. As Howard Becker notes in his classic statement, the assumption of the homogeneity of deviants based on their committing deviant acts is,

...an assumption [which] seems to ignore the central fact about deviance: it is created by society. I do not mean this in the way that it is ordinarily understood, in which the causes of deviance are located in the social situation of the deviant or in "social factors" which prompt his action. I mean, rather, that social groups create deviance by making the rules whose infraction constitutes deviance, and by applying those rules to particular people and labeling them as outsiders. From this point of view, deviance is not a quality of the act the person commits, but rather a consequence of the application by others of rules and sanctions to an 'offender'. The deviant is one to whom that label has been successfully applied; deviant behaviour is behaviour that people so label. (Becker, 1963: 8-9).

In this sense, the deviant, and the criminal especially, are viewed by society as being outsiders, pathological individuals thereby differentiated from the mainstream societal member, and as a person “...who cannot or will not act as a moral human being...” (Becker, 1973: 34). The sceptical societal perception-based approach taken within the interactionist perspective and its societal reaction or labelling offshoots, made it the logical precursor to the introduction of social constructionist theory and methodology in the study of social problems.

2.2 SOCIAL CONSTRUCTIONISM AND SOCIAL PROBLEMS:

Essentialism, the phenomenological approach, and constructionism provide different ways of looking at phenomena in the world. The essentialist (also known as objectivist or realist) view takes the position that all phenomena in the world have an inherent essence or ontology which is immutable and allows such phenomena to be unambiguously categorized and thereby distinguished from other categories and phenomena (Goode, 1994: 32). The phenomenological approach views 'reality' as a matter of perception or consciousness. The constructionist view, as illustrated in the following story, contests the idea that all phenomena in the world have inherent qualities or traits which allows them to be unambiguously categorized; instead, categories are viewed as social constructs defined by the criteria used to interpret and attribute meaning to them (Goode, 1994: 33).

Three baseball umpires are reflecting on their professional practice of calling balls and strikes. The first, a self-confident realist, says, "I call 'em the way they are," to which the second who leans toward phenomenological analysis says, "I call 'em as I see 'em," and the third [the constructionist umpire] closes the discussion with "They ain't nothin until I call 'em."

(Sarbin & Kitsuse, 1994: 1)

Whether a given pitch is a ball, a strike, or anything at all within the game of baseball is thus a matter of interpretation. The constructionist umpire is saying that, within the game of baseball, the ball does not exist until he, as an official in "*the game*", calls it, and thereby assigns meaning to it (Sarbin & Kitsuse, 1994: 1). In 'reality', attributions of meaning to events or objects are not as definitive as the umpire's call in a baseball game, and typically

such attributions are a product of definitional processes involving the interaction of various claims and claims-makers who vie for definitional control of what does or does not constitute a social problem, and what does or does not constitute 'reality'.

While the social constructionist approach does not deny the existence of a putative condition, it does assume that a social problem is the product of the activities of those who assert and are able to define such conditions as social problems. In Constructing Social Problems, Spector and Kitsuse (1977) provided the seminal statement of the social constructionist approach, a statement which both transformed and revitalized the sociology of social problems (Miller & Holstein, 1993a: 5). Constructionism breaks with the conventional and common-sense conceptions of social problems as 'objective' problematic conditions which cause harm to society or individuals, and focuses instead upon the social process of definition involved in the creation of social problems. Interpreted in this fashion, social problems are not viewed as 'objective' conditions to be studied and corrected based on a normative distinction between what is and what ought to be. Instead, social problems are viewed as the products of interpretive processes which constitute the basis for the transformation of putative problematic conditions into social problems. Accordingly, for constructionists a social problem is deemed to exist when, *"(1) a group of people recognize or regard something as wrong; (2) they are concerned about it; and (3) they urge or take steps to correct it"* (Goode & Ben-Yehuda, 1994: 88). Thus, a social problem is called into being when a number of people identify a problematic situation which they are concerned

about, and the situation is viewed as a condition for which ameliorative action can and should be taken.⁴

Consequently, “*The central problem for a [constructionist] theory of social problems is to account for the emergence, nature and maintenance of claims-making and responding activities...[and] The theoretical [and practical] problem is to account for how categories of social problems and deviance are produced, and how methods of social control and treatment are institutionally established*” (Spector and Kitsuse, 1977: 72, 76). However, constructionist theory in the study of social problems is not monolithic. The fracturing of constructionism into two major schools of thought,⁵ the strict and the contextual, has principally resulted from an ongoing debate among constructionists prompted by Woolgar and Pawluch’s (1985) charge that constructionist analysis engages in “*ontological gerrymandering*” via its selective attention to ‘objective’ conditions despite its purported indifference to the ‘objective’ basis of alleged conditions. That is, the constructionist focus on claims made about putative conditions implies that the ‘objective’ status of social conditions is either irrelevant or unknowable. However, such analyses typically contain the analyst’s assumptions (either implicit or explicit) about the ‘objective’ or actual status of the social condition (Best, 1989: 245).

⁴ Obviously, the problematic condition must be something which can be changed. Acts of God (e.g., flash floods, lightning strikes, etc.) are only problems, to the extent that they are linked to interpretations of God and nature and actions based on these interpretations which have resulted in transformations of environmental conditions. For example, flooding may be related as much to human use of the eco-system as to acts of God.

⁵ A comprehensive, in-depth discussion of the varieties of social constructionist thought is beyond the scope of this thesis. For a useful overview, see Pires and Acosta (1994: 2-33).

The desire for analytic purity evident in the efforts of strict constructionist analysts' attempts to avoid making either explicit or implicit assumptions about 'objective reality', and to focus exclusively on claims-making activities without engaging in the special 'privileging' of the analyst's judgements as to the accuracy or validity of various claims, comes at a high price. Without the analyst engaging in some assessment of the relative merit of various claims, one is compelled to treat all claims and counter-claims equally without regard to their 'objective' veracity, thereby leaving the analyst in the rather unpleasant situation of discussing without prejudice, and on an equal footing, for example, untestable anti-Satanist claims about a "*conspiratorial blood cult*" sacrificing sixty thousand victims a year and law enforcement counter-claims that anti-Satanist claims are implausible (Best, 1993: 136). While it may be possible to avoid explicit declarations about 'objective reality', invariably the analyst's implicit assumptions about 'objective' conditions will guide their research — e.g., those who doubt the satanic menace are more likely to look at the nature and spread of anti-Satanist views, while those who believe in the satanic menace are more likely to examine institutional reluctance or ignorance in dealing with the issue. Assessing a claims-maker's interest in putting forward certain claims also requires that the analyst make certain assumptions, however subtle or implicit they may be, about the 'objective' conditions which inform a particular interest position (Best, 1993: 137). Strict constructionists have responded to the issue of "*ontological gerrymandering*" by shifting their attention from social conditions and claims-making activities onto the language of claims-making, the "*Vernacular Constituents of Moral Discourse*" (Ibarra & Kitsuse, 1993) in an attempt to restrict their discourse to an analysis of the use of language.

For contextual constructionists, like Joseph Gusfield, “...*the value of the constructionist position rests in its ability to increase our knowledge of social life*”, and the charge of “*ontological gerrymandering*” does not alter sociological knowledge that claims-making occurs within a particular context of culture and social structure (Best, 1993: 138-139). Thus, for contextual constructionists, the importance of theoretical rectitude or epistemological consistency is secondary to the empirical work which provides us with new insights into the emergence, decline, and nature of social problems; insights which were previously ignored by the purportedly ‘scientific’ and factual approaches of other methods of ‘objective’ sociological inquiry. While strict and contextual constructionists are both concerned with the social construction of social problems, the essential difference between the two is the relevance they accord to the ‘objective’ dimension. Strict constructionists argue against the assumption of ‘objectivity’ and the analytic value of determining relationships between ‘objective’ harm and subjective concern — an approach which inevitably leads to the privileging of certain views over others which constitutes a bias or “*ontological gerrymandering*”.

The contextual social constructionist approach, on the other hand, does not deny the existence of putative conditions; however, it does assume that social problems are a product of claims-making activities situated within particular historical, cultural and social structural contexts.⁶ Contextual constructionists accept the relative independence of subjective

⁶ Strict constructionists attempt to avoid assumptions about the ‘objective’ status of the conditions underlying particular claims; they argue that social scientists should not be concerned with the validity (truth or falsity) of claims, but rather with their viability (i.e., when, where, and by whom they are used and how they are received). In contrast, contextual constructionists argue that it is difficult, if not impossible, to take a strict subjectivist standpoint which would make no assumptions about the conditions themselves and treat no claims as any more valid than another. Contextual constructionists argue that we are partially determined by the contexts (social structures, cultures, and languages) within which we live and work. In addition, contextual analysts argue

definitions from the 'objective' significance of putative conditions, but argue for the value of recognizing that the 'objective' seriousness of social conditions can be an influencing factor on subjective concern. For contextual constructionists, the 'objective' and subjective dimensions are not so much contradictory as they are independent, such that statements of the comparative size and scope of a social problem can be one, among many, important components⁷ in the discrediting or validation of particular claims or claims-making activities (Goode & Ben-Yehuda, 1994: 99). Becker (1973) acknowledges the impossibility of describing a "*higher reality*" or 'objective reality' which integrates different claims. While he recognizes that we may see the situation from both sides, he asserts that it can not be done simultaneously (Becker, 1973: 173). Inevitably, we will choose to focus our study, and thereby privilege, one viewpoint over another, and for this we will undoubtedly be accused of bias in presenting a one-sided or distorted view of 'reality'. However, in privileging certain views, or indicating whose side we are on, we are not presenting a distorted view of 'reality', rather we are presenting a "*...reality which engages the people we have studied, the reality they create by their interpretation of their experience and in terms of which they act*", and failure to present this 'reality', in both its subjective and 'objective' dimensions, precludes the achievement of a full sociological understanding of the phenomenon we are attempting to understand and explain (Becker, 1973: 174).

that constructionists can and must deal not only with the viability of claims but also with their relative validity. This is not an absolute privileging of one set of claims over another, but a matter of the analyst's informed judgements of the "best available" evidence given the context in which the research is being carried out. For a discussion of these issues see: (Best, 1990: 189; Best, 1993: 120-147; Goode, 1994: 61-63; and Gusfield, 1985: 16-18).

⁷ Relationships between the 'objective' and subjective dimensions are not automatic. Their relationships vary from case to case and are likely to be systematically connected to a number of other crucial factors and variables.

Particularly in the study of law and social problems one typically finds a dichotomy of consensus and conflict theories. In the former case, laws are deemed to reflect the common good and a shared sense of what is problematic, while in the latter case, laws are viewed as an expression of the interests and values of those groups which are dominant in terms of class, race, and other characteristics. The inherent limitation to the preceding essentialist viewpoints is that they tend to analyse social phenomena from a normative standpoint rather than an empirical one⁸ (Murray, 1988: 73). Moreover, essentialist interpretations tend to minimize the important influence of the interaction between various actors involved in the creation of deviance designations and the social context of claims-making activities. As Gusfield has argued, “...*definitions of suffering and corresponding intervention approaches are historically specific products of complex politics and culture*” (Gusfield, 1982: 1). Contextual constructionism provides sociologists with the necessary analytical and conceptual tools, and the appropriate balance between substance and theoretical consistency to examine assessments of both the subjective and ‘objective’ dimensions in the study of putative conditions, and the important relationships between these two dimensions and the socio-political context in which ‘problematic conditions’ emerge as social problems and come to be acted upon. I have taken the contextual constructionist perspective as the most appropriate epistemological framework for the purposes of the present study on the basis that it provides a decidedly more insightful frame of reference than essentialist interpretations or strict constructionist explanations.

⁸ This criticism does not apply equally to all forms of conflict theory. Indeed, pluralistic, non-partisan conflict theory often meshes quite well with macro-interactionist and contextual constructionist analyses. See for example: (Turk, 1979: 459–476; Davis & Stivers, 1975; Conrad & Schneider, 1980; and Ben-Yehuda, 1990).

2.3 THEORETICAL APPLICATIONS TO ANALYSES OF THE DRUGS ISSUE:

2.3.1 Interactionist, Labelling, and Conflict Accounts:

Becker's (1963) book *The Outsiders*,⁹ which included several papers on marijuana use originally published during the 1950's, is often considered to be the seminal interactionist study of drug users; however, it is actually an extension of the ground-breaking work initiated by Lindesmith (1938; 1947). Indeed, interactionist studies of drug use emerged with Lindesmith's (1938) innovative work in positing "*A Sociological Theory of Drug Addiction*". Lindesmith sought to redress the problematic nature of the predominance of moralistic rather than scientific theories of drug addiction, and to develop a satisfactory theory which accounted for the knowledge that the repeated administration of opiates is sometimes followed by addiction and is sometimes not. The central crux of the theory he advanced was that it "...is not the knowledge of the drug administered, but the knowledge of the true significance of the withdrawal symptoms when they appear and the use of the drug thereafter for the consciously understood motive of avoiding these symptoms" (Lindesmith, 1938: 598).¹⁰ To be addicted an individual user must exhibit the symptoms of physical withdrawal and be classified by others as being "*hooked*" and accept that he is "*hooked*". Once the withdrawal symptoms intrude upon an individual's consciousness and compel him to go on

⁹ I am utilizing Becker's 1973 book which is an updated version of his 1963 work.

¹⁰ Lindesmith cites three specific cases, and his knowledge of a number of other cases, in which individuals were administered opiates for various medical conditions and in which the careful withdrawal of the opiates, without the patient's recognition or notice of the symptoms of abstinence (e.g., the discomfort of withdrawal was attributed to recovery from illness), resulted in no development of cravings for the drugs. In re-affirming his findings, Lindesmith notes that in all three of these cases the patients were weaned off opiates, but returned to the use of opiates from a few weeks to nine years later and did in fact become addicted once they recognized that the symptoms they experienced during withdrawal were in fact withdrawal symptoms.

using the drug, he has thereby forced upon himself the unwelcome definition of himself as being a “*dope fiend*” (Lindesmith, 1938: 600-606).

Lindesmith attributes the theoretical underpinnings of his hypothesis to Mead's theory of the “*significant symbol*” and its role in human life, and the processual nature of drug addiction which appears to progress at the level of “*significant symbols*”; a symbolic process peculiar to human beings living in organized societies in communication with their peers (Lindesmith, 1938: 607). While Lindesmith recognizes that physiological symptoms of withdrawal form a necessary condition for the development of addiction, he argues that such symptoms are, by themselves, “*impotent*” in developing individual addiction without the presence of the sufficient condition — i.e., individual knowledge and recognition of the symptoms of withdrawal derived from the “*significant symbols*” employed by groups to describe the nature of drug effects and withdrawal symptoms (Lindesmith, 1938: 607; Lindesmith, 1964: 620-622). Thus, addiction is not a biological response to ‘objective’ drug effects, but rather a socially constructed response to ‘objective’ conditions which have been subjectively interpreted in terms of conceptualizations imparted through symbolic communication or language. In congruence with the tenets of symbolic interactionism, Lindesmith’s study of drug addiction demonstrated that human beings often respond to things as they conceive them to be, not as they really are (Lindesmith, 1964: 621).

Whereas Lindesmith's early work was focused on opiate addiction, Becker (1963) focused on the processes through which individuals learn to become marijuana smokers. Becker contends that individuals learn how to smoke the drug, and how to sense and enjoy its effects, not through some automatic reaction (i.e., the direct pharmacological effects of the

drug), but instead through a process of careful observation, imitation, and direct instruction in the techniques of smoking and the ritualized process of “*getting high*” (Becker, 1973: 58). He dismissed marijuana as a producer of addiction, at least in the sense of the withdrawal symptoms and cravings evident for opiate and alcohol users. He was interested in understanding “...*the sequence of changes in attitude and experience which lead to the use of marihuana for pleasure*” (Becker, 1973: 43). Becker noted that being high necessarily involves two elements:

...the presence of symptoms and their connection by the user with his use of the drug. It is not enough, that is, that the effects be present; alone, they do not automatically provide the experience of being high. The user must be able to point them out to himself and consciously connect them with having smoked marihuana before he can have this experience (Becker, 1973: 49).

Users also learn to moderate dosage to avoid uncomfortable symptoms and retain pleasant ones; for the novice his naive interpretation of drug effects may confuse him further and frighten him, but these symptoms can be redefined as pleasurable to the user through interaction with more experienced users who reassure him of the temporary character of unpleasant drug effects. Such interactionist and ethnographic studies of drug use were continued and enhanced¹¹ by Goode (1970a: 122-139) who examined the socialization process of how individuals become “*turned on*” to the use of marijuana, how important it is

¹¹ Goode's early work (1970a; 1970b [1969]) can be considered as an example of a contextual constructionist approach to the study of this issue. That is, Goode undertook to study not only the ethnographic aspects of the use of marijuana, but he also compared such evidence against the psycho-pharmacological harm evident in social science and scientific literature, as well as examining issues related to the social control of cannabis.

to overcome the negative preconceptions of non-users to the drug, the importance of drug using technique (i.e., drawing it deep into your lungs and holding it), and the physiological effects of the drug (sometimes pleasant and sometimes rather unpleasant) which are subjected to a process of definitional control by those who initiate the non-user (i.e., marijuana smoking is primarily a social activity). *“By interacting repeatedly with more experienced users, the neophyte takes their definitions of what the drug does to his body and mind as his own and eventually comes to experience those effects”* (Goode, 1970a: 137).

Though ethnographic and interactionist studies of ‘illicit drug’ use are of considerable interest in general, interactionist studies of the social control mechanisms which have developed to tackle the ‘illicit drug problem’ are of particular interest for the purposes of the present study. Once again, the pioneering work in this area of study was produced by Alfred R. Lindesmith. He examined the *“Dope Fiend Mythology”* popularized among the public by enforcement officials to enhance the power and resources of their bureaucracies (Lindesmith, 1940). In spite of claims-making activities which generated common-sense public beliefs that drug addicts were dangerous and heinous criminals who engaged in murder and rape, he found that ‘objective’ and officially produced statistics by no means supported such beliefs.¹² Although Lindesmith did not deny the involvement of drug users in crimes such as theft, prostitution, and drug peddling, he argued that the narcotic laws explicitly defined drug addicts as criminals and forced them to engage in criminal activity to support their drug

¹² Indeed, the Annual report of the Bureau of Narcotics for 1936 clearly shows that while approximately 13,000 felonies were committed by 4,975 drug users, only one-sixth of one percent, or 23 cases, were classified as murder or manslaughter with no recorded incidents of rape. Only a mere 5% of all drug-related crimes recorded by the police involved some form of violence (i.e., ranging from felonious assault and robbery to murder and manslaughter). Fully 65% of the total number of felonies were narcotic convictions. (Lindesmith, 1940: 200).

habits; habits made exorbitantly expensive by the inflationary pressures induced by drug law enforcement. He also argued that deterioration of individual character could not be ascribed to drug effects, but that they were more reasonably located in the social situations into which an addict is forced by the law, the public's conception of addiction, and the use of imprisonment which further encouraged individual acceptance that one is a "dope fiend" and the consequent behaviour associated with this definition (Lindesmith, 1940: 203-207).¹³ He argued that the "*dope fiend mythology*" was merely an ideology used to justify the severe treatment of drug users; an ideology exploited by vested interests to frighten the public into accepting that more and more financial resources be allocated to fight the 'illicit drug' scourge.

In retrospect, Becker's (1963) work on the creation and enforcement of rules — based on his analysis of the Marijuana Tax Act of 1937 — provided the touchstone for the development of social constructionist theory and method (particularly of the contextual constructionist variant). It represented the first widely influential shift from the traditional positivistic focus on the causal analysis of rule-breakers to an interactionist focus on the processes of rule creation and enforcement. Becker's examination of the creation of The Marihuana Tax Act of 1937 was a landmark in early constructionist analyses of social problems which identified the central role of moral entrepreneurs and bureaucratic agency in the creation and maintenance of a problematic condition in need of remedial action. The Treasury Department's Bureau of Narcotics, and its Commissioner, H.J. Anslinger's, moral

¹³ Certainly, the stigma of a prison sentence and the associated loss of employment and position, along with the extensive acquaintanceships with other drug users and peddlers cultivated in prison, further impinges upon an addict's ability to break his habit and return to a 'normal and productive' life.

enterprise in creating the 1937 act was evident in their, "...*cooperating in the development of state legislation affecting the use of marihuana, and providing facts and figures for journalistic accounts of the problem*" (Becker, 1973: 138). The marijuana issue, which the Bureau had deemed to be represented in an overly alarmist fashion in 1931, became in 1936, a pressing issue to be dealt with in the legislative and public realm. The Bureau's anti-marijuana publicity campaign, led by Commissioner Harry J. Anslinger, provoked considerable public interest which was harnessed to substantiate the seriousness of the problem and the need for federal legislative intervention and Congressional approval of the Marihuana Tax Act which essentially made the use and trade in marijuana illegal.¹⁴ The 1937 act passed through Congress virtually unopposed and unaltered.¹⁵ The absence of representations from the powerless, unorganized, and publicly illegitimate marijuana smokers eased the process in which, "*The enterprise of the Bureau had produced a new rule, whose subsequent enforcement would help create a new class of outsiders - marihuana users [and sellers]*" (Becker, 1973: 145).

Subsequent research on the Marihuana Tax Act questioned the contention that the Act was the result of an individual and bureaucratic moral crusade, and also argued that the data supporting Becker's assertions were "*misleading*" if not "*erroneously*" interpreted

¹⁴ The 1937 Act did not outlaw the possession of marijuana, instead it penalized those who failed to pay the prohibitive excise tax of \$100 per ounce for the transfer of marijuana. Nevertheless, the truly prohibitive nature of the legislation centred on the filing of forms with the Internal Revenue Service indicating an individual's intention to purchase a quantity of the drug and specifying the details of the purchase. No illicit user of marijuana could acquire the necessary licence despite a willingness to pay the tax because complying with the federal law automatically incriminated the individual under state law as federal officials shared this information with state officials. (Goode, 1970a: 265).

¹⁵ The bill was considered by the Treasury Department to be formed so as not to interfere with industrial, medical or scientific uses of the hemp plant, and an exemption on the prohibition of hemp seeds was provided for the bird seed industry after its representatives complained (Becker, 1973: 143-145).

(Dickson, 1968: 152). Dickson (1968) notes that Becker's use of the Readers Guide to Periodical Literature is misleading because of the time intervals used. Specifically, while Becker concedes that there were no articles on marijuana prior to 1935, but four from July 1935 to June 1937, and seventeen articles between July 1937 and June 1939, Dickson points out that all of the initial four appeared before 1937, and that of the seventeen articles only one appeared in July 1937 with the remaining sixteen following this period. While he accepts that some combination of moral and bureaucratic factors may have been at work, he argues that bureaucratic survival and growth during a period of budget cuts prompted the Bureau-inspired publicity campaign which almost entirely followed the passage of the act (Dickson, 1968: 152-155).¹⁶ Musto (1973) argued that the Federal Bureau of Narcotics did not create the marijuana scare of the 1930's, and that the fear of marijuana was primarily concentrated in the southwestern states where Mexican immigrants, who brought with them a tradition of marijuana use, were to be found in the greatest concentrations. He further argued that fear of marijuana was a product of hatred towards Mexicans, a group originally tolerated as a source of cheap labour during the economic boom of the 1920's, but increasingly viewed as competitors for scarce jobs in the 1930's, especially given their willingness to work for low wages.

A subsequent re-examination of the evidence surrounding the Marihuana Tax Act by Galliher and Walker (1977) found insufficient evidence to support the notion that Anslinger was an over-zealous moral crusader or that the Federal Bureau of Narcotics played a central

¹⁶ While the U.S. Narcotics Bureau did not receive a sizable increase in budgetary appropriations, it may certainly have been the case that the anti-marijuana campaign pre-empted a precipitous drop in their budget.

role in a national propaganda effort, nor did they find evidence to support the conclusion that concerns about marijuana were isolated in the Southwest. Galliher and Walker argued that the symbolic properties of the Marihuana Tax Act were foremost in both the creation of the legislation and its practical impact. Indeed, the lack of challenge by Congressmen and their reliance on the speculative claims of the Federal Bureau of Narcotics and media reports about marijuana indicate that Congress was already convinced of the danger of marijuana and needed little support for this belief. Moreover, the absence of additional appropriations for federal marijuana enforcement ensured that the practical import of the legislation was also symbolic.

2.3.2. Contextual Constructionist Accounts:

Explicitly contextual constructionist accounts of drug policy, which parallel the patterns established by early labelling or social reaction analyses, are evident in the following summaries of studies undertaken by Reinerman and Levine (1989), Goode (1990), and Beckett (1994).¹⁷ Along with an historical overview of American drug policy, Reinerman and Levine examined the so-called crack crisis from the birth and spread of this drug in the mid-1980's, the media coverage of "*the crisis*" and the central claims regarding the destructiveness of the supposed cocaine and crack "*epidemic*", the principal U.S. official government data upon which virtually all statistical claims are made, and the social and political context of the crack scare and its utility as a political issue. They argued that the "*orgy of media and*

¹⁷ A very interesting contextual constructionist study has been done on Canadian drug policy and Canada's Drug Strategy by Jensen and Gerber (1993), a study whose findings and analysis I will review in Chapter four.

political attention” began when crack use became visible and spread among the “*threatening*” group of poor and working-class inner-city populations¹⁸ (Reinarman & Levine, 1989: 116). Media reports in newspapers and magazines produced nearly 1,000 stories on the crack issue in the months leading up to the 1986 Congressional elections, and the three major American television networks offered 74 evening news segments on drugs, half of which dealt with crack. As in 1986, media and political claims described crack as “*supremely evil*” and central to the destruction of young lives, as well as being the cause of much of the crime, violence, prostitution, and child abuse in America (Reinarman and Levine, 1989: 118).

Reinarman and Levine (1989) pointed out that careful examination of data on drug-related emergencies and deaths from the Drug Abuse Warning Network (D.A.W.N.) and the National Institute on Drug Abuse (N.I.D.A.) national surveys on drug use among households and young people stood in stark contrast to media and political rhetoric. For example, in 1986 there were nearly 25,000 reported incidents in which cocaine was involved in a drug-related emergency. This represented an average of some 69 cocaine-related hospital incidents a day in the entire United States, a figure which could in no way constitute an “*epidemic*”. Moreover, while the D.A.W.N system reported 1092 deaths as “*cocaine-related*”, only one in five had cocaine mentioned as the sole drug in the persons system with three-fourths of these cases involving other drugs, typically alcohol. The moral certitude evident in media and political rhetoric overlooked the substantial ambiguities and uncertainties in the D.A.W.N. data, which also did not even provide separate figures for crack. Additionally, N.I.D.A.

¹⁸The authors note that middle-class “freebasers” had been discovering the dangers of smoking cocaine for several years before crack emerged, but that their financial stability and ties to conventional society gave them something to lose and the resources to cut down, quit, seek treatment, or conceal their drug use.

surveys demonstrated that cocaine use among young adults 18-25 had reached its peak in 1982 some four years before the crack scare, and that since 1982 these figures had stabilized or declined. Reinerman and Levine (1989) argued that the putative spread of cocaine and crack, although not grounded in 'objective' problematic conditions, was nevertheless an important scapegoat upon which spokespersons for America's New Right could steer the blame for America's economic and urban problems, and keep attention away from the Reagan administration's social and fiscal policies.

Another contextual constructionist examination of America's drug panic of the 1980's by Goode (1990) found 'objective' evidence for certain increasingly problematic aspects of cocaine use during this period even though general use rates actually declined. He argued that America's drug panic was rather interesting in that it occurred following the 1970's which represented a period of expanding 'illegal drug' use and a high point of public acceptance and tolerance of 'illegal drug' use. The hardening of attitudes toward 'illegal drug' use in the 1980's is readily apparent in opinion polls indicating that while in 1985 no more than six percent of respondents identified drug use as America's number one problem, in 1989 an astonishing sixty-four percent thought that drugs were America's leading problem (Goode, 1990: 1088). Goode also notes that the Reader's Guide to Periodical Literature index contained some 103 drug-related articles in 1985, whereas there were some 280 drug-related articles in 1986 (the year for Congressional elections) and this dropped to 116 articles in 1987. Moreover, The New York Times Index noted the number of drug abuse and drug trafficking articles at 444 in 1982, 458 in 1985, 912 for 1986, 622 in 1987, and then 892 in

1988. For Goode, the weight of this ‘objective’ evidence clearly denotes something of a moral panic regarding ‘illicit drugs’.

While Goode concedes that casual drug use rates measured by national surveys had declined in the 1980’s, and that there were methodological problems of attribution and causality in data from the D.A.W.N. system, he notes that frequent use of cocaine (i.e., once a week or more) increased by 33% from 1985 to 1988, and that the number of persons using cocaine “*daily or almost daily*” increased by 19% during the same time period. Additionally, he notes that non-lethal overdoses of cocaine increased by a factor of five between 1979 and 1985 (from 1,931 to 9,403 emergency room episodes, and another nearly five fold increase between 1984 and 1988 (from 8,831 to 46,020), and lethal overdoses jumped from 99 to 615 between 1979 and 1985 and from 628 to 1,589 from 1984 to 1988. Citing evidence of other problematic aspects of ‘illicit drug’ use relating to cocaine and other drugs (e.g., drug mixing, greater use of smoking as the route of administration, etc.), Goode concludes: “*In short, for nearly every systematic indicator measuring the objective seriousness of the drug problem — except for self-report surveys on drug use — there is an increase in severity. There can be absolutely no doubt whatsoever that, as measured by concrete, objective measures, the seriousness of drug use as a social problem is growing*” (Goode, 1990: 1093). Nevertheless, he does re-state his belief that social problems are constructed and that ‘illicit drug’ use is certainly not America’s number one problem by any ‘objective’ indicator of the seriousness of the problem compared with, for example, deaths from tobacco or alcohol. Although Goode supports the “*valid insights*” of the constructionist argument, he also argues that this

should not blind us to the concrete and 'objective' factors involved in the construction of a drug panic and the impact these have on people's lives.

A sophisticated analysis by Beckett (1994), employs data from the Federal Bureau of Investigation (F.B.I.) Uniform Crime Index, N.I.D.A. surveys, D.A.W.N., the Television News Index and Abstracts, the New York Times Index, the Gallup Poll and the New York Times/CBS News Poll. Utilizing these data sources, Beckett seeks to determine the utility of 'objectivist' and constructionist explanations in explaining the relationship between state and media coverage of the drugs and crime issue and its relationship to public opinion during the period from the mid-1980's to the early 1990's. With multiple regression analyses she finds greatest support for the constructionist explanations of this issue — that is, that state and media agenda-setting initiatives typically precede public concern about the drugs and crime issue and that these initiatives preceded rather than followed increases in heavy use of cocaine and crack and crime rates. While this evidence does not dismiss the influence of 'objective' factors in shaping state, media, and public concern it does point to the important role of certain claims-makers in the construction of a social problem and the necessity to interpret 'objective' factors within the social and political context which shapes them.

While the drug policy issue would certainly appear to exemplify the constructionist argument about social problems, such constructions are not completely independent of the drug problems which real people endure. Given the nature of this area of study, it would seem that strict constructionism is theoretically an inappropriate way of studying the interdependence of the subjective and 'objective' dimensions of this issue, an issue for which contextual constructionism provides a more appropriate theoretical framework for analysis.

Furthermore, looking at how the 'illicit drug problem' has been constructed cannot permit equal emphasis on all claims-makers as certain views (e.g., those of "*dope heads*" and drug policy reformers) are given little credence when compared with the powerful claims-making activities of the state and the media, and the primacy of such claims-makers in the definition of this problem and the intervention strategy to be employed. In the proceeding analysis, I will explore the 'reality' which engages those involved in the propagation of prohibition. I will examine the 'reality' they create by their interpretation of their experiences with 'objective' conditions, and the bases upon which they have constructed drug prohibition and the nature of this intervention strategy which they have generated. Although the views of selected commentators on drug policy will be discussed, their views will take a secondary role to the primary claims-makers who have supported drug prohibition. The following chapter will provide a discussion of the methodology which I will apply in addressing the social construction of cannabis harm and policy in Canada since the turn of the century.

CHAPTER 3

METHODOLOGY

The production of ideas, of conceptions, of consciousness, is at first, directly interwoven with the material activity and the material intercourse of men — the language of real life.... The phantoms formed in the brains of men are also, necessarily, sublimates of their material life-process, which is empirically verifiable and bound to material premises. Morality, religion, metaphysics, and all the rest of ideology as well as the forms of consciousness corresponding to these, thus no longer retain the semblance of independence.... It is not consciousness that determines life, but life that determines consciousness.

Karl Marx and Friedrich Engels

The German Ideology¹

3.1 THE METHODOLOGICAL UTILITY OF

ESSENTIALISM AND CONSTRUCTIONISM:

The Marxist position, a predominantly essentialist interpretation, states that material conditions form the base for human consciousness and thereby have a significant impact on society. However, this precept is tempered by Marx's recognition that consciousness is a social product and, like language, it arises out of the necessity for interaction or relations with other humans. Marxian assertions about the primacy of material conditions and social

¹ Marx & Engels (1976: 42).

intercourse as the base for the production of ideas, conceptions, and consciousness were probably correct for most people when The German Ideology was written in 1846.² However, in the modern era, while material conditions and social intercourse are still important factors, our ideas, conceptions, and consciousness are increasingly derived not from the material world but rather from the symbolic world. In the current information age, we increasingly rely upon symbols communicated through language or text (via books, radio, television, or computers) in order to understand our world and to make sense of it.

Some readers may contend that social constructionism, while providing interesting theoretical insights, is methodologically limited in terms of its analytical and practical utility in the study of social problems, especially as compared with its 'objective' counterparts. Nonetheless, consideration of the types of analysis utilized to understand the greatest tragedy of the twentieth century, the Holocaust, underscores the power of social constructionism to present us with considerable insight into how human conceptualizations and social problems are constructed and defined, as well as the important links between cognitions and behaviour. In Crime Control as Industry: Towards GULAGS Western Style?, Nils Christie examines three different waves of analysis in approaching the topic of the Holocaust (Christie, 1994: 160-175). The first wave of explaining the Nazi extermination camps asserted that they were the products of abnormal minds from Hitler all the way down to the front-line workers in the death camps. The second wave of explaining the camps moved from deviant persons to deviant social systems, wherein a pathological system acted as a trigger for ordinary people

² Literacy rates were probably quite low and formal education was probably lacking for most citizens in the 1800's. Thus, direct material social intercourse was likely the predominant method for developing individual understanding about the world and one's place in it.

to follow evil and/or deeply authoritarian people. The third wave of explanations proposed that extermination was not an exceptional event, but rather a logical extension of modern social organization (e.g., the division of labour, modern bureaucracy, the rational spirit, efficiency, scientific mentality, etc.). Central to this explanation is the social production of individual moral indifference in modern societies: a situation created through the systematic dehumanization of the victims through ideological definitions and indoctrinations. A fourth wave of analysis has recently emerged as evidenced by Goldhagen's (1996) book entitled Hitler's Willing Executioners: Ordinary Germans and the Holocaust. This quasi-constructionist³ account clearly exemplifies the power of symbolic communication in the social construction of definitions of putative conditions and the development of intervention strategies. Goldhagen's analysis is raised and discussed below for two reasons: first, to illustrate the methodological utility of constructionist analysis over 'objective' methods of analysis, and to underline the importance of employing a contextual constructionist approach rather than a strict constructionist approach; and second, to appropriate his general methodological stance as a suitable framework for addressing the social construction of cannabis harm and policy in Canada.

³ Goldhagen's approach is not an explicitly constructionist analysis. However, he employs a theoretical and methodological stance which parallels the contextual constructionist approach — i.e., he focusses on the subjective and socially constructed nature of German antisemitism evident in the rhetoric and language utilized by both party officials and ordinary Germans to illustrate the nature of their hatred of Jews and their feelings and views regarding the 'objective' dimensions of (putative) Jewish perniciousness. Additionally, he analyses the socially constructed nature of German antisemitism within its socio-historical context and the structural conditions which helped to shape both the form, content, and application of Nazified antisemitism.

3.2 THE ROAD TO EXTERMINATION — THE METHODOLOGICAL AND ANALYTICAL SIGNIFICANCE OF THE CONSTRUCTIONIST VIEW:

Goldhagen (1996) seeks to find the source of German eliminationist antisemitism and how it was translated into exterminationist antisemitism during the Nazi period. He examines the origins of the belief "*that the Jews ought to die*" and how it became a widely held common-sense belief among ordinary Germans.⁴ Indeed, members of killing operations were perfectly ordinary individuals. This became especially so as the war progressed and perpetrators — i.e., those involved directly or indirectly in killing operations — had to be recruited from members of German society considered, by Nazi standards, to be the least fit both physically and psychologically. These individuals were typically recruited without any analysis of their ideological "*fitness*" or even, in some cases, in spite of Gestapo records of their hostility towards the Nazi regime. Neither ideological differences nor the social strata from which the perpetrators were derived differentiated them with respect to one crucial variable, their virulent antisemitism (Goldhagen, 1996: 164-165; 205-211). If one accepts the materialist or 'objective' interpretation of consciousness then German understanding of the putative perniciousness of Jews was necessarily derived from material social intercourse or direct contact with Jews. However, given that Jews formed less than 1 percent of the German population in the early part of the Nazi period, and that 70 percent of this small percentage lived in a few large urban areas, the anti-Jewish beliefs and emotions of most German antisemites could not possibly have been based on any 'objective' assessment of Jewish

⁴ Goldhagen uses a broad definition of the German perpetrators wherein all those who knowingly contributed to the slaughter of Jews (e.g., front-line executioners, transportation workers, and the "desk-murderers" whose paperwork lubricated the wheels of deportation and destruction, etc) are defined as perpetrators.

perniciousness derived through direct contact, and must have instead been based largely upon what they had heard about Jews while listening to, and partaking in, the societal conversation (Goldhagen, 1996: 42).

The explanatory power of the constructionist interpretation is underscored by the following paradigmatic occurrence of 1939; an occurrence recounted by a Polish memoirist. When young German soldiers arrived in Losice, a town of the Lublin region of Poland, they initially acted courteously to its residents. Then they learned that the vast majority of the town's denizens were Jewish, *"...and immediately they [the German soldiers] were transformed. Their Sie [a respectful form of address] turned to du [a demeaning form of address]; they made us polish their boots and clubbed us for not tipping our hats promptly"* (Goldhagen, 1996: 449). The basis for this behaviour could not possibly have derived from the existing 'objective' conditions as the German soldiers beheld exactly the same people who appeared and acted as they had before. The invocation of Jewishness, however, initiated a longstanding and ingrained cognitive pattern in Germanic culture which transcended the 'objective' conditions of the situation and provided justifications for the German soldiers to beat otherwise innocent people (Goldhagen, 1996: 449).

Goldhagen repeatedly shows in graphic and hair-raising detail how ordinary Germans became involved in the slaughter of Jews, how they did so in many cases either on their own individual initiative or as an organized initiative without any compulsion from their superiors,⁵

⁵ One particularly notable example, among the many Goldhagen cites, was Major Trapp's address to the men of Police Battalion 101. Trapp told the battalion the nature of their task — a rounding-up and mass shooting of the Jewish residents of Jozefow, Poland — but he also told them that men who did not feel up to the task would be excused from the killing operation. Even when the full horror of the genocidal enterprise engulfed the men who agreed to participate, and the emotional incentive to opt out was at its height, the continuing opportunity to opt out had little discernible effect on their choices (Goldhagen, 1996: 212-215).

and at times against the explicit orders of their superiors.⁶ He also illustrates how the slaughter was not a product of the suppression of individual ethical norms or moral inhibitions (as the third, structural or 'objective', wave of Holocaust analysis would have us believe), but, rather grotesquely, it was an explicit expression of individual German morality. The violence committed against the Jews represented for the perpetrators a necessary, and just, catharsis of the German "*Volk*", and was thus the supreme moral expression of an individual Aryan commitment to protect Germany from the individuals of a race considered to be the children of the Devil. Such notions are patently absurd to 'rational' modern sensibilities and would seem more appropriate to the 'non-rational' perspectives associated with pre-industrial societies. That such 'non-rational' thinking occurred and was acted upon by supposedly 'rational' children of the Enlightenment (i.e., Germans) should provoke ongoing concern about public willingness to accept and support hyper-rationalized ideology and rhetoric over systematic and scientific assessments.

In response, one might argue that Goldhagen's analysis reaffirms the value of strict constructionist analysis and substantiates the position that the German societal conversation prior to and during the Nazi period produced the Holocaust, and moreover, that 'objective' conditions per se had nothing to do with the Holocaust? While Goldhagen's analysis certainly emphasizes the central role of symbolic communication, he does not isolate the subjective realm from the social and political context which had important influences on the nature,

⁶ One particularly notable example, among the many Goldhagen cites, was Himmler's directive in the latter stages of the war that expressly forbid the killing of any more Jews and required that they be treated humanely. Himmler made this directive because he was negotiating with the Americans and he did not want further killings to undermine his efforts. Nevertheless, many Germans involved in the death marches had so strongly assimilated definitions of Jews as demonic beings that they continued to kill Jews, right up to the last possible moment, even in direct violation of their duty (Goldhagen, 1996: 355-356).

development, and ultimately, the application of German antisemitic rhetoric during the Nazi period. In congruence with W.I. Thomas's dictum that "*If men define situations as real, they are real in their consequences*" (Merton, 1980: 29), Goldhagen argues that while "*Antisemitism is always abstract in its conceptualization and its source (being divorced from actual Jews), [it is] always concrete and real in its effects*" for Jewish people (Goldhagen, 1996: 35). Given this view, one might legitimately charge strict constructionists with professional conceit for their apparent ambivalence toward the subjects who suffer the concrete severity of social problems. Furthermore, the strict constructionist stance is potentially dangerous in that failure to challenge the purported 'objective' base of certain claims may, however unwittingly, lend credibility to 'non-rational' claims. Goldhagen outlines in considerable detail how widespread antisemitic rhetoric was during the Nazi period, and how few examples there were of individual or institutional challenges to the common-sense beliefs of the German people or the 'objective' basis for those beliefs. Consequently, I find no fault with the contextual constructionist conclusion that, "*The strict constructionist position is ... inhibiting, chilling, and paralyzing*" (Goode & Ben-Yehuda, 1994: 98).

The strict constructionist view makes a critical stance very difficult as it pushes the analyst to perceive all views as equally subjective (e.g., views of scientists, white supremacists, believers in extraterrestrial abductions, etc.). However, if we only deal with claims at the abstract or rhetorical level, and if we fail to systematically assess their validity according to rigorous and carefully designed criteria, then, like the ordinary Germans of the Nazi period, we run the risk of supporting and promoting common-sense views and, perhaps,

the development and application of ideology.⁷ One of the principal aims of sociological attempts to grasp the hardness of ‘social reality’ must be to act as a brake on the “...*wilder excesses of utopianism* [and ideology]” (Berger & Kellner, 1981: 144). We must, inevitably, privilege certain views, or indicate whose side we are on, based on the logical consistency of the claims, or the reasonableness of claims contrasted against the ‘objective’ backdrop of systematically evaluated evidence. Theoretical rectitude and epistemological consistency should not, in my opinion, be utilized as a means to divert sociologists (be they essentialists, phenomenologists, or constructionists) from the goal of achieving a fully sociological understanding of social phenomena — either currently recognized or unrecognized — which we wish to examine and explain. Furthermore, such concerns should not be utilized as a means to sidetrack analysts from lines of inquiry which may be used to contest and lay bare the myriad common-sense and ideological shibboleths which pervade Western consciousness.

3.3 CONTEXTUAL CONSTRUCTIONISM AND THE CANNABIS ISSUE:

While Goldhagen’s (1996) study clearly demonstrates how far a social construction can be divorced from the ‘objective reality’ it purports to describe and deal with, his general methodological stance is of considerable utility for the present study. Just as the ‘objective’ perniciousness of Germany’s Jews did not constitute the basis for early twentieth century German antisemitism, this study will demonstrate that the ‘objective’ perniciousness of cannabis does not constitute the basis for the “...*phantoms formed in the brains of men...*”

⁷ For example, the Presbyterian Church of Canada (1997) has recently conceded that the downside of the historically conservative stance taken by the Christian churches is that, via their inaction against un-Christian doctrines and social movements, they have become almost silent partners with unjust regimes such as Nazi Germany, Fascist Italy, and Czarist and Marxist Russia.

(Marx & Engels, 1976: 42) over the course of the twentieth century in Canada. These phantoms are instead the product of claims-making activities and the social construction of putatively problematic situations. Indeed, the question as to the etiology of understanding the putative perniciousness of cannabis and its relationship to drug policy, cannot be ascribed to material social intercourse — i.e., actual ‘objective’ experience with the drug — as the use of cannabis was “...*comparatively unknown in the United States and Canada*” when it was introduced to Canada’s drug schedules in 1923 (Murphy, 1922: 331), less than 4/10 of 1% of the population were estimated to have begun using cannabis by 1966 or earlier (LeDain, 1972: 202), and in 1994 only 7.4% of Canadians reported use of cannabis at least once during the year (Health Canada, 1995b).⁸

Common-sense understandings of the harm of cannabis are derived primarily from the societal conversation surrounding this issue. This conversation has been informed by the views of moral entrepreneurs, public pronouncements by law enforcement and health institutions, and by ‘scientific’ and pseudo-scientific inquiry into the harmfulness of cannabis and, typically, the interpretation of such evidence by the health and enforcement community for mass consumption. From a policy perspective all other views (e.g., of users, of reformist academics and moral entrepreneurs) have been, both historically and to a large extent at present, rendered as redundant and peripheral to the societal conversation on this issue, and the intervention employed to deal with the ‘cannabis problem’. Thus, in order to understand

⁸ Readers should be aware that surveys and their results are social constructions which are defined by the concepts, methodology, and interpretation of data by analysts. Thus, surveys cannot possibly provide an ‘objective’ and definitive determination of the extent of cannabis use (e.g., such surveys typically exclude homeless people and runaways whose drug use is substantially higher than among the regular surveyed subjects drawn from the general population), but they do provide a means to approximate levels of use.

the social construction of cannabis harm and policy one must examine the claims-making activities of those groups and/or individuals whose views form the bedrock for the common-sense conceptions about the harm of cannabis and the intervention employed to deal with it.

In Chapter four, I will analyse the social context and claims-making activities which gave rise to the genesis of prohibition with the 1908 Opium Act, the prohibition of cannabis in 1923, and developments leading up to the 1961 Narcotic Control Act. I will also examine the emergence of harm-based cannabis reformist claims-making during the LeDain era of Canadian drug policy (1969-1974), and the emergence of claims-making activities with respect to harm reduction as a federal policy position during the rise and decline of Canada's Drug Strategy (1987-1997). Rather than attempting to provide an exhaustive and definitive account of the evolution of drug prohibition in Canada — a subject which has been thoroughly tackled by others (e.g., Giffen et al., 1991; and LeDain, 1973) — my analysis will focus on the theoretical and philosophical underpinnings of the social construction of 'illicit drug' and cannabis harm and drug policy. In my analysis of the early period of drug prohibition in Canada (1908-1961), I will detail how drug prohibition originated within a variety of economic, social, racial, and political tensions. In providing an overview of the research literature on this issue, I will explore how moral crusaders and emerging government bureaucracies discovered 'illicit drugs' during a period of moral rectitude and often explicitly racist politics. I will demonstrate their insistence that 'illicit drugs' were the cause of innumerable actual and potential social problems, not the least of which was the corruption of the white race by the Chinese via the spread of their disease — i.e., opium use. I will also illustrate how the identification of 'illicit drugs' as the cause of social problems was

intimately intertwined with the reductionist logic which pervaded the Social Darwinist era of the late 19th and early 20th century. Within such a conceptual framework, claims-making about the harm of 'illicit drugs' were readily accepted as sufficient evidence of harm, and the intervention strategy designed to tackle the complexity of such social problems was drug prohibition with the ultimate goal of eradicating the availability of 'illicit drugs'.

I will also detail, in Chapter four, a clear movement away from the issue of the enforcement of morality as the basis for drug control and an increasingly greater focus on the issue of harm evident in the legal-philosophical claims-making activities of the LeDain Commission (1969-1974), and their partial rejuvenation in the concept of harm reduction associated with the rise and decline of Canada's Drug Strategy (1987-1997). The majority report of the LeDain Commission argued that it was acceptable for the criminal law to be used for the enforcement of morality, but not without regard to potential for harm which truly threatens social interests. After conducting an extensive cost-benefit analysis of the harm of cannabis and the potential harm associated with various control options, the majority position of the LeDain Commission recommended a lessening of penalties related to cannabis offences due to the relatively low demonstrable harm and toxicity of the drug. While LeDain Commission recommendations on cannabis were never adopted through legislative reform, I will illustrate how their focus on the issue of cannabis harm would re-surface as a central topic of discussion with the emergence of Canada's Drug Strategy in 1987 and its policy shift towards harm reduction. I will elucidate how the harm reduction position taken by Canada's Drug Strategy helped to generate a focal point for critics of drug prohibition, particularly with

respect to cannabis; a drug which many considered not to be harmful enough to justify the harm induced by measures aimed at controlling use of this drug.

In chapter five I will address the contemporary social construction of cannabis harm and policy deriving from the debates in the Sub-Committee hearings on the Controlled Drugs and Substances Act. Rather than provide an exhaustive review of witness evidence with respect to drug policy, which would be too detailed for the purposes of this thesis, I will follow the lines of argument presented and the specific issues raised related to cannabis and its control. I will also counterpose arguments about cannabis harm against the 'objective' evidence found in existing research literature. The summarized 'objective' evidence for each identified area of concern will be drawn from an overview of the health and psychological consequences of cannabis use conducted by Hicks and Conley (1996).⁹ I will not provide an exhaustive overview of media coverage of the C.D.S.A. related to the cannabis issue, however, I will cite a selection of notable journalistic articles. My reasons for excluding an extensive overview are centred on a principal conclusion which this analysis will substantiate. Specifically, while media coverage denouncing the the new drug law was an integral component in pushing the government to decriminalize cannabis possession under Bill C-8, I will argue that both the reasons behind this reform and the nature of what change could (and

⁹ The specific topics of cannabis harm covered by this paper were initially identified as target areas of inquiry in congruence with areas of concern raised in the hearings. To remove the partiality of relying upon one source of social/scientific evidence and to account for interesting temporal developments, the authors' consulted three of the most comprehensive and systematic reviews of the health and psychological consequences of cannabis use available: Cannabis: A Report of the Commission of Inquiry into the Non-Medical Use of Drugs (the LeDain Commission) (1973); Cannabis and Health Hazards: Proceedings of an Addiction Research Foundation/World Health Organization Scientific Meeting on Adverse Health and Behavioural Consequences of Cannabis Use (1983); and the [Australian] National National Drug Strategy: The Health and Psychological Consequences of Cannabis Use (1994). The policy paper produced by Hicks and Conley (1996) was exposed to critical review by nine members of the Canadian Centre on Substance Abuse National Working Group on Drug Policy, and numerous senior federal government officials in the seven federal departments participating in Canada's Drug Strategy.

eventually would) take place (and be acceptable to the primary interest groups) were clearly explicated in the Sub-Committee hearings.

Given the linear format of evidence presented at the hearings (i.e., witness format), temporal distinctions will be collapsed¹⁰ and the views expressed over the course of nearly six weeks of hearings will be broken down into various categories. I will categorize the various positions and statements along a tripartite epidemiological classification in an attempt to inject greater clarity into the typically nebulous issue of cannabis harm and policy. The first category will contain issues relating to the “*Agent*”, or cannabis itself, and how the agent is involved in the harm of cannabis. The second category will cover issues relating to the “*Host*”, or the user of cannabis, and how user behaviour impacts upon the harm of cannabis. Issues related to the first and second categories will be discussed as symbolic aspects of the C.D.S.A.. The third category will be the “*Environment*”. Here, I will focus on how the response to ‘illicit drugs’ tries to resolve, or is associated with, the harm of cannabis. Some of the issues related to the third category will be discussed as symbolic aspects of the C.D.S.A., while others will be discussed as non-symbolic aspects of the C.D.S.A.. While I recognize that any method of categorization is somewhat artificial, the epidemiological method of ordering phenomena is relatively systematic and permits greater attention to be drawn to the ‘causes’ of particular phenomena. By employing these methods, I will show that the Sub-Committee hearings demonstrate the continuing constructed nature of cannabis harm

¹⁰ Although the temporal distinctions have been collapsed, readers will undoubtedly notice that there appears to be a considerable amount of arguing and debate on certain specific points relating to drug policy and cannabis in particular. This is unlikely to be a result of an acute awareness of the representations made by various witnesses, and is, more likely, derived from the fact that many of these issues constitute long-standing debates in the drug policy field.

and policy, and the lack of an ‘objective’ basis for the statements and conclusions which are put forward as though they are common-sense and beyond dispute.

In the sixth and final chapter, I will provide a discussion of the key findings of this thesis, an overview of the master patterns in Canadian drug and cannabis policy since the turn of the century, an explication of a philosophical and practical framework for balanced drug control policy, and the conclusions and implications of my analysis. In examining the macro-level changes in the social construction of cannabis harm and policy, I will assess how the overt failure of drug prohibition operates as a veil for the covert success of drug prohibition. I will discuss how the institution of drug prohibition continually manages to succeed in the enhancement of its bureaucratic and economic power, not in spite of its failures, but, rather paradoxically, because of its failures. Furthermore, I will illustrate that by diverting attention from the issue of harm related to specific drugs, proponents of prohibition continuously manage to obfuscate the nature of the relationship between the psycho-pharmacological harm of cannabis, drug policy, and their role in shaping public conceptions and the precise nature of the prohibitionist enterprise. Before turning to my analysis of the genesis of drug prohibition in Canada, I will define below the central terms used throughout this essay.

3.4 DEFINITION OF TERMS:

Some central terms in this essay which require discussion are the following: cannabis, summary conviction and indictable offences, hybrid offences, criminal acts, legalization, decriminalization and harm reduction. The term cannabis refers to “1. *the hemp plant, Cannabis sativa*. 2. *The flowering tops of the plant*. 3. *any of the various parts of the plant*

from which hashish, marijuana, and similar drugs are prepared" (Webster's, 1997: 118).

While use of the term cannabis typically refers to the whole plant which has a wide variety of functions (e.g., the stalk can be used as fibre for clothes or rope), in this paper use of the term cannabis will refer specifically to the flowering elements of the plant which have intoxicating effects (i.e., those parts which contain delta-9-tetrahydrocannabinol) and the various preparations, concentrations, and modes of intoxicant delivery (e.g., marijuana and hashish).

Summary conviction offences involve a maximum sentence of 6 months imprisonment minus 1 day (excluding exceptions written in the law), whereas indictable offences involve higher maximum penalties and entail more procedural requirements (e.g., fingerprinting, preliminary inquiry, etc.). Summary conviction offences can be processed more rapidly than indictable offences because the former offence type does not require a preliminary inquiry, and because such cases are heard by a municipal or provincial court judge without the accused having the option of a trial by judge and jury. Criminal acts are treated with the usual penal procedures such as fingerprinting, photo, preliminary inquiry, and a criminal record (Beauchesne, 1997: 9). Indictable offences require all the aforementioned penal procedures, whereas summary conviction offences do not require fingerprinting, photos, preliminary inquiries, and do not entail a centralised criminal record on C.P.I.C. Hybrid offences provide Crown prosecutors with the option of prosecuting by summary conviction or indictment, and regardless of which prosecution option the Crown eventually takes (i.e., summary conviction or indictable), the police are empowered — under the Identification of Criminals Act (1970) — to take the fingerprints and photo of an accused.

Legalization can be defined as the complete removal of criminal controls for a specific drug (e.g., cannabis vs. cocaine) or specific activities associated with a particular drug (e.g., possession vs. trafficking), and the introduction of government or market-based measures to regulate conditions of sale, importation and exportation, and quality controls on previously 'illicit drugs' (Beauchesne, 1997: 9; Bertrand, 1990: 537; LeCavalier, 1994a: 3). The term decriminalization has been subject to wildly varying interpretations in the research and policy literature. Decriminalization has been defined as the removal — through legislative means or via a court decision — of criminal sanctions against currently controlled substances (Beauchesne, 1997: 9; Bertrand, 1990: 534). It has also been defined as the removal of offences with liability for imprisonment for possession of quantities of currently controlled substances deemed consistent with personal consumption (LeCavalier, 1994a: 3). Others have defined decriminalization as a policy option under which it would remain an offence to be in possession of a currently controlled substance, but the offence would not be of a criminal nature and therefore would not entail a criminal record (Normand, 1995). Understanding the term decriminalization is further confused by its use in describing the cannabis policy approach taken in The Netherlands¹¹ (Quinn, 1990: 16), as well as the approach initiated in the 1970's in eleven so-called "decriminalization" states in the U.S.A.¹² (Nadelmann & Wenner, 1994: 25; National Academy of Sciences, 1982: 6-14; Single, 1989: 456).

¹¹ Drugs policy in The Netherlands, since the Dutch Opium Act of 1976, has prompted enforcement officials to ignore low-level cannabis users in possession of less than 30 grams (reduced to 5 grams in 1996) of marijuana. This policy directive operates despite low-level cannabis possession being a summary offence under Dutch law which could result in an offender receiving a maximum sentence of 1 month imprisonment and/or a fine roughly equivalent to \$4,300 (Cdn.) upon conviction.

¹² In the eleven U.S. "decriminalization" states, low-level cannabis possession remained an offence subject to penalties, however, the maximum penalty was reduced to a nominal fine, or such offences were treated as a misdemeanor.

While there is “...*no consensus on the meaning of the term decriminalization*” (Single, 1989: 456), the concept generally covers a broad range of policy options focused on reducing the severity of punishment for the possession of a controlled substance (Clark, 1987: 10). The range of decriminalization interpretations spans a continuum in which the opposite positions are: first, the strict interpretation of removing criminal sanctions against cannabis from the criminal code; and second, the minimalistic interpretation of reducing the severity of the treatment of cannabis possession offences such that the offence may not be considered as a criminal offence which entails a criminal record, and/or where low-level possession offenders may not be subject to imprisonment. For the purposes of this thesis, I argue that the minimalistic interpretation of decriminalization — the most widely accepted definition within the health and enforcement communities — is the most viable definition (Schneider, 1985: 224) for the purposes of a constructionist analysis.¹³ This interpretation emerged as the dominant definition through consultations with members of the health and enforcement bureaucracies leading up to the completion of the Cannabis Policy Discussion Paper (Hicks & Conley, 1996: 23, 74-106). I will argue that developments in Canadian cannabis policy under the Controlled Drugs and Substances Act meet, or very nearly meet, the requirements of this definition.¹⁴ While there will be those who will argue that I have allowed an imprecise

¹³ In a sense, I am carrying out an ethnography of the definitional practices of the members of a community. My point of view and theoretical priorities on this definitional issue are not pre-given, rather they have been shaped and influenced by the reflexive relationships I formed with numerous practitioners of drug prohibition whose worlds I am trying to understand and explain (Emerson, Fretz, and Shaw, 1996: 215-216).

¹⁴ Under the previous Narcotic Control Act persons charged with possession of cannabis, regardless of quantity, were liable to prosecution by summary conviction (maximum penalty for a first offence of a \$1,000 fine and/or six months imprisonment, and for a subsequent offence \$2,000 fine and/or 1 year of imprisonment) or by indictment (maximum penalty of seven years imprisonment). Under the C-7 version of the Controlled Drugs and Substances Act (C.D.S.A.) the penalties for possession would remain the same, save a \$1,000 increase in the maximum fine which could be imposed for a first offence and a \$3,000 increase in the maximum fine which could be imposed for subsequent offences. Under the enacted C-8 version of the C.D.S.A. persons

use of the term decriminalization, I must accept this imprecision for didactic purposes which will become apparent as this analysis progresses.

Harm reduction is also a term subject to highly variable interpretations, and there is, at present, no agreement in the addictions literature or among practitioners as to the definition of harm reduction. For Health Canada officials, harm reduction “...*includes reducing harm to the individual, the family and community and society as a whole...[and] harm reduction relates not only to actual or demonstrated harm but also to potential harm*” (Health Canada, 1995a: 1). The National Working Group on Drug Policy (N.W.G.D.P.) of the Canadian Centre on Substance Abuse (C.C.S.A.) recently published a policy discussion paper “*Harm Reduction: Concepts and Practice*” (N.W.G.D.P., 1997: 1-11). This policy discussion paper was produced to — among other issues — clarify the definition of harm reduction. Indeed, lack of conceptual clarity is evident in varied interpretations of the goals of harm reduction. While some consider the reform of laws prohibiting drug possession to be an integral part of harm reduction, others consider the imprisonment of drug users for simple possession to be a form of harm reduction. As a goal, harm reduction is a very broad concept which encompasses nearly all drug policies including criminalization of users and abstinence-oriented programs. For the purposes of this thesis, I have adopted the definition of harm reduction as

charged with possession of small amounts of cannabis (e.g., 1 gram or less of cannabis resin, or 30 grams or less of marijuana) are liable to prosecution by summary conviction only (maximum penalty of a \$1,000 fine and/or six months imprisonment). The principal benefit of this change for individuals prosecuted for small-scale cannabis possession is the absence of the prospect of being prosecuted by indictment, and the consequent absence of fingerprinting (e.g., previously possession was a hybrid offence which allows prosecution by summary conviction or indictment and thus automatically requires fingerprinting) which is the basis for a criminal record on Canada's Centralised Police Information Computer System (C.P.I.C.). The absence of a centralised criminal record on C.P.I.C. does not imply that there is no record of the offence held at a local police station or within a local and/or provincial court registry. However, the utility of records not computerized and entered into the C.P.I.C. system is significantly constrained by the decreased accessibility such records offer for foreign/domestic police investigations or routine record sharing, and for employer security checks on prospective employees.

a strategy rather than as a goal. Within this orientation, “...*the term harm reduction generally refers to only those policies and programs which aim at reducing drug-related harm without requiring abstinence from drug use*” (N.W.G.D.P., 1997: 2). Thus defined, harm reduction strategies would not include abstinence-oriented treatment programs or criminalization of ‘illicit drug’ use, and would be restricted to strategies which prioritize efforts to reduce the negative consequences of drug use for the individual, the community and society. As a consequence, initiatives which aspire to be considered as examples of harm reduction must, from my perspective, be focused on addressing ‘objectively’ demonstrable harm associated with the use of ‘illicit drugs’.

CHAPTER 4

HISTORICAL AND ANALYTIC OVERVIEW OF CANNABIS HARM AND

POLICY IN CANADA — LATE 19TH CENTURY TO 1997

If you look at the history of drug legislation, you will find that it is always the prohibitionists views that prevail, in other words those who have a strong vested interest in continuing that war [on drugs]. Indeed, the various bodies that apply this repression have immediate interests in continuing this war. It's lucrative for them in terms of power, in terms of money, but especially in terms of power. An entire bureaucracy profits from the drug war.... Not only has it [i.e., repressive prohibitionism] failed to solve the problems, but the markets are ever increasing. And to solve the problems of consumption, more and more repression is used. Where will it stop?

Pierre Cloutier

Ligue antiprohibitionniste du Quebec¹

4.1 THE EARLY PERIOD OF DRUG PROHIBITION (1908-1961):

4.1.1 Introduction:

Prohibitionist intervention² strategies have proliferated in Canada for nearly a century, and yet the 'illicit drug problem' continues to escalate. Historically, the construction of 'illicit

¹ (House of Commons, 1994c: 54-55)

² Intervention in a social problem can be defined as "...any and all conscious, organized efforts to alleviate that problem" (Henshel, 1990: 91).

drugs' as a social problem has been based on a complex web of understandings apparently operating without regard for the 'objectively' demonstrable harm of certain drugs. Eugene Oscapella, Director of the Canadian Foundation for Drug Policy, calls drug prohibition "chemical McCarthyism". He says that it is the greatest shame of 20th century criminal justice because it is a witch-hunt causing more harm than it prevents (Oscapella, 1993: 1)

The central concern of this chapter is to explicate why the prohibitionist intervention strategy against 'illicit drugs' — despite repeatedly failing to achieve its objectives — continues to dominate discourse and practice in drug control policy. I will begin by examining historical constructions of the 'illicit drug problem' and their translation into intervention strategies and how the concept of iatrogenesis³ applies to drug prohibition. I will then address how bureaucratic lawmaking perpetuates the iatrogenic effects of prohibition, and how prohibition manifests itself in terms of the socio-politics of dominance and subordination. I will conclude by exploring two critical movements in Canadian drug policy proceeding the introduction of the 1961 Narcotic Control Act: the development of harm-based cannabis reformism during the LeDain era (1969-73), and the emergence of harm reduction as a federal policy position associated with the activities of Canada's Drug Strategy and Health Canada (1987-1997). Within both of these shifts, I will identify philosophical, theoretical, and policy movement away from morality as an appropriate basis, and an increasingly greater emphasis on harm as the central criterion for the basis and practice of drug control policy.

³ Iatrogenesis - a term derived from the medical field - refers to a condition in which a given disease is caused by, or exacerbated by, the intervention which ostensibly tries to alleviate or remedy the problem (Cohen, 1985: 169).

4.1.2 Constructing the Drug Problem - An Historical Overview:

Most research on the genesis of Canadian narcotics legislation tends to provide straightforward, atheoretical, historical accounts which describe such laws as resulting from anti-Chinese sentiment, the moral entrepreneurship of Mackenzie King while he was Canada's Deputy Minister of Labour, and the influence of drug policy developments in the United States of America (Giffen et al., 1991: 33). While a detailed discussion⁴ of the complex web of social forces in early 20th century Canada is clearly beyond the capacity of the present analysis, I will examine the social construction of Canadian narcotics policy in terms of the interaction of six key factors: the climate of moral reform; the influence of the international opium movement; racial hostility; the lobby for opium prohibition in Canada; events surrounding the passage of the 1908 Opium Act; and the influence of Mackenzie King (Giffen et al., 1991: 46-76).

The climate of moral reform, known as the 'social gospel', which pervaded this era was in many respects an attempt to stabilize the episodic frontier lifestyle in which hard labour alternated with periods of hedonistic enjoyment. Puritan moral groups (Baptists and Methodists in particular) promoted the idea that alcohol, sex, and opium were the three major sources of vice threatening families and the dominant White-Anglo-Saxon-Protestant (W.A.S.P.) way of life (Beauchesne, 1992: 127).⁵ Due to their distinctive cultures, racial

⁴ For an illuminating and detailed discussion of the origins and consequences of Canadian drug control policy see: (Beauchesne, 1988: 125-136; and Beauchesne, 1992).

⁵ Temperance Leagues were introduced in the United States and subsequently in Canada as a means to promote W.A.S.P. social and cultural values. Protestants sensed the rising power of disreputable non-Protestant cultures (e.g., Irish Catholics, Jews, Blacks, Francophones, Asians, and certain Southern Europeans) and actively promoted policy and legislation which symbolically asserted the dominance of Protestant morality — an assertion of power and control exemplified through the enactment of prohibitionist drug control (Gusfield, 1963). Temperance League promotion of prohibitionist approaches to drug control did not imply a broad societal consensus. Indeed, Roman Catholics and Anglican Protestants in Canada (particularly in Québec) were very

differences, and social distance from mainstream society, minorities were perceived as particularly threatening to those moral reformers who wished to stabilize society by proscribing deviant or sinful behaviour. While drug prohibition in early 20th century Canada did not proscribe 'legitimate' commerce in opium for medicinal purposes,⁶ such legislation did explicitly target Chinese opium smokers and manufacturers who transformed crude into prepared opium. The anti-opium legislation was an exemplar of societal faith in legal prohibition and the threat of punishment in solving social problems.⁷

The influence of the international opium movement was inexorably bound up with a prevailing European and Anglo-American conviction that, "*...the progress of European civilization was proof of the natural superiority of the Caucasians and that their moral superiority endowed them with the responsibility for civilizing the lesser races*" (Giffen et al., 1991: 52). As well as religious instruction via the missionary movements of the Christian churches, civilizing the 'lesser races' included the international control of opium on the basis that opium use was a pernicious disease spread by the Chinese. Towards the end of the 19th century, racial hostility on the west coast of North America became quite acute. Chinese and other Asian immigrants were increasingly perceived as a threat to economic security and

much resistant to Temperance League views and the use of total prohibitionist approaches. Nevertheless, the control of drug use had considerable appeal for many social groups given the precarious frontier lifestyle and their desire to protect the social order, morality, and public peace.

⁶ Provided that the ingredients were listed on the bottle, the new legislation did not preclude 'legitimate' commerce in opium and other drugs by anyone if it was used for medicinal purposes. The only other people subject to the legislative provisions were those who wanted to keep their medicinal formulas secret. The marketing of such products required Ministerial approval and a certificate of registration that the drug or drugs in a given nostrum were not dangerous to health.

⁷ Prohibitionist and punitive approaches demonstrated faith in a rational choice model of punishment, in which deviance was viewed as a result of wilful individual choices. Numerous attempts to legislate morality were found in legislative attempts to control racetrack gambling, and in attempts to ban cigarettes. The campaign to ban cigarettes has usually presented its rhetoric, similar to the anti-opium rhetoric, in terms of the moral and physical threat to society in general, and pregnant women and youth in particular.

Anglo-American ethnic dominance. The prevailing sinophobia was exacerbated by the failure of head taxes to slow Chinese immigration, and the large-scale unemployment and consequent labour unrest brought about by the end of railway construction.⁸

Prior to 1908, opium smoking was only one of several items popularly considered to exemplify the alien, inferior and unassimilable nature of the Chinese, and was generally not perceived as a habit harmful in itself.⁹ Increasingly however, opium use came to be viewed as a Chinese disease spreading into the white community. The prohibitionist control of opium — with opium addiction as a symbol of infection by the Chinese race — became a rallying call for a wide variety of moral reformers including: Federal Deputy Minister of Labour Mackenzie King, church groups, the police, the Anti-Opium League (a predominantly Chinese-Canadian pressure group), and municipal politicians in British Columbia. Racist sentiments against the Chinese found expression in the formation of various anti-oriental organizations. One of them, the Asiatic Exclusion League, organized an anti-Asiatic parade in Vancouver in September 1907 which resulted in a volatile mob damaging property in Asian quarters of the city.

As the appointed commissioner investigating Asian property damage claims, Deputy Minister King became engaged in the opium enquiry via the influence of the Anti-Opium League. In his report to Parliament, he showed his disdain for the loss claims made by two

⁸ Under pressure from the government of British Columbia the federal government imposed a Chinese entry tax of \$50 under the 1885 Chinese Immigration Act. However, this failed to control the burgeoning influx of Chinese and other Asians. The entry tax was increased to \$500 in 1904, and while this caused a sharp drop in Chinese immigration for the next four years, thereafter it began to rise rapidly. (Quinn, 1990: 6-7).

⁹ The Royal Commission reports on the 'Chinese problem', both in 1885 and 1902, made no mention of the opium problem in their conclusions and recommendations. Nevertheless, the opium problem soon became a major focus of the anti-Asiatic crusaders. (Giffen et al., 1991: 57).

opium manufacturers arguing that it was anomalous for the government to reimburse the losses of “*an industry so inimical to our national welfare*” (Giffen et al., 1991: 70). In keeping with the moral rhetoric of the period, King’s separate report on The Need for Suppression of the Opium Traffic in Canada ignored the physiological effects of opium and argued instead that the moral and social impact of the drug was sufficiently deleterious to justify the total prohibition of opium for non-medical purposes (Solomon & Green, 1988: 91-92). Parliamentary and Senate indifference to the passage of the 1908 Opium Act evidenced the convergence of the various voices of moral reform which had apparently neutralized any meaningful dissent.¹⁰

The impact of King’s report on the legislative process is unclear as it was only mentioned in the Senate during the passage of the Bill. While King was not the lone force behind the 1908 legislation, as a political opportunist, he created such an impression through newspapers, official documents, and at the Shanghai Opium Conference of 1909 where he promoted the image of Canada as a pioneer — under his guidance — in the field of narcotics control (Giffen et al., 1991: 74-75). In 1911 when King became the Minister of Labour, he introduced the comprehensive Opium and Drug Act, a landmark in narcotic drug prohibition on a national scale, which targeted both the demand as well as the supply side of ‘illicit drugs’ and provided police officers with a variety of tools to enforce the legislation.

Shirley Small has argued that the social construction of the opium problem primarily served as an attempt to resolve conflicts between whites and orientals, and between the

¹⁰ The 1908 Bill was passed without debate nor even a discussion of its content in the House of Commons. In the House of Commons the Minister of Labour introduced the Bill and as he entered into his discussion of it he was cut short by cries of “carried” from other members. There was very little resistance in the Senate, and with a small concession of a six month grace period before the Act would come into force, the bill was passed. (Giffen et al., 1991: 72).

medical profession and Chinese opium manufacturers (Small, 1978). In examining the inception of Canadian narcotics legislation, Gusfield's distinction between 'status politics' and 'class politics' (Gusfield, 1963: 16-19) provides particularly useful insights. In status politics, as opposed to class politics, the gains are of symbolic rather than material value. The conflict is between lifestyles, and success is viewed as having the lifestyle of one's own group embodied in legislation, regardless of whether it is actually enforceable. Indeed, the police of the time strongly criticized the two paragraph 1908 Opium Act as "*...hastily drafted and so limited in its scope that it proved to be very ineffective in suppressing opium smoking*" (Erickson et al., 1987: 18). The limited powers of police to affect drug control under the legislation, they argued, precluded their having any real impact in suppressing the illicit trade. The symbolic nature of this legislation is further reinforced by King's knowledge that strict enforcement of existing British Columbia pharmacy legislation could have been used to effectively restrict the sales of opium to pharmacies.¹¹ Furthermore, the new legislation symbolically reinforced the inferior status of the rapidly growing Chinese population in early 20th century Canada. The material gains of prohibitionist legislation would not come until the introduction of the Opium and Drug Act of 1911 and the rapid expansion of police intervention powers over the following years.

¹¹ British Columbia had pharmacy legislation in place which could have been effectively used to restrict the sales of opium — i.e., it limited such sales to licensed pharmacists, with the opium ingredient identified as a poison on the label, with the purchaser known to the pharmacist or identified by somebody known to the pharmacist, and the signing of a book by the purchaser recording the sales of such substances. Nevertheless, the provisions of the legislation were not followed nor were infractions penalized. King was convinced that prohibition through federal legislation was the only effective remedy. (Giffen et al., 1991: 74-75.

4.1.3 From Social Problem To A Reductionist Intervention Strategy:

In examining prohibition as an intervention strategy two central and interconnected issues emerge. First, prohibitionist intervention exemplified the reductionist logic which pervaded the Social Darwinist era of the late 19th and early 20th century. Second, such reductionism precluded a comprehensive intervention strategy which could address the complexity of the social problems surrounding drug use in this period. The words of Adolf Hitler, in a speech in August 1920, provide an explicit illustration of reductionist logic and the quintessential expression of the evils of Social Darwinism:

Don't think that you can combat an illness without killing its causative organ, without destroying the bacillus, and don't think that you can combat racial tuberculosis without seeing to it that the people is freed from the causative organ of racial tuberculosis. The impact of Jewry will never pass away, and the poisoning of the people will not end, as long as the causal agent, the Jew, is not removed from our midst. (Kershaw, 1991: 25)

While one obviously cannot get tuberculosis without having the tubercle bacillus, the bacillus itself is not the sole cause of tuberculosis. In modern Western society, tuberculosis can be linked to the conditions of unregulated competitive capitalism — a social organization unmodulated by the demands of labour unions and the state — where nutrition and living standards are inadequate to stave off development of the disease (Lewontin, 1991: 42-45). Just as the supposed 'Jewish problem' of early twentieth century Germany cannot be separated from the profound social, economic, and ideological upheaval of this period, neither

can the 'illicit drug problem' of the same tumultuous period of Canadian history be separated from such factors.

Many accounts of the genesis of Canadian narcotics legislation can deservedly be criticized for ignoring political, cultural, and economic factors, especially in their assertions that the problems apparently induced by prohibition were unintended consequences (See for example: Giffen et al., 1991; and Small, 1978). Others have argued that the creation of a social problem of 'illicit drugs' was no unintended consequence, rather it served to symbolically identify the Chinese as the source of the economic and social problems confronting British Columbia (Comack, 1985: 83). In Elizabeth Comack's analysis, the creation of a social problem took the wind out of the competing socialist movement which insisted on defining the difficult labour issues of the period in terms of class, rather than in terms of race (Hester & Eglin, 1992: 63). It has also been argued that legislative action against 'illicit drugs' was underpinned, not by concerns about preventing addiction and helping addicts, but instead upon upon a desire to develop international commercial exchanges (Beauchesne, 1992: 132). In Line Beauchesne's analysis, the Canadian government (in tandem with the U.S. government) viewed participation in international opium prohibition as a means to profit from new commercial exchanges with China (Beauchesne, 1992: 130, 132). The following discussion illustrates how reductionist understandings of early 20th century Canadian social problems were translated into the partial intervention strategy of prohibition; a strategy condemned to failure from the outset.

Intervention strategies can be grouped into the two following general classifications: essentially preventive reactions which attempt to preclude additional outbreaks; and

essentially restorative reactions aimed at repairing or minimizing the damage from a particular occurrence (Henshel, 1990: 107). While drug control at the turn of the century tacitly included the restorative strategy of moral regeneration, the main emphasis was on preventive strategies including: the deterrence of offenders and would be offenders through increasingly harsh penalties; education of the public through sensationalised accounts of the depravities assumed to be induced by the use of opium and other evil drugs; the incapacitation of offenders, especially traffickers; and an attempt to impede drug trading by prohibiting various aspects of such commerce. Rehabilitation, particularly of drug users, was a position advocated by almost all; however, the moral crusaders knew little about the psychopharmacological harm of 'illicit drugs' or how to treat the drug abuser (Giffen et al., 1991: 155). Thus, incarceration was the favoured penal sanction.

A useful didactic tool in analyzing intervention strategies is the distinction initially made within the health care community and now widely used by various disciplines — between primary, secondary, and tertiary interventions. Primary interventions are targeted at the whole population to alter socio-structural factors which 'cause' crime. Secondary interventions are targeted at people considered to be at 'high risk' for deviant behaviour, or categories of people deemed to be dangerous to themselves or others. Tertiary interventions involve the provision of measures to actual offenders or victims. Canadian interventions against 'illicit drugs' at the turn of the century, excluding the primary level attempts at public education through the media, were almost exclusively tertiary level interventions focused on the punishment of drug offenders. Primary intervention strategies, such as social welfarism for the masses of unemployed Chinese immigrants, were ignored as Social Darwinism and the

doctrines of classical economics extolled a vision of minimal governmental interference so as not to ensure the survival of the less fit and thereby lower the overall quality of the human race (Henshel, 1990: 120). In the following sections, I will argue that the enduring success of drug prohibition resides in its reductionist approach to addressing the complexity of 'illicit drug problems', and its capacity to — rather paradoxically — induce side effects which appear to make the 'illicit drug problem' worse rather than better.

4.1.4 Iatrogenesis And Drug Prohibition:

Prohibition at the turn of the century contained a curious combination of religious and moral perspectives on deviance, a faith in the deterrent effect of punishment based on the rational choice model, and a positivistic view of the deleterious individual and social consequences of drugs which did not directly translate into intervention programs (i.e., treatment for addicts) until the early 1960's. It is my contention that the moral opprobrium inherent in the Opium Act of 1908, and the subsequent reactive enforcement-based intervention strategy which developed, served to iatrogenically precipitate and perpetuate the growth of the 'illicit drug' trade. Indeed, it is widely accepted that, by sanctioning only the supply side, the 1908 Opium Act had inflated opium prices and created a profitable black market for smugglers (Giffen et al., 1991: 78; Green, 1986: 28; Quinn, 1990: 7; Solomon & Green, 1988: 93). The convergence of alarmist political and public panic over the expanding 'illicit drug' trade — a trade which was, ironically, a byproduct of prohibition — and the virtually ineffectual impact of customs officers on illicit importation (Oscapella, 1993: 8), readily translated into the need for more legislation and additional police investigative powers

which ensured the continued existence of this social problem and the central role of the police in attempting to curtail it.

The 1911 Opium and Drug Act, which marked the beginning of a fully prohibitionist approach to the control of 'illicit drugs', maintained sanctions against the supply of such drugs and criminalized possession, smoking opium, and being found in an opium den without lawful excuse. Penalties ranged from a maximum fine of \$500 and/or one year in prison for trafficking and possession to a maximum fine of \$50 and/or three months in prison for smoking opium (Giffen et al., 1991: 78). The Act also specified maximum penalties of a \$200 fine and/or three months imprisonment for record-keeping failures of wholesalers, retailers, pharmacists, and physicians engaged in 'legitimate opiate commerce' for medical purposes (Giffen et al., 1991: 78). This legislation also prohibited the use of cocaine for non-medicinal purposes. Perhaps more ominous than the expansion of prohibition itself was the granting of special powers to the police to seize, confiscate, and destroy drugs, and the provision of discretion to magistrates to award half of an offender's fine to an informant (Solomon & Green, 1988: 94). Amendments to the Opium and Narcotic Drug Act (so renamed in 1920) in 1921 permitted the imposition of a maximum seven-year penalty for the importation, manufacture, and sale of opium or any other drug mentioned in the act. By 1922, whipping and deportation of convicted drug offenders were included as judicial options in sentencing (Alexander, 1990: 31).

In criminalizing use, possession, and trafficking of 'illicit drugs', prohibition's proponents created the optimal conditions for both the growth of the 'illicit drug problem' and the parallel growth of a drug enforcement bureaucracy. Criminalization of trafficking

increased incentives for drug traffickers and criminalization of drug possession and use inhibited the social evolution of community drug use norms, diminished civil liberties, and promoted disrespect for the law by forcing users into a criminal life-style (Quinn, 1990: 12-14). Increased formal control of 'illicit drug' use, by isolating drug users from the wider community, severely limited the impact of informal social control in shaping drug use norms. The continuous encroachment on civil liberties since the inception of prohibition and the promotion of disrespect for the law among user and trafficker groups is intimately tied to the mystification of the 'illicit drug problem', which involves "*...the definition of issues and situations in such a way as to obscure their most basic and important features...*" (Lennard, 1971: 10).

The attribution of an ontological status to the social problem of 'illicit drugs' by politicians, police, and by the public, substantially contributed to the proliferation of reductionist views as to the harm of 'illicit drugs', and to the indispensable social control position which the police acquired. The isolation of drug users from the community largely excluded opposition, whether by users or non-users, to the claims-making activities of the various prohibitionist moral reformers. By the 1920's a chorus of moral reformers, including the influential Edmonton magistrate Emily Murphy, promulgated the conceptions of 'illicit drugs' as the producers of moral degeneration, crime (both violent and sexual), physical and mental illness, and intellectual and spiritual ruin (Solomon & Green, 1988: 96). This 'dope fiend' mythology¹² was not, however, uniform in its view of addicts. Drug users were viewed as either victims or villains, the former typically being young white people without free will

¹² The phrase 'dope fiend' mythology was coined by Alfred R. Lindesmith (Lindesmith, 1940: 199-208).

and the latter being dissolute racial minorities (particularly Chinese) with a compulsion to infect others with their disease (Quinn, 1990: 8). As Bruce Alexander has noted, claims that addiction to drugs was a contagious disease threatening to spread into and corrupt white civil society generated, “...[p]ublic acceptance of the dope-fiend mythology [which] permitted the virtually unchallenged passage of legislation that defined addiction as a law enforcement problem, extended the range of the criminal sanctions, increased the punitive consequences of conviction, and encroached on traditional civil liberties” (Alexander, 1990: 32). The reductionist logic inherent in the view that drugs per se are the cause of social problems provided ample opportunity for the addition of more drugs to the schedules of the harsh legislation. It would appear that cannabis was added to the Canadian drug schedules primarily as a result of the claims-making activities of Emily Murphy,¹³ including her reiteration of the following claim:

Persons using this narcotic, smoke the dried leaves of the plant, which has the effect of driving them completely insane. The addict loses all sense of moral responsibility. Addicts to this drug, while under its influence are immune to pain, and could be severely injured without having any realization of their condition. While in this condition they become raving maniacs and are liable to kill or indulge in any forms of violence to other persons, using the most savage methods of cruelty without, as said before, any sense of moral responsibility. (Murphy, 1973: 332-333)

¹³The main rationale for the addition of cannabis to the drug schedules appears to have been its perceived moral threat identified in Emily Murphy's claims-making efforts, rather than being a result of an 'objective' determination of the harmfulness of the drug. (Boyd, 1991: 10; Giffen et al., 1991: 358; LeDain, 1972: 230; and Solomon et al., 1988: 371-372).

Murphy's penchant for unsubstantiated and sensationalised claims-making with respect to cannabis is quite evident given her explicit admission that the use of cannabis was "*...comparatively unknown in the United States and Canada*" in the 1920's (Murphy, 1973: 331). Moreover, it has been argued that Murphy — who was the Director of one of the many Temperance Leagues used to promote puritan moral values at the turn of the century — promoted speculative and explicitly racist rumours about 'illicit drugs' to further her objective of saving the dominant white anglo-saxon races from the vices of foreign races contaminating the social order (Beauchesne, 1992: 136). Consequently, it would be illusory to argue that the 1923 addition of cannabis to Canada's drug schedules could have resulted from any knowledge of the 'objectively' demonstrable harmfulness of cannabis.

4.1.5 Bureaucratic Lawmaking, Class Politics, And The Ontological Status Of 'Illicit Drugs':

Whereas the inception of Canadian prohibition may be viewed as an example of status politics, class politics and bureaucratic influences soon began to dominate the 'illicit drugs' issue. In 1920 both the federal Department of Health and the Royal Canadian Mounted Police (RCMP) were created; the former being responsible for Canadian drug laws and international treaty obligations, and the latter being responsible for the enforcement of federal statutes (Solomon & Green, 1988: 97). The RCMP was seriously threatened by disbandment during the early 1920's over criticism of their handling of the Winnipeg General strike of 1919, and their general anti-subversive activities against organized labour. Ironically, the Liberal Party of Mackenzie King, which would dominate Parliament during the

1920's, was one of the severest critics of the newly organized RCMP (Giffen et al., 1991: 129). Nevertheless, narcotic drug prohibition was one subject upon which the RCMP and its critics could agree (Giffen et al., 1991: 129).

The symbiotic relationship between the Narcotic Division of the Department of Health and the RCMP produced a frenzy of six drug law revisions between 1921 and 1929. By 1929 doctors could be prosecuted and imprisoned for up to five years for providing maintenance doses to addicts (Quinn, 1990: 8), and writs of assistance provided the police with extraordinary discretionary powers of search and seizure (Alexander, 1990: 37) which conflicted with the English common law requirements necessary to achieve equivalent powers under a judicial warrant.¹⁴ Within such a climate, opposition to enforcement hegemony as *the* source of information was not seriously questioned until the 1950's when a treatment alternative to criminalization emerged. Nonetheless, the enforcement community raised the spectre of organized crime and continued to press for more stringent laws. While there would be some concessions to treatment concerns (e.g., the acceptance of methadone maintenance programs for heroin addicts in the early 1960's), legislative amendments resulting in the 1961 Narcotic Control Act reflected a continued focus on enforcement priorities and an unrealized preference for custodial treatment.¹⁵

¹⁴ Writs of Assistance were finally eliminated in 1985 when officers were provided with the option of obtaining a 'telewarrant' — i.e., officers could obtain a warrant over the phone where it was deemed to be necessary to the administration of justice and where the usual method of obtaining a warrant would be impractical.

¹⁵ Part II of the Narcotic Control Act made provisions for the custody for treatment and preventive detention of drug addicts, for an indeterminate period for a single offence, and for a term of life for subsequent offences. Ironically, no special provisions were made for treatment of addicts. This section was never proclaimed and never became law. (Solomon & Green, 1988: 105).

The mandate of the RCMP as the principal agency in narcotic control (post 1920) is indicative of state attempts to manage class conflict in 20th century Canada. From the inception of the RCMP, *“...it was clear from the comments of ministers and top RCMP officers that one of the main functions was to control class conflict and suppress industrial or political disturbances”* (Brown, 1992: 200). Indeed, an historical review of narcotic convictions demonstrates a shift in the focus of drug enforcement from race to social class. While Chinese and black drug convictions declined from more than 66% of the total between 1908 and 1920 to 10% between 1929 and 1953, the proportion of unemployed or working class drug convictions rose from 58% to 82% during the same time period.¹⁶ Drug prohibition simultaneously served as a means to enhance the growth and status of the RCMP, and in cooperation with the Narcotic Division, the Mounties were able to acquire through legislation the enforcement tools they and other police agencies deemed necessary to control the ‘dangerous classes’.

The justification for the increasing powers accorded to the police to enforce drug prohibition between 1920 and the introduction of the Narcotic Control Act in 1961, were not to be found within a burgeoning addict population nor within spiraling conviction rates. While there was an average of 900 convictions a year from 1912 to 1920, this fell rapidly to about 200 convictions a year by the end of the 1920’s (Solomon & Green, 1988: 94, 99). Moreover, Canada’s official addict population continued to decline in numbers even after the Second World War (Solomon & Green, 1988: 101). The growth of the prohibitionist

¹⁶ The present data were derived from the jail records of the five largest cities in Upper Canada — Toronto, Hamilton, Ottawa, Windsor, and London. The reader should note that, because of overlap among categories, totals do not add up to 100%. (Mosher & Hagan, 1994: 613-641).

enforcement bureaucracy was largely a product of racism initially, later of alarmist concern over a growing drug trade and the spectre of organized crime, and still later of sensationalised accounts of epidemic rates of addiction among America's ghetto youth which could potentially spill over into Canada. While the preceding influences should not be minimized, a key influence on the expanding prohibitionist agenda was the reductionist view that the origins of the 'drug problem' lay in the innate harmfulness of certain 'illicit drugs'. The 'internalization'¹⁷ of this social construction of the ontological status of 'illicit drugs' within popular consciousness became a common sense public view generated by "grounds" established in the form of official data on 'illegal drug' use, and "warrants" evident in the extensive media reporting of the moral threat 'illegal drugs' posed to vulnerable groups such as youth.¹⁸ However, both the moral foundations and the absence of 'objectively' demonstrated drug harm inherent to Canadian drug policy would come under increasing challenge during the LeDain era (1969-1974) and the rise and decline of Canada's Drug Strategy (1987-1997).

¹⁷ Here I utilize a view of reality construction as involving a social process of three stages: externalization, objectivation, and internalization. Externalization refers to the process by which people construct a social product (e.g., the idea that unusual behaviour can be caused by mental illness). Objectivation is deemed to occur when cultural products take on an 'objective reality' of their own, independently of the people who create them, and are consequently viewed as part of 'objective reality' (e.g., mental illness causes unusual behaviour). Internalization occurs when individuals learn the 'objective facts' of a culture through socialization and make them part of their own 'internal' consciousness. This formulation comes from Berger & Luckmann (1966), as discussed in Conrad & Schneider (1980: 21).

¹⁸ My use of the terms "grounds" and "warrants" is based on the grounds-warrants-conclusions model of the logical structure of claims-making as presented by Best, (1987: 101-121).

4.2 HARM-BASED CANNABIS REFORMISM AND THE EMERGENCE OF HARM REDUCTION AS A FEDERAL POLICY POSITION:

4.2.1 The LeDain Era of Canadian Drug Policy:

Canada's Commission of Inquiry into the Non-Medical Use of Drugs, commonly called the LeDain Commission, as part of its scope was charged in 1969 with the responsibility of looking at the cannabis issue and how the problems involved in such use might be reduced. The genesis of the commission was, ostensibly, the growing popularity of marijuana in Canada (and the U.S.) shortly after the introduction of the Narcotic Control Act in 1961, and the links this drug had with the anti-war movement and a culture of sexual experimentation among young people (Boyd, 1991: 80-81). The marijuana issue sparked considerable debate in the House of Commons and this led to the appointment of the LeDain Commission by the Trudeau government in 1969 (Boyd, 1991: 81). Commissioners were drawn from the fields of law, criminology, political science, psychiatry, and social work. Nevertheless, the Commission lacked representation from the enforcement community who chose not to participate (Erickson & Smart, 1988: 336). Through research and public consultations the commission completed its work in 1974.

While there are many interesting aspects to the voluminous amounts of information and analysis undertaken by the LeDain Commission, none is perhaps more important or of greater analytic utility to the present study, than the paradigmatic shift the Commission engendered with respect to the analysis and application of the claims-making of three classic legal-philosophers with regards to the basis for justifying whether, in principle, the criminal law should be used in the field of non-medical drug use. The three positions expounded by

the LeDain Commission (two minority and a majority position) on this issue follow arguments surrounding the issue of paternalism and the law, as put forward by three classic legal philosophers: John Stuart Mill, Lord Patrick Devlin, and H.L.A. Hart (Beauchesne, 1991: 165). The two minority positions represent opposite ends of a continuum with Commissioner Campbell's being the more restrictive and Commissioner Bertrand's being the more libertarian approach. Commissioner Campbell, similar to Lord Devlin's logic, argued that society has a right to protect its moral convictions and to defend the social environment from changes they oppose. Protection of the interests of society, based on moral convictions, provides the necessary warrant for the restriction of individual rights to use 'illicit drugs' under this approach. For Devlin the function of the criminal law is "*...to enforce a moral principle and nothing else*", and this stems from the knowledge that "*...the loosening of social bonds is often the first stage of [social] disintegration*" (Devlin, 1959: 9, 15).

Commissioner Bertrand, similar to the logic of John Stuart Mill, argued that the only justification for action against an individual is the protection of other individuals and society, not protection of the individual from self-inflicted harm. Under this approach individual civil rights take precedence over societal rights. For Mill the central "*...principle is that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection*" and that "*The only part of the conduct of anyone for which [an individual] is amenable to society is that which concerns others*" (Mill, 1859: 68-69). The majority report of the LeDain Commission rejected the

legal-philosophical claims of both Lord Patrick Devlin¹⁹ and John Stuart Mill as an appropriate basis for the principle of determining whether the criminal law should be used to control non-medical drug use. The former was rejected as a consequence of its corollary implication — deriving from the presumption that morality is essential to the preservation of society — that any marked departure from the prevailing morality could be regarded as a threat to the preservation of the society without regard to the harmfulness of such a departure (LeDain, 1973: 939). The latter position was rejected because of its implicit assumption that causing harm to oneself cannot, or only peripherally, cause harm to others or to society in general (LeDain, 1973: 936).

The majority report of the LeDain Commission follows the political philosophy expressed by H.L.A. Hart. Hart roundly criticizes the approach taken by Devlin and argues that it is absurd to suggest that every practice the society views as profoundly immoral and disgusting threatens its survival (Dworkin, 1978: 244). Nevertheless, in dismissing Mill's extreme fear of paternalism, Hart argues that “...[P]aternalism — *the protection of people against themselves* — *is a perfectly coherent policy*” (Hart, 1963: 31-32). Under Hart's approach the state has a responsibility to ensure individual liberty, but it is also responsible for civil order and thereby it has a paternalistic function. The state takes on a role of protecting societal interests, but also the interests of particular individuals and in executing this role the state may justify the use of force to prevent persons from inflicting harm upon themselves. This becomes a particularly important principle where certain groups, especially

¹⁹ The Commission rejected the extreme thesis of Lord Devlin — i.e., “that it is appropriate to use the criminal law to enforce morality, regardless of the potential for harm to the individual or society” (LeDain, 1973: 940); nonetheless, they did subscribe to Hart's reading of the moderate thesis of Devlin, which follows presently.

young persons, are not fully aware of the dangers inherent in the use of ‘illicit drugs’. On the issue of whether, in principle, the criminal law should be used in the field of ‘illicit drug’ control, the majority position of the LeDain Commission reached the following conclusion:

...Without entering into the distinction between law and morality, we also subscribe to the general proposition that society has a right to use the criminal law to protect itself from harm which truly threatens its existence as a politically, socially, and economically viable order for sustaining a creative and democratic process of human development and self realization... [However,] The Criminal law should not be used for the enforcement of morality without regard to potential for harm (LeDain, 1973: 940).

With this legal-philosophical basis, and after conducting an extensive cost-benefit analysis of the harm of cannabis and potential harm associated with various control options, the majority position of the LeDain Commission recommended a lessening of penalties for cannabis due to the relatively low demonstrable harm and toxicity of the drug. This was particularly the case with respect to cannabis possession as the Commission apparently reached the conclusion, “...that the health and social harm caused by cannabis, while possibly significant, was not so great as to justify criminal records and [jail] terms for simple possession” (Rogers, 1995b: 2). Nonetheless, legalization of cannabis was not advocated as it was felt that such a measure might encourage use, particularly among young persons. Maintenance of drug laws would continue to maintain a general deterrent to cannabis trafficking, importing and exporting, as well as cultivation for the purposes of trafficking.

While I will not discuss the extensive review of the health and psychological consequences of cannabis use conducted by the LeDain Commission, I will discuss some of their findings in Chapter five with respect to the areas of concern about the harm of cannabis raised in the Sub-Committee hearings on the Controlled Drugs and Substances Act. Specific recommendations of the majority report of the Commission with respect to cannabis policy included the following:

- *Simple Possession should no longer be considered an offence;*
- *Trafficking should become a hybrid offence; Upon summary conviction a maximum penalty of 18 months or a fine in lieu of imprisonment; Upon conviction by indictment a maximum penalty of five years imprisonment or a fine in lieu of imprisonment; Exclusion of exchanges of small amounts between users from the trafficking category;*
- *Possession for the Purpose of Trafficking should carry the same penalties as for trafficking, but allow the accused to raise reasonable doubt about his/her intention to traffic;*
- *Importing or Exporting should be included within the offence of trafficking; Conviction should result in higher maximum penalties, but no mandatory minimum penalty should be used;*
- *Cultivation should not be a punishable offence, except where it is for the purpose of trafficking then the penalties for trafficking should be imposed. (Erickson & Smart, 1988: 340-341)*

A crucial contribution of the LeDain Commission was the paradigmatic shift it promoted with respect to the philosophical basis for drug prohibition. From a foundation in moral distinctions and an absence of attention to ‘objectively’ demonstrable harm, the majority report promoted a new approach for drug policy in which morality was viewed as a reasonable warrant to utilize the criminal law, but only with regard to the demonstrable potential for harm. Nonetheless, the recommendations of the LeDain Commission were never formally adopted through legislative reform. This may be attributable to the lack of participation from the enforcement community, a strong presence in Canadian drug control policy, in the Commission’s inquiries. Also a fracturing of opinions within the Commission, into one majority and two minority positions on the cannabis issue, may have led to a perceived need for further examination by inter-departmental committees (Giffen & Lambert, 1988: 356).

In the throne speech of 1980, the Federal government — in a modest attempt to address some of the majority LeDain recommendations of 1973 — indicated its intention to transfer cannabis offences from the Narcotic Control Act to the Food and Drugs Act for the purpose of removing the possibility of imprisonment for the offence of simple possession and the recording of a criminal record for simple possession. In late 1980, the Department of the Solicitor General circulated a “*Cannabis Review Position Paper*” which detailed a number of options. The option detailed for Cabinet consideration provided for hybrid offences for possession with 30 grams being the dividing line. Under 30 grams fines were to be reduced to \$100 to \$200, or 15 days in jail in default of payment and removal of cannabis possession under 30 grams from the provisions of the Criminal Records Act (1970). By late 1982 issues

raised by the police with respect to the complex legal mechanisms surrounding criminal records, and by interest groups with respect to the possibility that any appearance of liberalization might increase use patterns particularly among youth ground this reform process to a near halt. Consequently, interdepartmental discussions shifted to the possibility of creating a separate Cannabis Control Act as an alternative to existing legislation. The 1984 election of the Progressive Conservative government of Brian Mulroney closed the door on cannabis law reform and signalled a new and unsuspected era in Canadian drug policy; the introduction of Canada's Drug Strategy.

4.2.2 The Rise and Decline of Canada's Drug Strategy, 1987-1997:

4.2.2.1 Canada's War On Drugs:

The landslide victory of Brian Mulroney and the federal Progressive Conservatives in September 1984, put a stop to the interdepartmental debate about the decriminalization of cannabis, and marked the introduction of Canada's Drug Strategy (C.D.S.).²⁰ Only two days after Ronald Reagan's declaration of a new war on drugs in the United States, Mulroney, departing from a prepared speech, unexpectedly announced: "*Drug abuse has become an epidemic that undermines our economic as well as our social fabric*" (Erickson, 1992: 248). This policy statement was troublesome because most 'illicit drug' use, and specifically cannabis use, which has always been the predominant focus for illicit control, had stabilized or declined in Canada since the early part of the 1980's. Self-reports, official statistics, and

²⁰ C.D.S. was called the National Drug Strategy in Phase I, and renamed C.D.S. in Phase II because the previous title was meaningless outside of Canada. In this essay use of the acronym C.D.S., unless otherwise stated, refers to the Drug Strategy in both Phases.

health-related statistics have provided an 'objective' picture of stable drug use patterns and few changes in health problems related to 'illegal drug' use, all of which tend to point to the conclusion that Canada's drug "*epidemic*" of the mid-1980's was not grounded in 'objective conditions' but was based instead upon a political social construction (Jensen & Gerber, 1993: 458). This announcement of a problematic condition that didn't 'objectively' exist was undoubtedly linked to the precipitous drop in the approval rating of the federal Conservatives from 60 percent following the election to 27 percent in early June of 1986. Furthermore, Prime Minister Mulroney required a "*safe*" political issue to help bolster his administration's seemingly endless downward spiral in the opinion polls (Jensen & Gerber, 1993: 455).

While the public and expert responses dismissed the Prime Minister's claims-making efforts, federal government bureaucrats who were scrambling to protect Mulroney also saw an opportunity to put the drugs issue on the "*front-burner*" (Conley, 1996).²¹ With the relegation of Mulroney's claims to bureaucratic process — a process largely invisible to the public — an Interdepartmental Secretariat on Drug Abuse was formed by Health and Welfare in November of 1986 to pursue the issue (Jensen & Gerber, 1993: 458). After months of wide-ranging consultations with federal departments, provincial departments, community groups and addictions agencies, the Minister of Health and Welfare announced the introduction of a five year National Drug Strategy (C.D.S. Phase I) to "*combat substance abuse*" in late May 1987 (Health Canada, 1994: 6). As a result of pressure from addiction agencies, and the need to substantially broaden the scope to rationalize the "*epidemic*" motif,

²¹ While there was talk of strengthening health and addictions federally between 1984 and 1986, the idea of introducing a coordinated drug strategy had not been discussed.

the drug strategy comprised not only 'illicit drugs', but also alcohol, licit pharmaceuticals,²² solvents, and to some extent, tobacco (Erickson, 1992: 248).

The emergence of C.D.S., however, in no way matched Mulroney's presumed intention to initiate a full-scale war on drugs akin to the agenda of the United States. Apparently running counter to the war on drugs approach, C.D.S. — which brought \$210 million in new federal funds for the substance abuse field in Phase I and \$270 million in Phase II — designated fully 70 percent of its resources for demand reduction activities (e.g., prevention, treatment, and rehabilitation), with the remaining 30 percent going to supply reduction activities (e.g., interdiction, drug enforcement, etc.) (Health Canada, 1994: 6). This approach stood in marked contrast to the U.S., where approximately 70% of federal drug funding was expended on supply reduction activities (Office of National Drug Control Policy, 1992: 140). Nevertheless, C.D.S. funds supplemented existing funding which, at the federal level, had been oriented almost totally toward supply reduction efforts including, interdiction, domestic enforcement, and the prevention and prosecution of drug-related crimes (Health Canada, 1994: 6). In deciding to take a "*balanced, coordinated, and cohesive*" approach, C.D.S. sought to rectify the imbalance of federal funding and added to the prevention and treatment activities which communities and provinces had heavily invested in prior to the advent of the drug strategy (Health Canada, 1994: 6).

²²It has been stated that, "*Canadians are among the world's largest per capita users of psychoactive prescription drugs — for example, tranquilizers and narcotic analgesics*" (Conley, 1991/1992).

4.2.2.2 Harm Reduction As A Key Concept In Canada's War On Drugs:

Notwithstanding inferences that Canada's federal drug strategy always had harm reduction as its central objective (Erickson, 1992: 248; Fischer, 1994: 71), the central objective in Phase I was to "*combat substance abuse*".²³ Harm reduction was not viewed as being an appropriate term for programs dealing with the general population which was the target population for Phase I, but was deemed acceptable for usage with respect to high-risk populations with particular reference to those issues relating to AIDS (Conley, 1996). Harm reduction was included in Phase II of the strategy by the C.D.S. secretariat without prior federal agreement on the meaning of the term, however, most of the strategy's partners hardly seemed to even notice its inclusion at the outset (Conley, 1996).²⁴ The concept of harm reduction, particularly with regard to public questions about the relationship between the Controlled Drugs and Substances Act (Bill C-8) of the newly elected Liberal Party in 1993²⁵ and the harm reduction philosophy of Canada's Drug Strategy, was a source of considerable discussion (Health Canada, 1995a: 1).

Nowhere was this discussion more evident than in the case of cannabis possession which the C-7 version of the C.D.S.A. proposed to increase the penalties for (i.e., increase in the fines). Consequently, C.D.S. sought to attain agreement among its federal partners as

²³ This stated objective of Phase I is contained in C.D.S., 1994.

²⁴ The term was not controversial initially because, while the health community had a pretty good idea of its meaning (although some disparate positions), the enforcement community thought that harm reduction included locking people up for drug offences — i.e., they're in jail so they can't do any more harm to themselves or society.

²⁵ The Controlled Drugs and Substances Act was simply a re-introduction of the Psychoactive Substances Act (Bill C-85) put forward by the previous Conservative government. However, Bill C-85 had not been passed into law before the electoral demise of the Progressive Conservatives in the 1993 election.

to a definition of harm reduction, but after several years of effort they were unsuccessful. Thereafter, the focus turned to the achievement of departmental policy with respect to a definition of harm reduction. After two years, agreement was reached on Health Canada's Position on Harm Reduction, and this position was approved as departmental policy by Health Minister Diane Marleau in 1995. The stated goal of C.D.S. was to

...reduce the harm to individuals, families and the community at large caused by the use of substances such as alcohol, pharmaceuticals, solvents and illicit drugs...[and it was asserted that] Health Canada supports [a] broad interpretation of 'harm reduction' within a supply control/demand reduction paradigm to include the prevention of use by non-users (abstinence), the management of risk of harm (for users and others), and the treatment of individuals either directly or indirectly affected by use. Within this broad continuum, Health Canada recognizes and accepts, but does not condone, that some people will use and abuse drugs.... The Department also maintains that harm reduction relates not only to actual or demonstrated harm but also to potential harm. (Health Canada, 1995a: 1-2).

While Health Canada's departmental position subscribed to a broad interpretation they also indicated that they did not support or endorse all approaches which may come under this heading, particularly with regards to the legalization or unrestricted availability of currently controlled drugs. However, Annex A of the aforementioned document indicated that there was a need to discuss decriminalization issues surrounding one or more substances currently

subject to controls and penalties, to search for possession penalties without criminal records, and to consider the potential of a ticketing option for cannabis possession offences. The need to discuss these issues was prompted by the debates about the treatment of cannabis possession offences during the Sub-Committee hearings on the C.D.S.A. in 1994. The precise nature of these debates are the subject matter of the following chapter, in which I will examine the contemporary social construction of cannabis harm and policy associated with the introduction of the C.D.S.A..

CHAPTER 5

THE SOCIAL CONSTRUCTION OF CONTEMPORARY CANADIAN

CANNABIS HARM AND POLICY

This enactment [The Controlled Drugs and Substances Act] repeals the Narcotic Control Act and Parts III and IV of the Food and Drugs Act.... [The enactment provides] ...a framework for the control of import, production, export, distribution and use of substances that can alter mental processes and that may produce harm to health and to society when distributed or used without supervision. [emphasis added]

The Controlled Drugs and Substances Act (Preamble), 1996

5.1 COMMON-SENSE, CANNABIS HARM, AND THE LEGISLATIVE RESPONSE:

In this chapter I will examine the contemporary social construction of cannabis harm and policy through a discussion of the 1994 Sub-Committee hearings (hereafter referred to as “the hearings”) on Bill C-8¹ the *Controlled Drugs and Substances Act* (C.D.S.A.).² I will

¹ While The C.D.S.A. is referred to as Bill C-8 in this essay, when the Sub-Committee hearings took place the Act was Bill C-7. All references to Bill C-7 have been changed to C-8 so as to provide continuity for readers. Though there were changes to C-7 when it became C-8, the principal change with respect to cannabis is the main subject matter of this thesis. Specifically, the decriminalization of possession of small amounts of cannabis under C-8. Please refer to footnote 2 for a brief overview of the nature of the decriminalization of cannabis possession under Bill C-8.

² Under the previous Narcotic Control Act persons charged with possession of cannabis, regardless of quantity, were liable to prosecution by summary conviction (maximum penalty for a first offence of a \$1,000 fine and/or six months imprisonment, and for a subsequent offence \$2,000 fine and/or 1 year of imprisonment) or by indictment (maximum penalty of seven years imprisonment). Under the C-7 version of the C.D.S.A. the penalties for possession would remain the same, save a \$1,000 increase in the maximum fine which could be imposed for a first offence and a \$3,000 increase in the maximum fine which could be imposed for subsequent offences. Under the current C-8 version of The Controlled Drugs and Substances Act persons charged with possession of small amounts of cannabis (e.g., 1 gram or less of cannabis resin, or 30 grams or less of marijuana) are liable to prosecution by summary conviction only (maximum penalty of a \$1,000 fine and/or six months imprisonment). The principal benefit of this change for individuals prosecuted for small-scale cannabis possession is the absence of the prospect of being prosecuted by indictment, and the consequent absence of fingerprinting (e.g., previously possession was a hybrid offence which allows prosecution by summary conviction or indictment and thus automatically requires fingerprinting) which is the basis for a

argue that the above preamble from the C.D.S.A. — in congruence with historical developments in Canadian drug policy — accurately identifies the essence of prohibitionist intervention with respect to cannabis control policy. Specifically, the Bill provides a framework for the control of trafficking and use of substances that “...*may produce harm to health and to society...*”. I will argue that claims-making activities in the hearings demonstrate that the relationship between cannabis harm and cannabis policy is elusive, and ultimately, illusory from an ‘objective’ perspective. I will argue that cannabis policy has little or no relationship to studies of psycho-pharmacological harm, heightened use levels, harm reduction rhetoric, the scheduling of this substance, the need to meet all aspects of United Nations Drug Conventions, or the need to achieve measurable and defined goals. I will show that these factors are more symbolic than instrumental aspects of the C.D.S.A. Nonetheless, if cannabis policy is unrelated to the above factors and ‘objectively’ demonstrable harm in particular, then how would one explain the decriminalization of cannabis possession under the new Act? I will argue that the decriminalization of cannabis possession under the C.D.S.A. is best explained by specific pressures brought to bear at the Sub-Committee hearings by several participants,³ administrative changes to the enforcement of trafficking offences, and the consequent administrative redundancy of having a hybrid possession offence for cannabis.

criminal record on Canada’s centralised police information computer system (CPIC). The absence of a centralised criminal record on C.P.I.C. does not imply that there is no record of the offence held at a local police station or within a local and/or provincial court registry. However, the utility of records not computerized and entered into the C.P.I.C. system is significantly constrained by the decreased accessibility such records offer for foreign/domestic police investigations or routine record sharing, and for employer security checks on prospective employees.

³ Institutional affiliations and occupational titles of witnesses who gave evidence at the hearings will be provided in parentheses following the name of the representative. This information will only reflect the time period during the hearings as many witnesses have, or may have since had a change in their occupational title or institutional affiliation.

For didactic purposes which will become apparent as this analysis progresses, I will employ the grounds-warrants-conclusions model for the study of rhetoric and social problems described by Best (1987: 101-121). In this model, grounds statements include the following: definitions which set a domain or limit on what can be said and orientation statements which give a particular orientation or spin to a problem; typifications, notably atrocity tales or particularly horrific examples used as common referents; and estimates of the extent of a problem which would include incidence or prevalence statements, and trend statements such as the epidemic metaphor suggesting rampant and indiscriminate impact, and range claims or statements of the extent to which a phenomenon is distributed within a population. Warrants are statements which justify drawing conclusions from the grounds. For such arguments to be persuasive, the persuaded individual typically belongs to a field which deems the warrant valid, and the strength of a particular warrant is often an implicit⁴ matter where values play a very strong role. Conclusions are calls for action to alleviate or eradicate social problems, and claims-makers may have an agenda with several goals, such as creating public awareness and prevention with posters, improving social control policies and techniques to address the scope of the problem, and other objectives such as addressing bureaucratic interests for expansion.

I will show that attempts to focus discussion on the issue of drug harm in the hearings — save the brief claims supporting common-sense conceptions — were generally ignored. The uncontested claims of cannabis (or ‘illicit drugs’ inclusive) harm made by

⁴ References to warrants may be oblique or implicit. The following are several examples: blameless victims who face terrible risks over which they have little or no control (e.g., children), deficient policies and resources which are insufficient to handle certain problems, historical continuity evident in the promotion of consistency with past policies or a founder's intent, and the issue of rights and freedoms and associated restriction on government policy.

representatives of bureaucratic prohibitionist interest groups illustrates an ongoing reliance on popular common-sense conceptions whose ‘objective’ basis is far from established in the research literature. The primary grounds for common-sense claims about cannabis harm and the foundations of drug policy are rooted in the historically-based chasm between the ‘objectively’ demonstrable harmfulness of ‘illicit drugs’ and Canadian drug policy. Secondary grounds for claims about cannabis harm and the presumed connection to Canadian cannabis policy — resting on the primary grounds — include studies of psycho-pharmacological harm and cannabis use levels. Warrants for conclusions included arguments raised in the hearings about harm reduction, the scheduling of this substance, the need to meet all aspects of the United Nations Drug Conventions, and the need to achieve measurable and defined goals. Conclusions about cannabis harm and its connection to policy tend to rest firmly within the historically-based and socially constructed disjunction between the two, and/or warrants based on soft or absent grounds which have been accepted as common-sense facts. I will illustrate that decriminalization of cannabis possession under the C.D.S.A., while unrelated to claims about cannabis harm, is grounded in claims-making activities centred on general and specific aspects of the technique of prohibitionist drug control. Within such a perspective, the concept of harm reduction — ostensibly the current framework for Canadian drug policy — does not relate to addressing the harm of ‘illicit drugs’, but rather to the interests and values of prohibitionist groups and their representatives.

From the outset, I will concede that the hearings could not be considered as a forum for an exhaustive discussion of drug policy issues. Indeed, Sub-Committee members were warned by a senior official from Health Canada on the very first day of hearings that many

witnesses would want to deal with broader policy issues, and would express the view that drug policy needs to be altered in some way. This official, Mr. Bruce Rowsell (Department of Health - D.O.H.), emphasized that “...*the government has given us a fairly specific task to do here...*[and drug policy] *was not an issue given to us by the government*” (House of Commons, 1994a: 14). The purpose of the legislation and the hearings were made explicitly clear by several senior federal government officials. Mr. Gerard Normand (Senior Counsel, National Security Group, Department of Justice - D.O.J.) and Mr. Bruce Rowsell (D.O.H.), for example, clearly explained that the purposes of Bill C-8 were twofold: first, to consolidate existing narcotic legislation (i.e., the Narcotic Control Act and the Food and Drugs Act), and to modernize and enhance those pieces of legislation, and; second, to fulfil Canada's international obligations under three United Nations drug control conventions to which Canada is a signatory (House of Commons, 1994d: 24; House of Commons, 1994a: 14).

Although the hearings do not provide an exhaustive overview of drug policy issues, they do provide one of the few public forums in which broader issues of drug policy as well as specific drugs are discussed in some detail by various concerned parties. Despite warnings by Mr. Rowsell (D.O.H.) and others to keep Sub-Committee members focused on discussions of the specific official purposes of the legislation, witness presentations and discussions in the hearings covered a diverse discourse on various aspects of the policy and practice of drug control, as well as specific drugs. The views of witnesses encompassed a wide range of interests and positions, and a sample of representatives who made submissions includes: the enforcement community, Ligue antiprohibitionniste du Québec, Canadian Foundation for

Drug Policy, community organizations, Health Canada, Department of Justice, Canadian Centre on Substance Abuse, and various experts and commentators on drug policy.

Rather than provide an exhaustive review of witness evidence with respect to drug policy, which would be too detailed for the purposes of this thesis, I will follow the lines of argument presented and the specific issues raised related to cannabis and its control. I will also counterpose arguments about cannabis harm against the 'objective' evidence found in existing research literature. The summarized 'objective' evidence for each identified area of concern will be drawn from an overview of the health and psychological consequences of cannabis use conducted by Hicks and Conley (1996). The specific topics of cannabis harm covered by this paper were initially identified as target areas of inquiry in congruence with areas of concern raised in the hearings. To remove the partiality of relying upon one source of social/scientific evidence and to account for interesting temporal developments, the authors' consulted three of the most comprehensive and systematic reviews of the health and psychological consequences of cannabis use available: Cannabis: A Report Of The Commission Of Inquiry Into The Non-Medical Use Of Drugs, the LeDain Commission (1972); Cannabis and Health Hazards: Proceedings of an Addiction Research Foundation (A.R.F.)/World Health Organization (W.H.O.) Scientific Meeting on Adverse Health and Behavioural Consequences of Cannabis Use (1983); and the [Australian] National Drug Strategy: The Health and Psychological Consequences of Cannabis Use (1994).⁵

⁵ The policy paper produced by Hicks and Conley (1996) was exposed to critical review by nine members of the Canadian Centre on Substance Abuse National Working Group on Drug Policy, and numerous senior federal government officials in the seven federal departments participating in Canada's Drug Strategy.

I will not provide an overview of media coverage of the C.D.S.A. related to the cannabis issue, however, I will cite a selection of notable journalistic articles. My reasons for excluding an extensive overview are centred on a principal conclusion which this analysis will substantiate. Specifically, media coverage of the cannabis issue generally decried the continued prohibition of cannabis possession and the increase in penalties for those charged as per the C-7 version of the C.D.S.A.. The central reason expounded time and time again was that the ‘objective’ harmfulness of cannabis was not sufficient to justify the ongoing criminalization of cannabis users. Media coverage denouncing the new drug law — and specifically articles denouncing the continuation of a prohibition on cannabis possession — was an integral component in pushing the government and its officials to decriminalize cannabis possession under Bill C-8. However, I will argue that both the reasons behind this reform and the nature of what change could (and eventually would) take place (and be acceptable to the primary interest groups) were clearly explicated in the Sub-Committee hearings. Consequently, I will argue that the reasons behind, and the nature of, developments in Canadian cannabis policy are not related to a general media outcry or the ‘objective’ demonstrable harmfulness of cannabis. These developments are primarily related to the needs of, and competition between, institutional power interests vying for control of this issue.

Given the linear format of evidence presented at the hearings (i.e., witness format), temporal distinctions have been collapsed⁶ and the views expressed over the course of nearly six weeks of hearings are broken down into various categories. I have categorized the various

⁶ Although the temporal distinctions have been collapsed, readers will undoubtedly notice that there appears to be a considerable amount of arguing and debate on certain specific points relating to drug policy and cannabis in particular. This is unlikely to be a result of an acute awareness of the representations made by various witnesses, and is, more likely, derived from the fact that many of these issues constitute long-standing debates in the drug policy field.

positions and statements along a tripartite epidemiological classification in an attempt to inject greater clarity into the typically nebulous issue of cannabis harm and policy. The first category contains issues relating to the “*Agent*”, or cannabis itself, and how the agent is involved in the harm of cannabis. The second category represents issues relating to the “*Host*”, or the user of cannabis, and how user behaviour impacts upon the harm of cannabis. Issues related to the first and second categories are discussed as symbolic aspects of the C.D.S.A.. The third category is the “*Environment*”. Here, I focus on how the response to ‘illicit drugs’ tries to resolve, or is associated with, the harm of cannabis. Some of the issues related to the third category are discussed as symbolic aspects of the C.D.S.A., while others are discussed as non-symbolic aspects of the C.D.S.A. While I recognize that any method of categorization is somewhat artificial, the epidemiological method of ordering phenomena is relatively systematic and permits greater attention to be drawn to the ‘causes’ of particular phenomena.

5.2 SYMBOLIC ASPECTS OF THE CONTROLLED DRUGS AND SUBSTANCES ACT:

5.2.1 Agent Issues:

Long maligned in the claims-making activities of various individuals and organizations, cannabis has been considered to be a ‘cause’ of many social problems. Since Emily Murphy’s claims-making activities in the early 1920’s, claims about the effects of cannabis have included the idea that the drug causes insanity, violence, and crime among users. While some of these claims have been either dismissed or remain unsubstantiated in ‘objective’ social/scientific research into the psycho-pharmacological harm of cannabis, many

of the claims against this drug persist as popular common-sense ‘facts’ which are rarely questioned. Currently, the major harmful side effects associated with cannabis use in the research literature include:

- *Acute intoxication effects such as anxiety, dysphoria, panic, and paranoia, cognitive impairment, psychomotor impairment; and*
- *Chronic heavy cannabis use effects such as respiratory diseases associated with smoking as the method of administration, development of a cannabis dependence syndrome, and subtle forms of cognitive impairment.* (Hall, Solowij, and Lemon, 1994: 15)⁷

A major recent macro-level analysis of the social/scientific research literature on the health and psychological consequences of cannabis use, conducted for the Australian National Task Force on Cannabis, revealed a modest degree of certainty regarding the acute adverse effects of cannabis, but also a substantial degree of uncertainty with respect to the adverse effects of chronic heavy cannabis use (Hall, Solowij, and Lemon, 1994: 15-16). Despite the modest degree of certainty with respect to the acute adverse effects of cannabis use, one must acknowledge that drug effects on any individual will depend upon: “...*the dose, the mode of administration, the user's prior experience with the drug, any concurrent drug use, and the “set” — the user's expectations, mood state and attitudes towards drug effects — and “setting” — the social environment in which the drug is used*” (Hall, Solowij, and Lemon, 1994: 41). Given this knowledge, it is not surprising that existing studies of cannabis harm

⁷ Refer to Appendix A for a more extensive general overview of the health and psychological consequences of cannabis use presented by the Australian National Task Force on Cannabis (1994).

lack the methodological rigour to partial out the causative effects of cannabis from numerous other interacting variables. The predominant modality used to account for the ‘objective’ harm of cannabis tends to rely upon correlative and anecdotal sources of information.

Nonetheless, the harm of cannabis has been accepted to such a large extent that claims of harmfulness have become common-sense views shared by virtually all major participants in Canadian drug policy. Explicit or tacit acceptance of such claims of cannabis harmfulness appear to occur without regard to the ‘objective dimension’ which ostensibly supports the rhetorical stances employed by representatives of various interest groups. Consequently, the evidence presented in the Sub-Committee hearings with respect to attempts to indicate the harm of cannabis are most interesting, for the purposes of this study, for what they fail to present — i.e., ‘objective evidence’ of the putative harmfulness of cannabis.

5.2.1.1 A Gateway Drug?

Cannabis has long been considered to be a “gateway” (or stepping-stone) to the use of harder drugs, such as heroin and cocaine. While cannabis has not been established as a causal factor in the development of substance abuse careers or progression to the use of harder drugs, the gateway issue continues to be an explicit or implicit focal point in claims relating to the harm of cannabis. This is clearly evident in the statement by Mr. Barry King (Chief, Sault Ste. Marie Police) that marijuana is one of our “*gateway drugs*” (House of Commons, 1994c: 105). That Mr. King’s statement of the gateway hypothesis was not directly contested by any of the Sub-Committee members or by other witnesses, points

towards its general acceptance as a common-sense 'fact' without regard to the difficulties inherent in establishing its empirical basis.⁸

A considerable amount of research literature has examined the gateway hypothesis (Brook et al. 1992; Donnelly & Hall, 1994; Fehr & Kalant, 1983; Kandel, 1978; Kandel, 1984; Kandel, 1988; Kandel and Davies, 1992; Kandel and Logan, 1984; Kandel & Yamaguchi, 1993; Kaplan et al., 1982; LeDain, 1973; Michka, 1993; Newcombe, 1992; Robins, Darvish, and Murphy, 1970; Scheier and Newcombe, 1991; Yamaguchi and Kandel, 1984a,b). The evidence most often utilized for the assertion that cannabis is a gateway drug is that the majority of users of hard drugs (eg. heroin and cocaine) used cannabis before their involvement with harder drugs (LeDain, 1972: 128; Donnelly & Hall, 1994: 59). The LeDain Commission found that most chronic users of cannabis, amphetamines and LSD reported earlier experience with cannabis, and with illicit (i.e., underage) heavy use of alcohol and tobacco as adolescents. Influences such as peer group values and the establishment of contacts with 'illicit drug' distribution networks was cited as playing a major role in the development of drug using careers. While the Commissioners found a strong statistical relationship between the use of cannabis and other psychoactive drugs, they did acknowledge that the precise role of cannabis was not yet fully understood. The LeDain Commission expressed the need for further investigation of the social, economic and criminal-legal, as well as pharmacological factors predisposing people to multiple drug use. Moreover, they argued that the reasons people take drugs are probably too complex to assign causal significance to

⁸ The gateway hypothesis, specifically its pharmacological basis, however, was challenged in witness evidence by Professor Boyd which preceded evidence presented by Chief King. I will return to Professor Boyd's pharmacological challenge against the gateway hypothesis below.

one factor or another, consequently, such research might still be unable to demonstrate causal links (LeDain, 1972: 161, 271).

A more recent review of the evidence by Donnelly and Hall (1994: 59-64), expands upon the shortcomings of LeDain Commission findings in this area, but the attribution of causality remains elusive. Risk of progression from cannabis to 'harder drugs' has been strongly associated with current degree of involvement with marijuana and frequency of use (Kandel, 1984), and early initiation and heavy use of any drug in the sequence of drug progression (Kandel, 1978; Kandel and Logan, 1984; Kandel, 1988; Robins, Darvish, & Murphy, 1970). Cohort studies have demonstrated that, among 87% of men, the sequence of drug progression is as follows: use of alcohol preceding marijuana; alcohol and marijuana preceding use of other 'illicit drugs'; and alcohol, cigarettes and marijuana preceding the use of prescribed psychoactive drugs (Yamaguchi & Kandel, 1984a: 671). Such studies have also shown that, among 86% of women, the sequence of drug progression is as follows: either alcohol or cigarette use precedes marijuana; alcohol, cigarettes and marijuana precede use of other 'illicit drugs'; and alcohol and either cigarettes or marijuana precede use of prescribed psychoactive drugs (Yamaguchi & Kandel, 1984a: 671). A more recent examination exploring the role of "crack" cocaine in drug sequence patterns (Kandel & Yamaguchi, 1993) found similar relationships to those found by Yamaguchi & Kandel (1984a,b). The former study found that among 93.4% of males the drug sequence was as follows: use of alcohol preceding marijuana; use of marijuana and cigarettes preceding cocaine and crack; and use of cocaine preceding crack. Among 94.2% of females, the same study found the following drug sequence: use of alcohol and cigarettes preceding marijuana; use of marijuana preceding

cocaine and crack; and use of cocaine preceding crack. Studies employing sophisticated statistical techniques to identify the influence of key predictor variables have revealed that early onset into drug use (licit or illicit) is a crucial risk factor for progression to the use of “harder drugs” (Yamaguchi and Kandel, 1984b; and Kandel & Yamaguchi, 1993).

Nevertheless, the notion that use of cannabis is part of a drug addiction pattern that will inevitably lead to harder drug use has generally been rejected by scientific researchers (Blackwell and Erickson, 1988: 133; Michka, 1993: 9-25). The pharmacological basis of the gateway hypothesis was contested in the hearings by Professor Neil Boyd (Department of Criminology, Simon Fraser University) who presented evidence at the hearings before Mr. King. Professor Boyd argued that there isn’t “...*anything in pharmacology that tells us that the consumption of cannabis is likely to lead to the consumption of cocaine or heroin...*” (House of Commons, 1994c: 24-31). Indeed, during the 1960's and a large portion of the 1970's cannabis was not even considered to be a drug of dependence. The LeDain Commission found little evidence to support the conclusion that cannabis can induce physical (e.g., tolerance and withdrawal symptoms upon cessation) or psychological dependency (e.g., behavioural, psychic or emotional dependence and habituation) (LeDain, 1972: 123).

However, narrow definitions of drug dependency typically limited to the demonstration of marked tolerance and withdrawal symptoms (i.e., akin to those for alcohol and opiates) had led many researchers to conclude that while abstinence symptoms were present, there was no support for a cannabis dependence syndrome. Broadened definitions of psychoactive drug dependence during the late 1970's and early 1980's minimized the emphasis on tolerance and withdrawal symptoms, and emphasized that “*The essential feature*

of this disorder [psychoactive substance use disorder] is a cluster of cognitive, behavioural and physiologic symptoms that indicate that the person has impaired control of psychoactive substance use and continues use of the substance despite adverse consequences" (American Psychiatric Association, 1987: 166). While tolerance and withdrawal symptoms are not required under this definition of dependence, controlled research studies have shown that both can occur (Benowitz and Jones, 1975, 1977a,b; Benowitz et al., 1976, 1980; Jones and Benowitz, 1976; Jones et al., 1976, 1981). Although these studies demonstrated that tolerance developed rapidly as evidenced by a 50% decrease in intoxication level produced by a 30 mg dose after 4 days of 10 mg doses, minimal withdrawal symptoms were found to require at least five days of steady intoxication, and the longer the period of sustained intoxication the greater the symptoms of withdrawal.⁹ Though this evidence points to the conclusion that cannabis dependency "*probably...occurs in heavy chronic users of cannabis*", we should be "*...wary of over-estimating its social and public health importance...[and] exaggerating its prevalence and the severity of its adverse effects on individuals*" (Hall, Solowij, & Lemon, 1994: 121). Consequently, lack of certainty with respect to a pharmacological basis for cannabis dependence clearly impinges upon claims that such dependency (if it is present) provides a causal mechanism for user progression to the use of 'harder drugs'.

⁹ The most common withdrawal symptoms exhibited in these studies were increased irritability and restlessness in formerly non-irritable patients, insomnia, anorexia, increased sweating, and mild nausea. More objective indicators included a mean decrease in body weight of 3.2 kg over four days of abstinence, hand tremor and intraocular pressure increased above pre-THC level, there was a large decrease in the percentage of time spent in rapid eye movement sleep, and salivary flow and body temperature increased.

The probability of initiating use of other 'illicit drugs' without prior use of marijuana is extremely small ranging from .01 to .03 (e.g., 1 to 3/100th of 1%) for men or .02 (2 /100th of 1%) for women (Yamaguchi & Kandel, 1984b: 677). The obvious inference is that marijuana would appear to be a necessary precondition for the initiation of other 'illicit drugs', and that cannabis control provides a critical entry point for drug policy intervention (Rogers, 1995a). While predictive capacities have certainly been developed by research relating to the gateway issue, establishing the causal significance of the pharmacological properties of cannabis in the development of dependence or progression to the use of 'harder drugs remains problematic (Donnelly and Hall, 1994: 61). Moreover, intervention against cannabis use is unlikely to tackle gateway or dependency problems to any great extent given that,

... although those who use cannabis are more likely to use other illicit drugs than those who do not use cannabis, it is more usual for cannabis use to decline in early adult life with only a minority continuing to use regularly, or progressing to the use of more dangerous illicit drugs. Even in the case of the minority (about one in four) who progress to daily cannabis use, the majority ceased their use by the mid to late 20's". (Donnelly & Hall, 1994: 61)

There is a clear lack of explanatory capacity offered by the stepping stone or gateway approach to understanding the initiation and continuation of cannabis use, or progression into harder 'illicit substances'. Two alternative models offer greater explanatory potential. First, the "*Selective Recruitment Model*" posits that certain individuals are recruited into cannabis

use due to their deviant and non-conformist personalities, and a predilection for the use of intoxicating substances. Initiation and progression relates to the availability and social disapproval associated with different drugs at different ages. Second, the “*Subcultural Model*” looks at the influence of subcultural groups (eg. those involved in the use or traffic in ‘illicit drugs’, and/or a wide range of criminal or deviant activity). Association with such groups is deemed to promote the initiation and continuation of cannabis and other ‘illicit drug’ use, through the increased availability and social approval of drug use among group members.

Drug users in general, but multiple and heavy users in particular, are generally engaged in deviant lifestyles in which drug use is only a part. Such findings are consistent with the wide variety of research findings that lend support to the selective recruitment model (See: Donnelly and Hall, 1994: 62). Research by Brook et al. (1992), Newcombe (1992), Scheier and Newcombe (1991) leads to the conclusion that, in most cases, the more risk factors (or predictors) that adolescents have, the more likely they are to progress to more intensive involvement with cannabis and other ‘illicit drugs’ (Donnelly and Hall, 1994: 62). The prevalence of cannabis and other drug use primarily occurs during the teenage years and declines sharply during the latter half of the twenties. While plausible, the subcultural model¹⁰ has received little direct support; however, the two models are not mutually exclusive, nor are they mutually exclusive of modernized versions of the stepping-stone model (Donnelly

¹⁰ Single and Kandel (1978) expanded the subcultural model to include not only social, but situational and psychological factors, other than friends’ use and involvement in marketing activities, as well. They found that the “*frequency of one’s own marijuana use retains an independent effect on the use of other drugs*”. Furthermore, the “*legalization of marijuana, while it would certainly reduce youth’s involvement in illegal drug marketing and youth’s use of other illicit drugs besides marijuana, would not completely prevent it, as has been claimed*” (Single and Kandel, 1978: 127).

and Hall, 1994: 64). Although a modern version of the stepping-stone model might still argue that some pharmacological basis of cannabis is at work, it could not negate the profound influence of individual and sociological variables on progression to the use of harder drugs. Moreover, researchers on drug progression studies have explicitly recognized that “...we [still] *need greater understanding of the basic biological, psychological, social, and cultural processes underlying progression through the different pathways*” (Kandel & Yamaguchi, 1993: 854).

5.2.1.2 Crime and Violence?

During the hearings, Deputy Commissioner J.P.R. Murray (R.C.M.P.) argued that, *The RCMP, by virtue of the variety of police services it provides, from municipal to international policing duties and from national security to laboratory services, is in an excellent position to observe first hand the harm caused by the use of substances such as alcohol, pharmaceuticals, solvents and illicit drugs and to evaluate drug legislative needs. In many instances [of criminal behaviour], such as spousal abuse, substance use, if not as a direct cause is certainly a mitigating factor, firstly in the occurrence taking place and secondly to the gravity of the wrongdoing.* (House of Commons, 1994c: 15-24).

Superintendent W.J. Burke (O.P.P.), who similarly argued that police officials are in an excellent position to observe the impact of drugs on family units and individuals, posed the following rhetorical questions to Sub-Committee members: “...Does it [illicit drugs] cause

violence? You're certain it does. Does it cause people to fight for turf and take over areas? Yes, it does. Whether you're trafficking marijuana or you're trafficking whatever drug, there's a lot of money involved, and we see those things. Organized criminal networks — there are all kinds of them. That's why we are emphatically opposed to any legalization" (House of Commons, 1994c: 99-106): The role of cannabis in the development of criminal careers, and the subsequent connection to violence is another issue which is often linked to the gateway issue. While Superintendent Burke and Deputy Commissioner Murray appear to be convinced that cannabis is a cause of crime and violence (either directly or at the very least as a contributing factor), scientific research evidence neither supports nor does it lend 'objective' credibility to their views. Indeed, reviews of the scientific evidence reveal that many popular common-sense understandings about 'illicit drug'/crime/violence relationships are frequently mired in myths and prejudiced views which obscure the complexity of this issue (Brochu, 1995a: 34; Brochu, 1995b: 163-164; Brochu, 1995c: 5).

The LaGuardia report (1944), an early study of marijuana and its users conducted by the New York Academy of Medicine, found that users did not come from the hardened criminal class nor did they find any direct relationship between the commission of crimes of violence and marijuana (LeDain, 1972: 186). This report found that the behaviour of the marijuana smoker was typically friendly and sociable, with aggressiveness and belligerency being uncommon (LeDain, 1972: 186). The RCMP and the Solicitor General's Department presented briefs to the LeDain Commission attempting to establish a link between 'illicit drug' use and criminal behaviour in Canada. However, the commissioners found no scientific documentation (except for a few isolated cases) of a criminogenic effect of cannabis use in

either the domestic or international literature (LeDain, 1972: 110). Nevertheless the association is often presumed as cannabis users have typically had delinquent or anti-social backgrounds, although this has changed somewhat over time (e.g., during the seventies youth from mainstream society had become more involved in cannabis use).

The concerns repeatedly expressed by the enforcement community in regards to the presumed relationship between drug use and crime is likely to be significantly jaded by their experience in dealing with, for the most part, the most problematic (ie. in terms of substance use, crime and/or deviant activity) groups of substance users. It is hardly surprising that police and/or court-identified samples of young persons or adults will contain high proportions of heavy drug users and frequent cannabis users (Chaiken & Chaiken, 1990: 214; Smart, 1983: 732). While cannabis is invariably blamed as a cause of crime, the impact of controlling the number of users is unlikely to effect crime committed by such persons, particularly for violent predatory crime. A review of the evidence revealed that, "*Reducing the number of adolescents [and adults] who are sporadic users of illicit drugs, especially marijuana, may possibly affect the incidence and prevalence of some types of crime, such as disorderly conduct and driving under the influence of controlled substances, but not predatory crime*" (Chaiken and Chaiken, 1990: 235)

The LeDain Commission did find some relationship between cannabis and crime, however the link illustrated a systemic function of the 'illicit drug' trade in which 'professional criminals' were engaged in the systematic, and often violent theft of cannabis from drug dealers operating independent of organized criminal networks in metropolitan areas such as Montreal and Ottawa-Hull (LeDain, 1972: 180, 182). Some of the reasons cited to explain

this continued participation among low level cannabis dealers included financing of their own habits, or providing cannabis at cost to friends. Jan and Marcia Chaiken's (1990: 211-213) review of the literature on drugs and predatory crime found no evidence that changes in use or non use of 'illicit drugs' is systematically related to changes in the participation or non-participation of individuals in general criminal activity. They also found that of all the studies examining the issue, the relationship between drug use and criminality has been found to be substantially weaker than the relationship between drug sales and other forms of criminality.¹¹

Research has shown that cannabis has affects on attention and judgement, and, if the dose is sufficiently large, can produce considerable perceptual distortion (LeDain, 1972: 60). However, there is virtually no evidence of aggression resulting from the pharmacological effects of marijuana and considerable evidence demonstrating that marijuana consumption actually suppresses aggression (Fagan, 1990; Fehr & Kalant, 1983; LeDain, 1972). An experimental study conducted by C.G. Miles et al. (1972), for the Addiction Research Foundation, sought to determine the effects of cannabis when it is freely available and usage is subject only to the desires of the individual. The study found that, "*The drug did not seem to induce hostility or aggression, and no evidence was found of social deterioration, or a decline in concern over personal hygiene or general physical condition*" (LeDain, 1972: 149). Fagan (1990: 265-266) cites studies conducted by Taylor et al. (1976) and a replication by Myerscough (1980). The former study found that high doses of THC tended to suppress aggression. The latter study found that, when confronted with a highly provocative

¹¹ The one exception to Jan and Marcia Chaiken's (1990) general characterization of the drug-crime issue is a repeated finding that among heroin-using high-rate offenders, intensity of offending appears to vary directly with intensity of drug use.

(simulated) opponent, only subjects in the low-dose THC condition exhibited aggressive responses over the two control conditions.

After reviewing a variety of international studies on the issue, the LeDain Commission (1972) concluded that, "*Although opinions are mixed, in general, reports from Eastern and non-industrial countries indicate that cannabis is not a significant cause of serious crime or violence, and is much less of a problem in this regard than is alcohol*" (LeDain, 1972: 108). Evidence presented to an A.R.F./W.H.O. Scientific Meeting on The Adverse Health and Behavioural Consequences of Cannabis Use in 1981 reached the same general conclusions. Negrete (1983: 603), cites the extensive review of evidence on the association between cannabis, crime and violence conducted by Abel (1980). Abel concluded that marijuana use does not precipitate violence in the majority of those using it either sporadically or chronically. While there is little evidence of a pharmacological link between cannabis ingestion and aggression, there is some evidence that the use of cannabis may result in aggression due to social and cultural expectations. For most Western countries, and countries in Asia and Southeast Asia, the use of cannabis is by and large for recreation and relaxation — with virtually no evidence of aggressive reactions. However, in some African countries patterns of cannabis use are associated with situations calling for aggressive postures and violence (Mohan, 1983: 699).

Despite the paucity of evidence for the cannabis-aggression nexus in the general population there are stronger indicators for such a conclusion within certain sub-populations. A recent review of the literature conducted for the National Task Force on Cannabis in Australia (1994) found:

- *little support for cannabis being a cause of chronic psychosis persisting beyond the period of intoxication;*
- *strongly suggestive (not established beyond a reasonable doubt) evidence that chronic cannabis use may precipitate a latent psychosis in vulnerable individuals;*
- *reasonable evidence that heavy cannabis use, and perhaps acute use in susceptible individuals, can produce an acute psychosis in which agitation, aggression and a variety of other symptoms predominate (Hall, Solowij, & Lemon: 172-179).*

However, one must also acknowledge that another part of the problem in identifying cannabis as a factor in drug induced psychosis is that those who are diagnosed in that state are usually multi-drug abusers and the synergy effect can not be determined (Anderson, 1995a).

5.2.1.3 Driving While Impaired (DWI)?

During the hearings, Mr. B.V. King (C.A.C.P.; Chief, Sault Ste. Marie Police) told Sub-Committee members that, "*The other thing is we have to remember that people can be impaired by drugs when they're driving vehicles. As of this date, we don't have anything to assist us in identifying if people are impaired by drugs. So if people had marijuana in the vehicles and they were driving around and they were engaging in it at the time, it's going to cause us a problem*" (House of Commons, 1994c: 98-106). Although Chief King's statement appears to have face validity, the 'objective' foundations for such claims-making are far from solid. Although epidemiological data tends to support the conclusion that cannabis induces

some decrease in driving ability, the LeDain Commission, in its majority report, argued that any impairment due to cannabis or a combination of alcohol and cannabis should be interpreted cautiously, until such time as the frequency and patterns of cannabis and other drug use, along with improved research techniques, are epidemiologically clarified (LeDain, 1972: 58, 63, 136-139).

A review of the evidence by Klonoff (1983: 433-466) on studies relating to the effects of marijuana on driving ability (or related skills) found general support for the conclusion that the effects of marijuana on cognitions, and psychomotor and perceptual abilities does, to a certain extent, impair driving ability, but Klonoff does indicate some reservations about generalizing such effects to driving. Klonoff's review of the literature found that while marijuana detracts from or impairs driving ability, many of the studies lack experimental evidence. However, he also acknowledged that there is increasing evidence that marijuana — alone or in combination with other drugs and alcohol in particular — is directly implicated in traffic accidents and fatalities. Notwithstanding the above discussion, he also provides the following cautions about interpreting prospective evidence:

- *psychomotor studies can only examine specific subsets of the complexity of behavioural demands for driving. While many studies report dose-related findings, there is a real question about generalizing to driving per se; and*
- *driving simulators have the advantage of enabling control of variables, but are nevertheless experimental artifacts. The studies to date have operationally defined variables such as speed errors, acceleration errors, risk-taking in terms of passing, passing-time judgements, and visual signal detection. Whereas dose-*

related effects have been reported, here again there is a question about generalizing to driving per se. (Klonoff, 1983: 465)

Driving while impaired is a significant area of public concern, particularly where young persons are concerned. Younger drivers (age 16-19), while generally consuming less alcohol when they drink and drive (compared to older drivers) are considered to be at a much higher risk of accident involvement after drinking than are drivers of other age groups (Eliany, 1989: 23). While overall drinking and driving offences declined from some 800 offences per 100,000 population in 1984 to 597 offences per 100,000 population in 1992 (Williams, Single, McKenzie, 1995: 322), this remains an area of considerable social concern. Among fatally injured drivers a very large proportion have high levels of alcohol in their system. A 1991 sample of fatally injured drivers illustrated the following: those with over 150 mg% accounted for 29.9% of fatalities, those with between 81-150 mg% accounted for 9.3% of fatalities, and those with 1 - 80 mg% accounted for 7.2% of fatalities (Williams, Single, McKenzie, 1995: 91). As these findings have been fairly consistent since the 1970's, there is an established correlation between higher levels of alcohol use and a greater risk of drivers being fatally injured.

The issue of driving while intoxicated, and the potential risks from higher levels of alcohol use would also appear to be associated to cannabis use. There is some evidence to suggest that regular cannabis users may develop the capacity to drink large amounts of alcohol (e.g., Siemens, 1978 laboratory study), and subsequently the use of cannabis may be capable of altering drinking behaviour (Negrete, 1983: 603). Study of the correlations between cannabis, alcohol, and driving is problematic, largely because there are no simple

roadside tests for cannabis similar to those for alcohol. Furthermore, the likelihood of getting such a device in the near future is low, as there is no simple test in existence that can detect the level of cannabis ingestion in people. Smart (1993) cites a study by Donelson (1987), in which 2,665 fatal motor vehicle accidents were examined and tests for alcohol and cannabis were made on those who died within an hour of the accident. Results found that of males (age 14-24) with no alcohol or trace levels in their system under 10% tested positive for THC, of those with low alcohol levels (.01% to .07%) one third had THC in their blood, and of those with high alcohol levels 27% had THC in their blood (Smart, 1993: 83). A study conducted by Stoduto et al. (1993) found that, after alcohol (35.5%), cannabinoids were the most frequently found drugs, at 13.9%, in the bodily fluids of drivers of motor vehicle collisions. These were followed closely by benzodiazepines (12.4%), and cocaine (5.3%). The authors found that their findings supported a number of previous study results with respect to the incidence of cannabis. The authors cautioned, however, that the results are limited to severely injured motor vehicle collision victims and cannot be generalized to the remaining populace (Stoduto et al., 1993: 412). Also, these findings can not be interpreted in a temporal or rank order since various drugs stay in the body for varying lengths of time.

It remains difficult to establish if there is a true relationship (beyond mere correlation) between cannabis consumption and altered or increased alcohol consumption. The lack of research in this area, and the correlative nature of existing research evidence, detracts from the ability to generalize from particular samples to the general population or those at risk for driving while impaired. Notwithstanding the above discussion, the interaction of the two drugs on driving ability should merit concern and further study to determine if such a

relationship exists. Nonetheless, LeDain Commission recommendations over 20 years ago for clarified epidemiological evidence on the relationship between cannabis use and driving, or linkages to alcohol use, have not as yet been firmly established.

5.2.2 Host Issues:

Witnesses appearing at the hearings presented little evidence relating directly to the host or users of cannabis or other ‘illicit drugs’. While there was some discussion of the issue of host elasticity (i.e., users moving on to the use of other substances in the case of dwindling drug supplies), such concerns do not relate directly to cannabis harm per se. Moreover, it would be difficult to disentangle this issue from the environmental considerations which play a profound role in shaping the patterns of drug use and the elasticity of user appetite for them. The principal host issue identified by witnesses was the subject of drug use levels. There seemed to be little controversy or discussion of the often repeated claim — exemplified in the following statement by Mr. Mark Taylor (President, Addiction Research Foundation) — that “*Contrary to popular mythology, consumption of illicit drugs has stabilized or declined since...1977*” (House of Commons, 1994b: 21-30). Indeed, Deputy Commissioner J.P.R. Murray of the RCMP conceded that “...*the [drug use] situation is relatively stable in absolute numbers...*” (House of Commons, 1994c: 19). Claims about reasonably stable patterns of cannabis use are supported by Official statistics¹² on cannabis use patterns (see Table 1).

¹² I use the phrase official statistics to indicate that the figures are used in official government and other publications. Readers should be cautious about the veracity of any of these statistics, and particularly cautious about comparisons between the various years. All of the statistics are social constructs produced with methodologies defined by researchers. Consequently, they cannot be considered as definitive evidence per se of use levels. The 1989 National Alcohol and Other Drug Use Survey was Canada’s first truly national drug use survey with large sample sizes and relatively representative samples drawn from across the country. The extrapolation of survey data to represent Canada’s population in other surveys warrants considerable suspicion in any

TABLE 1	USE OF MARIJUANA					
PAST 12 MONTHS	1978	1985	1989	1990	1993	1994
	10%	5.6%	6.5%	5.1%	4.2%	7.4%

* Sources: Health Promotion Survey 1985, 1990;
National Alcohol and Other Drug Use Survey (NADS), 1989
Active Health Report 1989;
Horizons 1994;
Canada's Alcohol and Other Drugs Survey (CADS) 1995.

5.2.3 ENVIRONMENTAL ISSUES - HARM REDUCTION

RHETORIC AND DRUG POLICY:

In the hearings, Mr. Bruce Rowsell (D.O.H.) noted that early attempts at international drug control focused on controlling the supply of 'illicit drugs' began some 25 years ago, whereas at present government officials recognize that a simple strategy doesn't work. Consequently, Canada's Drug Strategy was brought forward in 1987 as a purportedly multifaceted and balanced approach to deal with the 'illicit drug problem' with enforcement and control as one very important element of a larger strategy (House of Commons, 1994a: 13-38). At the hearings, Mr. Ziggy Malyniwsky of Canada's Drug Strategy Secretariat (D.O.H.) provided the following overview of the nature of the drug strategy and C-8's relationship to it:

direct comparisons between years. Moreover, surveys are notoriously inadequate in including individuals such as homeless persons and street youth who are considered to have much higher rates of 'illicit drug' use than the general population. Nevertheless, these official statistics are one of the very few systematic means by which we can have some estimation of the extent of cannabis use in Canada, and it is for this reason that I use them here.

The objective of [C.D.S.] was, and continues to be, to reduce harm to individuals, families, and communities caused by alcohol and other drugs.

The strategy was based on six components: prevention, treatment and rehabilitation, information and research, enforcement and control, the international cooperation aspect, and coordination. [Bill C-8] ... was identified as a renewal priority [for C.D.S.] as it along with the proceeds of crime act and the seized property act, form the legislative framework for Canada's Drug Strategy. Within the strategy [C-8] supports the enforcement or control side of the strategy in that it provides the law enforcement community with the tools they require to do their job, while there is a health component to it as well. (House of Commons, 1994d: 5-21)

While the C.D.S.A. is explicitly an enforcement tool, Mr. Malyniwsky argued that there is also a health component to the Bill as well. The health component is related to the mechanisms the Bill engenders with respect to doctor prescribed use of narcotic and psychoactive drugs.

However, many witnesses noted the inconsistency between the harm reduction position taken by C.D.S. and the absence of any reference to this principle in the C.D.S.A.; a Bill which does not address prevention and treatment as means to reduce harm associated with 'illicit drug' use and which continues to promote criminalization and enforcement as the only legislated method for drug control. Proponents of the general position that C-8 and drug policy generally, should be focused on means to reduce harm with a primary focus on public health rather than relying solely on criminalization, included Ms. Pamela Fralick (C.C.S.A.),

Mr. Wade Hillier (Department of Public Health, City of Toronto), Mr. Robert Hamon (Ligue antiprohibitionniste du Québec), Mr. John Conroy (Canadian Bar Association), Mr. Jan Skirrow (Individual Presentation; Former Managing Director, Canadian Centre on Substance Abuse; and Former Director, Alberta Alcohol and Drug Commission), Mr. Eugene Oscapella (Director, Canadian Foundation for Drug Policy), and Mr. Mark Taylor (Addiction Research Foundation). Mr. Robert Hamon made his contempt for this inconsistency explicitly clear by stating,

This is supposed to be a health committee. This is supposed to be a health bill. Yet I find it very strange that a health bill, instead of saying that we should take care of the problem by moving drugs out of criminal law and moving it into health and welfare, is continuing to say that in order to take care of the health of the community we must criminalize. I think that this is completely against the international movement for harm reduction, which says — (House of Commons, 1994c: 60).

Mr. Szabo (Chairman of the Sub-Committee) abruptly interrupted, and stated that C-8, as was the case for previous drug control legislation, is under the jurisdiction of the Minister of Health, and that the present bill represents a housekeeping measure (i.e., integration of N.C.A. and F.D.A. with some improvements and enhancements) while it is retained within the same jurisdiction (House of Commons, 1994c: 60). The clear implication is that the Bill is a Health Bill simply by virtue of whose jurisdiction the law is under. Nevertheless, the Bill is virtually devoid of Health considerations and lacking in any reference to harm reduction which is, ostensibly, the federal objective for drug control policy. The absence of any mention

of harm reduction in the Bill should arouse suspicion as to the true intent of the legislation and of the federal government's commitment to the principles and programs of its own drug strategy which is scheduled to “sunset” in 1997 with no plans for renewal.¹³

A number of enforcement officials argued the importance of preventive deterrence of existing and would-be users and traffickers of ‘illicit drugs’. Chief Barry King of the Sault Ste. Marie Police argued that, “*The drug trade, as we know, is an ‘enterprise crime’, with the opportunity for an individual to realize very high profits. We must strive collectively to ensure that such an opportunity also carries with it an appropriately high risk*”. (House of Commons, 1994c: 98-106). Mr. Eugene Oscapella argued that Canada’s prohibitionist drug laws do not stop people using drugs, instead such laws support an enormously profitable, corrupting and vicious black market in drugs (House of Commons, 1994d: 10-20). Mr. Jan Skirrow (Individual Presentation) argued that :

Rather than reconsider our approach we continue to seek the magic combination of penalties and sanctions that will eliminate the drug scourge. The major result to date is not reduced drug use. That has to be abundantly clear. Rather, it is an entrenched, criminally controlled, and enormously profitable drug market offering a host of dangerous substances to unwitting users. (House of Commons, 1994c: 85-91).

A number of witnesses — such as Mr. Mark Taylor (A.R.F.), Mr. Barry Beyerstein (Department of Psychology, Simon Fraser University; Member, Canadian Foundation for

¹³ C.D.S. was created as a five year strategy in 1987, and was renewed in 1992. There are, at present, no clear indications that the strategy will be renewed (i.e., receive federal funds).

Drug Policy), Mr. Wade Hillier (Drug Abuse Prevention Coordinator, Department of Public Health, City of Toronto), and Eugene Oscapella (Director, Canadian Foundation for Drug Policy) — questioned whether criminal sanctions produce any realistic deterrent effect against ‘illicit drug’ and/or cannabis use, and/or that health and social considerations play a much stronger role in shaping substance use behaviour (House of Commons, 1994b: 18-19; House of Commons, 1994b: 21-30; House of Commons, 1994c: 6-15). The deterrent effect of drug enforcement against cannabis possession is likely to be very weak. In 1993, for example, there were approximately 1 million current users of cannabis (i.e., who used cannabis at least once in the previous 12 months), and yet there was a mere 16,907 offences of possession in which police cleared the offence with a charge (See Table 2). Statistically, in 1993, current users of cannabis faced slightly less than a 1.7% chance of being caught and charged by police for cannabis possession. This could hardly be considered to provide a reasonable deterrent to such behaviour.

TABLE 2	INCIDENCE OF RECORDED CANNABIS OFFENCES							
	1986	1987	1988	1989	1990	1991	1992	1993
Types of Offences								
Total Offences	30946	32257	29594	30592	29446	24638	24566	25174
Possession	23810	22889	21881	22252	21161	16631	16745	16907
Trafficking	6730	8689	7115	7652	7624	6954	6262	6671
Importation	136	262	153	133	130	258	398	433
Cultivation	273	417	445	555	531	795	1161	1163

Canadian Centre for Justice Statistics: 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993.

5.2.3.1 Scheduling, Harm, Response, and the United Nations Drug Conventions

Of all the various issues, the scheduling issue is the one which most closely forms a link between the harm of cannabis and the extent and stringency of measures used to control it. With regards to the scheduling of drugs in the Controlled Drugs and Substances Act, Mr. Paul Saint-Denis (D.O.J.) stated that the schedules are intended to follow the principle that, *“The greater the danger, the greater the harm, the more the controls were going to impos[ing] and the greater the degree of control to be imposed”* (House of Commons, 1994c: 50). Nevertheless many witnesses appearing before the subcommittee, including Mr. Michel F. Denis (Quebec Bar Association), Mr. Jan Skirrow (Individual Presentation), Mr. Paul Copeland (Criminal Lawyers Association), and Mr. Jean-Claude Bernheim (Ligue antiprohibitionniste du Québec) expressed concern that the scheduling of cannabis was inconsistent with its relative harmfulness, especially with it being in schedule I with cocaine and heroin (House of Commons, 1994c: 53, 80, 90, 93). This position was summed up in the following quote by Mr. Denis (Quebec Bar Association):

...We don't see any classification in the various schedules according to the danger of the drugs or products that are listed there. We think this is somewhat arbitrary in terms of the sentences. The best proof of this is that marijuana is listed in schedule I, which is for the most serious crimes, judging by the maximum sentence called for, even though marijuana is certainly not one of the most dangerous drugs that are contemplated in the Act.... [We are] not convinced that schedules I, II, III, IV and V are commensurate with the dangerousness of the listed substances. It seems

obvious to us that the more dangerous a substance, the heavier the sentence should be. (House of Commons, 1994c: 80).

Mr. Bruce Rowsell (D.O.H.) told the Sub-Committee that Canada's drug schedules are simply adhering to international drug control schedules established by the W.H.O.; schedules created on the advice of "*expert committees*" which are then forwarded to the United Nations for adoption as the "*international norm for these substances*" (House of Commons, 1994a: 13-38). After being questioned by Sub-Committee Chairman Szabo as to whether Canada has to follow exactly the schedule of the W.H.O., Mr. Rowsell conceded that not every country is exactly adhering to W.H.O. drug schedules (House of Commons, 1994a: 37).¹⁴

Ms. Pamela Fralick (Deputy Chief Executive Officer, Canadian Centre on Substance Abuse) asserted that clause 60 (the scheduling component) of the C.D.S.A. be modified or that regulations be adopted establishing strict criteria for the scheduling of all substances. She argued that besides inclusion in one of the international conventions to which Canada is a party, the criteria should require scientific evidence of dependence potential and abuse liability, actual abuse levels and their significance, actual and potential risks to public health and safety, degree of actual or potential harm relative to benchmark substances in the schedules, and whether or not a substance is an immediate precursor of a scheduled substance (House of Commons, 1994c: 31-42). Given Ms. Fralick's statement, it would be difficult to argue that the drug schedules are based on 'objectively' demonstrable harm.

¹⁴ In both the United Kingdom and The Netherlands, for example, cannabis (particularly marijuana leaf and hashish, but not cannabis resin) is listed as a schedule II substance (the Schedule II equivalent is referred to as "Class B" in the United Kingdom)

Deputy Commissioner J.P.R. Murray (RCMP) told Sub-Committee members that the C.D.S.A. brings Canadian drug legislation into compliance with all aspects of the latest U.N. Drug Conventions, including controls on the import, export, production, distribution, and use of mind-altering substances which can produce harm to the health of individuals and to society in general¹⁵ (House of Commons, 1994c: 15-24). However, Mr. John Conroy (C.B.A.) pointed out that the 1988 Convention which Canada ratified in 1990 provides in the section pertaining to the possession, manufacture and use of 'illicit drugs', that "*...parties may provide, as an alternative to conviction or punishment or in addition to it, measures for the treatment, education, after-care, rehabilitation or social reintegration of the offender*" (House of Commons, 1994c: 63-70). Consequently, it would be illusory to argue that the C.D.S.A. brings Canadian drug legislation into compliance with "*all aspects*" of the latest U.N. Drug Conventions. Indeed, the following exchange between Mr. de Savoye and Mr. Malyniowsky (D.O.H.) makes it quite clear that the C.D.S.A. explicitly avoids the issues of prevention and rehabilitation provided for in the 1988 U.N. Drug Convention:

- Mr. de Savoye:

You know that international conventions allow signatories to use new approaches and new strategies in the area of drugs; these conventions deal with rehabilitation, prevention and other matters. It is quite obvious that

¹⁵ Despite claims that the United Nations Drug Conventions (and particularly the most recent 1988 Convention) do not oblige parties to use criminalization or prohibition to control drug use (Beauchesne, 1997: 9), Section 3(2) of the 1988 Convention explicitly states that "*Subject to its constitutional principles and the basic concepts of its legal system, each party shall adopt such measures as may be necessary to establish as a criminal offence under its domestic law, when committed intentionally, the possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal consumption*" (LeCavalier, 1994b: 8). Notwithstanding the above obligation to establish criminal offences, the 1988 Convention does state that drug laws must conform to the Constitution of signatory countries including, in our case, Canada's Charter of Rights (Beauchesne, 1997: 9). Moreover, signatories are not restricted from using alternative measures in addition to or in lieu of conviction and punishment.

[Bill C-8] *does not avail itself of the areas allowed by those conventions. Do you know why?*

- Mr. Malyniowsky:

Within the strategy itself we have mechanisms to deal with prevention and treatment, and to deal with the problem of substance abuse from that perspective, consistent with international treaties.

- Mr. de Savoye:

Bill [C-8] does not however go into these positive areas [i.e., alternatives to criminal proceedings and sentencing] and stays on the negative side. Why does Bill [C-8] not make that link? It seems to me it would fit very well with the strategy.

- Mr. Malyniowsky:

If I am not mistaken, the international conventions speak to or encourage countries to consider a number of options, including prevention and treatment, when they are dealing with the problem of substance abuse, but there is no requirement that they do so. It is my understanding that the judiciary currently has the option to consider treatment as a penalty. I am not sure we are doing anything that is inconsistent with the international treaties or with the approach you have described.

- Mr. de Savoye:

We're just on the line of our obligations. Whatever we do, we could do more. That's allowed by the conventions, but we don't do it. We barely respect the

bare minimum we are obligated to do. Why aren't we more positive about this? Why aren't we going as far as the convention allows us to go to get positive results? It would fit beautifully in the strategy you've...explained to us. I don't understand why it isn't there.

- Mr. Malyniowsky:

I'm not sure I would agree with you that we're doing the bare minimum with respect to the conventions. In relation to the activities of other countries, I'm sure we're doing considerably more. I'm certainly not in a position to comment on the reasons why we haven't considered the approaches you've talked about. (House of Commons, 1994d: 11)

As Mr. Bruce Rowsell (D.O.H.) noted early on in the hearings, the federal government cannot dictate to provincial or other governments to pick up the costs for drug treatment programs, thus, federal jurisdiction is limited to the creation of criminal law which the provinces are obliged to adhere to (House of Commons, 1994a: 13-38).¹⁶ Mr. Malyniowsky (D.O.H.) pointed out that Canada's Drug Strategy has mechanisms to deal with prevention and treatment consistent with international treaties. However, the failure to entrench these principles in the C.D.S.A. necessarily implies the tenuous nature of federal commitment to the prevention and treatment principles of the U.N. Drug Conventions to which Canada is a

¹⁶ Immediately following the debate between Mr. de Savoye and Mr. Malyniowski (D.O.H.), Mr. Paul Saint-Denis (Senior Counsel, Criminal Law Policy Section, Department of Justice) noted that the "...sentencing reform Bill (C-61) would allow the courts to do exactly the kinds of things Mr. de Savoye is suggesting, the Bill suggests treatment for drug traffickers or drug abusers and that sort of thing." (House of Commons, 1994d: 12). Bearing in mind the jurisdictional issues presented by Mr. Rowsell (D.O.H.), it would seem that the "suggestive" power of Bill C-61 to promote treatment for drug traffickers or abusers would be severely constrained, particularly if additional funding mechanisms for such measures were not made available under Canada's Drug Strategy.

signatory. With the “sunset” of Canada’s Drug Strategy in 1997, so too, it would appear, did federal commitment to such principles.

Mr. Jan Skirrow (Individual Presentation) argued the following points:

Perhaps most important, the subcommittee could begin to demand that drug experts provide concrete reasons to expect success from the measures they are proposing, other than simply good intentions. The good intentions have always been there. We know that virtually every measure we have taken in the past has been countered, often in highly dangerous and undesirable ways, by both the drug market and drug users. In that escalating conflict a lot of people are being hurt. We should demand thorough discussion of the likely unintended consequences, usually negative, of all proposed changes before we make them, not afterwards.... Bill [C-8] must be viewed as an opportunity to consider the direction of Canada's drug law. This is particularly important when, by any objective measure, our approach has failed. There are other viable approaches that should be objectively assessed against our current approach. ...[S]ince the 1908 Opium Act...Canada has pursued a prohibitionist and punitive approach to drug control characterized by an almost total reliance on the criminal justice system. The continued failure to achieve the desired results has resulted in more complex and punitive legislation. ...While Bill [C-8] is admittedly a house-keeping bill, I must ask if it makes sense to waste valuable political and bureaucratic attention tidying up a bankrupt policy. At some point we

must acknowledge that a century is long enough to try one failed approach before admitting its failure. If you wish to perpetuate Canada's drug problem, which I am sure you don't want to do, I can think of no better way than to continue to endorse the "more of the same" approach that Bill [C-8] represents. [emphasis added] (House of Commons, 1994c: 85-91)

Superintendent J.G.R. Goulet (Acting Director, Drug Enforcement Directorate, Royal Canadian Mounted Police) argued that the enforcement community seems to succeed in intercepting approximately 10% of available quantities, but he acknowledged the difficulty in acquiring statistics on the percentage of drugs they seize. Superintendent Goulet also stated that “...*it is very difficult to anticipate what they [the benefits of the new Act] will be, but we [the enforcement community] do expect that there will be an increase [in drug seizures and arrests, and criminal prosecutions] given that the new legislation will provide us with additional tools and will allow us to control substances which were not previously controlled [i.e., designer and look-alike drugs, and precursor chemicals]*” (House of Commons, 1994c: 15-24). The following exchange between Mr. Gerard Normand (D.O.J.) and Sub-Committee member Mr. de Savoye provides a particularly telling account of the nature of the ‘success’ the C.D.S.A. is ostensibly designed to achieve:

- Mr. Gerard Normand (D.O.J.):

As far as I know, no estimates have been prepared of the potential impact of the legislation as far as the increase in criminal prosecution is concerned. Rather than go out on a limb, I think it's best that I not try to specify the kind of percentage increase we could be looking at.

- Mr. de Savoye:

Do you know if anyone has assessed the [potential] effectiveness of this new legislation once it is passed?

- Mr. Normand:

To my knowledge, no. (House of Commons, 1994a: 20)

Given this evidence presented at the hearings it would be fallacious to argue that prohibitionist expansion under the C.D.S.A. is related to 'objective' targets for reducing the harm of 'illicit drugs'. Besides acceptance of the "*good intentions*" of the enforcement community, there appears to be no other basis for the C.D.S.A. presented in the hearings, save the probable increase in criminal prosecutions and its implications for the institutional growth of the enforcement bureaucracy. The following exchange between Sub-Committee Chairman Mr. Paul Szabo and Chief Barry King (Sault Ste. Marie Police) is particularly instructive in this regard:

- Chairman Szabo:

You're coming forward, just like the RCMP, to say that this legislation is going to help us do a better job and that we have work to do. Yet so many other groups have come before us to basically discuss policy. There's the potential of decriminalizing certain drugs, lightening up, and saying things don't work. We're at very different end of the spectrum. Have you been able to rationalize in your own mind why others can be so different? Do they not appreciate what you see, or is it that you don't appreciate what they see?

- Chief King:

Honestly, without trying to discredit people who have been before us — very learned people have been here — we see the results. We deal with the parents, children, post-mortems, and suicides ... and I believe that our position is consistent with the needs and the expectations of a majority of Canadian society.... We see an awful lot of things that are occurring. I think some people, in their own mind and rightly so, are trying to say it's a health problem. Other people, maybe from our section, are trying to say it's more a legalistic and criminal problem. I think a balance is what we're all trying to achieve here. (House of Commons, 1994c: 105)

The issue of balance which Chief King alludes to is the subject matter of the following section in which I analyse the non-symbolic focal points of the Act and drug policy evident in the distribution of drug control resources, technical aspects of the refinement of the drug and social control apparatus, the demise of Canada's Drug Strategy, and the unlikely convergence between the enforcement community and drug policy reformers.

5.3 ENVIRONMENTAL ISSUES IN CONTEXT — THE NON-SYMBOLIC AND EXPLICITLY TECHNICAL FOCUS OF THE CONTROLLED DRUGS AND SUBSTANCES ACT:

In the analysis above, I have detailed how evidence presented at the Sub-Committee hearings on the C.D.S.A. demonstrates that certain issues are predominantly of symbolic significance to cannabis policy. These issues include: the relative absence of 'objectively'

demonstrated psycho-pharmacological cannabis harm and evidence of heightened levels of cannabis use, debates about harm reduction and deterrence, the scheduling of 'illicit drugs' according to their 'objectively' demonstrated harmfulness, the need to adhere to all aspects of United Nations Conventions to which Canada is a signatory, and the absence of any concrete assessment or statistical evidence of the need for, and potential benefits of, the C.D.S.A. While the above issues are of symbolic significance in Canadian policy with respect to 'illicit drugs' and cannabis in particular, there are a number of non-symbolic and technical issues identified in the hearings which provide the foundations for drug policy in general and the current decriminalization of cannabis possession in particular.

Perhaps the principal non-symbolic issue is that of the distribution of resources in addressing the 'illicit drug problem'. Mr. Eugene Oscapella (Director, Canadian Foundation for Drug Policy) argued that, "[A]s a Canadian I'm concerned about the need for economic restraint, and I see an outlandish waste of money on drug law enforcement that does not work" (House of Commons, 1994b: 10-20). Sub-Committee member Ms. Fry responded to Mr. Oscapella's concerns by arguing that: "*You must not take this bill and separate it from the drug strategy we have. Only 30% of our funds are being spent on enforcement at the moment. The other 70% is being spent on drug strategy [i.e., demand reduction]*" (House of Commons, 1994b: 16). However, Ms. Fry's comments were misleading as other witnesses such as Mr. Mark Taylor (A.R.F.) and Mr. Malyniwsky (D.O.H.) clearly stated that C.D.S. funds were supplementary resources, and that the funding split in favour of prevention and treatment was intended to produce some balance between supply and demand reduction given

the previous predominance of federal spending on supply reduction (House of Commons, 1994b: 21-30; House of Commons, 1994d: 5-21).¹⁷

A national study conducted for the Canadian Centre on Substance Abuse estimated that in 1992, “policy costs”¹⁸ associated with ‘illicit drugs’ were approximately \$442.2 million (Single et al., 1996: 10-11).¹⁹ Over 90% (\$400.3 million) was expended on direct law enforcement costs including the police (\$208.3 million), courts (\$59.2 million), corrections (\$123.8 million), and customs and excise (\$9.0 million). Less than 10% (\$41.9 million) was spent on prevention programs and research. Assuming that these relative resource allocations have been reasonably stable over time, it is apparent that the \$480 million in C.D.S. funds over a ten year period (1987-1997) would be woefully inadequate to achieve even “*some balance*” between supply and demand reduction spending. Even with C.D.S. funds entered into the equation, as they are in the above estimates, spending on prevention programs and research represents less than 10% of “policy costs”. Given that cannabis is still the primary focus of enforcement efforts accounting for 67% of 62,722 ‘illicit drug’ charges in 1994 and

¹⁷ Mr. Malyniowsky noted that prior to the introduction of C.D.S. the emphasis was more on enforcement and supply reduction, and because of this, the \$480 million of strategy resources (1987-1997) were divided 70% for demand reduction and 30% for supply reduction (House of Commons, 1994d: 5-21). The division of funding under C.D.S. was 70% in favour of demand reduction during Phase I (1987-1992), and roughly 67% in favour of demand reduction during Phase II (1992-1997).

¹⁸ Policy costs can be defined as expenses incurred as a conscious decision by policy-makers, as opposed to costs which are imposed on treatment systems and industry as a result of illness and death related to substance use or abuse. In broader terms, the study estimated that in 1992 the economic costs of ‘illicit drugs’ was \$1.37 billion, or \$48 per capita. The largest cost (approximately \$823.1 million) was attributed to lost productivity due to illness and premature death, and a substantial portion (\$400.3 million) were for law enforcement. Direct health care costs due to ‘illicit drugs’ were estimated at \$88 million, and the costs of prevention and research were estimated at \$41.9 million (Single et al., 1996: 10).

¹⁹ Of course, this study of the economic impact of ‘illicit drugs’ is a social construction defined by the researchers and the methodology used to produce the estimates. While the estimates provided should not be considered as definitive ‘objective’ evidence, this study provides the only available nation-wide overview of the costs associated with ‘illicit drugs’. Reader’s should be aware that the authors’ of this study explicitly note several of the limits of their review, including: an overt tendency to adopt conservative estimates, and the exclusion of a number of costs such as the costs of purchasing alcohol, tobacco, and ‘illicit drugs’, and welfare benefits to people disabled by substance abuse (Single et al., 1996: 2-3).

cannabis possession alone accounting for 46% of the total number of 'illicit drug' charges (Fischer, 1995), it would be extremely difficult to argue that cannabis enforcement does not consume a great deal of drug control funds.

Many witnesses who gave evidence at the hearings advocated some form of decriminalization for cannabis possession. Proponents of this position included: Ms. Janzen (Department of Public Health, City of Toronto), Professor Neil Boyd (Simon Fraser University), Ms. Pamela Fralick and Dr. Eric Single (C.C.S.A.), Jan Skirrow (Individual Presentation), and Mr. John Conroy (C.B.A.) (House of Commons, 1994c: 6-15; 24-31; 36-42; 85-91; 63-70). The reasons used to support decriminalization were varied, however, the key theme among all these — exemplified in statements by Dr. Eric Single (C.C.S.A.), Mr. John Conroy (C.B.A.), and Mr. Jan Skirrow (Individual Presentation) — was the argument that Canada needs an approach to 'illicit drug' control policy focused on the issue of harm with health concerns as the central focus. They argued the need to utilize an approach which looks at the harm caused and the costs incurred as a result of the use of specific drugs and by use of law enforcement, treatment, and prevention measures aimed at controlling such problems (House of Commons, 1994c: 36-42; 63-70; 85-91). They asserted that while cannabis is, or may potentially be harmful, its harmfulness has not been sufficiently established to warrant the harm induced by control measures against its use. Such comments can be viewed against a considerable volume of public dialogue, characterized in media representations, that cannabis policy under the Narcotic Control Act and the C-7 version of the C.D.S.A. was too harsh and not in accordance with the harm of the drug (Armstrong,

1994; Bryan, 1995a; Bryan, 1995b; Fischer, 1995; Hamilton, 1997; Laframboise, 1997; Starnes, 1997; Vienneau, 1995; Young, 1997).

Within this general harm-oriented position, drug control measures against cannabis were repeatedly excoriated by witnesses for the harm such measures induce upon those saddled with a criminal record for simple possession, and particularly among young people. Mr. Paul Copeland (Former Vice-President, Criminal Lawyers Association) noted that in 1980, the Minister of Justice, our current Prime Minister Jean Chretien, said that the government would introduce measures to address the problem of criminal records for young people charged with marijuana possession. Indeed, then Justice Minister Chretien publicly stated in 1980 that, *"We want to be sure that young people using marijuana for the first time, or only using it in small quantities, would not be considered criminals. It will remain an offence, but the young people will not have a criminal record for the rest of their lives"* (Fisher, 1995). Mr. Copeland and other witnesses expressed concern that the C.D.S.A., a drug law put forward by a Liberal government led by Jean Chretien, has completely ignored this issue (House of Commons, 1994c: 91-97). At the time of the Sub-Committee hearings, the C.D.S.A. (C-7 version) maintained cannabis possession as a hybrid offence. As a hybrid offence, cannabis possession charges provide the crown with the option of prosecuting by indictment or by summary conviction, and therefore automatically allows — under the Identification of Criminals Act (1970) — police to fingerprint those arrested. Police fingerprints form the basis for a criminal record and are forwarded for entry into the

R.C.M.P.'s Centralised Police Information Computer system (C.P.I.C.).²⁰ While the seriousness of a criminal record for cannabis possession in Canada is probably somewhat limited, it does bar an individual from admission to the United States. Even though one may receive an absolute discharge or a pardon, U.S. access to the C.P.I.C. system and refusal to accept the conditions of judicial decisions regarding pardons, and no requirement that they delete such entries on their computers, means that, once charged, an individual can be refused entry into the United States.²¹

While this general pressure surrounding criminal records for cannabis possession offenders was an important factor in the decriminalization of cannabis possession under the C.D.S.A., I argue that one of the key pressures promoting this change is evident in the following exchange between Sub-Committee member Ms. Paddy Torsney, Mr. Saint-Denis (D.O.J.), and Sub-Committee Chairman Paul Szabo. Ms. Paddy Torsney told Mr. Saint-Denis about a young person who visited her constituency office — an individual who wasn't convicted for cannabis possession but was given a discharge for possessing a very small amount of hash oil. She pointed out that this individual had been told that he was discharged by a Canadian court, and yet American authorities still considered it to be a conviction under their interpretation of our laws. Ms. Torsney asked rather pointedly:

This kid had one screw-up and does not deserve for the rest of his life to pay exorbitant fines to the U.S. in order to be able to go down there and make

²⁰ Mr. Paul Saint-Denis (Senior Counsel, Criminal Law Policy Section, Department of Justice) (House of Commons, 1994d: 27)

²¹ It is possible to get a "waiver" from U.S. Customs for offenders charged with only one incident of cannabis possession involving no more than 30 grams of marijuana leaf. It is unclear as to how many such individuals would be eligible for a "waiver", nor how many of these cases have been processed by U.S. Customs.

sales for a Canadian company. How do we deal with that? Is it covered here?

- Mr. Saint-Denis:

It may be addressed. It's possible, but because we haven't looked at it....What we have are conditional absolute discharges, which mean technically the individual is guilty but is not convicted. It's a legal fiction.

Mr. Saint-Denis acknowledged that while U.S. authorities have access to either C.P.I.C. and/or other police information networks, that there may be ways of keeping such situations out of the ambit of U.S. enforcement.

- Ms. Torsney:

I guess that would sort of reassure me that the commitment of this bill is not in fact to put more people in jail nor to screw up more people's lives but is really to address helping people — that it fits into the drug strategy in a constructive manner rather than a restrictive manner.

- Chairman Szabo:

The issue of the criminal record and how you address a criminal record for what many would view to be a minor offence and the implications of that does come up often. I know the Minister of Health has said very clearly that the government is not in favour of decriminalizing marijuana, for instance.

- Ms. Torsney:

I would just like to put on the record that I don't think I was asking for a decriminalization. I'm asking them to look into a specific amendment that

would in fact in law do exactly what we are trying to do in policy through the court decisions, so we prevent kids and people from paying over and over and over again for the rest of their lives for a very, very minor...[infraction].

(House of Commons, 1994d: 31)

In response to this dialogue, Sub Committee member Rose-Marie Ur argued that the 11 U.S. states which decriminalized marijuana possession saw use rates triple among adolescents and quadruple among adults (House of Commons, 1994d: 31). She questioned whether the Sub Committee was proceeding in the right manner with respect to discussing decriminalization given such evidence from the United States. However, as both Professor Boyd and Dr. Single noted, the evidence from South Australia, The Netherlands, and the eleven U.S. decriminalization states suggests that decriminalization of cannabis possession has had no demonstrable impact on use rates. This position is supported by research demonstrating that liberalization of cannabis laws had no impact on use rates when nominal fines were introduced in the 11 so-called U.S. decriminalization states²² (National Academy of Sciences, 1982; Single, 1989) or in South Australia (Christie, 1991; Donnelly, Hall, & Christie, 1995), nor did use rates increase in The Netherlands following the introduction of defacto decriminalization²³ of cannabis possession in 1976 (van de Wijngaart, 1988).

²² While there were increases in use patterns in "decriminalization" states, they were lower than the increases in states retaining harsher penalties, and therefore usage increases could not reasonably be attributed to the change in the law. Moreover, as Dr. Single pointed out those states employing nominal fines for cases of cannabis possession saw significant reductions in law enforcement and court costs, administrative efficiencies in processing fines rather than pursuing court action, as well as the revenue garnered from the fines which turned a costly program into less of a liability for state finances (House of Commons, 1994c: 36-42).

²³ The term defacto decriminalization is used because cannabis possession continued to be an offence following the Dutch Opium Act of 1976. However, drugs policy prompted enforcement officials to ignore low-level cannabis users even though possession of less than 30 grams, while a summary or minor offence, could potentially result in an offender receiving a maximum sentence of 1 month imprisonment and/or a fine roughly equivalent to \$4,300 (Canadian Funds) upon conviction.

Chairman Szabo's response to the advocates of decriminalization was that "...*changing the law on whether cannabis or any other hallucinogen or anything like that is going to be criminal is not going to change the reality of the environment that surrounds drug use.... Just decriminalizing marijuana is not going to make it better*" (House of Commons, 1994c: 61).

5.3.1 Decriminalization By Default — Refining Drug Prohibition Technique:

The pressure of decriminalization advocacy being brought to bear and a long-standing issue relating to the harm of drug control measures being expounded rather thoroughly (e.g., the criminal records issue for low-level cannabis possession offenders) and a specific amendment being requested, one might expect that these explain the decriminalization of cannabis possession under the C.D.S.A.. Nevertheless, the acceptance of decriminalization by the enforcement community and the precise nature of this liberalization of drug laws — while undeniably prompted by pressures brought to bear in the hearings — is, I argue, primarily related to the enhancement of the technical apparatus for the enforcement of cannabis trafficking offences under Canada's latest 'illicit drug' law and the mounting technical redundancy of having cannabis possession as a hybrid offence. Under the C.D.S.A. a special provision was made which applies solely to the trafficking of cannabis. Trafficking in cannabis involving 3 kilograms or less became a hybrid offence which allows Crown Attorneys the option of prosecuting summarily with a maximum penalty of 2 years imprisonment upon conviction, or by indictment with a maximum penalty of 14 years imprisonment upon conviction. Under the previous Narcotic Control Act (N.C.A.),

trafficking was a straight indictable offence which carried with it the potential for a maximum sentence of life imprisonment. As Mr. Paul Saint-Denis (D.O.J.) acknowledged, trafficking being an indictable offence under the N.C.A., carried with it several problems for drug enforcement and prosecution, including: an accused having the right to trial by jury, and cases normally proceeding with a preliminary inquiry which is “...*all very time consuming*” (House of Commons, 1994c: 49-52). Both Mr. Saint-Denis (D.O.J.) and Mr. Normand (D.O.J.) noted that in the case of trafficking of cannabis involving small amounts, Crown attorneys have tended to proceed via the hybrid possession offence because it is easier to convict offenders (House of Commons, 1994c: 49-52; House of Commons, 1994d: 24-38).

It is easier to convict under hybrid offences because prosecutors can proceed by summary conviction wherein individuals go directly to trial with no preliminary inquiry and no chance of having a trial by judge and jury. Mr. Saint-Denis and Mr. Normand (D.O.J.) also noted that the creation of a hybrid trafficking offence for marijuana should help reduce court backlog and ensure that offenders caught for trafficking would be charged with trafficking and not a lesser offence. However, Department of Justice officials did not present any ‘objective’ evidence to support their claims surrounding the situation of Crown prosecutors laying charges for possession in trafficking cases to ease the prosecution process, nor would they speculate on the numbers of cases this may include. When pressed by Subcommittee member Mr. de Savoye that the problem of prosecuting low-level traffickers and use of the possession offence provides a way of assessing the impact of the C.D.S.A., Mr. Normand (D.O.J.) stated that there will be an impact on this widespread practice of laying

charges of possession rather than trafficking, but he conceded that he didn't know how this could be assessed (House of Commons, 1994a: 21).

Several proponents of drug policy reform, including Professor Neil Boyd (Simon Fraser University) and Mr. Paul Copeland (Former Vice-President, Criminal Lawyers Association), argued that there is little interest among police in prosecuting marijuana users and little support among judges for convicting and sentencing marijuana users. Nevertheless, several enforcement officials argued that cannabis possession charges are taken regularly and that is where the bulk of charges are laid. Cannabis possession charges by the police have certainly declined since the mid-1980's, however, cannabis conviction data has not been collected on a national basis since the Bureau of Dangerous Drugs (now called the Bureau of Drug Surveillance, Health Canada) stopped collecting such information in 1985. In seeking to develop a "*snapshot*" on cannabis convictions, I solicited court data from the provinces of British Columbia and Ontario. Professor Boyd's claim that judges currently impose jail sentences for possession of cannabis for fewer than 2% or 3% of those convicted (House of Commons, 1994c: 24-31) was not supported by 'objective' data from British Columbia and Ontario (See Table 3).

Sentencing patterns for cannabis possession offences appear to be quite consistent between both provinces with an approximate average of: 15% of offenders being sentenced to jail, 53% receiving fines; 12% receiving probation; 6.5% receiving absolute discharges; and 8.8% receiving either a conditional discharge, suspended sentence, or a community service order. This data set also provides some insight into the assertions by Mr. Saint-Denis and Mr. Normand (D.O.J.) about traffickers in cannabis who are charged with simple

possession to ease the process of prosecution. I would argue that it is reasonable to assume that a large proportion of the approximately 15% of individuals receiving jail sentences more appropriately belong to the category of trafficking due either to the quantity of drugs in their possession at the time of arrest, or the frequency with which they have come to the attention of the police.

Table 3	CANNABIS CONVICTIONS AND DISPOSITIONS FOR SIMPLE POSSESSION: BRITISH COLUMBIA AND ONTARIO^{*24}								
	1989	1990	1991	1992		1993		1994	
	B.C.	B.C.	B.C.	B.C.	ONT.	B.C.	ONT.	B.C.	ONT.
New Charges (B.C.)/ Charges Received (Ont.)	6859	6330	6246	6970	16668	6732	15414	7109	16594
Percentage of Charges Resulting in Conviction	62%	63%	62%	56%	45%	54%	44%	52%	43%
MOST FREQUENT DISPOSITIONS									
Fine	62%	60%	58%	56%	45%	54%	44%	52%	43%
Jail	14%	15%	15%	16%	16%	18%	17%	18%	18%
Probation	9%	11%	12%	11%	16%	11%	16%	11%	11%
Absolute Discharge	6%	5%	6%	7%	5%	7%	7%	8%	8%
CD/SS/CS**	7%	7%	7%	9%	9%	10%	11%	9%	11%

*Court Data: Court Services Branch, Resource Analysis Group, Ministry of the Attorney General (British Columbia); Provincial Division Statistics, Information Planning and Court Statistics, Program Development Branch, Ministry of the Attorney General (Ontario).

**CD/SS/CS: Represents an aggregate of conditional discharges, suspended sentences, and community service orders.

²⁴ Readers should note several limitations of this data set, including unavailable breakdowns on the distribution of charges, convictions and sentences by: age, gender, quantity of drugs, number of prior offences, duration of punishment or amount of imposed fines).

If one generally accepts this interpretation of the data, then it becomes quite apparent that the remaining dispositions do not require a hybrid possession offence with the possibility of prosecutors proceeding by indictment and seeking severe penalties such as jail for offenders. Although it is not clear what amounts of cannabis were involved in those receiving penalties lesser than jail, the remaining dispositions could quite reasonably be processed as summary convictions since the penalties are not very substantial. Moreover, the decidedly substantial attrition rate of an approximate 47% average (e.g., an approximate average of 53% of received charges result in conviction) may be related to procedural difficulties or overburdened courts forced to drop cases.²⁵ Consequently, decriminalization of cannabis possession under the C.D.S.A. may significantly aid in the future prosecution of cannabis possession offences and resolve the extremely high rates of attrition in cases coming before the courts.

It is my contention that the decriminalization of cannabis possession under the C.D.S.A. is unrelated to 'objectively' demonstrable harm. It is principally related to specific pressures brought to bear at the hearings related to the harm induced by criminal records for charged cannabis possession offenders, and, most significantly, administrative changes to the enforcement of trafficking offences which have ensured the redundancy of having a hybrid offence for possession of cannabis. From my perspective, the decriminalization of cannabis possession under the C.D.S.A. is merely another among a series of refinements of the technique of drug prohibition which began with the introduction of the Opium Act of 1908;

²⁵ For example, the Askov decision in Ontario places an 8 month time limit to bring charges to trial, unless there is a reasonable excuse for a trial delay.

an Act grounded in moral distinctions and claims-making activities lacking in reference to 'objectively' identified harm. In the following chapter, I will provide a discussion of the key findings of this thesis and an overview of the master patterns in Canadian drug policy since the turn of the century, an explication of a philosophical and practical framework for a balanced approach to drug control policy, and the conclusions and implications of my analysis.

CHAPTER 6

THE MASTER PATTERNS IN CANADIAN CANNABIS POLICY: TECHNOLOGICAL MORALITY IN OPERATION

Society can and does execute its own mandates; and if it issues wrong mandates instead of right, or any mandates at all in things with which it ought not to meddle, it practises a social tyranny more formidable than many kinds of political oppression, since, though not usually upheld by such extreme penalties, it leaves fewer means of escape, penetrating much more deeply into the details of life, and enslaving the soul itself. Protection ... [is therefore required] against the tyranny of the prevailing opinion and feeling, against the tendency of society to impose, by other means than civil penalties, its own ideas and practices as rules of conduct on those who dissent from them.... There is a limit to the legitimate interference of collective opinion with individual independence; and to find that limit, and maintain it against encroachment, is as indispensable to a good condition of human affairs as protection against political despotism.

John Stuart Mill

On Liberty¹

¹ Mill (1859: 63)

6.1 AN OVERVIEW OF KEY FINDINGS:

In this chapter, I will provide a discussion of the key findings of this thesis and an overview of the master patterns in Canadian drug policy since the turn of the century, an explication of a philosophical and practical framework for balanced drug control policy, and the conclusions and implications of my analysis. This thesis has provided an historical and analytic overview of the social construction of cannabis harm and policy in Canada. In Chapter two, I explored the historical antecedents of contextual constructionism — the theoretical structure employed in this essay — which is rooted in the development of symbolic interactionism and labelling theory. I identified and discussed some key works in the development of interactionist, labelling, and constructionist theory. Attention was also devoted to an overview of selected interactionist, labelling, conflict, and contextual constructionist accounts of the ‘illicit drug’ issue. Beginning with Lindesmith’s (1938) innovative work in positing an interactionist theory of drug addiction,² early interactionist and more recent contextual constructionist studies have demonstrated that claims-making against ‘illicit drugs’ are typically based on soft or non-existent evidence and that such claims-makers have engaged in moral crusades against ‘illicit drugs’, not to address ‘objective’ harmfulness, but rather for bureaucratic interests and to promote certain moral positions.

In Chapter three, I examined the methodological approach used by Goldhagen (1996) in his provocative account of the causes underlying the nature and magnitude of the Holocaust. This quasi-constructionist analysis clearly exemplifies the power of symbolic

² Lindesmith argued that withdrawal symptoms alone were not enough to cause a drug user to become “hooked” or addicted to drugs. He argued that physical withdrawal symptoms, while an important component to addiction, must also be connected to social and individual recognition of the symptoms of withdrawal and individual acceptance that one is in fact “hooked” and thereby defining oneself as a “dope fiend”.

communication in the social construction of definitions of problematic conditions and the development of intervention strategies. Goldhagen transcends previous analyses which have attributed the Nazi extermination camps to abnormal minds from Hitler down to front-line death camp workers, pathological systems acting as a trigger for ordinary people to follow evil and/or deeply authoritarian people, and the analysis that the slaughter was an unexceptional event which was a logical extension of rational, efficient, and scientific modern social organization. He begins with the premise that the view “*that the Jews ought to die*” was cultivated over a long period, and became through Nazi facilitation, a view held almost without exception by ordinary Germans as a common-sense belief. He also argues that German conceptions of Jewish perniciousness could not possibly have been rooted in material social intercourse as Jews formed less than 1% of the German population during the early Nazi period. Consequently, Goldhagen inverts the Marxian precept that conceptions and consciousness are derived from material social intercourse, and posits that the antisemitic beliefs and emotions of most German anti-Semites could not possibly have been based on any ‘objective’ assessment of putative Jewish perniciousness, and must have been based largely upon what they had heard about Jews while listening to, and partaking in, the societal conversation. In seeking to validate his hypothesis, Goldhagen embarks upon an exhaustive and virtually fruitless attempt to identify incidents where common-sense conceptions of putative Jewish perniciousness were challenged, either through communication or through refusal to kill unarmed and innocent human beings.

Key to Goldhagen’s methodology and analysis is his reversing the onus of responsibility: using the very words and deeds of ordinary German perpetrators of the

Holocaust and analysis of 'objective' conditions in attempting to find evidence that would invalidate his hypothesis. In adopting this stance, the onus of responsibility is placed squarely upon those who were responsible for the nature and magnitude of the Holocaust. I adopted Goldhagen's methodological stance as an appropriate framework for the present study. I argued that neither direct social intercourse with cannabis, nor 'objectively' demonstrated cannabis harm, have formed the basis for the common-sense conceptions of cannabis harm. Rather, such conceptions are primarily derived from the societal conversation surrounding this issue, and specifically the claims-making activities of moral crusaders and representatives of powerful bureaucracies whose views form the bedrock for the common-sense conceptions of cannabis harm and the consequent necessity of prohibitionist intervention to tackle this problem. I have also reversed the onus of responsibility: using the very words and activities of prohibitionist interest groups involved in the propagation of prohibition and analysis of 'objective' conditions in attempting to un-cover evidence that would invalidate my hypothesis. In adopting this stance, the onus of responsibility has been placed squarely upon those who were responsible, and continue to be responsible, for the nature and magnitude of drug prohibition. Obviously, I have not attempted to draw some moral comparison between the perpetrators of the Holocaust, and those responsible for prohibitionist drug intervention. Rather, I have drawn a comparison between the two in terms of their responsibility for the development and exercise of the intervention strategies which they have rather zealously pursued without regard to establishing the 'objective' harm they are ostensibly attempting to resolve.

In Chapter four, I analysed the social context and claims-making activities which gave rise to the genesis of prohibition with the 1908 Opium Act, the prohibition of cannabis in 1923, and developments leading up to the 1961 Narcotic Control Act. I also examined the emergence of harm-based cannabis reformist claims-making during the LeDain era of Canadian drug policy (1969-1974), and the emergence of claims-making activities with respect to harm reduction as a federal policy position during the rise and decline of Canada's Drug Strategy (1987-1997). In my analysis of the early period of drug prohibition in Canada (1908-1961), I detailed how drug prohibition originated within a variety of economic, social, racial, and political tensions. During this period of moral rectitude and often explicitly racist politics, moral crusaders and emerging government bureaucracies discovered 'illicit drugs' and insisted that they were the cause of innumerable actual and potential social problems, not the least of which was the corruption of the white race by the Chinese via the spread of their disease - i.e., opium use. The identification of 'illicit drugs' as the cause of social problems was intimately intertwined with the reductionist logic which pervaded the Social Darwinist era of the late 19th and early 20th century. Within such a conceptual framework, claims-making about the harm of 'illicit drugs' were readily accepted as sufficient evidence of harm, and the intervention strategy designed to tackle the complexity of such social problems was drug prohibition with the ultimate goal of eradicating the availability of 'illicit drugs'.

Beginning with the LeDain Commission (1969-1974) and the subsequent introduction of Canada's Drug Strategy in 1987, there was a clear movement away from the issue of the enforcement of morality as the basis for drug control and an increasingly greater focus on the issue of harm. The majority report of the LeDain Commission argued that it was

acceptable for the criminal law to be used for the enforcement of morality, but not without regard to potential for harm which truly threatens social interests. After conducting an extensive cost-benefit analysis of the harm of cannabis and the potential harm associated with various control options, the majority position of the LeDain Commission recommended a lessening of penalties related to cannabis offences due to the relatively low demonstrable harm and toxicity of the drug. While LeDain Commission recommendations on cannabis were never adopted through legislative reform, their focus on the issue of cannabis harm would re-surface as a central topic of discussion with the emergence of Canada's Drug Strategy and its policy shift towards harm reduction. Designed to inject new resources and a renewed effort on tackling the 'illicit drugs' issue, Canada's Drug Strategy split its \$480 million of funding (1987-1997) approximately 70% in favour of demand reduction (prevention, treatment, and rehabilitation) activities to counter the previous predominance of federal spending on supply reduction measures. The harm reduction position taken by Canada's Drug Strategy helped to generate a focal point for critics of drug prohibition, particularly with respect to cannabis; a drug which many considered not to be harmful enough to justify the harm induced by measures aimed at controlling use of this drug. In light of such criticisms, attention was devoted to internal bureaucratic discussion of potential options for lessening penalties associated with cannabis possession.

In Chapter five, I examined the contemporary social construction of cannabis harm and policy evident in witness presentations during the Sub-Committee hearings on the Controlled Drugs and Substances Act. I argued that, in congruence with historical developments in cannabis policy, the current Controlled Drugs and Substances Act continues

to avoid connecting ‘objectively’ demonstrated cannabis harm to drug control policy. Indeed, attempts to focus discussion on the harm of ‘illicit drugs’ and cannabis in particular — save the brief claims supporting common-sense conceptions — were generally ignored in the hearings. I showed how the uncontested claims of cannabis (or ‘illicit drugs’ inclusive) harm made by representatives of bureaucratic prohibitionist interest groups illustrates an ongoing reliance on popular common-sense conceptions whose ‘objective’ basis is far from established in the research literature. Following the lines of argument presented in the hearings about cannabis harm and counterposing them against ‘objective’ evidence in existing research literature, I argued that cannabis policy is unrelated to studies of ‘objectively’ demonstrable psycho-pharmacological harm. I also examined other symbolic arguments and demonstrated how cannabis policy is unrelated to heightened use levels, harm reduction rhetoric, scheduling of this substance based on harm, the need to meet all aspects of the United Nations Conventions, or even the need to achieve measurable and defined goals. I then examined non-symbolic and technical aspects of the C.D.S.A. related to the distribution of drug control resources, and the refinement of the enforcement and control apparatus for cannabis offences. I argued that the decriminalization of cannabis possession, while unrelated to ‘objectively’ demonstrable harm, was related to specific pressures brought to bear at the hearings related to the harm induced by criminal records for charged cannabis possession offenders, and, most significantly, administrative changes to the enforcement of trafficking offences which ensured the redundancy of having a hybrid offence for possession of cannabis.

6.2 THE MASTER PATTERNS AND TECHNOLOGICAL MORALITY — THE CRUEL IRONIES OF 'DRUG LAW REFORM' UNDER THE C.D.S.A.:

In an effort to cognitively re-map the history of social control in Western society since the late eighteenth century, Cohen (1985: 13-39) argues that there have been two major transformations. The first of these was the emergence of carceral culture in the late eighteenth and early nineteenth century. The four key changes which marked this transformation were: the increasing strength, centralization, and rationalization of bureaucratic state control; the professionalization of punishment and classification by a body of 'scientific' experts; the move towards closed and segregated institutions, with the prison providing the dominant model for behavioural control and punishment; and the shift in focus from the physical body to the mind of the actor as the target of penal repression. The second transformation was the 'destructuring movement' which began in the 1960's. The four key themes of this movement included: the minimalization of state intervention and the decentralization of control into the community; deprofessionalization, dispersion, and demystification of expert control monopolies; decarceration and 'open' measures of community control; and a movement away from the mind of the actor towards a focus on acts and justice.

Cohen argues that while the first transformation was 'transparent' and 'real', the second transformation was 'opaque' and eventually 'illusory'. The second movement, he argues, demonstrated a fracture in praxis — i.e., while the rhetoric of the destructuring movement was in evidence, the actual implementation of a congruent program to match the rhetoric was not realized in practice. This fracture in praxis leads Cohen to conclude that

there has only been one Master Pattern in Western social control since the late eighteenth century: the diversification and intensification of carceral culture. Within this framework, the alternatives of the destructuring movement have merely provided us with 'wider, stronger and different nets', a system of social control for whom failures and mistakes readily translate into the message that more of the same is needed, and a situation where it is 'business as usual' for the practitioners of carceral culture and the panoptic model.

In examining the history of drug prohibition in Canada, there are two major legal-philosophical/policy shifts in the social control of 'illicit drugs' and cannabis in particular. The first major shift occurred with the genesis of drug prohibition in the early twentieth century. During this period of moral distinctions and often explicit racism, moral crusaders and emerging government bureaucracies discovered 'illicit drugs' and were quick to insist that these objects were the cause of innumerable actual and potential social problems. Identification of 'illicit drugs' as the cause of social problems in the late 19th and early 20th century was intimately intertwined with the reductionist logic inherent to the 'science' of Social Darwinism which pervaded Western social consciousness during this era. Within this conceptual framework, claims-making about the harm of 'illicit drugs' were readily accepted as sufficient evidence of harm. The lack of reference to 'objectively' demonstrable harmful conditions associated with 'illicit drugs' appeared not to have caused concern either to the general public or among claims-makers. It would appear that moral distinctions inherent to such claims-making activities readily became (if they were not already) common-sense conceptions shared by an Anglo-American population fearful of a reduction in the overall

quality of the white race via corruption by the Chinese symbolized in the growing diffusion of their disease — i.e., opium use.

Creation of the federal Department of Health and the R.C.M.P. in 1920 — with respective responsibilities for Canadian drug laws and international treaty obligations, and the enforcement of federal statutes — ushered in a new phase of prohibitionist drug control in which bureaucratic interests and refinement of the social control apparatus predominated the ‘illicit drugs’ issue. The precedent of prohibiting substances on the basis of moral distinctions and claims-making lacking in reference to demonstrated ‘objective’ harm persisted with the 1923 addition of cannabis to Canada’s drug schedules. Bureaucratic symbiosis between the Narcotic Division of the Department of Health and the R.C.M.P. provided an invaluable opportunity to add more substances to Canada’s ‘illicit drug’ schedules, and to generate drug control legislation focused on responding to the moral threat posed to society by eradicating the availability of ‘illicit drugs’ as well as controlling those involved in the use and trade of such substances. Modest attempts to address and remedy the ‘objective’ harm associated with ‘illicit drugs’, evident in the emergence of a treatment alternative to criminalization in the 1950’s, did not significantly impede the development of legislation and policy reflecting a continued focus on enforcement interests and priorities even up to the introduction of the 1961 Narcotic Control Act. Within this first major shift, we see the application of the legal-philosophical position of Lord Patrick Devlin evident in his assertion that the function of the criminal law is “...*to enforce a moral principle and nothing else*” (Devlin, 1959: 9). Protection of the interests of society, based on moral convictions, undeniably provided the

necessary warrants for the restriction of individual rights to use ‘illicit drugs’ during the early period of drug prohibition in Canada.

The second major legal-philosophical/policy shift occurred with the introduction of the LeDain Commission in 1969. Through extensive research and consultations between 1969 and 1974, the LeDain Commission studied the ‘illicit drugs’ issue and devoted considerable attention to the cannabis issue. After conducting an extensive cost-benefit analysis of the harm of cannabis and the potential harm associated with various control options, the majority position of the LeDain Commission recommended a lessening of penalties related to cannabis offences due to the relatively low demonstrable harm and toxicity of the drug. This general recommendation was premised on the Commission’s rejection of Lord Patrick Devlin’s legal-philosophical position that morality provides a sufficient warrant for using the criminal law, and their endorsement of H.L.A. Hart’s legal-philosophical position that the state — while responsible for ensuring individual liberty — has a paternalistic responsibility for civil order and protecting individuals against self-inflicted harm. In agreement with H.L.A. Hart’s dismissal of John Stuart Mill’s extreme fear of paternalism, the majority report of the LeDain Commission accepted that the criminal law could be used for the enforcement of morality, but not without regard to demonstrated harm or potential for harm which truly threatens social interests. Nevertheless, the LeDain Commission recommendations on lessening the penalties for cannabis possession were never adopted through legislative reform. The focus on the issue of harm became a key focus once again with the introduction of Canada’s Drug Strategy in 1987 and its adoption of harm reduction policy in 1992. Canada’s Drug Strategy and Health Canada were prompted to look at

possession control measures which were more proportional to the harm of cannabis (i.e., measures which would not induce more harm than they attempted to resolve) as a result of the substantial pressure brought to bear during the Sub-Committee hearings on the Controlled Drugs and Substances Act by advocates for the decriminalization of cannabis possession.

It is my contention that while the first legal-philosophical/policy shift in Canadian cannabis policy was ‘transparent’ and ‘real’, the second legal-philosophical/policy shift was decidedly ‘opaque’ and will, with respect to cannabis possession reform, eventually prove to be ‘illusory’. The second shift demonstrated a fracture in praxis — i.e., while the rhetoric of addressing the issue of ‘objective’ harm was in evidence, the actual implementation of a congruent program to match the rhetoric was not realized in practice. In expounding my central thesis that cannabis possession under the C.D.S.A. has been decriminalized by default, I demonstrated that, both historically and at present, cannabis policy is un-related to the ‘objectively’ demonstrable harm of the drug. I illustrated that common-sense conceptions of the criminogenic effects of cannabis continue to be put forward without regard to the research literature which does not provide ‘objective’ evidence lending support to such claims. Consequently, I argued that cannabis possession has been decriminalized under the C.D.S.A., not because it is recognized as being less harmful than previously thought. Instead, cannabis possession has been decriminalized as a result of specific pressures brought to bear during the Sub-Committee hearings on the C.D.S.A. related to the harm of criminal records for those charged with simple possession, administrative changes to the enforcement of trafficking offences, and the consequent administrative redundancy of having a hybrid possession offence for cannabis.

I assert that decriminalization of cannabis possession, while providing the appearance of a harm reduction or more humane approach to low-level cannabis offenders, is best explained as a compromise which only gives the appearance of enlightened reformism or acquiescence to drug policy reformers. I further assert that this reform, predicated as it is on issues un-related to the harm of cannabis and a legal-philosophical basis which continues to parallel the principles set out in Devlin's The Enforcement of Morals³ (1959), will prove to be wholly illusory in the very near future. This will become evident as a significant future refinement of the social control apparatus occurs with the development of the Centralised Police Information Computer (C.P.I.C.) system of the R.C.M.P. Increasingly automated systems for gathering provincial court records which could be ready to share information between provinces in as little as three years, will be accessible by the R.C.M.P. once a new program called C.P.I.C. 2001 becomes fully operational.⁴ Of course, the cruel irony is that once the C.P.I.C. system has access to these records, the principal benefit of the decriminalization of low-level cannabis possession under the C.D.S.A. (i.e., the absence of a criminal record on the C.P.I.C. system which is accessible by U.S. authorities) will dissolve entirely. Moreover, the ability to proceed by summary conviction in cases of low-level cannabis possession offences will streamline enforcement and prosecution practices and will

³ The introduction of prohibitionist control of drug use in early 20th century Canada had considerable appeal for many social groups (and Protestants in particular) given the precarious frontier lifestyle and the desire of many social groups to protect the social order, morality, and public peace. However, the grounds for claims-making against 'illicit drugs' and the consequent necessity of drug prohibition, continues to be based on moral convictions rather than systematic assessments of the 'objective' perniciousness of 'illicit drugs' and the strategy ostensibly designed to control the use and trade of these substances. It is within this context that we can understand the continuing predominance of the legal-philosophical position of Lord Devlin in Canadian drug policy, as well as the avoidance of the legal-philosophical positions of John Stuart Mill and H.L.A. Hart as a more appropriate basis for drug policy.

⁴ Telephone interview with a senior official in the federal department of the Solicitor General on July 30, 1996.

probably significantly reduce costs associated with the prosecution of such cases.⁵ Procedural streamlining and reduction in enforcement and prosecution costs could also provide an opportunity for significant increases in the enforcement of cannabis offences.⁶

The decline of Canada's Drug Strategy — which “*sunset*” in 1997 with no plans for funding renewal — offers another cruel irony for advocates of some measure of balance between supply (i.e., enforcement) and demand (i.e., prevention, treatment, and rehabilitation) reduction activities in Canadian drug control policy. Specifically, while C.D.S. funds will no longer be made available, several “*partners*” in the Drug Strategy have had some of the funds they received under C.D.S. “*A-based*” — i.e., Canada's Treasury Board has given approval for their financial resources under the drug strategy to be provided directly by the government regardless of whether C.D.S. continues. The RCMP had roughly 80% of their funding under C.D.S. “*A-based*” except for their portion of the Integrated Anti-Drug Profiteering Units (IADP), and the Department of Justice also had some of their C.D.S. funds “*A-based*”. In

⁵ Before the innovation of having a separate summary conviction offence for low-level cannabis possession offences, cannabis possession was a hybrid offence which automatically required finger-printing and a preliminary inquiry for accused individuals. As identified in the Sub-Committee hearings on the C.D.S.A., such issues were increasingly viewed as a significant impediment to the enforcement and prosecution of cannabis offences.

⁶ Despite the argument that there has been no real reduction in punishment with respect to cannabis possession offences (Beauchesne, 1997: 8), the C.D.S.A. has indeed significantly reduced the severity of punishment. The three principal areas of penalty reduction include: cannabis is now a schedule II substance and no longer a schedule I substance along with cocaine and heroin; the penalty for simple possession of larger amounts of cannabis (anything above the following minimums which are treated as a Schedule VIII substance — 30 grams of marijuana or 1 gram of cannabis resin) has been reduced from a maximum of seven years imprisonment to five years (less one day) when prosecuted by indictment; and low-level possession of cannabis (Schedule VIII minimum amounts or less) which were previously subject to a maximum penalty of seven years imprisonment if prosecuted by indictment, has been reduced to a summary conviction offence with no fingerprinting of accused persons and no centralised criminal record on the C.P.I.C. system. These are indeed considerable reductions in the severity of punishment for offences of cannabis possession. However, the reductions relate — not to increased acceptance of the lack of demonstrated ‘objective’ harm associated with cannabis — to the need to streamline the enforcement of cannabis possession and to reduce the costs associated with processing offenders. The reduction of penalties from a maximum seven years to five years (less one day) for possession offences (Schedule II) prosecuted by indictment, eliminates the possibility of a trial by judge and jury. Access to a jury trial for accused persons is only available, as per section 11f of the Canadian Charter of Rights, where the maximum punishment for an offence involves imprisonment for five years or a more severe punishment. Eliminating the possibility of jury trials holds obvious benefits for the state during a period of budget cuts, however for accused persons who can no longer plead their case to a jury, this change is clearly a reduction of their individual rights (Beauchesne, 1997: 8).

developments which closely resemble an inversion of the words of Jesus in the Gospel of Matthew, it would seem that a “*Matthew principle*” is at work within Canadian drug control policy: “*to those who have, much will be given; to those who have little, even that will be taken away*” (Goudzwaard and de Lange, 1995: 130). Nevertheless, assuming that some malicious intent of the government was at the heart of these developments would be misleading as the RCMP were on the “*political forefront*” in seeking the “*A-basing*” of their C.D.S. funds in Phase I of the strategy while other partners waited for renewal of the strategy.⁷

The analysis I have provided above inexorably leads to the conclusion that there has only been one Master Pattern in Canadian prohibitionist drug control since 1908: the diversification and intensification of carceral culture. Within this framework, drug policy reform and that of cannabis possession in particular will only offer ‘wider, stronger and different nets’, a system of social control for whom failures and mistakes readily translate into the message that more of the same is needed, and a situation where it is ‘business as usual’ for the practitioners of carceral culture and the panoptic model. Drug prohibition is a failure in terms of its consistent inadequacy to address the ‘illicit drug problem’ and its continuous mutations, and its capacity to, rather paradoxically, induce side effects which appear to make the problem worse rather than better. Nonetheless, the iatrogenic nature — or “*inverted efficiency*” (Foucault, 1979: 271) — of prohibitionist intervention against ‘illicit drugs’ should not be considered as an ‘objective’ failure, but instead as a virtually impervious success of

⁷ Telephone interview with a senior official in the federal department of the Solicitor General on July 30, 1996.

twentieth century social control which consistently converts failure into success through bureaucratic expansion and the refinement of prohibitionist discipline techniques.

Drug prohibition is an enduring success in bureaucratic terms because it is a technique geared towards managing the 'illicit drug problem' rather than attempting to tackle the problem in a comprehensive way. The key to the power of drug prohibition is to be found among the enforcement community and to a lesser extent the health community, the practitioners of carceral culture and the panoptic model. The exercise of their power is grounded within a deterrence orientation modelled on Bentham's panopticon.⁸ Broad bureaucratic interests in deterrence and enforcement interests in particular are located, metaphorically, in the central surveillance tower of the panopticon, and they are consciously attempting to deter individual and public involvement in 'illicit drugs' like cannabis. However, the central surveillance tower which they occupy is a socially constructed strawman because it is premised on the erroneous belief that 'illicit drugs' (and cannabis in particular) are the principal cause of the 'illicit drug problem', and because their deterrence-focused intervention strategy, based on this causal misconception, bears no relationship to 'objectively' demonstrable drug-related harm which they are ostensibly attempting to remedy.

There is an absence of a well thought-out individual morality among the practitioners of drug prohibition evident in their failure to question whether they are resolving 'objectively' demonstrable drug harm or simply inducing further harms through drug control. This lack of reflection and relentless pursuit of an intervention strategy which is designed for failure

⁸ For a discussion on the architectural form and the social control implications of the panoptic model, refer to Foucault (1979: 200-209)

stems from individual and collective acceptance of the common-sense view that ‘illicit drugs’ like cannabis are harmful, and that the only recourse is the technique of drug prohibition. In understanding how this technique can be so divorced from ‘objective reality’, the following words from Jacques Ellul provide considerable insight:

The power and autonomy of technique are so well secured that it, in its turn, has become the judge of what is moral, the creator of a new morality.... We no longer live in that primitive epoch in which things were good or bad in themselves. Technique in itself is neither, and can therefore do what it will. It is truly autonomous. (Ellul, 1964: 134)

Thus, the truly autonomous nature of drug prohibition derives from individual, bureaucratic and public willingness to accept, either explicitly or implicitly, the internal morality of the technique of drug prohibition over systematic assessments of ‘objective reality’. In congruence with the tenets of symbolic interactionism, this study has shown that, with respect to cannabis harm and policy, human beings often respond to things according to pre-conceived and unsubstantiated notions rather than how things demonstrably are. The power and continuous growth of drug prohibition flourishes with individual and collective faith in this technological morality; a morality within which “...the ‘more’ becomes a criterion in itself. The greater, the higher, the more powerful, that suffices. The new morality justifies automatically that which is ‘more’. It is a close companion to technology in its development and justifies it as it goes along” (Ellul, 1975: 170).

6.3 A BALANCED LEGAL-PHILOSOPHICAL AND PRACTICAL BASIS FOR DRUG POLICY:

Critics are often faced with the charge that it is easy to criticize, as well as with questions regarding how one could or would do things better given the chance. I would argue otherwise. Critical analyses provide an unlikely path to endear oneself to others, particularly among the subjects of one's analysis. Moreover, developing a detailed critique — which I hope to have accomplished in this thesis — requires considerable effort and attention to detail. It simply is not easy to criticize, and it is not an undertaking I have taken lightly. The present critique aimed to identify key problems in Canadian drug prohibition specifically relating to cannabis, and the necessity for a more balanced approach to control policy focused on 'objectively' demonstrable harm, and the design of strategies directed to redress such harm, rather than simply meeting the interests of powerful bureaucracies. I have argued that governmental responsibilities with respect to demonstrating the harmfulness of cannabis have not been met and that the current law and its reform under Bill C-8 represents a continued avoidance of the government's responsibility to design balanced social policy in a democratic society. I have also undertaken to explain the power interests which have obfuscated governmental responsibility in this regard, how the social construction of Canadian cannabis policy is an exemplar of reductionist conceptualizations of the nature of cannabis harm which have become the "*common-sense*" views of both the prohibitionist interest groups who shape drug control policy and practice, and the public.

It is my position that, in combination, the legal-philosophical claims of John Stuart Mill and the practical standards for constitutional social policy established by the Supreme

Court of Canada in the Oakes case (1986) provide a coherent and viable philosophical and practical standard for balanced drug control policy. Consequently, I will also be arguing that the LeDain Commission's arguments supporting H.L.A. Hart's legal-philosophical position were misguided and represented an inappropriate standard for social control policy in a democratic society. More specifically, it is my assertion that morality is a wholly insufficient basis for drug policy even if it is linked to the potential for harm. Some have argued that the position advocated by LeDain Commissioner Bertrand — which parallels the legal-philosophy of J.S. Mill — provides the only way to avoid the useless repression and violation of human rights which has marked government drug control policies (Beauchesne, 1991: 169). Nevertheless, the political philosophy of Mill is in fact not that dissimilar to the position expressed by the majority position of the LeDain Commission, albeit with some crucial limitations on the state's right to intervene.

John Stuart Mill, despite starting from a decidedly different point of view than that taken by H.L.A. Hart, arrives at virtually the same conclusion on the issue of the right of control of the state over the individual. He begins by proclaiming the inalienable sovereignty of the individual in maturity of his faculties over his own mind and body (those below the age of consent and the mentally impaired are excluded), and identifies such liberty as a sign of modern and enlightened societies. While the actions of an individual may be hurtful to others or lacking in due consideration for their welfare, without the violation of any of their constituted rights, the offender should only be subject to punishment by opinion, not by law. Mill clearly states his position on the state's right of control over the individual in the following passage:

As soon as any part of a person's conduct affects prejudicially the interests of others, society has jurisdiction over it, and the question whether the general welfare will or will not be promoted by interfering with it, becomes open to discussion. But there is no room for entertaining any such question when a person's conduct affects the interests of no persons besides himself, or needs not affect them unless they like (all the persons concerned being of full age, and the ordinary amount of understanding). In all such cases there should be perfect freedom, legal and social, to do the action and stand the consequences (Mill, 1859: 208).

But as Mill acknowledges, the consequences of an act may also affect others through the individual actor. For example, a man who has undertaken the moral responsibility of a family, but due to intemperance or extravagance becomes incapable of supporting or educating his family, or is unable to pay his debts, is justly the subject of community censure and might justly be punished for it. Having said this, Mill explicitly states that the reason for censuring or punishing the individual is not for his intemperance or extravagance (which has been identified as the causal factor), but instead for his breach of duty to his family or creditors. Mill's position is concerned with the harm produced, with reprimand and correction resulting from consideration of the social impact of the behaviour in question, and is therefore reasonably consistent with the focus on harm by Hart and the majority opinion of the LeDain Commission — save the unfortunate return to issues of morality evident in the latter two. Nevertheless, in protecting the right of the individual to cause harm to himself and to a certain extent to others, the burden of proof in demonstrating resulting social harm that

merits punishment undoubtedly falls upon the state, not the individual in question. It is this central philosophical point surrounding the onus of responsibility in demonstrating harm which underpins both the failure and the enduring success of drug prohibition. The institution of drug prohibition is situated in a position in which it is not obliged to identify the harm it is ostensibly trying to resolve, to specify its goals or the need to achieve measurable results, and whose every failure is translated into tangible bureaucratic growth and power enhancement. However, several Canadian court decisions discussed below cast some doubt over whether this situation will continue into perpetuity, especially with respect to the criminalization of cannabis possession.

6.3.1 The Constitutionality of Prohibiting Cannabis Possession in Canada:

In the proceeding analysis I discuss the constitutionality of prohibiting cannabis possession in Canada with respect to several court rulings. The discussion is centered on the general constitutional and legal-philosophical principles established in the Supreme Court of Canada's decision in the case of *R. v. Oakes* (1986), as well as selected aspects of two tests of the constitutionality of Canada's cannabis laws: the *R. v. Clay* (1997) decision of Justice McCart⁹ of the General Division of the Ontario Court of Justice, and the *R. v. Parker* (1997) decision of Justice Sheppard¹⁰ of the Provincial Division of the Ontario Court of Justice.

⁹ Readers who wish to review Justice McCart's decision in *R. v. Clay* (1997) may refer to Appendix B. Justice McCart ruled that while the cannabis laws do infringe individuals rights under Section 7 of the Charter of Rights — "no one can be deprived of the right to life, liberty and security except in accordance with the principles of fundamental justice" — he argued that the deprivation of liberty inherent to these laws was not contrary to the principles of fundamental justice as cannabis could not be considered to be of fundamental personal importance to Mr. Clay.

¹⁰ Readers who wish to review Justice Sheppard's decision in *R. v. Parker* (1997) may refer to Appendix C. Justice Sheppard, relying on the expert evidence presented during the Clay trial and more specific evidence relating to the special circumstances of Mr. Parker, found that current cannabis laws criminalizing cultivation and possession of marijuana for

The Supreme Court of Canada's decision in the Oakes case is the benchmark for testing the constitutionality of policies and laws in Canada. I argue that this decision demonstrates considerable continuity with the analysis provided by John Stuart Mill. The Oakes decision also reaffirms the requirement that any social harm resulting as a consequence of a given behaviour is properly identified as such, that any policies attempting to impose social control be proportional to the harm in question, and that the onus to prove the connection between the behaviour and the social harm resides with the state and not the individual exhibiting the dubious behaviour. The Supreme Court of Canada's decision in the Oakes case provides policy makers with a framework to aid in the determination of whether any given policy or law will be in accordance with the provisions of Canada's Charter of Rights and Freedoms, and subsequently whether a policy or law is constitutional. Section 1 of,

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The need for “*Charter-friendly*” policy development is required both to exhibit a sense of fairness and justice in law, as well as averting the potential for legislation to be struck down by the courts.

medical purposes are unconstitutional. Justice Sheppard argued that cultivation and possession of marijuana is of fundamental personal importance to the accused as no other equally effective treatment (e.g., pharmaceutical therapies) could control his epileptic seizures. Rather than strike down the Charter-offensive cannabis laws, Justice Sheppard “read in” an exemption to Section 4(1) and Section 7(1) of the Controlled Drugs and Substances Act. This exempts from prosecution persons possessing or cultivating cannabis for their personal medically approved use.

For an issue to be considered under Section 1 of the Charter, two components must be demonstrated in relation to claims of the violation of individual rights specified under, in the case of Mr. Clay and Mr. Parker, Section 7 of the Charter: first, that there is indeed a violation of a right or freedom prescribed in the Charter; and, second, that the deprivation was contrary to the principles of fundamental justice. The onus to prove both of these elements resides with the accused (*Cunningham v. Canada*, 1993). However, as Justice McCart noted, the principles of fundamental justice are also concerned with striking a fair balance between the interests of individuals who claim that their liberty has been limited, and the limitations on freedom necessary to protect public safety, order, health, morals or the rights of others. It is within this context that we can understand the failure of the constitutional challenge by Christopher Clay which did not proceed beyond the question of fundamental justice. Clay was charged with trafficking, possession for the purpose of trafficking, possession, and cultivation of cannabis. Under these circumstances it would be extremely difficult for the accused to argue that his activities related to cannabis were of fundamental personal importance, and these interests were of negligible significance compared to the societal interests of deterring the possession and use of cannabis as well as intervening in the black market trade. It is my opinion that a constitutional challenge of Canada's cannabis laws relating solely to the issue of simple possession holds significant potential to overcome this particular legal obstacle.

Once an applicant has proven that there is a violation of a right or freedom prescribed in the Charter which is contrary to the principles of fundamental justice, establishing whether

a limit on a particular right or freedom is justified under Section 1 there are two criteria which must be satisfied:

- *it must be demonstrated that the objective of a policy relates to concerns which are pressing and substantial in a free and democratic society.*
- *the means chosen to achieve the objective must pass a three-part proportionality test:*
 - *First, the measures adopted must be carefully designed to achieve the objective in question. The measures must not be arbitrary, unfair or based on irrational considerations but rather must be rationally connected to the objective.*
 - *Second, the means, even if rationally connected to the objective, should impair as little as possible the right or freedom in question....*
 - *...Finally, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or freedom and the objective which has been identified as of sufficient importance (Greenspan: CCR 1).*

The Supreme Court of Canada's decision in the Oakes case invalidated the possession for the purpose of trafficking provision under the Narcotic Control Act that placed a "Reverse Onus" on a charged individual. This onus required that the individual, in order to escape punishment for the more serious offence of possession for the purpose of trafficking (potential sentence of life imprisonment as opposed to a seven year maximum for simple possession), prove that the quantity of drugs in his/her possession was in fact for personal use. However,

the individual could always argue that the drugs were not his or her property. While the court accepted that the drug issue was a pressing and substantial concern, this particular provision of this section of the Narcotic Control Act was deemed to not be rationally connected to the objective of 'illicit drug' control policy as it arbitrarily contravened the right of an individual against self-incrimination.

While there have been some modifications¹¹ to the principles established in the Oakes decision, the analysis provided above casts considerable doubt on whether drug control policy related to cannabis and cannabis possession in particular approximates the standards for constitutional social policy provided by the Supreme Court of Canada. Although it is a decidedly controversial public issue, attempting to provide 'objective' evidence that cannabis is a "*pressing and substantial concern*" would prove to be difficult if not impossible. After hearing the statistical evidence from a large number of experts who shared a general consensus on the effects of the consumption of marijuana, Justice McCart concluded (and Justice Sheppard later concluded based on the same evidence) that:

1. *Consumption of marihuana 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 marihuana;*

¹¹ Kiedrowski & Webb (1993) discuss the implications of the proportionality test in light of subsequent Supreme Court decisions on the issue. First, revisions of the "rational connection" test have made it easier to place limits on Charter rights. Policy makers need only establish a credible basis for a particular legislative approach. A consensus in the literature or research on a given issue is not required. Second, the "little as possible" test has been revised such that the effectiveness of a given policy becomes the central issue. Measures chosen by Parliament may be considered acceptable where alternative measures, which are less Charter offensive, would also be less effective. The first two elements of the proportionality test are the critical components of the Oakes process. The third element, the "effects" component, has rarely been used by itself as a basis for disallowing a challenged provision (Kiedrowski & Webb, 1993: 385).

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. *Marihuana is not criminogenic in that there is no evidence of a causal relationship between cannabis use and criminality;*
7. *That the consumption of marihuana probably does not lead to "hard drug" use for the vast majority of marihuana consumers, although there appears to be a statistical relationship between the use of marihuana and a variety of other psychoactive drugs;*
8. *Marihuana does not make people more aggressive or violent;*
9. *There have been no recorded deaths from the consumption of marihuana;*
10. *There is no evidence that marihuana causes anti-motivational syndrome;*
11. *Less than 1% of marihuana consumers are daily users;*
12. *Consumption in so-called "decriminalized states" does not increase out of proportion to states where there is no decriminalization;*
13. *Health-related costs of cannabis use are negligible when compared to the costs attributable to tobacco and alcohol consumption.*

(Appendix B: 199-200; Appendix C: 222)

Even if one was to charitably accept that cannabis is a “*pressing and substantial concern*” given the clear absence of ‘objective’ evidence detailed above, current cannabis control measures could not withstand even the first component of the three part

proportionality test described in the Oakes decision. Justice McCart conceded that the criminal sanctions against cannabis (added to the drug schedules in 1923) occurred in a “*climate of irrational fear*” in which Judge Emily Murphy’s claims held considerable resonance even though “[t]here was absolutely no truth to any of [her] wild and outlandish claims” (Appendix B: 196). As far as the contemporary C.D.S.A., the Sub-Committee hearings on the Bill demonstrate an overt avoidance of clearly identifying objectives for drug control policy. Indeed, when pressed by Sub-Committee member Mr. de Savoye on whether anyone had assessed the potential effectiveness of the C.D.S.A., Mr. Gerard Normand (Senior Counsel, National Security Group, Department of Justice) conceded that he was not aware of any such assessment, but he felt that the C.D.S.A. would help to increase the number of prosecutions for drug offences. With respect to cannabis control, the C.D.S.A. could not possibly meet the first requirement of the three part proportionality test. Indeed, control measures against cannabis beginning in 1923 originated from “*irrational considerations*”, and there is no rational connection between the measures chosen and the objective which — save the probable increase in criminal prosecutions — has not been clearly defined.

With respect to the second and third component of the proportionality test, Justice McCart’s ruling amply demonstrates that alternative less restrictive methods for dealing with cannabis possession employed in various countries — alternatives which would be significantly less offensive to individual rights protected under Canada’s Charter of Rights and Freedoms — do not result in increases out of proportion to states where more restrictive measures have been retained. Severe and deleterious effects will continue to be inflicted on individuals charged for cannabis possession — in spite of the illusory appearance that penalties have been

significantly reduced under the C.D.S.A. Cannabis control policy has, and remains, woefully inadequate to control the use of this drug or to even reduce 'objective' harm associated with the use of this drug which has not as yet been adequately detailed. It is my position that, given the weight of evidence presented throughout this thesis, the objective of cannabis control relating to possession is unreasonable and cannot be demonstrably justified in a free and democratic society.

6.4 CONCLUSIONS AND IMPLICATIONS:

The preceding analysis has examined the reductionism of historical constructions of 'illicit drugs' and their subsequent translation into the partial intervention strategy of prohibition. From my perspective, drug prohibition has produced iatrogenic effects which have manifested in the growing social problem of 'illicit drugs'. The expansion of prohibition, and the central role of law enforcement within this agenda, can be located within the interests of bureaucratic lawmaking, which continues to perpetuate the iatrogenic effects of prohibition. The history of prohibition in Canada can be depicted as an example of the socio-politics of dominance and subordination in terms of race, ethnicity, and class. Furthermore, the expansion of the prohibitionist agenda was, and continues to be grounded, not in 'scientific' evidence of demonstrably harmful conditions, but rather within pervasive popular mythologies of the criminogenic effects of 'illicit drugs' and cannabis in particular.

The central implication for intervention theory and practice which emerges is that a contextual form of social constructionism provides numerous conceptual and analytic advantages over other theoretical approaches. First, it clearly demonstrates the historical and

cultural specificity of deviance labels and intervention strategies. As the present analysis revealed, deviance labels and prohibitionist intervention strategies emerged not as an inevitable linear progression (i.e., the economic determinism of variants of the Marxian conflict tradition, or the biological and social determinism of the positivistic tradition) but as the result of a process of interaction and negotiation between various social forces. Second, the social constructionist approach, with its analytic stance that social problems are to be considered as claims-making activities, does not accept the 'objective' ontological status of social problems. Such acceptance within rational choice, positivistic, and even Marxist approaches, is problematic because it impedes both empirical analysis of how social problems have been historically constructed and efforts at deconstruction.

Third, while social constructionism has been criticized for being apolitical and avoiding structural considerations, the study of definitional processes and their translation into intervention strategies must eventually lead to the study of how power is distributed in society, how the powerful produce deviance designations and intervention strategies, and whose interests such designations and interventions support (Conrad & Schneider, 1980: 20). Hopefully, the present analysis has convincingly demonstrated the pervasive influence of power throughout the social construction of the social problem of 'illicit drugs' (and cannabis in particular) and the development of prohibitionist intervention strategies, as well as provided an understanding of whose interests have been served by this construction. In the development of prohibition in Canada, the influence of power did not present itself in a direct fashion. Instead, relations of power were located within reductionist accounts of the nature

of social problems promulgated in 20th century Canada, and the ability of various social actors to ascribe an ontological status to cannabis as the progenitor of a number of social evils.

The contextual social constructionist perspective utilized above has demonstrated how the prohibitionist intervention strategy was, and continues to be in the 1996 enactment of the Controlled Drugs and Substances Act (Bill C-8), grounded in reductionist constructions produced by various moral entrepreneurs. The differentiation between licit and 'illicit drugs', both historically and at present, continues to be based on invidious moral distinctions rather than the demonstrable harmfulness of such drugs. Too often ignored within such distinctions is the question of the state's ability to 'cure' or reduce the harms of 'illicit drug' use, whether moral, physical, or psychological. The following argument, raised by the expounding magistrate of the Supreme Court of Colombia in 1994, appropriately situates the role of the state in controlling the use/abuse of 'illicit drugs': "[W]hile the judicial norm is bilateral, morality is unilateral.... [T]he precept of law always creates a disadvantageous situation that correlates with an advantageous situation. In this case ... 'obligations' correlate with 'rights'. Morality does not recognize this mode of regulation. The obligations that morality imposes do not favour anyone in power to demand proper conduct."¹² Prohibitionist intervention against drug users is thus suspect, morally as well as practically — despite the state's power to sanction certain behaviours — because such approaches not only can not

¹² The Supreme Court of Colombia's decision in the Sochandamandou case legalized the possession of small quantities of illicit drugs (specifically, cannabis, heroin, and cocaine) for personal use largely on the basis of the preceding logic. The Court specified that the setting of maximum quantities which could be considered as being for personal use was constitutional as it provided some safeguards against individuals causing undue harm to themselves, and the possible implications for the traffic in illicit drugs if there was no specified limit. (Diaz, 1994)

'cure' or reduce the harmful consequences of 'illicit drug' use, but they are also the source of demonstrable harm.

The prohibitionist mission statement, of saving souls from the depravities which popular common-sense ascribes to the use of 'illicit drugs' is suspect — not because of a lack of genuineness in its proponents having the best intentions (which the author does not wish to disparage) — but because it is based on the false premise that 'illicit drugs' are the cause of the 'illicit drug problem'. It is additionally suspect because the goal of prohibitionist intervention, based on that false premise, is the historically-based necessity of attempting to eliminate the object (i.e., 'illicit drugs') which has been incorrectly identified as the cause of the 'illicit drug problem'. It would be extremely difficult to argue against the culpability of the enforcement and health communities in promoting and driving the maintenance and expansion of the 'illicit drug' industry (which they may well be unaware of or not believe at all) given the analysis above. However, it may certainly be the case that the proponents of prohibition (and particularly those involved in its genesis) are unaware of the iatrogenic nature of the intervention strategy they support and maintain. As a consequence, some will conclude that I have unfairly judged the individuals and organizations involved in the propagation of prohibition; individuals and organizations who exude benign intentions. In response, I would ask that readers refrain from the tendency to sympathize with those who would feign innocence on the grounds that they acted with the best intentions. As the late novelist Graham Greene warned: *"Innocence always calls mutely for protection when we would be so much wiser to guard ourselves against it: innocence is like a dumb leper who has lost his bell, wandering the world, meaning no harm"* (Greene, 1955: 37).

BIBLIOGRAPHY:

Abel, E. (1980) Marijuana: The First Twelve Thousand Years, New York: Plenum Press.

Active Health Report (1989) (See: Health and Welfare Canada, 1989)

Alexander, B.K. (1990) Peaceful Measures: Canada's Way Out of The 'War on Drugs', Toronto: University of Toronto Press.

American Psychiatric Association. (1987) Diagnostic and Statistical Manual of Psychiatric Disorders (DSM-III-R), 3rd edition, Washington, D.C.: American Psychiatric Association.

Anderson, J. (1995) Comments on the First Draft of the Cannabis Policy Discussion Paper, Ottawa: Health Canada (Unpublished).

Armstrong (1994) (See: Globe and Mail).

Aronson, N. (1984) "Science as a Claims-Making Activity: Implications for Social Problems Research", in Schneider, J.W., and Kitsuse, J.I. (eds.) Studies in the Sociology of Social Problems, Norwood, New Jersey: Ablex Publishing Corporation, pp. 1-29.

Askov (See: R. V. Askov)

Beauchesne, L. (1988) "L'origine des lois canadiennes sur les drogues", dans P. Brisson (sous direction de) L'usage des drogues et la toxicomanie, Vol. I, Montréal: Gaëtan Morin.

Beauchesne, L. (1991) "Social Morality and the Civil Rights of Canadian Drug Users", The Journal of Drug Issues, XXI, 1: 165-182.

Beauchesne, L. (1992) La légalisation des drogues pour mieux on prévenir les abus, Montréal: Le Méridien.

Beauchesne, L. (1997) "Un sujet d'actualité: La loi C-8", L'Écho-Toxico, 8, No. 1, Janvier: 7-10.

Becker, H.S. (1963) Outsiders: Studies in the Sociology of Deviance, New York: The Free Press.

Becker, H.S. (1973) Outsiders: Studies in the Sociology of Deviance, Second Edition, New York: The Free Press.

Beckett, K. (1994) "Setting the Public Agenda: 'Street Crime' and Drug Use in American Politics", Social Problems, XLI, 3: 425-447.

Benowitz, N.L. and Jones, R.T. (1975) "Cardiovascular effects of prolonged delta-9-tetrahydrocannabinol ingestion", Clin. Pharmacol. Ther., 18: 287-297.

Benowitz, N.L. and Jones, R.T. (1977a) "Prolonged delta-9-tetrahydrocannabinol ingestion. Effects of sympathomimetic amines and autonomic blockades", Clin. Pharmacol. Ther., 21: 336-342.

Benowitz, N.L. and Jones, R.T. (1977b) "Effects of delta-9-tetrahydrocannabinol on drug distribution and metabolism: Antipyrine, Pentobarbital and ethanol", Clin. Pharmacol. Ther., 22: 259-268.

Benowitz, N.L., et al. 1976. "Depression of growth hormone and cortisol response to insulin-induced hypoglycemia after prolonged oral delta-9-tetrahydrocannabinol administration in man", J. Clin. Endocrinol. Metab., 42: 938-941.

Benowitz, N.L., et al. (1980) "Metabolic and psychophysiologic studies of cannabidiol-hexobarbital interaction", Clin. Pharmacol. Ther., 28: 115-120.

Ben-Yehuda, N. (1990) The Politics and Morality of Deviance: Moral Panics, Drug Abuse, Deviant Science and Reversed Stigmatization, Albany: SUNY Press.

Berger, P.L. and Kellner, H. (1981) Sociology Reinterpreted: An Essay on Method and Vocation, New York: Anchor Press/Doubleday.

Berger, P.L. and Luckmann, T. (1966) The Social Construction of Reality, New York: Doubleday and Co.

Bernat de Celis, J., et de Celis, G. (1992) Fallait-il creer un delit d'usage illicite de stupefiants?, Paris: CESDIP, No. 54.

Bertrand, M.A. (1990) "Beyond Antiprohibitionism", The Journal of Drug Issues, XX, 4: 533-542.

Best, J. (1987) "Rhetoric in Claims-Making: Constructing the Missing Children Problem, Social Problems, XXXIV, 2, April: 101-121.

Best, J. (ed.) (1989) Images of Issues: Typifying Contemporary Social Problems, New York: Aldine De Gruyter.

Best, J. (1990) Threatened Children: The Rhetoric of Child Victims, Chicago: University of Chicago Press.

Best, J. (1993) "But Seriously Folks: The Limitations of the Strict Constructionist Interpretation of Social Problems", in J.A. Holstein and G. Miller (eds.) Reconsidering Social Constructionism, New York: Aldine De Gruyter, pp. 101-121.

Blackwell, J.C. and Erickson, P.G. (1988) Illicit Drugs in Canada: A Risky Business, Scarborough: Nelson Canada.

Blumer, H. (1937) "Social Psychology", in Emerson and Schmidt (eds.), Man and Society, New York: Prentice-Hall.

Boyd, N. (1991) High Society: Legal and Illegal Drugs in Canada, Toronto: Key Porter Books.

Brochu, S. (1995a) Drogues et criminalité: Une relation complexe, Montréal: Les Presses de L'Université de Montréal.

Brochu, S. (1995b) "La relation drogue-crime dans un pays en guerre", Revue internationale de criminologie et de police technique, 2: 159-166.

Brochu, S. (1995c) "Estimating the Costs of Drug-Related Crime", Second International Symposium on the Social and Economic Costs of Substance Abuse (October 2-5), Montebello (Québec): Canadian Centre on Substance Abuse, pp. 1-31.

Brook, J.S. et al. 1992. "Psychosocial Risk Factors in The Transition From Moderate to Heavy Use or Abuse of Drugs", in M. Glantz and R. Pickens (eds.) Vulnerability to Drug Abuse, Washington, D.C.: American Psychological Association, pp.

Brown, L. (1992) "The RCMP and its Ancestors: Over 100 Years of Willing Service" in D.H. Currie and B.D. MacLean (eds.), Re-Thinking the Administration of Justice, Halifax: Fernwood Publishing, pp. 185-213.

Bryan (1995a) (See: Ottawa Citizen).

Bryan (1995b) (See: Vancouver Sun).

Caballero, F. (sous la direction de). (1992) Drogues et Droits de l'Homme, Paris: Les Empêcheurs de Penser en Rond.

Canada's Alcohol and Other Drugs Survey (1995) (See: Health Canada, 1995b)

Canadian Charter of Rights and Freedoms (1982).

Chaiken, J.M., & Chaiken, M.R. (1990) "Drugs and Predatory Crime", in M. Tonry and J.Q. Wilson (eds.) Drugs and Crime, Vol. XIII of Crime and Justice: A Review of Research, Chicago: University of Chicago Press, pp. 203-239.

Choiseul, P. (de), C.H. (1991) La drogue, une economie dynamisee par la repression, Paris: CNRS.

Christie, N. (1994) Crime Control As Industry: Towards GULAGS, Western Style, London: Routledge.

Christie, P. (1991) The Effects of Cannabis Legislation in South Australia on Levels of Cannabis Use, Parkside, South Australia: Drug and Alcohol Services Council.

Clay (See: R. v. Clay)

Cohen, P. (1989) ARCHITEKTUR DES UNTERGANGS [The Architecture of Doom], Stockholm: POJ Filmproduktion AB.

Cohen, S. (1985) Visions of Social Control, Oxford: Polity Press.

Comack, E. (1985) "The Origins of Canadian Drug Legislation: Labelling Versus Class Analysis", in T. Fleming (ed.), The New Criminologies in Canada, Toronto: Oxford University Press, pp. 65-86.

Conley, P. (1991/1992) "Canada's Drug Strategy", Just Info, Ottawa: Canadian Centre For Justice Statistics, Statistics Canada, pp. 3-5.

Conley, P. (1996) Seniors Directorate - Health Canada (Telephone Interview: July 9), Ottawa: Health Canada.

Conrad, P. and Schneider, J.W. (1980) Deviance and Medicalization: From Badness to Sickness, St. Louis: C.V. Mosby.

Controlled Drugs and Substances Act. (1996)

Coser, L.A. (1977) Masters of Sociological Thought: Ideas in Historical and Social Context, Second Edition, San Diego: Harcourt Brace Jovanovich.

Cottrell, W.F. (1955) Energy and Society: The Relationship Between Energy, Social Change and Economic Development, New York: McGraw-Hill.

Cottrell, W.F. (1972) Technology, Man, Progress, Columbus, Ohio: Charles E. Merrill.

Cunningham v. Canada (1993), 80 C.C.C. (3d) 492 at 496. (S.C.C.).

Davis, F.J., and Stivers, R., eds. (1975) The Collective Definition of Deviance, New York: The Free Press.

D.E.A. (1994) How To Hold Your Own In A Drug Legalization Debate, Seattle: Drug Enforcement Administration, Demand Reduction Section, United States Department of Justice.

Devlin, P. (1959) The Enforcement of Morals, Oxford: Oxford University Press.

Diaz, C.G. (Expounding Magistrate) (May 5, 1994) Constitutional Court Gazette: 1994 Special Edition, Bogota: Colombia.

Dickson, D. (1968) "Bureaucracy and Morality: An Organizational Perspective on a Moral Crusade", Social Problems, XVI: 143-157.

Donnelly, N. and W. Hall. (1994) National Drug Strategy: Patterns of Cannabis Use in Australia (Monograph Series No. 27). National Drug and Alcohol Research Centre, University of New South Wales. Canberra: Australian Government Publishing Service.

Donnelly, N., Hall, W., and Christie, P. (1995) "The Effects of Partial Decriminalization on Cannabis Use in South Australia, 1985 to 1993", Australian Journal of Public Health, XIX, 3: 281-287.

Donelson, A.C. (1987) "Cannabis and Alcohol Use Among Drivers and Pedestrians fatally injured in Traffic Crashes", in P.C. Noordzij and R. Roszbach (eds.) Alcohol, Drugs and Traffic Safety, Excerpta Medica. Amsterdam.

Duncan, D.F. et al. (1994) "Harm Reduction: An Emerging New Paradigm For Drug Education", Journal of Drug Education, XXIV, 4: 281-290.

Dworkin, R. (1978) Taking Rights Seriously, London: Duckworth.

Eliany, M., et al. (1992) Alcohol and Other Drug Use by Canadians: A National Alcohol and Other Drugs Survey (NADS) (1989) Technical Report, Ottawa: Minister of Supply and Services.

Ellul, J. (1959) La Technique (ou l'enjeu du siècle), Paris: Librairie Armand Colin.

Ellul, J. (1964) The Technological Society, New York: Vintage Books.

Ellul, J. (1975) "Technological Morality", in F.J. Davis and R. Stivers (eds.) The Collective Definition of Deviance, New York: The Free Press, pp. 162-173.

Embree, S. (1977) "The State Department as Moral Entrepreneur: Racism and Imperialism as Factors in the Passage of the Harrison Narcotics Act", in D.F. Greenberg (ed.) Corrections and Punishment, Beverly Hills, CA: Sage, pp. 193-204.

Emerson, R.M., Fretz, R.I., and Shaw, L.L. (1996) Writing Ethnographic Fieldnotes, Chicago: University of Chicago Press.

Erickson, P.G., Adlaf, E.M., Murray, G.F., Smart, R.G. (1987) The Steel Drug: Cocaine in Perspective, Toronto: Lexington Books.

Erickson, P.G. (1992) "Recent Trends in Canadian Drug Policy: The Decline and Resurgence of Prohibitionism", Daedalus, MXXI: 239-267.

Erickson, P.G. and R. Smart. (1988) "The LeDain Commission Recommendations", in J.C. Blackwell and P.G. Erickson (eds.) Illicit Drugs In Canada: A Risky Business, Scarborough: Nelson Canada, pp. 336-344.

Fagan, J. (1990) "Intoxication and Aggression", in M. Tonry and J.Q. Wilson (eds.) Drugs and Crime, Vol. XIII of Crime and Justice: A Review of Research, Chicago: University of Chicago Press, pp. 241-320.

Fehr, K.O. and H. Kalant (eds.). (1983) Cannabis and Health Hazards: Proceedings of an ARF/WHO Scientific Meeting on Adverse Health and Behavioural Consequences of Cannabis Use, Toronto: Addiction Research Foundation.

Fischer, B. (1994) "Maps and Moves", The International Journal of Drug Policy, V, 2, 70-81.

Fischer (1995) (See: Ottawa Citizen).

Food and Drugs Act. R.S., c. F-27, s.1.

Foucault, M. (1979) Discipline and Punish: The Birth of the Prison, New York: Vintage Books.

Galland, J. (1992) Fumée Clandestine, Paris: Les Éditions du Léopard.

Galliher, J.F. and Walker, A. (1977) "The Puzzle of the Social Origins of the Marihuana Tax Act of 1937", Social Problems, XXIV, 3: 367-376.

Garland, D. (1990) Punishment and Modern Society: A Study in Social Theory, Oxford: Clarendon Press.

George, S. and Sabelli, F. (1994) Faith and Credit: The World Bank's Secular Empire, Boulder, Colorado: Westview Press.

Giffen, P.J., Endicott, S., and Lambert, S. (1991) Panic and Indifference: The Politics of Canada's Drug Laws, Ottawa: Canadian Centre on Substance Abuse.

Giffen, P.J. and Lambert, S. (1988) "What Happened on the Way to Law Reform?", in J.C. Blackwell and P.G. Erickson (eds.) Illicit Drugs In Canada: A Risky Business, Scarborough: Nelson Canada, pp. 345-369.

Globe and Mail (1994) September 24 (C. Armstrong, "Cracking Down on the Demon Weed: Bill C-7 May be an Attempt to Up-Date Canada's Narcotics Laws, But Its Many Opponents Say Its Provisions Are Like A Bad Trip From the Sixties").

Globe and Mail (1997) May 31 (D. Laframboise, "It's Time To Bust Our Drug Laws").

Goldhagen, D.J. (1996) Hitler's Willing Executioners: Ordinary Germans And The Holocaust, New York: Alfred A. Knopf.

Goode, E. (1970a) The Marijuana Smokers, New York: Basic Books.

Goode, E. (1970b [1969]) "Marijuana and the politics of Reality", in D.E. Smith (ed.) The New Social Drug: Cultural, Medical, and Legal Perspectives on Marijuana, Englewood Cliffs, New Jersey: Prentice-Hall, pp. 168-186.

Goode, E. (1990) "The American Drug Panic of the 1980's: Social Construction or Objective Threat", The International Journal of the Addictions, XXV, 9: 1083-1098.

Goode, E. (1994) Deviant Behaviour, Fourth Edition, Englewood Cliffs, New Jersey: Prentice-Hall.

Goode, E. and Ben-Yehuda, N. (1994) Moral Panics: The Social Construction of Deviance, Cambridge, Massachusetts: Blackwell.

Goudzwaard, B. and de Lange, H. (1995) Beyond Poverty and Affluence: Towards A Canadian Economy of Care, Toronto: University of Toronto Press.

Gove, W.R. (1975) The Labelling of Deviance: Evaluating a Perspective, New York: Sage Publications.

Greene, G. (1955) The Quiet American, London: Penguin Books.

Green, M. (1986) "The history of Canadian Narcotics control: The Formative Years", in N. Boyd (ed.) The Social Dimensions of Law, Scarborough, ON: Prentice-Hall, pp. 24-40.

Greenspan, E.L. (annotations). (1994) Martin's Annual Criminal Code, Aurora, Ontario: Canada Law Book Inc.

Gusfield, J.R. (1963) Symbolic Crusade: Status Politics and the American Temperance Movement, Urbana: University of Illinois Press.

Gusfield, J.R. (1975) "Moral Passage: The Symbolic Process in Public Designation of Deviance", in F.J. Davis and R. Stivers (eds.) The Collective Definition of Deviance, New York: The Free Press, pp. 85-98.

Gusfield, J.R. (1982) "Deviance in the Welfare State", Social Problems and Public Policy, V. 2.: JAI Press Inc, pp. 1-20.

Gusfield, J.R. (1984) "On the Side: Practical Action and Social Constructivism in Social Problems Theory", in Schneider, J.W., and Kitsuse, J.I. (eds.) Studies in the Sociology of Social Problems, Norwood, New Jersey: Ablex Publishing Corporation, pp. 31-51.

Gusfield, J.R. (1985) "Theories and Hobgoblins", Society for the Study of Social Problems Newsletter, XVII, Fall: 16-18.

Hall, W., Solowij, N., and Lemon, J. (1994) National Drug Strategy: The Health and Psychological Consequences of Cannabis Use (Monograph Series No. 25), National Drug and Alcohol Research Centre, Canberra: Australian Government Publishing Service.

Hamilton (1997) (See: Ottawa Citizen).

Hart, H.L.A. (1963) Law, Liberty, and Morality, Stanford: Stanford University Press.

Health and Welfare Canada (1989) The Active Health Report on Alcohol, Tobacco and Marijuana, Ottawa: Supply and Services Canada.

Health Canada. (1994) Canada's Drug Strategy, Phase II, A Situation Paper, Ottawa: Health Canada.

Health Canada. (1995a) Health Canada's Position On Harm Reduction, Ottawa: Health Canada (Unpublished).

Health Canada (1995b) Canada's Alcohol and Other Drugs Survey, Ottawa: Health Canada.

Health Promotion Survey (1985; 1990) (See: Stephens and Graham, 1993)

Henshel, R.L. (1990) Thinking About Social Problems, San Diego: Harcourt Brace Jovanovich, Publishers.

Hester, S. and Eglin, P. (1992) A Sociology of Crime, London: Routledge.

Hicks, D. and Conley, P. (1996) Cannabis Policy Discussion Paper, Ottawa: Canadian Centre on Substance Abuse.

Holstein, J. and Miller, G. (eds.) (1993) Reconsidering Social Constructionism, New York: Aldine De Gruyter.

Holstein, J.A. and Miller, G. (1993) "Reconstituting the Constructionist Program", in J.A. Holstein and G. Miller (eds.) Reconsidering Social Constructionism, New York: Aldine De Gruyter, pp. 241-250.

House of Commons. (1994a) Minutes of Proceedings and Evidence of the Sub-Committee on Bill C-7...of the Standing Committee on Health, Issue No. 1, Ottawa: Publishing, Public Works and Government Services Canada.

House of Commons. (1994b) Minutes of Proceedings and Evidence of the Sub-Committee on Bill C-7...of the Standing Committee on Health, Issue No. 2, Ottawa: Publishing, Public Works and Government Services Canada.

House of Commons. (1994c) Minutes of Proceedings and Evidence of the Sub-Committee on Bill C-7...of the Standing Committee on Health, Issue No. 3, Ottawa: Publishing, Public Works and Government Services Canada.

House of Commons. (1994d) Minutes of Proceedings and Evidence of the Sub-Committee on Bill C-7...of the Standing Committee on Health, Issue No. 4, Ottawa: Publishing, Public Works and Government Services Canada.

Ibarra, P.R. and Kitsuse, J.I. (1993) "Vernacular Constituents of Moral Discourse: An Interactionist Proposal for the Study of Social Problems", in J.A. Holstein and G. Miller (eds.) Reconsidering Social Constructionism, New York: Aldine De Gruyter, pp. 25-58.

Identification of Criminals Act (1970). R.S., c. 12 (1st Supp.), s. 1.

Jansen, A.C.M. (1991) Cannabis in Amsterdam: A Geography of Hashish and Marijuana, Amsterdam: Dick Coutinho/Muiderberg.

Jansen, A.C.M. (1994) Cannabis à Amsterdam: Une Géographie du Haschisch et de la Marijuana, Paris: Les Éditions du Léopard.

Jeffery, C.R. (1990) Criminology: An Interdisciplinary Approach, Englewood Cliffs, New Jersey: Prentice-Hall.

Jensen, E.L. and Gerber, J. (1993) "State Efforts To Construct A Social Problem: The 1986 War on Drugs in Canada", Canadian Journal of Sociology, XVIII, 4: 453-462.

Jones, R.T. and Benowitz, N.L. (1976) "The 30 day trip- clinical studies of cannabis tolerance and dependence", in M.C. Braude and S. Szara (eds.) Pharmacology of Marijuana, II, New York Raven Press, pp. 627-642.

Jones, R.T. et al. (1976) "Clinical studies of cannabis tolerance and dependence", Ann. N.Y. Acad. Sci., 282: 221-239.

Jones, R.T. et al. (1981) "Clinical relevance of cannabis tolerance and dependence", J. Clin. Pharmacol., 21(8-9): 143s-152s.

Kandel, D.B. (1978) "Adolescent Marijuana Use: Role of Parents and Peers", Science, 181: 1067-1070.

Kandel, D.B. (1984) "Marijuana Users in Young Adulthood", Archives of General Psychiatry, 41: 200-209.

Kandel, D.B. (1988) "Issues of Sequencing of Adolescent Drug Use and Other Problem Behaviours", Drugs and Society, 3: 55-76.

Kandel, D.B. and Davies, M. (1992) "Progression to Regular Marijuana Involvement: Phenomenology And Risk Factors For Near Daily Use", in M. Glantz and R. Pickens (eds.) Vulnerability to Drug Abuse, Washington, D.C.: American Psychological Association.

Kandel, D.B. and Logan, J.A. (1984) "Patterns of Drug Use From Adolescence to Young Adulthood: I. Periods of Risk For Initiation, Continued Use and Discontinuation", American Journal of Public Health, 74: 660-666.

Kandel, D., and Yamaguchi, K. (1993) "From Beer to Crack: Developmental Patterns of Drug Involvement", American Journal of Public Health, Vol. 83, 6: 851-855.

Kaplan, H.B. et al. (1982) "Pathways to Adolescent Drug Use: Self-Derogation, Peer Influence, Weakening of Social Controls, and Early Substance Use", Journal of Health and Social Behaviour, 25: 270-289.

Kershaw, I. (1991) Hitler, London: Longman Group U.K. Limited.

Kiedrowski, J. and K. Webb. 1993. "Second Guessing the Law-Makers: Social Science Research in Charter Litigation", Canadian Public Policy, 19: 379-397.

Klonoff, H. (1983) Acute Psychological Effects of Marihuana in Man, Including Acute Cognitive, Psychomotor, and Perceptual Effects on Driving", in K.O. Fehr and H. Kalant (eds.) Cannabis and Health Hazards, Toronto: Addiction Research Foundation, pp. 433-474.

Laframboise (1997) (See: Globe and Mail).

Le Cavalier, J. (1994a) "The Legalization Debate: Some Facts We Need To Know", Action News, V(2): 2-3.

Le Cavalier, J. (1994b) "Laws Must Heed Global Pacts", Actions News, V(3): 1,6,8.

LeDain, G. (Chairman). (1972) Cannabis: A Report Of The Commission Of Inquiry Into The Non-Medical Use Of Drugs, Ottawa: Information Canada.

LeDain, G. (Chairman). (1973) Final Report of The Commission of Inquiry Into The Non-Medical Use of Drugs, Ottawa: Information Canada.

Lemert, E. (1951) Social Pathology, New York: McGraw-Hill.

Lennard, H.L. et al. (1971) Mystification and Drug Misuse, New York: Jossey Bass Inc.

Lewontin, R.C. (1991) Biology As Ideology: The Doctrine of DNA, Concord, Ontario: Anansi.

Lindesmith, A.R. (1938) "A Sociological Theory of Drug Addiction", American Journal of Sociology, XLIII, 4: 593-613.

Lindesmith, A.R. (1940) "Dope Fiend Mythology", Journal of Criminal Law and Criminology, XXXI, 2: 199-208.

Lindesmith, A.R. (1947) Opiate Addiction, Bloomington, Indiana: Principia Press.

Lindesmith, A.R. (1964) "Narcotic Addiction", in E.W. Burgess and D.J. Bogue (eds.) Contributions to Urban Sociology, Chicago: University of Chicago Press, pp. 616-628.

Lindesmith, A.R. (1965) The Addict and The Law, New York: Vintage Books.

Lindesmith, A.R. and Strauss, A.L. (1968) Social Psychology, Third Edition, New York: Holt, Rinehart and Winston.

Marlaire, C.L. and Maynard, D.W. (1993) "Social Problems and the Organization of Talk and Interaction", in J.A. Holstein and G. Miller (eds.) Reconsidering Social Constructionism, New York: Aldine De Gruyter, pp. 173-198.

- Marx, K. and Engels, F. (1976) The German Ideology, Moscow: Progress Publishers.
- Merton, R.K. (1980) "The Self-Fulfilling Prophecy", in L.A. Coser (ed.) The Pleasures of Sociology, New York: Mentor Books, pp. 29-47.
- Michka. (1993) Le Cannabis: Est-il une Drogue?, Geneva: Georg.
- Mill, J.S. ([1859] 1985) On Liberty, London: Penguin Books.
- Miller, G. (1993) "New Challenges to Social Constructionism: Alternative Perspectives on Social Problems Theory", in J.A. Holstein and G. Miller (eds.) Reconsidering Social Constructionism, New York: Aldine De Gruyter, pp. 253-278.
- Miller, G. and Holstein, J.A. (1993a) "Reconsidering Social Constructionism", in J.A. Holstein and G. Miller (eds.) Reconsidering Social Constructionism, New York: Aldine De Gruyter, pp. 5-23.
- Miller, G. and Holstein, J.A. (1993b) "Social Constructionism and Its Critics: Assessing Recent Challenges", in J.A. Holstein and G. Miller (eds.) Reconsidering Social Constructionism, New York: Aldine De Gruyter, pp. 535-548.
- Mohan, D. 1983. "Epidemiology of Cannabis in Developing Countries", in K.O. Fehr and H. Kalant (eds.) Cannabis and Health Hazards, Toronto: Addiction Research Foundation, pp. 691-722.
- Mosher, C. and Hagan, J. (1994) "Constituting Class and Crime in Upper Canada: The Sentencing of Narcotics Offenders, circa 1908-1953", Social Forces, LXXII, 3: 613-641.
- Murphy, E. (1973 [1922]) The Black Candle, Toronto: Thomas Allen.
- Murray, G.F. (1988) "The Road to Regulation: Patent Medicines in Canada in Historical Perspective", in J.C. Blackwell and P.G. Erickson (eds.), Illicit Drugs in Canada: A Risky Business, Scarborough: Nelson Canada, pp. 72-87.
- Musto, D.F. (1973) The American Disease: Origins of Narcotic Control, New Haven, Connecticut: Yale.
- Myerscough, R. (1980) "The Effects of Delta-9-Tetrahydrocannabinol on Human Physical Aggression", Masters Thesis, Kent State University, Department of Psychology.
- Nadelmann, E. and Wenner, J.S. (1994) "Toward a Sane National Drug Policy", Rolling Stone, May: 24-27.

National Working Group on Drug Policy, Canadian Centre on Substance Abuse. (1997) Harm Reduction: Concepts and Practice, Ottawa: Canadian Centre on Substance Abuse.

Narcotic Control Act (1961). R.S., c. N-1, s.1.

National Academy of Sciences. (1982) An Analysis of Marijuana Policy: A Report by the Committee on Substance Abuse and Habitual Behaviour, Washington, D.C.: National Research Council.

Negrete, J.C. 1983. "Psychiatric Effects of Cannabis Use", in K.O. Fehr and H. Kalant (eds.) Cannabis and Health Hazards, Toronto: Addiction Research Foundation, pp. 577-616.

Newcombe, M.D. (1992) "Understanding the Multidimensional Nature of Drug Use and Abuse: The Role of Consumption, Risk Factors and Protective Factors", in M. Glantz and R. Pickens (eds.) Vulnerability to Drug Abuse, Washington, D.C: American Psychological Association.

Normand, G. (Senior Counsel, National Security Group, Department of Justice). (1995) "Comments on the first draft of the Cannabis Policy Discussion Paper" (Hicks & Conley, 1996).

Oakes (See: R. v. Oakes)

Office of National Drug Control Policy, The White House. (1992) National Drug Control Strategy: A Nation Responds to Drug Use, Washington, D.C.: U.S. Government Printing Office.

Oscapella, E. (1988) Reducing the Harm of Drug Use: Legalization and Other Issues, Ottawa: National Associations Active in Criminal Justice.

Oscapella, E. (1993) Witch Hunts and Chemical McCarthyism: The Criminal Law and Twentieth Century Canadian Drug Policy, Ottawa: Canadian Foundation For Drug Policy.

Ottawa Citizen (1995a) March 23 (M. Bryan, "Reefer Madness: Criminal Records for Possession of Cannabis Make no Economic or Social Sense").

Ottawa Citizen (1995) August 11 (D. Fischer, "Marijuana Debate Drags On: Canada Can't Decide Whether Pot Smoking Should Be Legalized").

Ottawa Citizen (1997) January 25 (W. Hamilton, "Busted: How I Became A Criminal")

Ottawa Citizen (1997) January 25 (R. Starnes, "The Joint Proposal: After Years of Smoking Marijuana is Still Far From Legal").

Ottawa Citizen (1997) April 12 (A. Young, "High Time To Stop The War On Marijuana").

Ottawa Citizen (1997) November 22 (D. Trigueiro, "Reefer Madness: Pot Laws Clouded with Distinctions").

Parker (See: R. v. Parker).

Petrunik, M. (1991) Labeling's Maverick: Edwin Lemert and the Societal Reaction Perspective in the Sociology of Deviance, Social Problems, and Social Control (Paper presented at the Society for the Study of Social Problems meetings, Cincinnati), Ottawa: Criminology Department, University of Ottawa.

Pfohl, S.J. (1985) Images of Deviance and Social Control: A Sociological History, New York: McGraw-Hill Inc.

Pires, A. and Acosta, F. (1994) "What's Real in Realism? What's Construction in Constructionism? The Case of Criminology", Journal of Human Justice, V, 2, Spring: 2-33.

Presbyterian Church of Canada (1997) Faith and Economics, North York, Ontario: Church Doctrine Committee, Presbyterian Church of Canada.

Quinn, R. (1990) An Examination of Recent Arguments Favouring Legalization of Drugs, Edmonton: Alberta Alcohol and Drug Abuse Commission.

R. v. Askov (1990), 59 C.C.C. (3d) 449, [1990] 2 S.C.R. 1199, 79 C.R. (3d) 273.

R. v. Clay (1997), 35 W.C.B. (2nd) 440.

R. v. Oakes (1986), 24 C.C.C. (3d) 321, [1986] 1 S.C.R. 103, 50 C.R. (3d) 1.

R. v. Parker (1997).

Reinarman, C. and Levine, H.G. (1989) "The Crack Attack: Politics and Media in America's Latest Drug Scare", in J. Best (ed.) Images of Issues: Typifying Contemporary Social Problems, New York: Aldine De Gruyter, pp. 115-137.

Riley, D. (1993) The Harm Reduction Model: Pragmatic Approaches To Drug Use From the Area Between Intolerance and Neglect, Ottawa: Canadian Centre on Substance Abuse.

Robins, L., H.S. Darvish, and G.E. Murphy. (1970) "The Long- term Outcome For Adolescent Drug Users: A Follow-up Study of 76 users and 145 non-users", in J. Zubin and A.M. Freedman (eds.) The Psychopathology of Adolescence, New York: Grune and Stratton, pp. 159-178.

Rogers, B. (1995a) Comments on First Draft of the Cannabis Policy Discussion Paper (Hicks & Conley, 1996).

Rogers, B. (1995b) Cannabis Control Policy Review, Ottawa: Health Canada (Unpublished).

Rubington, E. and Weinberg M.S. (1989) The Study of Social Problems, Fourth Edition, New York: Oxford University Press.

Sarbin, T.R. and Kitsuse, J.I. (eds.). (1994) Constructing The Social, London: Sage.

Scheibe, K.E. (1994) "Cocaine Careers: Historical and Individual Constructions", in Sarbin, T.R. and Kitsuse, J.I. (eds.) Constructing The Social, London: Sage, pp. 195-212.

Scheier, L.M. and Newcombe, M.D. (1991) "Psychosocial Predictors of Drug Use Initiation and Escalation: An Expansion of The Multiple Risk Factors Hypothesis Using Longitudinal Data", Contemporary Drug Problems, XVIII: 31-73.

Schneider, J.W. (1984) "Morality, Social Problems, and Everyday Life", in Schneider, J.W., and Kitsuse, J.I. Studies in the Sociology of Social Problems, Norwood, New Jersey: Ablex Publishing Corporation, pp. 180-205.

Schneider, J.W. (1985) "Social Problems Theory: The Constructionist View", Annual Review of Sociology, XI: 209-229.

Schneider, J.W., and Kitsuse, J.I. (eds.). (1984) Studies in the Sociology of Social Problems, Norwood, New Jersey: Ablex Publishing Corporation.

Single, E. (1989) "The Impact of Marijuana Decriminalization: An Update", Journal of Public Health Policy, X, 4: 456-466.

Single, E. et al. (1994) Horizons: Alcohol and Other Drug Use in Canada, Ottawa: Canada's Drug Strategy and Canadian Centre on Substance Abuse.

Single, E. et al. (1996) The Costs of Substance Abuse in Canada (Highlights), Ottawa: Canadian Centre on Substance Abuse.

Single, E. & Kandel, D. (1978) "The Role of Buying and Selling in Illicit Drug Use", in A. Trebach (ed.) Drugs, Crime and Politics, New York: Praeger Publications.

Small, S.J. (1978) "Canadian Narcotics Legislation, 1908-1923: A Conflict Model Interpretation", in W.K. Greenaway and S.L. Brickey (eds.) Law and Social Control In Canada, Scarborough: Prentice-Hall, pp. 28-42.

Smart, R.G. 1983. "The Epidemiology of Cannabis Use and its Health Consequences in Western Countries", in K.O. Fehr and H. Kalant (eds.) Cannabis and Health Hazards, Toronto: Addiction Research Foundation, pp. 723-762.

Smart, R.G. (1993) The Smart Report: Substance Abuse and Canadian Youth, Toronto: Addiction Research Foundation.

Smith, R.C. (1970) "U.S. Marijuana Legislation and the Creation of a Social Problem", in D.E. Smith (ed.) The New Social Drug: Cultural, Medical, and Legal Perspectives on Marijuana, Englewood Cliffs, New Jersey: Prentice-Hall, pp. 105-117.

Solomon, R.R. and Green, M. (1988) "The First Century: The History of Non-medical Opiate Use and Control Policies in Canada, 1870-1970", in J.C. Blackwell and P.G. Erickson (eds.) Illicit Drugs in Canada: A Risky Business, Scarborough: Nelson Canada, pp. 88-116.

Solomon, R.R., Single, E., and Erickson, P.G. (1988) "Legal Considerations in Canadian Cannabis Policy", in J.C. Blackwell and P.G. Erickson (eds.) Illicit Drugs in Canada: A Risky Business, Scarborough: Nelson Canada, pp. 370-391.

Spector, M. and Kitsuse, J. (1987) Constructing Social Problems, Chicago: Cummings Publishing Company, Inc.

Starnes (1997) (See: Ottawa Citizen).

Stephens, T. and Graham, D.F. (1993) Canada's Health Promotion Survey 1990: Technical Report, Ottawa: Supply and Services Canada.

Stoduto, G., et al. (1993) "Alcohol and Drug Use Among Motor Vehicle Collision Victims Admitted to a Regional Trauma Unit: Demographic, Injury, and Crash Characteristics", Accident Analysis and Prevention, XXV, 4: 411-420.

Tannenbaum, F. (1938) Crime and the Community, New York: Columbia University Press.

Taylor, S.P., et al. (1976) "The Effects of Alcohol and Delta-9-Tetrahydrocannabinol on Human Physical Aggression", Aggressive Behaviour, II: 153-161.

Toronto Star (1995) June 12 (D. Vienneau, "MP's Set To Consider Tory-era Drug Law").

Trigueiro (1997) (See: Ottawa Citizen).

Turk, A. (1979) "Analyzing Official Deviance: For A Non-Partisan Conflict Analysis", Criminology, VI, 4: 459-476.

United Nations. (1988) Declaration of the International Conference on Drug Abuse and Illicit Trafficking and Comprehensive Multidisciplinary Outline of Future Activities in Drug Abuse Control, New York: United Nations.

Vancouver Sun (1995b) May 10 (M. Bryan, "Just Say No To The War On Drugs").

van de Wijngaart, G.F. (1988) "A Social History of Drug Use in The Netherlands: Policy Outcomes and Implications," The Journal of Drug Issues, XVIII, 3: 481-495.

Vienneau (1995) (See: Toronto Star).

Webster's. (1997) Webster's Universal College Dictionary, New York: Gramercy Books.

Williams, B., E. Single, and D. McKenzie. (1995) Canadian Profile: Alcohol, Tobacco, and Other Drugs, Ottawa: Canadian Centre on Substance Abuse and Addiction Research Foundation.

Winter, M.F. (1996) "Societal Reaction, Labeling and Social Control: The Contribution of Edwin M. Lemert", History of the Human Sciences, IX, 2: 53-77.

Woolgar, S. and Pawluch, D. (1985) "Ontological Gerrymandering: The Anatomy of Social Problems Explanations", Social Problems, XXXII: 214-227.

Yamaguchi, K. and Kandel, D.B. (1984a) "Patterns of Drug Use From Adolescence to Adulthood. II Sequences of Progression", American Journal of Public Health, Vol. 74: 668-672.

Yamaguchi, K. and Kandel, D.B. (1984b) "Patterns of Drug Use From Adolescence to Adulthood: III Predictors of Progression", American Journal of Public Health, Vol. 74: 673-681.

Young, (1997) (See: Ottawa Citizen).

Appendix A

The Health and Psychological Consequences of Cannabis Use:

The Australian National Task Force on Cannabis Overview

OVERVIEW OF THE HEALTH AND PSYCHOLOGICAL CONSEQUENCES ASSOCIATED WITH CANNABIS USE

Acute Effects

The probable major acute adverse psychological and health effects of cannabis intoxication are (very much dependant upon the dose, the mode of administration, the users' prior experience with the drug, any concurrent drug use, and the "set" - the user's expectations, mood state and attitudes towards drug effects - and "setting" - the social environment in which the drug is used; prevalence and frequency rates are not provided in this review):

Chronic Effects

The major health and psychological effects of chronic heavy cannabis use, especially daily use, over many years, remain uncertain. On the available evidence, the major probable adverse effects appear to be:

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

The following are the major possible adverse effects of chronic, heavy cannabis use which remain to be confirmed by further research:

- *an increased risk of developing cancers of the aerodigestive tract, ie. oral cavity, pharynx, and oesophagus;*

- *an increased risk of leukemia among offspring exposed in utero;*
- *a decline in occupational performance marked by underachievement in adults in occupations requiring high level cognitive skills, and impaired educational attainment in adolescents; and*
- *birth defects occurring among children of women who used cannabis during their pregnancies.*

HIGH RISK GROUPS

A number of groups can be identified as being at increased risk of experiencing some of these adverse effects.

Adolescents

- *Adolescents with a history of poor school performance may have their educational achievement further limited by the cognitive impairments produced by chronic intoxication with cannabis.*
- *Adolescents who initiate cannabis use in the early teens are at higher risk of progressing to heavy cannabis use and other illicit drug use, and to the development of dependence on cannabis.*

Women of Childbearing Age

- *Pregnant women who continue to smoke cannabis are probably at increased risk of giving birth to low birth weight babies, and perhaps of shortening their period of gestation.*
- *Women of childbearing age who smoke cannabis at the time of conception or while pregnant could increase the risk of their children being born with birth defects.*

Persons with Pre-Existing Diseases

Persons with a number of pre-existing diseases who smoke cannabis are probably at an increased risk of precipitating or exacerbating symptoms of their diseases. These include:

- *individuals with cardiovascular diseases, such as coronary artery disease, cerebrovascular disease and hypertension;*
- *individuals with respiratory diseases, such as asthma, bronchitis and emphysema;*
- *individuals with schizophrenia who are at increased risk of precipitating or of exacerbating schizophrenic symptoms; and*
- *individuals who are dependent on alcohol and other drugs, who are probably at an increased risk of developing dependence on cannabis.*

TWO SPECIAL CONCERNS

Storage of THC

There is good evidence that with repeated dosing of cannabis at frequent intervals, THC can accumulate in fatty tissues in the human body where it may remain for considerable periods of time. The health significance of this fact is unclear. The storage of cannabinoids would be a serious cause for concern if THC were a highly toxic substance which remained physiologically active while stored in body fat. It is only actively metabolized when the fatty tissues themselves are metabolized through such activities as dieting, etc. The evidence that THC is a highly toxic substance is weak and its degree of activity while stored has not been investigated. One potential health implication of THC storage is that stored cannabinoids could be released into blood, producing a "flashback", although this is likely to be a very rare event, if it occurs at all. Nevertheless, despite the lack of research, health analysts feel cause for concern about complex chemical sequestration in fatty tissues (viz: DDT and Breast cancer), and since the fatty tissues of regular cannabis users likely become slowly saturated in THC there should be cause for caution. Whatever the uncertainties about health implications of THC storage, all potential users of cannabis should be aware that it occurs.

Increases in the Potency of Cannabis

It has been claimed that the existing medical literature on the health effects of cannabis underestimates its adverse effects, because it was based upon research conducted on less potent forms of marijuana than became available in the USA in the past decade. This claim has been repeated and interpreted in an alarmist fashion in the popular media on the assumption that an increase in the THC potency of cannabis necessarily means a substantial increase in the health risks of cannabis use.

It is far from established that the average THC potency of cannabis products has substantially increased over recent decades (See proceeding paragraphs: findings support an increase in the potency of cannabis over time). If potency has increased, it is even less certain that the average health risks of cannabis use have materially changed as a consequence, since users may titrate (the authors meaning that the user controls the amount of cannabis they use) their dose to achieve the desired effects (See proceeding paragraphs: the issue of titration, as put forward by these authors, is questionable). Even if the users are inefficient in titrating their dose of THC, it is not clear that the probability of all adverse health effects will be thereby increased. Given the existence of these concerns about THC potency, it would be preferable to conduct some research on the issue rather than to rely upon inferences about the likely effects of increased cannabis potency. Studies of the ability of experienced users to titrate their dose of THC would contribute to an evaluation of this issue.

(Hall, Solowij, and Lemon, 1994: 15-16)

Appendix B

R. v. Clay (1997):

Decision of Justice McCart

DECISION

**ONTARIO COURT
(GENERAL DIVISION)
(Southwest Region)**

BETWEEN:

**HER MAJESTY THE QUEEN
respondent
and
CHRISTOPHER CLAY and JORDAN KENT PRENTICE
Applicants**

Heard at London: April 28, 29, and 30, and May 5, 6, 7, 12, 13, 14,
15, 20 and 22, 1997.

McCART J.: (Delivered orally August 14, 1997) The accused were jointly charged that on or about the 17th day of May, 1995 at the City of London did unlawfully traffic in a narcotic, namely cannabis sativa, contrary to s.4(1) of the Narcotic Control Act and further, that on or about the 17th day of May, 1995 at the City of London did unlawfully possess a narcotic, namely cannabis sativa, for the purpose of trafficking contrary to s.4(2) of the Narcotic Control Act. In addition, Clay alone was charged that on the same date he did unlawfully traffic in a narcotic, namely cannabis sativa; that he did unlawfully possess a narcotic, namely cannabis sativa for the purpose of trafficking; and did unlawfully cultivate marijuana contrary to s.6(1) of the Narcotic Control Act.

Further, on or about May 18, 1995 the accused Clay along with Zachary Bassett and Patricia Prescott were charged with (simple) possession of a narcotic: to wit, cannabis sativa.

I made a ruling that these three did not have status or standing to challenge the provisions relating to that offence as it was not before me but in Provincial Court where they had elected to be tried by a Provincial Court Judge. Prior to May 14, 1997 counsel for Clay had expressed a clear intention to re-elect to be tried before me in the Superior Court. However, this reelection did not occur until subsequent to the Controlled Drugs and Substances Act coming into force and which provided that the charge of simple possession was within the exclusive jurisdiction of the Provincial Court where the amount involved was not more than 30 grams of

marijuana. Clay had been charged with possession of 6.1 grams. On the authorities cited to me by Mr. Young, but with some reluctance, I am prepared to accept Mr. Clay's re-election and the matter can be dealt with when I give judgment on the constitutional issues.

At the outset of the trial I heard evidence pertaining to the substantive charges facing Clay and Prentice, set out above in paragraph 1, with respect to which I made no ruling pending a determination of the constitutional challenge launched by Mr. Clay who has applied for an order granting a stay of proceedings on the basis that the offences with which he and Prentice are charged violate s.7 of the Charter of Rights and Freedoms. Section 7 provides that:

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

In other words, has there been a deprivation of one or more of these rights, and if so, was the deprivation contrary to the principles of fundamental justice? I think it is clear that the onus is on the applicants; *Cunningham v. Canada* (1993), 80 C.C.C. (3d) 492 at 496. (S.C.C.).

The constitutional issues which were raised are as follows:

1. Whether it is a violation of the principles of fundamental justice for Parliament to prohibit, upon threat of criminal sanction, conduct which is relatively harmless;
2. Whether it is a violation of the principles of fundamental justice for Parliament to maintain an existing criminal sanction in the face of calls for reform from the majority of Canadians and from a Commission of Inquiry established by Parliament to examine and assess the various claims which have been made respecting the social and medical harms associated with the consumption of cannabis sativa;
3. Whether it is a violation of the principles of fundamental justice for Parliament to provide for a term of imprisonment as a sentence for conduct which results in little or no harm to society;
4. Whether Parliament has constitutional authority under s.91 of the British North America Act to prohibit activity which results in little or no harm to society;

5. Whether it is a violation of the principles of fundamental justice for Parliament to interfere with an individual's right to make autonomous decisions with respect to that individual's bodily integrity in the absence of compelling reasons for the interference;

6. Whether the principles of fundamental justice include a right to privacy with respect to the recreational, medical or sacramental consumption of an intoxicating substance in the privacy of one's home;

7. Whether the inclusion of cannabis sativa in the Schedule of the Narcotic Control Act as a narcotic is an arbitrary classification which violates principles of fundamental justice. Under the new Controlled Drugs and Substances Act, marijuana is no longer classified with the so-called hard drugs and some of the penalties have been eased; this can no longer be an issue.

8. Whether inclusion of cannabis sativa in the Schedule of the Narcotic Control Act violates the principles of fundamental justice on the basis of overbreadth in that no meaningful exemptions are provided which allow for cannabis sativa to be used for legitimate medical purposes, and in that no meaningful and operative distinction is drawn in the legislation between conduct relating to or facilitating personal consumption of cannabis sativa and conduct which forms part and parcel of the commercial trade in this psychoactive substance.

With respect to the constitutional issues, the relief sought by the accused is:

1. An order declaring that the offences of possession, possession for the purpose, trafficking and cultivation are unconstitutional and of no force and effect as applied to the psychoactive substance, cannabis sativa; or

2. An order declaring that the offence of possession of a narcotic is unconstitutional and of no force and effect as applied to the psychoactive substance, cannabis sativa, and that the offences of trafficking, possession for the purpose and cultivation be read down so that these offences only apply to acts which form part and parcel of the commercial trade in cannabis sativa and not to acts of distribution which only relate to or facilitate personal consumption; or

3. An order declaring that no term of imprisonment can be applied to conduct relating to the consumption and personal possession of cannabis

sativa or to conduct which facilitate the consumption and personal possession of cannabis sativa, or

4. An order suspending the operation of the prohibitions contained in the Narcotic Control Act as they relate to cannabis sativa until such time as Parliament has a sound scientific basis for criminalizing conduct relating to the consumption and personal possession of cannabis sativa, or, at least until such time as Parliament conducts sound scientific studies as directed and recommended by the Standing Senate Committee on Legal and Constitutional Affairs.

5. An order granting a stay or proceedings with respect to any offence which this Honourable Court declares is violative of the Charter of Rights and Freedoms and/or The British North America Act.

The applicants further submitted that the sought after declaration of constitutional invalidity should issue for the following reasons.

- a) It is a violation of the principles of fundamental justice to criminalize conduct which does not create harm to society that rises above a minimum threshold warranting the imposition of a criminal sanction;
- b) It is a violation of the principles of fundamental justice to create an arbitrary and irrational legislative classification in which cannabis sativa is subject to the same legislative regime as the "harder" drugs including the opiate and coca derivatives;
- c) It is a violation of the principles of fundamental justice to create an over broad legislation which unnecessarily and unjustifiably overshoots the purported objectives of the legislation. In this case, the constitutional overbreadth of the legislation is found in the fact that cannabis sativa is not legally available for legitimate medical use. In addition, constitutional overbreadth is found in the fact that the Parliament has not drawn a meaningful and operative distinction between conduct relating to personal and private consumption (and acts which facilitate personal consumption) and conduct which forms part and parcel of the illicit black market trade;
- d) The criminalization of conduct relating to the personal and private consumption of cannabis sativa violates the constitutional right to privacy which has been recognized as a constituent element of the principles of fundamental justice;

e) The criminalization of conduct relating to the personal and private consumption of cannabis sativa, and the criminalization of small- scale trafficking and small-scale cultivation which is in no way related to the black market drug trade, is ultra vires Parliament of Canada in that it is not a valid exercise of the criminal law power contained in s.91(27) of the British North America Act, nor does it fall within the residual power of "Peace, Order and Good Government".

Aside from the constitutional issues, the accused Clay submitted that the Crown failed to prove beyond a reasonable doubt that the accused was in possession of, trafficked in or cultivated a "narcotic". He submitted that the certificate of analysis which identified the plant substance as cannabis (marijuana) did not sufficiently identify a prohibited narcotic. He submitted that the failure of the certificate of analysis to specify the level of THC found in the plant substance renders the certificate deficient in properly identifying a prohibited narcotic. I have carefully considered both the written and oral submissions of counsel and I am of the view that *Perka et al v. The Queen* (1984), 14 C.C.C. (3d) 385 is a complete answer to the defence submissions. The Supreme Court of Canada per Dickson J. held at p. 411:

Where, 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 of 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 the light of studies not undertaken until the early 1970's, does not alter that intention.

During the course of the trial, on May 14, 1997 the Narcotic Control Act was repealed and was replaced by the Controlled Drugs and Substances Act. It is interesting to note that sativa L no longer appears in the Schedule to that Act. Accordingly, I find no merit in the argument of the accused and find that the Crown has proved the charge beyond a reasonable doubt.

At this point it might be useful to outline the historical background what led up to the inclusion of cannabis sativa as a prohibitive substance. In the course of these reasons I use the terms cannabis, cannabis sativa and marijuana interchangeably.

The first narcotic prohibition legislation was the 1911 Opium and Drug Act and which contained no reference to marijuana. It was not until 1923 that marijuana was added to the schedule of prohibited drugs. Curiously, there was no discussion or debate in the House of Commons about its inclusion other than the bald statement, "There is a new drug in the Schedule". There was no correspondence in the Narcotic Control Division files about the addition of the new drug. One might ask why it was included because until 1937 there were no convictions for possession of marijuana and for the ensuing 20 years the annual conviction rate fluctuated between 0 and 12. There were no significant numbers of recorded offences until the late 1960's. From that time on, there has been an escalation in prosecutions for not only possession of marijuana but for trafficking.

Although there was no evidence of a problem of marijuana use in Canada in 1923, its inclusion in the Opium and Drug Act may have been influenced by the writings of Emily Murphy, a crusading Edmonton, Alberta magistrate. In 1920 she published a series of sensational and racist articles in McLean's Magazine on the horrible effects of drug use and the deliberate debauching of the young by evil, often alien, traffickers. The articles were later expanded into a book, *The Black Candle*, published in 1922. Her views on marijuana were derived mainly from correspondence with U.S. enforcement officials. She quotes, for example, the Chief of Los Angeles Police Department:

Persons using this narcotic [marihuana], smoke the dried leaves of the plant, which has the effect of driving them completely insane. The addict loses all sense of moral responsibility. Addicts to this drug, while under its influence, are immune to pain, and could be injured without having any realization of their condition. While in this condition they become raving maniacs and are liable to kill or indulge in any form of violence to other persons, using the most savage methods of cruelty without, as said before, any sense of moral responsibility If this drug is indulged in to any great extent, it ends in the untimely death of its addict.

There was absolutely no truth to any of those wild and outlandish claims. It was in this climate of irrational fear that the criminal sanctions against marijuana were enacted.

Next, it may also be useful to outline the direction in which other jurisdictions are going. In particular, I will refer to the situations that presently prevail in the Netherlands, Germany, Spain, Italy, some of the United States, and Australia. Of all of the major western countries outside

of North America, only France and New Zealand have taken no measures to ease the impact of cannabis laws. The national governments of Canada and the United States appear to be somewhat out of step with most of the rest of the western world.

The Netherlands

In 1976 the Opium Act in the Netherlands was amended to draw a clear distinction between so-called hard drugs on the one hand and cannabis products on the other. Since that time there has been a policy of non-enforcement of the law as it relates to marijuana use and possession, although possession continues to be a criminal offence. In fact, marijuana and hashish can be openly purchased in hundreds of licensed cafes throughout the country. Studies have shown that since 1976 the consumption of marijuana and hashish has not significantly increased.

The consumption of marijuana in The Netherlands is substantially lower than that in the United States. Current use by high school students in The Netherlands is much lower than use in the United States (5.4% vs. 29% respectively).

Germany

In Germany, public prosecutors have been given discretion to dismiss minor cases of drug possession unconditionally or on condition that a fine be paid or that community service be completed. Prosecutors have used this discretionary power to dismiss minor drug cases in which the offender purchased or was in possession of drugs for personal use. Each of the German states has developed its own guidelines as to when it would be permissible to dismiss a drug case.

Spain

In Spain, a 1995 amendment to the Penal Code stipulates that a criminal offence for drug possession is only established upon proof of a subjective intent to traffic or facilitate drug use by others. Possession of any illicit drug for personal use is no longer subject to any criminal or administrative sanction.

Italy

In Italy, there has been a movement towards replacing the criminal sanctions for drug use and possession with an administrative sanction.

Essentially, the Italian drug laws put the drug user beyond the reach of the criminal law by creating drug law exemptions for possession, purchase and import of drugs for personal use while still keeping the drug user under administrative controls.

The United States of America

In Alaska it is not against the law to possess marijuana in the privacy of one's residence, but it is still illegal to possession marijuana anywhere else in the State. However, Alaska appears to be moving towards overturning decriminalization. In Alaska, Maine, Minnesota, Mississippi, Nebraska and Oregon, possession of small amounts of marijuana is treated as a "civil violation" rather than a crime, much like minor traffic offences. In California, New York and North Carolina, possession of small amounts is deemed a misdemeanour; in Ohio it is a "minor misdemeanour" and in Colorado it is a "petty offence".

I wish to refer to two American decisions. *Ravin v. State of Alaska*, 537 Pacific Reporter, 2d series 494, to which I was referred by the applicants, does not assist them. The Alaska court held that possession of marijuana by adults at home for personal use is constitutionally protected. The court based its ruling on a new provision of the state constitution that explicitly guarantees a right of privacy. Without that constitutional provision, no such right would exist.

The respondent referred me to the decision of *NORML v. Griffin Bell et al.*, 488 F. Supp. 123 (1980), a decision of the United States District Court of the District of Columbia. This case stands essentially for the proposition that the prohibition of the private possession and use of marijuana does not violate the constitutional right of privacy in one's home, since smoking marijuana does not qualify as a fundamental right. Reference may also be had to *NORML v. Gain et al.*, 161 Cal. Rpt. 181 (1979).

Thus, it can be seen that nowhere in the United States has the simple possession of marijuana been legalized, although, as noted above, in many of the states the consequences of simple possession have been eased to a greater or lesser extent.

Australia

In 1987, in South Australia, and in 1992, in the Australian Capital Territory, "expiation" schemes were introduced which effectively de facto

de-criminalized the use and possession of cannabis. Under these schemes, the police have the option of issuing an expiation notice to anyone caught with a specified amount of cannabis instead of charging the individual with a criminal offence. The expiation notice allows the offender to pay a small fine and avoid being saddled with a criminal record. Small-scale cannabis possession, cultivation or use remain criminal offences: but they are no longer penalized as though they were. In South Australia, the designated amount allowing for the issuance of an expiation notice in lieu of a criminal charge is 100 grams of cannabis or 20 grams of cannabis resin. In addition, an expiation notice can be used for someone cultivating up to 10 cannabis plants. In the Australian Capital Territory, an expiation notice can be issued for 25 grams of cannabis or up to 5 plants being cultivated.

In most of the so-called "decriminalization" areas, the possession of marijuana remains against the law, although the penalties have been eased. However, in no western country has cultivation, trafficking or possession for the purpose of trafficking been decriminalized, nor have the penalties been reduced.

I wish to turn now to some statistical evidence which was introduced by various of the witnesses and which I accept as valid. I heard from a most impressive number of experts, among whom there was a general consensus about effects of the consumption of marijuana. From an analysis of their evidence I am able to reach the following conclusions:

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.

Harmful Effects of Marijuana and the Need for More Research

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 Rico and Jamaica generally supported the idea that marijuana was a relatively safe drug - not totally free from potential harm, but unlikely to create serious harm for most individual users or society.

The LeDain Commission found at least four major grounds for social concern: the probably harmful effect of cannabis on the maturing process in adolescence; the implications for safe driving arising from impairment of cognitive functions and psycho motor abilities, from the additive interaction of cannabis and alcohol and from the difficulties of recognizing or detecting cannabis intoxication; the possibility, suggested by reports in other countries and clinical observations on this continent, that the long term, heavy use of cannabis may result in a significant amount of mental deterioration and disorder; and the role played by cannabis in the development and spread of multi-drug use by stimulating a desire for drug experience and lowering inhibitions about drug experimentation. This

report went on to state that it did not yet know enough about cannabis to speak with assurance as to what constitutes moderate as opposed to excessive use.

The Report of the National Task Force on Cannabis, Canberra, Australia, was delivered on September 30, 1994. This Task Force concluded in general, that the findings on the health and psychological effects of cannabis suggest that cannabis use is not as dangerous as its opponents might believe, but that its use is not completely without risk, as some of its proponents would argue. As it is most commonly used, occasionally, cannabis presents only minor or subtle risks to the health of the individual. The potential for problems increases with regular heavy use. While the research findings on some potential risks remain equivocal, there is clearly sufficient evidence to conclude that cannabis use should be discouraged, particularly among youth.

Sometime prior to the Canberra Report, the Royal Commission into the non-medical use of drugs in South Australia was released. This Commission concluded that marijuana is not an addictive drug and "is comparatively harmless in moderate doses, although there are effects on skills such as those required for driving, and its effects may be greater if it is taken in combination with other drugs. It is almost certainly harmful to some extent in high doses. The summary of the scientific and medical evidence does not entirely resolve the policy questions, since further value judgments have to be made."

Finally, I would refer to a commentary by Dr. Harold Kalant on three reports which appeared in 1982 respecting the potential health damaging consequences of chronic cannabis use. The one report is that of an expert group appointed by the Advisory Council on the misuse of drugs in the United Kingdom. The second is that resulting from a scientific meeting sponsored jointly by the Addiction Research Foundation of Ontario and the World Health Organization. The third is that of a committee set up by the Institute of Medicine, National Academy of Sciences, of the United States of America. There was general agreement by the three groups after a review of essentially the same body of evidence. In brief, the verdict in each case has been that the available evidence is not nearly complete enough to permit an identification of the full range and frequency of occurrence of adverse effects from cannabis use, but that the practice can certainly not be considered harmless and innocent.

I can only conclude from a review of these reports and the other viva voce evidence which I heard that the jury is still out respecting the actual and

potential harm from the consumption of marijuana. It is clear that further research should be carried out. While it is generally agreed that marijuana used in moderation is not a stepping stone to hard drugs, in that it does not usually lead to consumption of the so-called hard drugs, nevertheless approximately 1 in 7 or 8 marijuana users do graduate to cocaine and/or heroin.

There have been a number of studies commissioned with respect to potential harms and benefits of marijuana consumption. I have attached as an addendum to these reasons a digest of the reports prepared for the benefit of the court by the accused Christopher Clay which I accept as accurate, as far as they go.

Neither of the Applicants have alleged that they need to possess marijuana for medical purposes and any finding that I might make about the availability of marijuana for medical use would have to be of some benefit to the applicants or they would not have standing to ask for it. I agree and find that the right to possess marijuana for medical purposes is irrelevant to a consideration of the constitutionality issues. Having said that, it might be useful to outline what is generally agreed to be the therapeutic value of marijuana and I quote in part from Ex. B from the affidavit of Dr. John P. Morgan, Professor of Pharmacology, of the State of New York, who testified during the course of the trial. He had this to say:

A number of studies have shown that marijuana is effective in reducing nausea and vomiting. Lowering intra-ocular pressure associated with glaucoma, and decreasing muscle spasm and spasticity. People undergoing cancer chemotherapy have found smoked marijuana to be an effective anti-nauseant - often more effective than available pharmaceutical medications. Marijuana is also smoked by thousands of Aids patients to treat the nausea and vomiting associated with both the disease and AZT drug therapy. Because it stimulates appetite, marijuana also counters HIV-related wasting allowing Aids patients to gain weight and prolong their lives.

In 1986, a synthetic THC capsule (Marinol) was marketed in the United States and labelled for use as a anti-emetic. Despite some utility, this product has serious drawbacks, including its cost. For example, a patient taking three 5 milligram capsules a day would spend over \$5,000 to use Marinol for one year. In comparison to the natural, smokable product, Marinol also has some pharmacological shortcomings. Because THC delivered in oral capsules enters the bloodstream slowly, it yields lower serum concentrations per dose. It more frequently yields unpleasant psycho-active effects. In patients suffering from nausea, the swallowing

of capsules may itself promote vomiting. In short, the smoking of crude marijuana is more efficient in delivering THC and, in some cases, it may be more effective.

As an aside, Parliament may wish to take a serious look at easing the restrictions that apply to the use of marijuana for the medical uses as outlined above as well as for alleviating some of the symptoms associated with multiple sclerosis, such as pain and muscle spasm. There appears to be no merit to the widespread claim that marijuana has no therapeutic value whatsoever. In any event, as I understand it, Marinol is not available in Canada.

With respect to the LeDain Commission Report in which there was not consensus, the majority (3) of Commissioners recommended repeal of the prohibition against simple possession. One Commissioner recommended complete removal of cannabis from the Narcotic Control Act and that its sale and use be placed under controls similar to those governing the sale and use of alcohol. However, this Commissioner stated at the outset of her conclusions;

With legalization, there is a strong possibility that the number of regular users will increase and that the effects of cannabis intoxication will be observed in a greater number of people. It is also expected that a certain number of cannabis users would go onto other hallucinogens and would make greater use of barbiturates, tranquilizers and alcohol, as well.

The 5th Commissioner said this:

I must dissent from the recommendation of the majority of my colleagues and recommend that the prohibition on the possession of cannabis be maintained, for the time being at least. Possession of cannabis should be punishable, upon summary conviction, by a fine of \$25 for the first offence and by a fine of \$100 for any subsequent offence. This recommendation is not too dissimilar from the present law under the Controlled Drugs and Substances Act.

Cultivation, Trafficking and Possession for the Purpose of Trafficking as they Relate to Marijuana

Counsel for the applicants appear to have abandoned their constitutional challenge to all but possession of marijuana and cultivation and trafficking which only relate to or facilitate personal consumption. If there has not been abandonment, it seems to be they have virtually conceded that they cannot succeed. In his submissions Mr. Young claimed that Parliament had overshot the mark, in failing to draw a meaningful distinction between

small scale trafficking and acts which form part and parcel of the illicit black market trade. Again, in the applicants' memorandum of argument paragraph 34 on pp. 27 and 28 this submission is made:

It is respectfully submitted that the failure to draw a meaningful and operative distinction with the Narcotic Control Act between private "vice" and the business of encouraging, promoting and profiting from the activity for commercial purposes is inconsistent with the modern legislative approach to consensual crime and does not serve a valid legal objective. By widening the net this broadly, the offences contained in the Narcotic Control Act go well beyond serving a valid state objective (i.e. combatting the social evils of the black market drug trade) and serve to promote a form of "legal moralism" which has been frowned upon by the Supreme Court of Canada.

Furthermore, in his submissions Mr. Young agreed that Parliament has a right to intervene in the commercial trade and the black market trade in marijuana.

It may be instructive to note that, with one exception, none of the witnesses who testified recommend legalizing the cultivation, trafficking and possession for the purpose of trafficking. The one exception, Mme. Marie Bertrand who was a member of the LeDain Commission recommended the removal of cannabis from the Narcotic Control Act. She further recommended that the sale and use of cannabis be placed under controls similar to those governing the sale and use of alcohol, including legal prohibition of unauthorized distribution. Thus, even she was opposed to the unrestricted cultivation, trafficking and possession for the purpose of trafficking.

Canada is one of 85 countries which have ratified the United Nations convention against illicit trafficking in narcotic drugs and psycho-tropic substances (1988). Article 3(2) of the convention provides:

Subject to its constitutional principles and the basic concepts of its legal system, each party shall adopt such measures as may be necessary to establish as a criminal offence under its domestic law, when committed intentionally, the possession, purchase or cultivation of narcotic drugs or psycho-tropic substances for personal consumption contrary to the provisions of the 1961 convention, the 1961 convention as amended, or the 1971 convention.

However, Article 3 and 4(c) provides:

Notwithstanding the preceding paragraphs, in appropriate cases of a minor nature, the parties may provide, as alternatives to conviction or punishment, measures such as education, rehabilitation or social re-integration, as well as, when the offender is a drug abuser, treatment and after care. Principles of Fundamental Justice

As stated previously and to paraphrase s. 7 of the Charter of Rights and Freedoms, no one can be deprived of the right to life, liberty and security except in accordance with the principles of fundamental justice. In other words, (a) has there been a deprivation of one or more of these rights, and if so, (b) was the deprivation contrary to the principles of fundamental justice? The onus is on the applicant to establish these two things; *Cunningham v. Canada* (1993), 80 C.C.C. (3d) 492 at 496 (S.C.C.) (per McLachlin, J.). I am prepared to concede that the applicants, who are facing criminal charges with most serious consequences, have their liberty and security in grave peril. The question is whether the provisions of the Narcotics Control Act under which they are charged violate the principles of fundamental justice

In attempting to arrive at what is meant by the term "principles of fundamental justice", I have gleaned the following from a review of some of the cases referred to me.

The principles of fundamental justice are concerned not only with the interests of the person who claims his liberty has been limited, but with the protection of society. Fundamental justice requires that a fair balance be struck between these interests both substantively and procedurally: *Cunningham v. Canada* (1993), 80 C.C.C. (3d) 492 at 499 per McLachlin J.

A mere common law rule does not suffice to constitute a principle of fundamental justice, rather, as the term implies, principles upon which there is some consensus that they are vital or fundamental to our societal notion of justice are required: *Rodriguez v. B. C. (A.G.)* (1993), 85 C.C.C. (3d) 15 at 65 per Sopinka J.

Where the deprivation of the right in question does little or nothing to enhance the state's interest (whatever it may be), it seems to me that a breach of fundamental justice will be made out as the individual's rights will have been deprived for no valid purpose: *Ibid* at p. 68.

It follows that before one can determine that a statutory provision is contrary to fundamental justice, the relationship between the provision and the state interest must be considered. One cannot conclude that a particular limit is arbitrary because (in the words of my colleague McLachlin J.) it bears no relation to or is

inconsistent with the objective that lies behind the legislation without considering the state interest and the society concerns which it reflects: Ibid p.69.

Discerning the principles of fundamental justice with which deprivation of life, liberty or security of the person must accord, in order to withstand constitutional scrutiny, is not an easy task... principles upon which there is some consensus that they are vital or fundamental to our societal notion of justice is required. Ibid p. 65.

The principles of fundamental justice cannot be created for the occasion to reflect the court's dislike or distaste of a particular statute. While the principles of fundamental justice are concerned with more than process, reference must be made to principles which are "fundamental" in the sense that they have general acceptance among reasonable people. Ibid p. 78.

Unlike the situation with partial decriminalization of abortion, the decriminalization of attempted suicide cannot be said to represent a consensus by Parliament or by Canadians in general, that the autonomy interest of those wishing to kill themselves is paramount to the state interest in protecting the life of its citizens. Ibid p. 71.

Reviewing legislation for overbreadth as a principle of fundamental justice is simply an example of the balancing of the state interest against that of the individual: *R. v. Heywood* (1994), 94 C.C.C. (3d) 481 at 516, per Cory J.

Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals, or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience. *R. v. Big M. Drug Mart Ltd.* (1985), 1 S.C.R. 295 at 336-7 per Dickson, J. as he then was.

At this juncture it will be useful to indicate what Canadians think about the laws pertaining to the possession of marijuana. In 1977, a Gallop Poll reported that the majority of Canadians opposed the harsh criminalization of cannabis possession. In particular, 36 percent of Canadians wanted to see cannabis possession sanctioned by a fine at the maximum, whereas 23 percent thought it should not be a full criminal offence, and only 35 percent wanted the offence to be a full criminal offence. More recently, Health Canada released a public opinion poll in 1995 which found that 27 percent of Canadians believed that possession of marijuana should be legal, while 42.1 percent believe it should remain illegal but only be punished by a fine or a non-jail sentence. Therefore, in 1995, it is apparent that 70 percent of Canadians are opposed to the use of incarceration to combat marijuana use. On the other hand, a significant

majority of Canadians do not believe that possession of marijuana should be legal.

I will now attempt to address the several issues raised by the applicants.

Fundamental Justice - The Harm Principle

With apparent reliance on the decision of the Supreme Court in *Reference Re: s. 94 (2) of the Motor Vehicle Act (1985)*, 23 C.C.C. (3d) 289, it is the applicants' position that the illegal conduct causes actual harm before Parliament is entitled to legislate against that conduct. I could find no authority for that proposition and in any event I believe I have amply demonstrated that the consumption of marijuana does cause harm, albeit and perhaps not as much harm as was first believed. Reference may also be had to: *R. v. Hinchey (1996)*, 111 C.C.C. (3d) 353; *R. v. Audet (1996)*, 106 C.C.C. (3d) 481; *R. v. Butler (1992)*, 70 C.C.C. (3d) 129; and *Irwin Toy Ltd. v. Quebec (Attorney General) (1989)*, 58 D.L.R. (4th) 577.

Fundamental Justice - Arbitrariness

I believe it is the applicant's submission that it is a violation of the principles of fundamental justice to create an arbitrary and legislative classification in which marijuana is subject to the same legislative regime as the harder drugs is answered by the passage of the Controlled Drugs and Substances Act. In this Act marijuana is listed in a separate schedule from the so-called hard drugs and the penalties for simple possession of small amounts of marijuana have been significantly reduced. Given the actual and potential harm which results from the consumption of marijuana, there can hardly be any argument that its prohibition is arbitrary or irrational.

Fundamental Justice - Overbreadth

The applicants submit that the prohibition on the use and distribution of marijuana is overbroad in that (a) no meaningful exemptions are provided for legitimate medical use and (b) the legislation fails to make any meaningful distinction between personal and private acts of consumption or distribution and acts which form part and parcel of the illicit drug trade. I have already dealt with (a), finding that the applicants have no standing in that neither of them have need to consume marijuana for therapeutic purposes. With respect to (b) I believe the simple answer is that in certain circumstances the consumption of marijuana is harmful in a variety of respects. Furthermore, as many of the studies have indicated, further

research is necessary to determine the long-range effects of marijuana consumption.

Fundamental Justice - Personal Privacy and Autonomy

I quote from a recent decision of the Supreme Court of Canada as follows:

Freedom of the individual to do what he or she wishes must, in any organized society, be subjected to numerous constraints for the common good. The state undoubtedly has the right to impose many types of restraints on individual behaviour, and not all limitations will attract Charter scrutiny. On the other hand, liberty does not mean mere freedom from physical restraint. In a free and democratic society, the individual must be left room for personal autonomy to live his or her own life and to make decisions that are of fundamental personal importance. In *R. v. Morgentaler*, [1988] 1 S.C.R. 30, Wilson J. noted that the liberty interest was rooted in the fundamental concepts of human dignity, personal autonomy, privacy and choice in decisions going to the individual's fundamental being. She stated, at p. 166:

Thus, an aspect of the respect for human dignity on which the Charter is founded is the right to make fundamental personal decisions without interference from the state. This right is a critical component of the right to liberty. Liberty, as was noted in *Singh*, is a phrase capable of a broad range of meaning. In my view, this right properly construed, grants the individual a degree of autonomy in making decisions of fundamental personal importance.

While I was in dissent in that case, I agree with that statement.

B. (R.) v. Children's Aid, (1995) 1 S.C.R. 315 at 368-9 per Lamer, C.J. In my view, the critical words in the above quotations are "fundamental personal importance", "fundamental concepts of human dignity", "personal autonomy", "privacy and choice in decisions going to the individual's fundamental being". The therapeutic value of marijuana aside, it was generally agreed among the experts that, in the words of Dr. Morgan, marijuana is primarily used for occasional recreation. One might legitimately ask whether this form of recreation qualifies as of "fundamental personal importance" such as to attract Charter attention. In this regard, I quote from the *Alaska* decision at p. 502:

Few would believe they have been deprived of something of critical importance if deprived of marijuana.

Again, in the Bell decision at p. 133:

Private possession of marijuana....cannot be deemed fundamental.

Finally, in *Cunningham v. Canada*, supra, I quote from the judgment of McLachlin J. at p. 498 where she says:

The Charter does not protect against insignificant or 'trivial' limitations of rights.

On the basis of my findings, there can be no doubt that the Narcotic Control Act addresses a concern which is national in scope and in my view it falls within the competence of the Parliament of Canada as affecting the peace, order and good government of Canada.

Reference may also be had to *R. v. Cholette*, a decision of the Supreme Court of British Columbia (Dorgan, J.) released March 23, 1993 and *R. v. Hamon*, a decision of the Quebec Court of Appeal, (1993), 85 C.C.C. (3d) 490. In both of these cases the prohibition against the cultivation and possession of marijuana was held not to infringe s. 7 of the Canadian Charter of Rights and Freedoms. I adopt the reasoning in both of these cases. For whatever significance it may have, in *R. v. Hamon*, leave to appeal to the Supreme Court of Canada was refused on January 27, 1994. While I have not referred specifically to all of the submissions and the case law, I have considered everything that was put before me and referred to only what I felt was necessary to reach my decision and explain my reasons.

All of the so-called decriminalized initiatives in the Netherlands, etc. were legislative initiatives, not court imposed. The changes requested by the applicants regarding simple possession and small-scale cultivation would constitute a completely different approach to the question and would in my view amount to an unwarranted intrusion into the legislative domain. Any changes to the Narcotic Control Act should be made by Parliament. The following quote from *NORML v. Bell et al.*, supra, may be instructive:

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 C.S.A.

C.S.A. stands for Controlled Substances Act. In *R. v. Heywood*, *supra*, Cory J. says much the same thing at p. 524.

In further response to the submission that I should correct what is perceived by some to be an injustice, i.e. decriminalization of the possession of marijuana, because the Government has taken no action in this regard, I wish to quote from the judgment of McLung, J.A. in *Vriend v. Alberta* (1996), 132 D.L.R. (4th) 595 at 606:

When considering the assumption of legislative initiatives:

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

Rodriguez v. British Columbia (Attorney-General) (1993), 107 D.L.R. (4th) 342 at p. 392, 85 C.C.C. (3d) 15, [1993] 3 S.C.R. 519 (per Sopinka J.).) While he was addressing the limits of "fundamental justice" as employed in s. 7 of the Charter, Sopinka J.'s curial alert, which I have quoted, should not be artificially distinguished. It applies with equal, if not more, force when legisceptical Canadian judges decide to strike down constitutionally assembled laws in favour of their own, substituting their vision of the ideal statute in place of that which has been democratically endorsed by the electors;

and again at p. 607:

While any legislative product touching governmental activity is, of course, now subject to Charter scrutiny under its ss. 32 and 52 [Constitution Act, 1982], the practice of judicially upgrading that product should be strictly disciplined. This is

because of the spectre of constitutionally hyperactive judges in the future pronouncing all of our emerging rights laws and according to their own values; judicial appetites, too, grow with the eating. Equally undesirable is the prospect of Canada's legislators, painfully aware of later electoral rejection for backing the wrong political horses, further acquiescing in the growing (and painless) expedient of shipping awkward political questions to the judiciary for decision, thus reserving to themselves the privilege of possible later disclaimer.

I commend a reading of the entire judgment which, in a brilliant manner, delineates the relative roles of the legislature and the judiciary in relation to our Constitution.

Conclusions

As I stated previously, the two questions required to be answered are (a) do the accused or either of them stand at risk of being deprived of their right to life, liberty and security, and, (b) if so, is that deprivation contrary to the principles of fundamental justice? Accepting that answer to (a) is yes, then clearly, for the reasons I have stated, the answer to (b) must be no. In other words, with respect to marijuana, the prohibition against the possession, possession for the purpose of trafficking, trafficking and cultivation do not infringe s. 7 of the Constitution.

The overwhelming weight of the evidence which I heard supports legislative controls over any scheme which might ease or remove the criminal sanctions for simple possession of marijuana. As I have already stated, with one exception, nowhere in the western world has trafficking, possession for the purpose of trafficking and cultivation been decriminalized, nor has there been any recommendation (save for one) that this should take place. As I have already pointed out, easing of restrictions on the possession and use of marijuana is within the domain of the legislative branch of government. I do not believe there is any dispute that this court has power only to declare that the Narcotics Control Act as it pertains to marijuana is either constitutional or it is not.

With the passage of the Controlled Drugs and Substances Act, the consequences of being convicted for possession of a small amount of marijuana has greatly eased. Furthermore, s. 717 of the Criminal Code now provides for "alternative measures" other than judicial proceedings. Thus, Parliament is moving away from the harshness of the penalties for possession of marijuana and perhaps, some day, they may adopt some of the measures which exist, for example, in Australia and which I do not believe would meet with much objection from an informed public.

Having found that the Narcotics Control Act as it pertains to marijuana does not infringe s. 7 of the Constitution, I am prepared to hear further evidence and/or submissions pertaining to the substantive charges.

DELIVERED ORALLY: August 14, 1997

Justice J.F. McCart

Appendix C

R. v. Parker (1997):

Decision of Justice Sheppard

DECISION

ONTARIO COURT OF JUSTICE (PROVINCIAL DIVISION)

Toronto Region

B E T W E E N :

HER MAJESTY THE QUEEN
Respondent

- and -

TERRANCE PARKER
Applicant

SHEPPARD, PROV. DIV. J.:

Kevin Wilson, for the Crown

Aaron Harnett, for the Accused

By agreement between Crown and Defense, Terrance Parker was tried before this court in one proceeding on the following two counts arising July 18, 1996:

- 1.cultivate a narcotic, to wit: Cannabis Marihuana, contrary to Section 6(1) of the Narcotic Control Act.
- 2.unlawfully did have in his possession for the purpose of trafficking, a narcotic, to wit: Cannabis Sativa, its preparations, derivatives, and similar synthetic preparations, namely Cannabis (Marihuana), contrary to Section 4(2) of the Narcotic Control Act, thereby Committing an Offense under Section 4(3) of the said Act.

and one count on September 18, 1997:

- 1.unlawfully possess a controlled substance to wit: Cannabis Sativa, its preparations, derivatives and similar synthetic preparations,

namely Cannabis Marihuana contrary to Section 4(1) of the Controlled Drugs and Substances Act.

The Trial

Crown evidence at the trial on counts 1 and 2 was by way of an agreed statement of facts (Appendix 1 A to these reasons for judgment) and a statement" by way of questions and answers in the arresting officer's notebook given immediately following the accused's arrest. This statement, typed from the officer's notebook, (Appendix 1B to these reasons for judgment) was agreed to be free and voluntary and were admitted without a voir dire. In addition, the Crown called the police officer who received, bagged and weighed the marihuana and an officer expert in aspects of the street trade (trafficking) in illicit drugs in Toronto.

The Crown's evidence read in at the trial on the simple possession count was the police synopsis which stated that, on September 18, 1997, the accused at his apartment was found to be in possession of three growing marihuana plants which he acknowledges were marihuana. The defense called no evidence at trial. The bulk of the nine-day proceeding was consumed by the defense's application for Charter relief.

The Court ruled earlier (see reasons of October 30, 1997) that any ruling in respect of the Charter application ought to come at the conclusion of the trial so as not to fragment the trial process with appeals being launched at the conclusion of each motion or application. *R. v. Martin* 63 C.C.C. (3d) 71 @ 85 (Ont. CA.), *R. v. DeSousa* 76 C. C. C. (3d) 124 @ 132 (S.C.C.).

As this application had no effect on count 2, the possession for the purpose of trafficking count, it can be addressed separately first. The receiving police officer's evidence as to weights and the bagging of the fresh marihuana plants he received was unclear. The Court was left in a state of some confusion and therefore doubt, as to what quantity of smokable marihuana (as opposed to dirt, water, stems, and roots) that he had actually received. Therefore, I find no inference can be drawn based on the weight of marihuana seized.

The drug squad officer fairly testified that with this number of plants and no other paraphernalia of trafficking (papers, scales, bags, etc.) that he could not have formed the opinion that the accused's possession was for the purpose of trafficking. This officer has four times been found to be an

expert on this issue by Ontario Provincial Courts. Given this evidence, the Crown argues that Mr. Parker must be convicted by his own statement.

The defense argues that although the statement was a free and voluntary one, on the elements necessary to prove possession for the purpose of trafficking beyond a reasonable doubt, it is too vague. If it is found to be too vague, it ought to leave a reasonable doubt in the Court's mind resulting in the accused's acquittal.

The Court cannot agree. Mr. Parker is an experienced individual with respect to offenses under the Narcotic Control Act. He is a long-time user of marihuana and an advocate for the legalized medical use of marihuana. When the totality of the questions and answers with Officer McArthur are reviewed, it is absolutely certain what was asked and what was answered. There is a responsiveness and consistency to the answers. Nothing is left vague:

Q: What do you do with this stuff, Terry? A: I use most of it and I GIVE (court's emphasis) some to some people who need it for seizures.

Beyond not identifying the people who receive his marihuana, this is a perfectly clear statement. It is confirmed by the next answer "Yeah, I help other people out".

Section 2, the interpretation section of the Narcotic Control Act, defines traffic as:

- (a) to manufacture, sell, give, administer, transport, send, deliver or distribute, or
- (b) to offer to do anything referred to in paragraph (a)

This definition includes the exact word "give" as used by the accused in his statement. Since "for gain" need not be an element of the offense, this court finds that the accused's possession of the marihuana found on July 18, 1996 was, at least in part, with the intent and for the purpose of physically making the marihuana available to others as selected by him. Further, Mr. Parker's statement indicates this intent had on occasion been carried out. Therefore, there will be a finding of guilt on count 2.

On the remaining counts to which the Charter application refers, it is conceded that the facts to support a finding of guilt both under Section 6, Cultivation, of former Narcotic Control Act (the N.C.A.) and Section 4, Possession, of the Controlled Drugs and Substances Act (the C.D.S.A.)

are established in the Crown's evidence. Should the Charter application fail, the accused would be guilty of both offenses.

Charter Application

In short, the Applicant/Accused seeks a declaration of invalidity of each of the above Sections as they relate to an individual who can establish a personal medical necessity for his use of marihuana. This relief is sought pursuant to both Section 52 of the Constitution Act, 1982, and 24(l) of the Canadian Charter of Rights and Freedoms (the "Charter").

Alternatively, the accused would seek to be exempted from the impugned sections while Parliament considers the possession and production of personal use medicinal marihuana prior to the effective date of any declaration of invalidity. In both alternatives, the accused argues these sections are over-broad and unconstitutional as they violate Section 7 of the Charter.

In support of the application, the accused filed materials and called evidence as follows:

1. his extensive affidavit with numerous exhibits attached on which he was cross-examined;
2. his mother, Helen Cork's affidavit giving the history and treatment of Mr. Parker's epileptic seizures. The affidavit describes in layman's language the positive effect smoking marihuana has on Mr. Parker when he shows signs of imminent seizure;
3. the affidavit of Dr. Lester Grinspoon one of the foremost authorities on marihuana including two published works *Marihuana: The Forbidden Medicine* and *Marihuana: Reconsidered*;
4. the affidavit of Robert Carl Randall an American glaucoma sufferer who has become a leading expert on marihuana's medical use. He is an advocate for such medical use;
5. the affidavit of Dr. John P. Morgan, Professor of Pharmacology at the City University of New York Medical School, an expert/advocate on medical uses of marihuana. Dr. Morgan also testified and advised that research and studies indicate that Tetrahydrocannabinol and Cannabidiol appear to be the effective elements within marihuana which have medical therapeutic effect for a significant list of illnesses. This list includes victims of epilepsy;
6. Dr. Lynn Zimmer, Associate Professor at the University of New York, co-author with Dr. Morgan of *Marijuana Myths, Marijuana Facts* testified on marihuana policies in foreign jurisdictions. The

trend described was to an increasing recognition of the medically therapeutic value of smoked marihuana. She described how formally and informally its use was being recognized or tolerated in several foreign jurisdictions;

7. Valerie Corral, an epileptic and a medical user and cultivator of marihuana in California, testified on her medical needs and on a non-profit growing and distribution organization for medical users,
8. Diane Riley, an academic and former member of the Canadian Centre on Substance Abuse - National Policy Group, now defunded, orally reviewed studies and policy in a number of foreign jurisdictions. She reviewed a rare long-term study from New South Wales which concluded "no significant finding" could be attributed to marihuana smoking. Although this study was done in the 1980's, it has not to date been challenged. Finally, the witness reviewed the course of passage of the new Controlled Drug and Substance Act by Parliament, expressing her disappointment at the legislators' rejection of submissions for a medical exemption for marihuana possession; and:
9. Dr. John Goodhue, M.D., a General Practitioner doing primary care in Toronto for over 200 HIV reactive (positive) patients, 70 of whom have developed AIDS. He described negative side effects of Marinol (synthetic Tetrahydrocannabinol) in some patients. His perception is that smoked marihuana is not a "particularly risky drug". He does warn users not to drive after use. The smokable marihuana does not have the side effect of Marinol. AZT, prescribed in AIDS treatments, and other drugs in "drug cocktails" for these patients often produce the side effects of nausea and vomiting. He prescribes Marinol for control of this side effect but is aware many of his patients prefer and use smokable marihuana.

In this application and trial, the Court was advised that the Applicant/Accused had faced trial for simple possession in Brampton in 1987. The agreed history of this criminal litigation is found in the filed materials of the Applicant/Accused as follows:

On December 15, 1987 His Honour Judge Langdon, as he then was, ruled in favour of the applicant. His brief reasons are as follows:

I have reviewed the evidence and the defence of necessity as the Supreme Court of Canada defined it in the case of Perka. Having reviewed all of the evidence, it is my view that the evidence fairly raises the "defence". I am not satisfied beyond a reasonable doubt that the prosecution has negated each and every element. For that reason I will enter a verdict of not guilty.

The Department of Justice appealed the decision to the District Court on the basis that His Honour Judge Langdon had erred in his application of the decision of *Perka et. al v. The Queen*. On November 8, 1988 His Honour Mr. Justice B. Shapiro heard the appeal. On November 17, 1988 His Honour released his reasons for dismissing the appeal. The endorsement of His Lordship is as follows:

I have reviewed the evidence in this matter and considered that law as set out in *Perka v. The Queen* (194) 14 C.C.C. (3d) 385.

In light of the long history (27 years) of grand mal epilepsy of the respondent, age 31, and the continuing attempts at treatment including two surgical procedures, there was evidence upon which the learned trial judge could have found as he did that the accused respondent was entitled to the benefit of reasonable doubt in his defence of necessity. Particularly is this so in light of the comments of Dickson J. (As he then was) at pages 398 and 399 of *Perka* with reference to "moral and normative involuntariness". The appeal will therefore be dismissed.

B. Barry Shapiro
Judge

I should add that it may be appropriate for the respondent to pursue further the matters referred to in the letters filed as Ex. #1 at trial.

B.B...,.

This final sentence of the appeal reasons was reference to Mr. Parker's medical opinion that his marihuana use was "medically necessary". The final paragraph of Dr. D.M. Sider's medical report dated November 6, 1987 reads:

Terry has had many side-effects over the years due to his anticonvulsant medications, which have prevented their perhaps more efficacious use in higher dosages. These side-effects are well recognized in the medical literature. Hence, from a medical and quality-of-life point-of-view, I am of the opinion that it is medically necessary, in order to obtain optimal seizure control, that Terry regularly uses marihuana in conjunction with his other anticonvulsant medications.

No further appeal of this decision was filed by the Respondent/Crown. As no evidence was called by the Applicant/Accused at this trial, the defence of necessity often described as the *Perka* defence, was not raised before this court.

The Respondent/Crown filed the judgment of The Honourable Justice McCart in R. v. Clay dated August 14, 1997 now at 35 W. C.B. (2nd) 440. In addition to this judgment, both parties have agreed to file three volumes of expert evidence heard during the Clay trial. They have asked to incorporate these transcripts as if they were evidence heard at this trial. This Court has agreed to this procedure to save needless expense to the parties and also to save trial court time. There are no findings of credibility to be made in relation to any of this evidence. There is a strong agreement among these experts with only some alterations of emphasis or in their caveats.

This Court is aware that notice of application for leave to appeal and notice of appeal of conviction was filed September 5, 1997 by Christopher Clay and the appeal is pending at this date of judgment.

The Respondent/Crown called:

1. Professor Harold Kalant, a pharmacist expert who had given evidence at the R. v. Clay trial. He took very limited issue with that Court's findings in assuming continued current levels of use of marihuana by each consumer except to advise that synthetic Tetrahydrocannabinol (hereinafter THC) sold under the name Marinol was available in Canada contrary to the previous Court's review of the evidence at the Clay trial. He further confirmed that synthetic Cannabidiol (hereinafter CBD) did not exist, although it may well be useful for treatment of epileptic patients and that the cannabinoids in marihuana increase the effectiveness of other regularly prescribed medications. He "would be much happier if CBD was available". CBD is only available in smokable marihuana; and:
2. Leslie Bruce Rowsell, Federal Director of the Bureau of Drug Surveillance, who advised there was no authorized producer of smokable marihuana in Canada. There are two licensed synthetic THC drugs. He reviewed the \$100,000 - \$200,000 process for testing and licensing a drug in Canada. No application for marihuana has been made; therefore, no tests have been done. He acknowledged that there is no realistic way today for this Applicant/Accused to obtain "legal" marihuana in Canada.

This Court has reviewed the key aspects of the witnesses' evidence both heard, or filed during evidence in R. v. Clay, from Dr. Lester Grinspoon, Robert Carl Randall, Dr. John P. Morgan, Dr. Harold Kalant and Leslie Bruce Rowsell. The latter three were heard for the second time in the past six months in air Ontario trial Court in this trial. This Court has their evidence for review in transcripts, provided on consent to me, from the Clay trial. Having heard and read fresh evidence in this trial directed

particularly to this and other accused who receive effective medical benefit from the use of marihuana, this court can conclude it has been established to the necessary level on this application that the timely smoking of marihuana has a therapeutic effect in the treatment of,

- a) nausea and vomiting particularly related to Chemotherapy
- b) intra-ocular pressure from glaucoma
- c) muscle spasticity from spinal cord injuries or multiple sclerosis
- d) migraine headaches
- e) epileptic seizures
- f) chronic pain

The Parker affidavit sworn October 7, 1997 notes that, in the control of epileptic seizures, Mr. Parker has found:

Paragraph 18:

Between December 19, 1980 and March 1981, I recorded in my journal that I consumed marihuana in addition to my prescription medicine every day. I suffered no grand mal attacks at all, but did suffer some petit mal seizures. As a result of this phenomenon, he (Mr. Parker's physician) formed the opinion that marihuana was of medical benefit to me.

(Attached as exhibit "D" to this affidavit is a copy of a letter from my then physician Dr. Douglas Sider to this effect dated November 6, 1987.
(Reproduced in part earlier in this judgment.))

Paragraph 19:

I continue to derive very substantial medical benefit from marihuana since 1969 to this day. My current prescription of pharmaceutical drugs is Dilant'm, 300 mg per day and Mysoline, 750 mg per day since 1969. If I consume marihuana on a daily basis in addition to this, I experience virtually no seizures of any kind. However, if I am without marihuana, within 3 days I will begin to experience seizures again, and have approximately 3-5 grand mal seizures per week, and anywhere from 15-80 petit mal, partial complex, fall and Jacksonian seizures per week.

Paragraph 20:

In fact, the use of marihuana can help me overcome a seizure as it descends upon me. When I feel the prodrome, I can consume marihuana and actually combat the oncoming seizure. The effects of the marihuana helps me confront the @ety, and I feel as if I can literally fight off the coming seizure. After 38 years of this terrible

affliction, and hundreds, if not more than a thousand seizures, I can say that it is only with the assistance of marihuana that I have ever been able to fight through the prodrome and stave off an oncoming grand mal.

The Court has again looked at the same statistical evidence reviewed by Mr. Justice McCart and would conclude as he did at p. 11-12 of his oral reasons:

1. Consumption of marihuana 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 marihuana;
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. Marihuana is not criminogenic in that there is no evidence of a causal relationship between cannabis use and criminality;
7. That the consumption of marihuana probably does not lead to "hard drug" use for the vast majority of marihuana consumers, although there appears to be a statistical relationship between the use of marihuana and a variety of other psychoactive drugs;
8. Marihuana does not make people more aggressive or violent;
9. There have been no recorded deaths from the consumption of marihuana;
10. There is no evidence that marihuana causes anti-motivational syndrome;
11. Less than 1% of marihuana consumers are daily users;
12. Consumption in so-called "decriminalized states" does not increase out of proportion to states where there is no decriminalization;
13. Health-related costs of cannabis use are negligible when compared to the costs attributable to tobacco and alcohol consumption.

The only established negative effect, as with tobacco smoking, is bronchial pulmonary damage. The greater the usage, the greater this risk becomes. The general agreement of experts appears to be that regular moderate use of marihuana causes no physical or psychological harm for the vast majority of users.

Further, from the evidence of Dr. Morgan and others, it is established that in patients suffering from nausea, an oral medication may cause vomiting. The smoke of marihuana is more efficient and at least five times faster in delivering THC (and of course CBD) to the blood stream and in some cases like Mr. Parker's, more effective.

This Court has noted Mr. Justice McCart's aside at page 16 of his reasons:

As an aside, Parliament may wish to take a serious look at easing the restrictions that apply to the use of marihuana for the medical uses as outlined above as well as for alleviating some of the symptoms associated with multiple sclerosis, such as pain and muscle spasm. There appears to be no merit to the widespread claim that marihuana has no therapeutic value whatsoever. In any event, as I understand it, Marinol is not available in Canada.

The learned trial judge erred regarding the availability of Marinol (synthetic THC). Marinol has been available in Canada for several years. However, it is correct that no form of synthetic CBD is available which may, in fact, be the most medicinally effective element in smokeable marihuana. This element does not exist in Marinol.

It is clear on the evidence specific to the facts of this case that Mr. Parker's cultivation of marihuana was incidental to his need to possess marihuana for its therapeutic medical use for the treatment of his epilepsy. It allowed him to control the quality of the drug smoked to maximize its benefit and minimize any risks from a tainted or adulterated product.

Further, it was an economic necessity for him to grow his own marihuana. All witnesses agree that at illicit street prices, the marihuana used by Mr. Parker would cost approximately \$5,000.00 annually. Mr. Parker lives on disability benefits from C.P.P. Therefore, little income would remain for the other necessities of life, food, shelter, transportation and clothes, if he had to pay street prices for his marihuana.

It seems clear to this court that given the unique set of circumstances present in this Applicant/Accused, this application can be seen as a "best case scenario" for the liberalization/review of legislation governing possession and cultivation of marihuana in Canada. In *R. v. Clay*, no such medical need could be claimed by the applicant. The similar application in that proceeding was based... preference for marihuana smoking as a recreational activity.

By not raising the Perka defence at trial, the Applicant/Accused has chosen to rely entirely on his Charter application. He does so because of the limited protection afforded by the Perka defence.

The Respondent/Crown was aware of this situation. The counsel for the Applicant/Accused as much as acknowledged this in his submissions. In other words, if a Charter attack in support of the possession and personal

use of marihuana could successfully be mounted, then for the Applicant/Accused, this was the case to do so.

Does the Applicant/Accused Stand a Risk of Being Deprived of His Right to Life, Liberty and Security as Protected by Section 7 of the Charter?

Section 7 of the Charter reads:

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

The onus to establish this rests with the Applicant/Accused. As in Clay, however, this onus can quickly be satisfied given that for both these offences a custody sentence may be imposed. This is a peril faced by any able-bodied individual so charged. However, the peril becomes dramatically intensified for an individual suffering under the disabilities of Mr. Parker.

Although prescribed medication should be available to an incarcerated person, the beneficial therapeutic effects of smoking marihuana would not be available. In a jail setting, if a seizure followed, then Mr. Parker could be at real risk of injury or death. A jail cell containing hard objects, wall and floor would be a most dangerous environment in which to suffer a seizure. The anxiety from worrying about such an event could be a cruel and unusual punishment in itself. It appears from his evidence that such an event would just be a matter of time. Therefore, for this Applicant/Accused, jail is far more than a temporary loss of liberty. It puts his very life at risk and threatens the security of his person.

Although the Crown mounted a general rebuttal to the position adopted by this Court, it could not bring Mr. Parker into the general situation. For example, the Crown argued since medical treatment is not denied inmates, then Mr. Parker could receive his prescription drugs plus Marinol while in custody. Further, in custody, he could have his blood level monitored for THC so as to control his seizures. This ignores the evidence that synthetic THC is not effective for this individual and in any event he would not be receiving CBD which is believed to be of further assistance to him.

Finally, the trial process itself cannot provide protection for this Applicant/Accused's liberty. He is an admitted daily possessor, cultivator and user of marihuana. He is and has been guilty of an offence arising from his admissions every day of his life for at least two decades. He is a

chronic offender. Barring a medical discovery, his need for marihuana will not abate.

A common law defence of necessity has previously succeeded (1987) but it would have to be made afresh at each trial. In addition to financial cost, stress, trial uncertainties and arrest, failure to have his defence accepted creates a serious daily risk. Security of the person is lost; therefore, the trial process is no protection for Mr. Parker.

Mr. Parker suffers the loss of his plants or dry product each and every time he is arrested. Having accepted the Applicant/Accused's daily need for marihuana and his inability to pay illicit street prices for it, as in itself, severely affects the security of his person by reducing the availability of marihuana to him.

The evidence established that the Applicant/Accused with his medical disability is traumatized by police raids at his premises, the questioning, the arrest and the ultimate loss of his marihuana.

"Security of the person" within the meaning of, s.7 of the Charter must include a right of access to medical treatment for a condition representing a danger to life or health without fear of criminal sanction. If an Act of Parliament forces a pregnant woman whose life or health is in danger to choose between, on the one, hand, the commission of a crime to obtain effective and timely medical treatment and, on the other had, inadequate treatment or no treatment at all, her right to security of the person has been violated. *Morgentaller, Smolling and Scott v. the Queen* 37 C.C.C. (3d) at p. 465, 485.

Therefore, in conclusion, Mr. Parker stands a daily risk of being deprived of his right to life, liberty and security. The Court now moves to consider whether legislation which puts a person in such a position can be in accord with the principles of fundamental justice.

Is this Deprivation Contrary to the Principles of Fundamental Justice?

If liberty is the right a person has under the Charter, then a person must possess an autonomy to make decisions of personal importance. Good health is of personal importance. The achievement and maintenance of the best individual level of health possible is of personal importance. Further, it is of personal importance to be as free of illness and medical disability or their effects as is possible for each individual. Health is fundamental to life and the security of each person.

Serious decisions regarding the management of illness and medical disability are, for most Canadians, made following consultation with a doctor. Canada has an elaborate and costly health care system to ensure this opportunity is available to all Canadians. This has been the lengthy course followed by Mr. Parker. The negative side effects or "harms" in the use of any medication is a significant part of that medical decision-making process between a doctor and patient. Mr. Parker has made his decision in the management of his epilepsy. It has apparently met with some success. It has been known and supported by some of his doctors over the years.

This is an entirely different factual situation than has been before other courts in the past. This was not the situation before Mr. Justice McCart in *R. v. Clay*; nor would it be for the huge majority of persons charged with this offence. These situations are ones of occasional recreational use. The parallel with the recreational consumption of beverage alcohol is obvious. Courts have consistently rejected arguments that the personal possession of marihuana was of "fundamental personal importance". *R v. Clay* at p. 23.

This same reasoning cannot apply to the Parker facts. The control of his epileptic seizures is of critical personal importance to him and in the interest of the greater community of which he is a part, the same community who pay his health care costs. I find he has established that this control is best achieved through a combination of prescribed medications and the smoking of marihuana. For this Applicant/Accused to be deprived of his smokable marihuana is to be deprived of something of fundamental personal importance.

It is accepted that beverage alcohol and tobacco, although both potentially individually addictive and carrying with their use a huge taxpayers' cost, are tolerated in our society (although regulated) as part of the cultural tradition of the majority of our community. This cannot be said of marihuana and therefore it is argued it ought to be prohibited. This argument is to ignore that for many prohibited drugs, use is permitted for a controlled therapeutic medical purpose - morphine and heroin being such examples of long-standing. Therefore, when considering cultural tradition as a curb on the state's legislative action, the setting for the tradition must also be considered. On the facts before this Court, the "setting" is therapeutic and not recreational. Therefore, consideration of the difference in cultural traditions in a recreational setting between beverage alcohol or tobacco and marihuana is not relevant.

The Respondent/Crown argued that Mr. Parker's choice of an illegal form of therapy for the control of his epilepsy is an unnecessary choice. Although the Respondent/Crown did not challenge the Applicant/Accused's affidavit, they allege Mr. Parker had:

- a) failed to seek sufficient medical attention,
- b) failed to request a prescription for Marinol, and
- c) failed to have his blood levels of THC monitored by regular blood tests.

The Court on the evidence cannot accept any of these three alleged failures as having been supported in the evidence. In fact, Mr. Parker has received regular medical supervision for his prescribed drugs since 1969. He has not sought a Marinol prescription because synthetic THC was not effective for him in a clinical trial. It does not reach his blood stream quickly enough to prevent a seizure when he is first aware of an impending attack. THC and CBD from smoked marihuana reach the blood stream many times more quickly through lung absorption. Finally, Marinol does not contain CBD which appears to have additional therapeutic value for him. Parker does have regular blood work done during numerous emergency hospital admissions and regular medical visits. The Court has found no basis on which to fault Mr. Parker for his management of his serious medical condition. This is not an answer to this application.

It is overbroad not to provide by legislation a procedural process for an individual in these circumstances to be exempt from prosecution when personal possession and cultivation is for legitimate medical use. It does not accord with fundamental justice to criminalize a person suffering a serious chronic medical disability for possessing a vitally helpful substance not legally available to him in Canada.

It is accepted that in large measure both the N.C.A. and C.D.S.A. are statutes designed to protect the health and well-being of Canadians. However, the effect as it relates to this Applicant/Accused is to do, if not the exact opposite, certainly significantly less by leaving him vulnerable to arrest and imprisonment, to the loss of the therapeutic assistance of marihuana, and to greater risk of physical injury in the community by more frequent seizures. Thus, a balance between the state's interest to protect the health of Canadians and the effect it has on this individual is not met. Therefore, the Court concludes that deprivation to the Applicant/Accused arising from a blanket prohibition denying him possession of marihuana, in the circumstances of this case, does little or nothing to enhance the state's interest in better health for this individual member of the community.

It is a principle of fundamental justice that the legislation not be overbroad.

Morgentaller p. 51 1.

As Mr. Justice Cory wrote for the majority in *R. v. Hood*:

In considering whether a legislative provision is overbroad, a court must ask the question: are those means necessary to achieve the state objective? If the state, in pursuing a legitimate objective, uses means which are broader than is necessary to accomplish that objective, the principles of fundamental justice will be violated because an individual's rights will have been limited for no reason. The effect of overbreadth is that in some applications the law is arbitrary or disproportionate.

R. v. Hood, 94 C.C.C. (3d) 481 at 514.

If the original purpose in 1923 for the inclusion of marihuana in N.C.A. and now the C.D.S.A. was to protect the good health of Canadians from something that would jeopardize that health, then current knowledge of its effects, as summarized earlier, ought now to cause a review of this purpose.

The Respondent/Crown argues that one rationale for the continuation of the current legislative prohibition is to assure that Canada will continue to legislate in accordance with its treaty obligations under the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Article 3(2) (hereinafter called the Convention). The schedules to this treaty included cannabis (marihuana).

However, these schedules include also numerous narcotic drugs which are possessed and used by Canadians with medical approval. The Convention therefore, is not a prohibition against all possession or distribution. As article 3(2) states, the Convention must be read subject to Canada's constitutional principles and it is up to Canada to "adopt such measures, **AS MAY BE NECESSARY**" (Court emphasis) to criminalize the possession of marihuana. The Respondent/Crown, on these facts and based on any of the tests of the principles of fundamental justice, has not demonstrated the necessity of a legislative enactment so broad as to prevent therapeutic use this non-manufactured grown plant product.

Article 14(2) of the Convention reads:

Each Party shall take appropriate measures to prevent illicit cultivation of and to eradicate plants containing narcotic or Psychotropic substances, such as opium

poppy, coca bush and cannabis plants, cultivated illicitly in its territory. The measures adopted shall respect fundamental human rights and shall take due account of traditional licit uses, where there is historic evidence of such use, as well as the protection of the environment.

Life, liberty and security of the person are just such fundamental human rights which Canada is obligated to respect under this article. Therefore, a finding that the Applicant/Accused's rights under Section 7 of the Charter have been violated fully rebuts the proposition that impugned legislation enhances Canada's interest by appearing to adhere to the Convention.

The Respondent/Crown submits that, having found a breach of the principles of fundamental justice and thereby a breach of Section 7 of the Charter, a like analysis would apply to Section I of the Charter.

Section I reads:

The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The Respondent/Crown conceded that finding Section 3(l) and 6(l) of the N.C.A. and Section 4(l) and 7(i) of the C.D.S.A. inconsistent with Section 7 of the Charter, would result in the Court answering the question under Section I in the negative. The Court accepts the logic of the submission and therefore answers the question imposed by the section in the negative.

This Charter application must, for the above reasons, succeed. The violation of the fundamental principles of justice which underlies this community's sense of fair play and decency require this result.

This judgment ought not to be read as a decriminalization initiative by one Court in the face of the legislative competence of the Parliament of Canada. A review of *Rodriguez v. British Columbia Attorney General* [1993] 3 S.C.R., 519 assists in delineating this Court's role in relation to that of the Parliament of Canada.

The Remedy: To Strike Down or Read In?

The Applicant/Accused has sought in his application alternative remedies in respect of section 3(t) and 6(l) of the former N.C.A. sections 4(l) and 7(l) of the new C.D.S.A. Mr. Parker is assisted by either alternative.

Without question, the provincial court in a criminal proceeding has the power to declare legislation invalid ("of no force or effect") by reason of a Charter violation. A dismissal in such circumstance can follow without reference to Section 24(1) of the Charter. *R. v. Big M Drug Mart* [1985] 1. S. CR. 295. Equally, the Court, rather than a declaration of invalidity, can create an exception *R. v. Seaboyer and The Queen* (1987), 37 CCC (3d) 53.

It has not proved difficult on the facts of the case at bar for the Applicant/Accused to prove on a balance of probabilities the Section 7 Charter violation and his entitlement to an exemption. There is no direct evidence of how many individuals in Canada could be in a similar position. How often the impugned sections of the N.C.A. or C.D.S.A. would produce a result inconsistent with the Charter is unknown. However, it is clear from the expert evidence accepted by the Court that Mr. Parker is not alone in having his Section 7 rights violated in this manner.

In *Schacter v. Canada* [1992] 2. S. CR., 679 the Supreme Court of Canada discussed reading in or down versus striking down, and Section 52 versus 24(1). In *Schacter*, the Court said that an individual remedy under section 24(1) of the Charter would rarely be available in conjunction with action under section 52 of the Constitution Act. This is one of those rare situations. The nature of the Charter violation in this application requires remedies under both sections. Otherwise, it is doubtful Mr. Parker could have the return of his property as part of an order of this Court.

The N.C.A. did not and the C.D.S.A. does not include an exemption for a person who requires smokable marihuana for therapeutic medically sanctioned use. It does not provide the opportunity for lawful marihuana use in Canada. Reading in such an exemption is necessary to protect the Charter rights of Mr. Parker. To do so reduces the breadth of those sections of the statutes.

This Court concludes therefore, the appropriate remedy on this application is one of reading in an exemption. This remedy could be seen as a reading down or a reading in. It pulls back the breadth of legislation and so it reads the legislation down. It adds an exemption to legislation and so reads that exemption into the legislation.

Mr. Parker will be granted immediate protection under Section 24(1) of the Charter of a stay of proceeding with respect to count I (cultivate a narcotic, Section 6(1) N.C.A.) and the September 18, 1997 count (possession of a controlled substance, Section 4(1) of the C.D.S.A). All

plant material (three plants) seized from him by the Metropolitan Toronto Police Services on September 18, 1997 is to be returned to him forthwith.

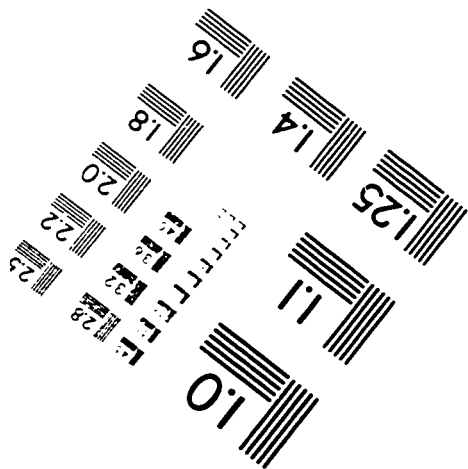
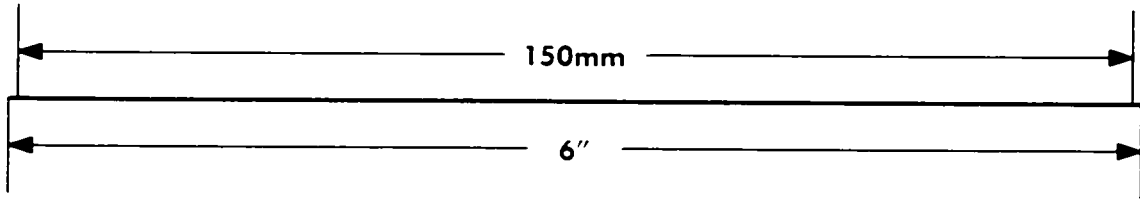
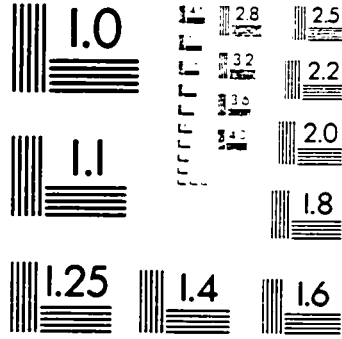
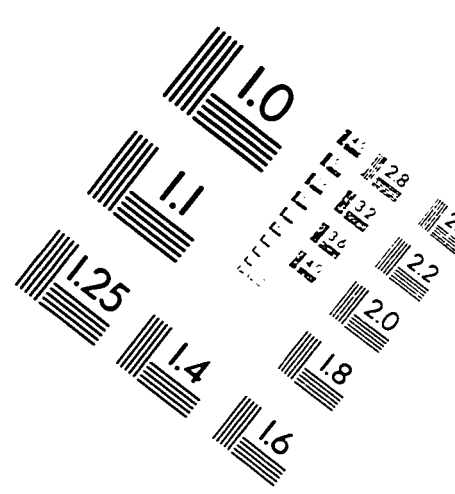
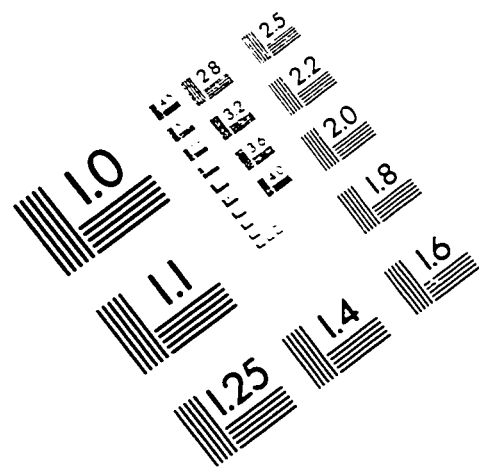
Notwithstanding that the N.C.A. was repealed by Parliament effective May 14, 1997, many alleged offences under Section 3(l) and Section 6(l) remain in the criminal justice system to be adjudicated. It is ordered pursuant to Section 52, that Section 3(1) and Section 6(l) of the N.C.A.

It is ordered pursuant to Section 52, that Section 4(1) and Section 7(l) of the C.D.S.A. be read down so as to exempt from its ambit persons possessing or cultivating Cannabis (a schedule II substance) for their personal medically approved use.

Delivered in writing and filed.
December 10, 1997.

Judge P.A. Sheppard

RESOLUTION EVALUATION TEST TARGET (QA-3)



APPLIED IMAGE, Inc.
1653 East Main Street
Rochester, NY 14609 USA
Phone: 716-482-0300
Fax: 716-288-5989

© 1993, Applied Image, Inc. All Rights Reserved

