
CRIMINAL FOCUS

Volume I, Issue 2, pp. 9-16

October 2000



Smoke and Mirrors: The Court, the Constitution and the Marijuana Menace

R. v. Malm-Levine; R. v. Caine (2000), 145 C.C.C. (3d) 225, 2000 BCCA 335

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Simple possession of marijuana has been a criminal offence in Canada since 1923. The drug was initially prohibited under the *Opium and Narcotic Drug Act*, later under s. 3 of the *Narcotic Control Act*, and now by virtue of s. 4 of the *Controlled Drugs and Substances Act*, read together with the schedules to the *Act*.

In this judgment, the Court considers arguments by two appellants that penal sanctions against possession of the drug offend the *Charter of Rights and Freedoms*. The trial level judgments were *R. v. Malm-Levine*, [1998] B.C.J. No. 1025 (QL) (S.C.) and *R. v. Caine*, [1998] B.C.J. No. 885 (QL) (Prov. Ct.) ("*Caine*"). A majority of the Court (Braidwood and Rowles J.J.A.) rejects the appellants' arguments and dismisses both conviction appeals. Prowse J.A. in dissent finds that the law offends s. 7 and would go on to consider whether it might be saved by *Charter* s. 1.

The split results from differing views of the applicable threshold test. The majority states that societal harm caused by a "criminal" act need only be other than insignificant or trivial. Prowse J.A. writes that it should be serious or substantial.

The trial judge in *Caine* heard a considerable amount of evidence on the use of marijuana and its effects. Her findings of fact are reproduced by Braidwood J.A. in his reasons at pp. 237-238, followed by a summary of the

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“The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral is not a sufficient warrant.”

~ Mill ~

"All laws which can be violated without doing anyone any injury are laughed at. Nay, so far are they from doing anything to control the desires and passion of man that, on the contrary, they direct and incite men's thoughts toward those very objects; for we always strive toward what is forbidden and desire the things we are not allowed to have. And men of leisure are never deficient in the ingenuity needed to enable them to outwit laws framed to regulate things which cannot be entirely forbidden... He who tries to determine everything by law will foment crime rather than lessen it."

~ Spinoza ~

conclusions of the Le Dain Commission of Inquiry into the Non-Medical Use of Drugs (1972-3) and a 1994 Australian government report known as “the Hall Report”. In brief, the evidence discloses very little risk of harm to users, and a risk of harm to others limited to situations where a marijuana user is in control of a vehicle or other potentially dangerous equipment (a situation already covered, of course, by s. 253 of the *Criminal Code*).

The other side of the coin—the harm caused by the prohibition of marijuana—was also evaluated at trial. Included in this harm are the effects of branding hundreds of thousands of citizens with criminal records (as well as actually imprisoning many of them), growing disrespect for the law and mistrust of medical and educational authorities, lack of governmental control over the quality of the drug consumed, the creation and maintenance of a huge criminal industry and sub-culture, difficulties in engaging in research into the drug, and the enormous costs of law enforcement.

Analytical Framework for a Section 7 Claim

Beginning at p. 244, Braidwood J.A. lays out a useful framework for s. 7 analysis, as it stands at present. Prowse J.A., in her own reasons, generally concurs with this statement of the law. The analysis is to proceed through three stages (*R. v. White* (1999), 135 C.C.C. (3d) 257 (S.C.C.)), each containing its own sub-steps.

Stage 1(a) of the analysis is to determine whether the applicant has suffered a real or imminent deprivation of life, liberty or security of the person (*R. v. S. (R.J.)* (1995), 96 C.C.C. (3d) 1 (S.C.C.)). Not surprisingly, imprisonment qualifies as a deprivation of liberty (*Reference re: Section 94(2) of the Motor Vehicle Act* (1985), 23 C.C.C. (3d) 289 (S.C.C.)). If no physical restriction on liberty is involved, the question is whether there is a restriction on some activity that is of “fundamental personal importance” (*R. v. Morgentaler* (1988), 37 C.C.C. (3d) 449 (S.C.C.); *Rodriguez v. British Columbia (Attorney General)* (1993), 85 C.C.C. (3d) 15 (S.C.C.); *B. (R.) v. Children’s Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315; *Godbout v. Longueil (City)*, [1997] 3 S.C.R. 844; *Buhlers v. British Columbia (Superintendent of Motor Vehicles)* (1999), 132 C.C.C. (3d) 478 (B.C. C.A.)).

At stage 1(b), the Court will ask whether the deprivation is sufficiently serious to attract *Charter* protection. In *Cunningham v. Canada* (1993), 80 C.C.C. (3d) 492 (S.C.C.), McLachlin J. wrote that the *Charter* “does not protect against insignificant or ‘trivial’ limitations of rights”. Braidwood J.A. returns to and leans heavily upon this quote later in his reasons.

Stage 2(a) is to identify the relevant principle of fundamental justice. It appears that the principle in question must be a legal principle (*Rodriguez, supra*).

At stage 2(b), the principle is defined and understood. This must be done in light of common and statute law, as well as of other (competing) legal principles and *Charter* rights (*R. v. Mills* (1999), 139 C.C.C. (3d) 321 (S.C.C.)).

Moving on to stage 3, the answers from stages 1 and 2 are to be brought together in judging whether the deprivation is in accordance with the principles of fundamental justice.

“There is considerable debate as to what factors should be weighed at the s. 7 stage...”

At stage 3(a), the Court determines which party bears the onus of proof. This will generally be the rights claimant (contrast this with the shift in onus to the state, should the inquiry reach the issue of justification under *Charter* s. 1).

Stage 3(b) looks for a rational connection between the purpose of the impugned legislation and the deprivation of liberty. The test is failed if the deprivation “does little or nothing” to advance the purpose (*R. v. Jones* (1986), 28 C.C.C. (3d) 513 (S.C.C.)).

Finally, at stage 3(c), the Court is to balance the respective interests of the individual and the state (*Thomson Newspapers Ltd. v. Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)* (1990), 54 C.C.C. (3d) 417 (S.C.C.)).

Up to this point, it will be seen that the procedure closely parallels a s. 1 analysis (*R. v. Oakes* (1986), 24 C.C.C. (3d) 321 (S.C.C.)). It seems that any distinction between such an analysis and this balancing under s. 7 lies in the selection of factors that may be placed in the balance. Whereas the protection of society will be taken into account at the s. 7 stage (see, for example, *R. v. Beare*,

[1988] 2 S.C.R. 387), less pressing societal concerns (administrative, financial, etc., as well as broader values such as those discussed in cases like *R. v. Keegstra*, [1990] 3 S.C.R. 697) are to be left until s. 1 is under consideration. Because more factors come into play at that later stage, it is theoretically possible for a s. 7 breach to be “saved” by s. 1 (*R. v. Penno* (1990), 59 C.C.C. (3d) 344 (S.C.C.), per Lamer J. in dissent; *R. v. Nguyen*; *R. v. Hess* (1990), 59 C.C.C. (3d) 161 (S.C.C.), per McLachlin J. in dissent), though this will be rare (*Motor Vehicle Act Reference, supra*), and has indeed been held to be impossible (*Morgentaler, supra*).

The Majority

Braidwood J.A. begins his application of the foregoing at p. 253. Stage 1 is easily passed: a conviction for marijuana possession carries with it the risk of imprisonment, a serious deprivation of liberty.

At stage 2, the operative principle of fundamental justice is found to be the “harm principle”. Braidwood J.A. quotes from a number of sources on this topic. Older English cases referred to a requirement that a criminal offence “affect the public”, be “of a public nature”, or “a wrong against the public welfare”. Similarly, in the U.S., it was said that a crime was something “injurious to the public”. Blackstone said that any crime must include an injury, and Sir James Fitzjames Stephen wrote that there must be “some definite, gross, undeniable injury to some one”. Morality alone cannot be the basis for criminalization (*R. v. Butler* (1992), 70 C.C.C. (3d) 129 (S.C.C.)) (pp. 264-266).

Braidwood J.A. goes on to cite current authors for the propositions that a crime must affect the “security or well-being of the public”, that there must be “a particularly harmful effect on the public”, that such wrongdoing must “directly and in serious degree threaten the security or well-being of society”, and that prohibited conduct must cause “serious private harm ... or harm to important public institutions and practices” (pp. 266-267, emphasis added).

“Since many acts may be ‘harmful’, and since society has many other means for controlling or responding to conduct, criminal law should be used only when the harm caused or threatened is serious, and when the other, less

STATUTORY PROVISIONS

Controlled Drugs and Substances Act, Section 4:*

(1) Except as authorized under the regulations, no person shall possess a substance included in Schedule I, II or III.**

...

(4) Subject to subsection (5), every person who contravenes subsection (1) where the subject-matter of the offence is a substance included in Schedule II

(a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years less a day; or

(b) is guilty of an offence punishable on summary conviction and liable

(i) for a first offence, to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding six months, or to both, and

(ii) for a subsequent offence, to a fine not exceeding two thousand dollars or to imprisonment for a term not exceeding one year, or to both.

(5) Every person who contravenes subsection (1) where the subject-matter of the offence is a substance included in Schedule II in an amount that does not exceed the amount set out for that substance in Schedule VIII*** is guilty of an offence punishable on summary conviction and liable to a fine not exceeding one thousand dollars or to imprisonment for a term not exceeding six months, or to both.

...

*the current provision dealing with simple possession

**cannabis (marijuana) is listed in Schedule II of the *Act*

***the amount currently set out for cannabis (marijuana) in Schedule VIII is thirty grams

Charter Section 7:

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

coercive or less intrusive means do not work or are inappropriate

A 1969 report by the Canadian Committee on Corrections stated the principles that a crime must involve conduct that “represents a serious threat to society”, and that no act should be criminalized unless it “is substantially damaging to society”. The 1976 Law Reform Commission stated that the criminal law should be confined to wrongful acts “seriously threatening and infringing fundamental societal values”. The harm must be “serious both in nature and degree”. A 1982 report, “The Criminal Law in Canadian Society”, said that “criminal law should be used only when the harm caused or threatened is serious” (p. 267-268, emphasis added).

There need not be a demonstration of actual harm; a “reasoned apprehension” of it is sufficient (*Bulter, supra*; *R. v. Cuerrier* (1998), 127 C.C.C. (3d) 1 (S.C.C.); *R. v. Sharpe* (1999), 136 C.C.C. (3d) 97 (B.C. C.A.)).

Finally, at p. 274, Braidwood J.A. embarks upon the stage 3 task of determining whether the admitted deprivation of liberty accords with the established principle of fundamental justice. He does not actually follow the sequence of establishing onus, rational connection and balance that he had just finished laying out, but engages instead in a sort of extended threshold analysis.

At the outset, he asserts that the test is whether the act that has been criminalized causes harm that is more than insignificant or trivial. With respect, this is difficult to understand, given that at this point he has just recited a list of quotations from authoritative sources, most of whom seem to set the threshold much higher—harm that is serious and substantial.

The only justification offered (at p. 275) for this lowering of the bar is the quotation alluded to earlier, from McLachlin J. in *Cunningham*, to the effect that “the *Charter* does not protect against insignificant or ‘trivial’ limitations of rights”. Braidwood J.A. seems to have concluded that, if it is to be the rule that an individual may claim *Charter* protection against any non-trivial rights infringement, then society should be able to penalize any act that causes non-trivial societal harm. The two questions are, of course, almost entirely independent, but the answer to the first seems to be claimed as support for the answer Braidwood J.A. offers

to the second—in the face of a broad sweep of authority to the contrary.

Having concluded in this manner that the question is whether marijuana use raises a reasonable apprehension of harm to others that is not insignificant, Braidwood J.A. again lists the findings of fact of the trial judge. These refer only to potential harm to the user, and to a risk of harm to others that at present “cannot be said to be significant”. Despite this, the conclusion of the trial judge that Parliament is entitled to enact penal law in an attempt to avert this minimal potential harm is said to be supported by the evidence (pp. 276-277).

At this point, metaphorically, both “players” are at the table. The rights claimant has established that penal consequences are a limitation of his liberty interest that is sufficient to give him a stake. Similarly, the Crown has established that the potential interest of society is sufficient to keep it in the game. The final round is a balancing of these competing interests.

The aggregate harm to the section of the population penalized for marijuana possession is, of course, huge and undeniable. Consequences such as the destruction of lives, careers and families, the cost to the state and the damage to the reputation of the justice system are briefly alluded to by Braidwood J.A. at p. 278.

Regarding societal harm, Braidwood J.A. refers again to the small risk of direct harm found to exist, and adds that possession and use of a prohibited drug is also harmful because of the market it creates for other unlawful activities such as production of and trafficking in that drug.

The conclusions of the majority, at pp. 280-281, are that the result of the balancing test is “admittedly quite close” and that “such matters are best left to Parliament”.

The Dissent

Prowse J.A. in dissent takes issue with the majority on two points.

First, based on the broad range of authority cited in the course of the majority reasons, she states that a proper formulation of the “harm principle” requires “a reasoned apprehension of harm of a ‘serious’, ‘substantial’ or ‘significant’ nature” before Parliament is justified in imposing criminal sanctions (p. 284). The findings of fact of the trial judge in this case do not amount to a

“In my view, the evidence does not establish that simple possession of marijuana presents a reasoned risk of serious, substantial or significant harm to either the individual or society or others. As a consequence of this finding, I conclude that the appellants have established that they have been deprived of their right to life, liberty and security of the person in a manner which is not in accordance with the principles of fundamental justice...”

~ Prowse J.A. ~

“I agree that the evidence shows that the risk posed by marijuana is not large. Yet, it need not be large in order for Parliament to act. It is for Parliament to determine what level of risk is acceptable and what level of risk requires action.

~ Braidwood J.A. ~

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finding of any such serious harm, or risk thereof.

Second, Prowse J.A. rejects the notion that in a balancing of harms there be much significance assigned to the fact that consumption of a product creates a market for other illegal activities. She also questions the significance of the fact that many people convicted for simple possession actually go to jail, given that the risk is still very real, and that conviction itself still leaves the individual with the stigma and handicap of a criminal record (pp. 287-288).

Postscript

Braidwood J.A. alludes in his reasons (at p. 276) to the possibility that the Supreme Court of Canada might now have to clarify the definition and limits of the “harm principle”, and it seems that is what will happen soon. Mr. Malmo-Levine has filed notice of appeal as of right.

In the meantime, the judgment of the majority of the B.C. Court has been referred to approvingly in two judgments released together by the Ontario Court of Appeal (*R. v. Parker* (2000), 146 C.C.C. (3d) 193; *R. v. Clay* (2000), 146 C.C.C. (3d) 276). That court too has held that a criminal prohibition on the possession of marijuana for non-medical purposes does not offend s. 7 of the *Charter*.

“[T]he Supreme Court of Canada has ruled that the ‘purpose’ of a criminal law must be to suppress an ‘evil’ that has the potential of inflicting harm to others. However, the Court has not specifically quantified this ‘evil’ for the purposes of establishing a threshold standard of ‘harm’. ... Perhaps this case may make it necessary for the highest court to do exactly that.”

It will be interesting to watch our highest court wrestle with the issue. On the one hand, parliamentary inertia, judicial deference and the smoke that still lingers from the blazing rhetoric of fear that was so prevalent in the early and mid 1900’s. On the other, a sizeable stack of scientific data and an equally sizeable stack of legal and philosophical authority.

Jurists, of course, like magicians, have occasionally been known to make sizeable objects disappear... ❖

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