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## The Constitutionality of Restrictions on Recreational Cannabis Advertising: Balancing Public Health and Freedom of Expression

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A thesis submitted in partial fulfillment of the requirements for the Master of Laws degree in Law

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# Abstract

On April 20, 2016, Health Minister Jane Philpott announced that legislation legalizing recreational marijuana would be introduced in Spring 2017, with the goal of keeping marijuana out of the hands of children and profit out of the hands of criminals. Bill C-45, *An Act Respecting Cannabis* passed the second reading in the House of Commons, and contains restrictions on advertising cannabis, with a few exceptions. Advertising is recognized as a protected form of expression under the *Charter of Rights and Freedoms*, so if the government infringes on this right, they must be able to prove that it is justified in a free and democratic society, pursuant to section 1 of the *Charter*. The Supreme Court of Canada has twice assessed restrictions on tobacco advertising, providing a framework for assessing whether advertising restrictions pass constitutional muster. Using this framework, this thesis analyzes whether the proposed restrictions on advertising marijuana are constitutional.

## Keywords

freedom of expression, cannabis, drug policy, charter of rights and freedoms, public health, marijuana, advertising

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## List of Abbreviations

*ACMPR* – Access to Cannabis for Medical Purposes Regulations

ATP – Authorization to Possess

BHO- Butane Hash Oil

CBD – cannabidiol

*CDSA* – *Controlled Drugs and Substances Act*

DPPL – Designated-Person Production License

*MMAR* – Marihuana Medical Access Regulations

*MMPR* – Marijuana for Medical Purposes Regulations

PUPL – Personal Use Production License

SCC – Supreme Court of Canada

THC – delta-9-tetrahydrocannabinol

WHO – World Health Organization

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# 1. Introduction

In April 2016, the Canadian federal government announced its intention to legalize and regulate recreational cannabis. Minister of Health Jane Philpott indicated that legalizing recreational cannabis would “keep marijuana out of the hands of children and profits out of the hands of criminals.”<sup>1</sup> In April 2017, the government released the proposed legislation, to come into effect no later than July 2018, legalizing recreational cannabis use for adults in Canada.<sup>2</sup> The proposed *Cannabis Act*, Bill C-45, will operate concurrently with the medical cannabis regulations, the *Access to Cannabis for Medical Purposes Regulations (ACMPR)*<sup>3</sup>. Since the initial announcement in April 2016, academics, politicians, scientists, doctors, and citizens have been clamoring for answers to a seemingly endless list of questions. What age should the minimum age of purchase be set at? Who should be able to sell cannabis? Will using cannabis legally in Canada exclude me from travelling to the United States? How will legalization impact rates of cannabis use among youth? While the cacophony rages on, an important concern about the new legislation has received relatively little attention, even though it could have significant legal and economic consequences – should advertising of cannabis, cannabis products, and cannabis services<sup>4</sup> be permitted? If the answer to that is no, the question instead becomes, can advertising of cannabis *legally* be prohibited? There are several grounds on which advertising restrictions may be challenged<sup>5</sup>, this thesis focuses

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<sup>1</sup> Health Canada, “Plenary Statement for the Honourable Jane Philpott Minister of Health – UNGASS on the World Drug Problem” (April 20 2016) online: <<https://www.canada.ca/en/health-canada/news/2016/04/plenary-statement-for-the-honourable-jane-philpott-minister-of-health-ungass-on-the-world-drug-problem.html?=&wbdisable=true?>>.

<sup>2</sup> Government of Canada, “Legalizing and strictly regulating cannabis: the facts” (April 13 2017) online: <<https://www.canada.ca/en/services/health/campaigns/legalizing-strictly-regulating-cannabis-facts.html>> [Government of Canada, The Facts].

<sup>3</sup> SOR/2016-230 [ACMPR].

<sup>4</sup> For the sake of brevity, I do not use this whole phrase throughout this paper. Whenever referencing the advertising restrictions, the use of the word cannabis includes cannabis accessories and cannabis services, unless indicated otherwise.

<sup>5</sup> For example, on the basis that the federal government does not have jurisdiction to legislate in that area. Under the criminal law power the federal government has significant jurisdiction to regulate the marketing

specifically on whether the proposed advertising restrictions are a justified infringement of freedom of expression. The purpose of this thesis is to predict how a court will analyze the proposed restrictions contained in Bill C-45, knowing that they may change as they are reviewed by the Standing Committee on Health and then Senate. This thesis argues that cannabis advertising should be afforded a higher threshold of justification than tobacco advertising, and that as a result, several aspects of the advertising restrictions in Bill C-45 may be difficult to justify, particularly at the minimal impairment stage.

Chapter two begins with a discussion of the role of “harm” in constitutional adjudication, highlighting the ways in which the actual or potential harmfulness of the infringed expression can impact the *Oakes* analysis. Then, chapter two provides an introduction to cannabis, emphasizing the properties of cannabis that make it particularly difficult not only to study, but to regulate. Next, the prevalence of cannabis use in Canada is considered, to provide an understanding of the burden of risk imposed by cannabis on a population level. The remainder of the chapter provides a summary of scientific and medical evidence regarding the safety of cannabis use for medical purposes and recreational purposes. The purpose of this chapter is to situate the harmfulness of cannabis in comparison to other types of expression, in order to determine the threshold of justification for the *Oakes* analysis.

Chapter three provides a comprehensive summary of the legal and political history of cannabis in Canada. This chapter first looks at the history of cannabis and the criminal law, starting with the addition of cannabis to the *Opium and Narcotic Drugs Act*<sup>6</sup> in 1923, and tracing legislative changes up until the current criminal regime, the *Controlled Drugs*

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and advertising of products. This is where the federal government finds its authority to regulate tobacco advertising. In *RJR-MacDonald v Canada (Attorney General)*, [1995] 3 SCR 199, SCJ No 68 [*RJR-MacDonald (SCC)*] the SCC determined the federal criminal law power is broad in scope, and requires only a prohibition and a penal sanction directed at a legitimate public health evil. Because tobacco was deemed a public health evil, the federal government’s legislation restricting tobacco marketing was *infra vires*.

<sup>6</sup> SC 1908, c 50.

*and Substances Act*<sup>7</sup>. Next, this chapter looks at the legalization of cannabis for medical purposes, following the case law and accompanying statutory amendments, followed by a brief history of past attempts to legalize or liberalize recreational cannabis use in Canada, culminating with the introduction of Bill C-45, *An Act Respecting Cannabis*. The purpose of this chapter is to provide the historical context out of which cannabis legalization arises.

Chapter four focuses on the legal foundation of freedom of expression, beginning with pre-*Charter* rights protection and the pre-*Oakes* section 1 analysis. Next, this chapter focuses on the development of commercial speech jurisprudence in Canada, the rationales underlying freedom of expression, and the scope of what type of speech the freedom protects. The bulk of this chapter focuses on the judicial application of the *Oakes* test, discussing each step of the *Oakes* test, and the chapter concludes with a discussion of remedies available upon a finding that a statute or provision unconstitutionally infringes upon freedom of expression. The purpose of this chapter is to provide a legal framework for the analysis of Bill C-45 in the following chapter.

Chapter five takes the framework set out in chapter four, and applies it to the proposed advertising restrictions set out in Bill C-45, identifying what parts of the legislation are most likely to cause constitutional pause. Particularly, this chapter carves out a new category of commercial speech, one that is differentiated from tobacco advertising or advertising to children, in that the harm posed by the commercial speech is not as concrete, but there are possible benefits that may be realized by Canadians who use cannabis either medically or therapeutically. This chapter focuses on two aspects of the promotion restrictions contained in Bill C-45: the general restriction and accompanying exceptions, and the restriction on sponsorship and facility naming rights.

Before proceeding to the first substantial chapter, there are several scope and technical issues that warrant some clarification. First, this thesis in its entirety considers only the cannabis plant and plant products. Unless specifically noted otherwise, comments made

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<sup>7</sup> SC 1996, c 19 [CDSA].

about cannabis refer to the plant and plant products and not synthetic cannabinoids.<sup>8</sup> Second, although the terms marijuana and cannabis are often used interchangeably, they have different and distinct meanings. Cannabis is a broad term that describes products derived from the *Cannabis Sativa* plant.<sup>9</sup> The term marijuana, on the other hand, refers specifically to the dried buds of a cannabis plant.<sup>10</sup> For accuracy, the term cannabis is used when referring generally to the substance. The term marijuana is used only when referring to the dried buds, and not other cannabis products. Additionally, when quoting others or using proper names, the term used by the original author is used.

Third, by nature of the existing case law on commercial speech, tobacco advertising litigation is used as the primary comparator. However, care must be taken not to compare the two substances too closely. There are many parallels between tobacco advertising litigation in the 1990's and 2000's, and the potential cannabis advertising litigation. They are both products with a long social history in North America, accompanied by immense stigma. But there is one significant difference between the regulatory history of cannabis and the regulatory history of tobacco: in the case of tobacco, the government was moving from a liberal regulatory regime to a more heavily regulated one, and in the case of cannabis, the government is moving from a severely restrictive prohibitory regime to one that is liberalized, but still heavily regulated. Further, they are both commercial speech cases involving a *possible* public health risk. The word possible is emphasized because it will likely be the key to distinguishing cannabis from tobacco. While the latter is widely understood to be of almost certain harm to users and those around them, creating a significant burden on Canada's health care system and shortening the lives of many Canadians, the same cannot be said about cannabis. As will be seen in chapter two,

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<sup>8</sup> National Academies of Sciences, Engineering, Medicine. *The Health Effects of Cannabis and Cannabinoids: The Current State of Evidence and Recommendations for Research* (Washington, D.C.: The National Academies Press, 2017) at 2-9 [The FDA has licensed synthetic drugs based on cannabinoids, for example, Dronabinol and Nabilone, synthetic THC products clinically indicated to counteract the nausea and vomiting association with chemotherapy and to stimulate hunger in AIDS patients] [National Academies].

<sup>9</sup> *Ibid* at 1-10.

<sup>10</sup> Maisto, Stephen A., Mark Galizio & Gerard J. Connors, *Drug Use and Abuse*, 7th ed (Stamford, CT: Cengage Learning, 2015) at 259 [Maisto, Galizio & Connors].

whether or not cannabis is harmful is very much debated, but, there is consensus that at the very least, it is not nearly as dangerous as tobacco or alcohol.<sup>11</sup>

In order to contain this project, the analysis focuses on the advertising and promotion restrictions, and does not analyze the packaging and labelling restrictions. Additionally, the scope of this project is limited to challenging the promotion provisions on the basis that they are an unjustified infringement on freedom of expression. A separate analysis for freedom of expression cases that involve expression on public property has been developed in Canadian jurisprudence<sup>12</sup>, but due to the nature of the proposed cannabis advertising restrictions, this thesis does not analyze the restrictions on the basis of freedom of expression on public property, and instead focuses on cases where there is a health element. As alluded to earlier, there are various grounds on which advertising restrictions could be challenged. In order to contain the scope of this project, division of powers will not be discussed in depth. This thesis focuses specifically on whether cannabis advertising restrictions violate freedom of expression. The reason for doing so is based on past jurisprudential success. In *RJR-MacDonald Inc. v Canada (Attorney General)*<sup>13</sup>, the legislation restricting advertising was challenged both as an unjustified infringement of section 2(b) of the *Canadian Charter of Rights and Freedoms*<sup>14</sup>, and also as an unconstitutional use of federal powers pursuant to the *Constitution Act*<sup>15</sup>. The division of powers argument was rejected by the Supreme Court of Canada (SCC).<sup>16</sup> The

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<sup>11</sup> See e.g., Dirk W. Lachenmeier & Jürgen Rehm, “Comparative Risk Assessment of Alcohol, Tobacco, Cannabis and Other Illicit Drugs Using the Margin of Exposure Approach” (2015) 5:8126 *PMC* 1 [Lachenmeier & Rehm].

<sup>12</sup> See e.g. *Montréal (City) v 2952-1366 Québec Inc.*, 2005 SCC 62 [*Montréal (City)*].

<sup>13</sup> *RJR-MacDonald (SCC)*, *supra* note 5.

<sup>14</sup> Part I of the Constitution Act 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [*Charter*].

<sup>15</sup> 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11 [*Constitution*].

<sup>16</sup> *RJR-MacDonald (SCC)*, *supra* note 5 [Despite the Quebec Superior Court finding that the legislation infringed up the rights of the provinces to legislate in the area, the SCC held that the Act’s purpose to protect the public’s health was sufficient to meet the requirements to use the criminal law power, namely, it is directed at a public health evil, and is accompanied by a prohibition and a penalty].

remainder of this chapter will discuss the theoretical framework that informs this paper, in addition to the methodologies used.

## 1.1. Theoretical Framework

The theoretical framework guiding this research is premised on the core philosophical and ethical issue that plagues public health law and policy: the balancing of population and individual rights. In the context of this project, the population rights include the right to be protected from fraudulent, misleading, or inciting advertising of marijuana. An additional concern is exposure to advertising will lead to increased prevalence of use, particularly amongst youth, and therefore an increase in the occurrence of harms.<sup>17</sup> The individual rights are two-fold, and include the rights of the speaker, in this case, corporations or individuals wishing to advertise their products for economic reasons, and the rights of potential consumers, or the hearer, to receive accurate product information, promoting consumer choice and individual self-fulfilment.

Public health law research has consistently been informed by utilitarianism, liberalism, and communitarianism when balancing the infringement of individual rights against government actions to preserve or protect public health.<sup>18</sup> A new legal theory in the public health domain is Wendy Parmet's population-based legal analysis, which is set out thoroughly in her book *Populations, Public Health, and the Law*<sup>19</sup>. The core tenet of Parmet's theory is that the "law ought to protect and promote the health of

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<sup>17</sup> See e.g. Elizabeth J. D'Amico, Jeremy N.V. Miles & Joan S. Tucker "Gateway to Curiosity: Medical Marijuana Ads and Intention and Use during Middle School" (2015) 29:3 *Psychology of Addictive Behaviours* 613 [D'Amico, Miles & Tucker].

<sup>18</sup> See e.g. Dan E. Beauchamp, "Public health and Individual Liberty" (1980) 1 *Ann Rev Public Health* 121; James F. Childress & Ruth Gaare Bernheim. "Beyond the Liberal and Communitarian Impasse: A Framework and Vision for Public Health" (2003) 55 *Fla L Rev* 1191; James Colgrove & Ronald Bayer. "Manifold Restraints: Liberty, Public Health, and the Legacy of Jacobson v Massachusetts" (2005) 95:4 *American Journal of Public Health* 51; Lawrence O. Gostin, "Public Health Law in an Age of Terrorism: Rethinking Individual Rights and Common Goods" (2002) 21 *Health Affairs* 79; Marc Lappé, "Values and Public Health: Value Considerations in Setting Health Policy" (1983) 4:1 *Theoretical Medicine* 71; Howard M. Leichter, "'Evil habits' and 'personal choices': Assigning Responsibility for Health in the 20th Century" (2003) 81 *Millbank Quarterly* 603; Wendy E. Parmet, "Liberalism, Communitarianism, and Public Health: Comments on Lawrence O. Gostin's Lecture" (2003) 55:5 *Fla L Rev* 1221.

<sup>19</sup> (Washington, D.C.: Georgetown University Press, 2009) [Parmet].

populations.”<sup>20</sup> This theory emerged in part as a result of the challenges associated with the increasing prevalence of interdisciplinary legal scholarship, and particularly the issues present when attempting to reconcile systemic differences in public health scholarship and legal scholarship.<sup>21</sup> This approach is premised on the concept that one of many rationales for law is the protection and promotion of public health.<sup>22</sup> Population-based legal analysis is not meant to disparage other values, such as individual autonomy, democracy, or equality, it merely claims that public health is one goal that needs to be considered in legal decision making.<sup>23</sup> Additionally, Parmet’s theory asserts that law must acknowledge the importance of populations *in addition to* individuals, and consider empirical knowledge as well as probabilistic reasoning, which health law has typically relied on exclusively.<sup>24</sup> Population-based legal analysis challenges individualism, but strives not to threaten the safeguards developed by law to protect the vulnerable and limit the intrusion of government into an individual’s choice.<sup>25</sup>

Parmet has applied her theory to free speech in an American context.<sup>26</sup> She asserts that a population approach views free speech “as designed to protect groups or populations, rather than merely individual interests.”<sup>27</sup> A population approach also insists that we consider how speech affects populations, particularly the fact that actions and policies affect populations differently than they do individuals.<sup>28</sup> Thus, speech and the laws that

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<sup>20</sup> *Ibid.*

<sup>21</sup> See Wendy E. Parmet, “Population-Based Legal Analysis: Bridging the Interdisciplinary Chasm Through Public Health in Law” (2016) 66:1 *Journal of Legal Education* 100.

<sup>22</sup> Parmet, *supra* note 19 at 2 [This foundation, upon which Parmet’s theory rests has been criticized for prioritizing public health over other goals of law, however, Parmet clearly states that public health is but one goal of many that law strives to improve].

<sup>23</sup> Wendy E. Parmet & Jason Smith. “Free Speech and Public Health: A Population-based Approach to the First Amendment” (2006) 39 *Loyola of Los Angeles Law Review* 363 at 432 [Parmet & Smith].

<sup>24</sup> Parmet, *supra* note 19 at 2.

<sup>25</sup> *Ibid* at 3.

<sup>26</sup> Parmet & Smith, *supra* note 23 at 432.

<sup>27</sup> *Ibid* at 436.

<sup>28</sup> *Ibid* at 437.



limit it may have different effects upon different populations.<sup>29</sup> Population-based legal analysis incorporates public health methodologies and approaches, particularly epidemiology, which is “the study of health events in a population.”<sup>30</sup> In doing so, population-based legal analysis acknowledges that epidemiological information can inform legal analysis, and should be used by courts in balancing rights in cases of commercial speech infringement.<sup>31</sup> In following Parmet’s approach, this project relies heavily on scientific and medical research regarding cannabis to inform the constitutional analysis.

## 1.2. Methodology

This project utilized two methodologies: (a) doctrinal legal analysis; and, (b) an analysis of secondary literature relating to (i) freedom of expression; (ii) the benefits and harms of cannabis use; and, (iii) advertising. Each will be discussed in turn.

### 1.2.1. Doctrinal legal analysis

Doctrinal legal analysis is used to determine whether restrictions on advertising cannabis are constitutional. The analysis in this thesis is primarily centered on case law that deals with freedom of expression, particularly as it pertains to advertising or other commercial speech. Jurisprudence was collected by noting up section 2(b) of the *Charter* and identifying cases to see how the courts have balanced the right of commercial speech against competing rights, typically the protection of the public. This project primarily relies on SCC cases, but refers to appeal and trial level decisions that relate to commercial speech, particularly where the facts involve public health risks or benefits. Additionally, in chronicling the history of cannabis laws in Canada, all three medical cannabis regulatory schemes were noted up: the *Medical Marijuana Access*

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<sup>29</sup> *Ibid* at 432 (Parmet and Smith use the example of children versus adults, and school children as a sub population).

<sup>30</sup> *Ibid* at 440.

<sup>31</sup> *Ibid* at 440-1.

*Regulations*<sup>32</sup>, the *Marijuana for Medical Purposes Regulations*<sup>33</sup>, and the *ACMPR*, in order to identify cases challenging each respective regulatory scheme.

## 1.2.2. Secondary Literature Analysis

### 1.2.2.1. Freedom of Expression

A systematic review of secondary literature (including both monographs and journal articles) on the topic of freedom of expression was conducted to provide a thorough and accurate literature review on the topic. To limit the results, it focused on literature situated in the Canadian context. Given the breadth of literature surveying section 2(b) broadly, the search was narrowed to return both monographs and articles solely analyzing commercial speech, and furthermore, commercial speech accompanied by public health concern. Searches were conducted on legal databases, including LexisNexis Quicklaw, Westlaw, HeinOnline, and non-legal databases, such as Western's Library Catalogue and Google Scholar.

### 1.2.2.2. Cannabis

Methodical database searches on PubMed, Google Scholar, Cochrane Databases, HeinOnline, and Western's Library catalogue were conducted.<sup>34</sup> Additionally, monographs on the topic released in the last 15 years were identified. This project required differentiating cannabis, both recreational and medicinal, from tobacco products in terms of potential and actual harms. To do that, a thorough search on scientific and social science databases on the population and individual harms of marijuana use was

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<sup>32</sup> SOR/2013-119, s 267 [*Repealed*] [*MMAR*].

<sup>33</sup> SOR/2016-230 [*Repealed*] [*MMPR*].

<sup>34</sup> Using the following search terms combinations to identify any relevant sources:

- marijuana AND advertis\* AND commercial speech
- marijuana AND advertis\* AND freedom of expression
- marijuana AND marketing AND commercial speech
- marijuana AND marketing AND freedom of expression

All of the databases selected automatically expand the search term marijuana to include cannabis and marihuana.

conducted. Where possible, systematic reviews or meta-analyses were relied upon. Case studies, animal studies, or *in vitro* studies were avoided, relying primarily on human research, unless they were unavailable. Additionally, research from other jurisdictions that have legalized recreational marijuana, primarily Washington and Colorado, was utilized for data on the actual implications of cannabis legalization. Further articles and reports were identified in the references of the materials returned from searches.

### 1.2.2.3. Advertising

In order to assess the advertising provisions contained in Bill C-45, particularly at the rational connection stage, research regarding advertising practices and their effects on consumption was conducted, particularly related to youth. Because of the dearth of research looking at cannabis advertising, research on the impact of various alcohol and tobacco marketing practices was sought out. Various databases were used, including Google Scholar, PubMed, and Western's Library Catalogue.

## 2. Introduction to Cannabis & Harms

### 2.1. Introduction

It has been argued that one of the goals of legalizing cannabis for recreational use is to reduce the harms<sup>35</sup> associated with the criminalization of cannabis, including: interacting with the black market<sup>36</sup>; illegal crops, adulterated products, barriers to seeking treatment, and the burden imposed on the Canadian legal system.<sup>37</sup> However, legalization comes with its own harms, including increased rates of use and associated risks, normalization of use, and increased availability of cannabis to minors. These harms form the basis for specific regulations. Cannabis use is not risk-free, and any legalization regulatory scheme should attempt to mitigate or eliminate harms where possible. The notion of harm will be particularly important if the regulatory framework is subject to any constitutional analysis. If the legislation is challenged, potential harms will be considered against the actual or potential benefits by the court when assessing the objective of the impugned legislation, as well as the proportionality. Therefore, it is necessary to understand the best current knowledge regarding the potential for harm with recreational cannabis use, as well as possible benefits. However, because cannabis is a class of products rather than a homogenous product, research does not always account for variables between specific products and how they are used, such as cannabinoid content, history of use, method of delivery, or individual factors that impact the effects of cannabis, such as age, experience, tolerance, etc.

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<sup>35</sup> For the purposes of this thesis, harm is defined as “actual or potential ill effect or danger” including physical harm, mental or emotional harms, and population-level social harm. In contrast, “risk” refers to being exposed to a danger. (Oxford English Dictionary, *sub verbo* “harm” online: <<https://en.oxforddictionaries.com/definition/us/harm>>; Oxford English Dictionary, *sub verbo* “risk” online: <<https://en.oxforddictionaries.com/definition/us/risk>>)

<sup>36</sup> Harms associated with purchasing and using black market cannabis include, greater likelihood of encountering weapons, adulterated or contaminated products, being mugged or otherwise assaulted, being blackmailed, and consumers being less likely to contact the police or other authorities for fear of legal ramifications.

<sup>37</sup> Bill C-45, An Act respecting cannabis and to amend the Controlled Drugs and Substances Act, the Criminal Code and other Acts, 1st Sess, 42nd Parl, 2017 [Bill C-45].

As will be demonstrated in the next chapter, cannabis has a long and complex history with the law. It's history of being used as a medical and/or recreational substance is even longer, and arguably, more complex. The earliest recorded use of the cannabis plant can be dated to more than 10,000 years ago, on the island of Taiwan, where archaeologists discovered evidence that cannabis was used for rope, cloth, fishing nets and paper,<sup>38</sup> although the use of cannabis as medicine and recreational drug did not occur until much later.<sup>39</sup> Over the past 10,000 years cannabis has been used for a variety of religious, medical, spiritual, and recreational purposes. Cannabis also has a long tradition of being viewed with suspicion, in some cases being forbidden or discouraged due to the perceived harms associated with its use. Less than one hundred years ago, cannabis was believed to be incredibly dangerous. In 1922, Magistrate Emily Murphy wrote Canada's first book on drug abuse, *The Black Candle*, in which she vilified cannabis use. Murphy wrote:

*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 form of violence to other persons, using the most savage methods of cruelty without, as said before any sense of moral responsibility. When coming from under the influence of this narcotic, these victims present the most horrible condition imaginable. They are dispossessed of their natural and normal will power, and their mentality is that of idiots. If this drug is indulged to any great extent, it ends in the untimely death of its addict.<sup>40</sup>*

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<sup>38</sup> See Ernest L. Abel, *Marihuana: The First Twelve Thousand Years* (New York: Plenum Press, 1980) at 4.

<sup>39</sup> Andrew Hand et al, "History of Medical Cannabis" (2016) 9:4 *Journal of Pain Management* 387 [Hand] [The earliest evidence of cannabis cultivation dates to 4000 BCE in China, where cannabis was farmed as a major food crop.]

<sup>40</sup> Emily F. Murphy, *The Black Candle* (Toronto, T. Allen, 1922) at 332-33 [Murphy].

While we have come a long way in our understanding of cannabis and its effects on humans, there is a lot of debate in the scientific and medical literature, popular media, and politics about the relative safety or harm of cannabis use. The purpose of this chapter is not to advocate for a particular view on the safety of cannabis use, or to come to a conclusion about how risky (or safe) cannabis use is, but instead it aims to provide an overview of the available evidence in order to determine whether or not the concept of harmfulness will impact the constitutional analysis of the advertising restrictions contained in Bill C-45, and if it does, to what degree.

After Part two's brief summary of the methodology utilized in this chapter, Part three of this chapter will look at Canadian constitutional jurisprudence on commercial free speech and the role of harm in assessing section 1 analyses for violations of freedom of expression. From there, Part four will provide a brief introduction to cannabis and cannabinoids, followed by a summary of the prevalence of cannabis use in Canada. Part six describes some of the issues inherent to researching cannabis, such as the heterogeneity of cannabis products and the different effects cannabis can cause depending on the mode of administration. Finally, Part seven provides a summary of the evidence supporting (or refuting) the medical use of cannabis, and Part eight provides a summary of the evidence regarding the harms associated with cannabis use. The harms of cannabis use are divided into acute and long-term risks, and long-term risks is further subdivided into categories by body system, followed by population-level risks.

## 2.2. The Concept of Harm in Freedom of Expression Litigation

The concept of harm plays a significant role in commercial speech litigation. Unfortunately, the way that courts have considered and treated harm has been inconsistent, or even contradictory. In some cases, the concept of harm prevails throughout the entire judicial decision whereas in others it is not mentioned at all. While this difference may be explained by the facts of each case<sup>41</sup>, it nevertheless results in

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<sup>41</sup> For example, in *Rocket v Royal College of Dental Surgeons (Ontario)* [1990] 2 SCR 232, SCJ No 65 [*Rocket*], the advertising being restricted (advertising for dentistry services) was not being restricted

confusion about what constitutes harm and how this will factor into the court's decision. This section provides an overview of how the concept of harm has factored into the leading SCC freedom of expression and commercial speech cases. Four ways in which harm factors into the analysis are considered: (1) at the division of powers analysis, (2) in determining whether section 2(b) has been infringed, (3) in the use of evidence, and (4) in the *Oakes* analysis. Each section also considers how these factors may be relevant to Bill C-45, should it be challenged.

First, the possibility of harm is relevant to a division of powers analysis. In order for a law to be classified as a criminal law, and thus properly within the jurisdiction of the federal government, the law must meet three requirements: a valid criminal law purpose backed by a prohibition and a penalty.<sup>42</sup> Valid purposes of the criminal law were broadly categorized by Estey J in *Labatt Breweries of Canada Ltd v Attorney General of Canada*<sup>43</sup> to include public peace, order, security, health and morality. In that case, it was found that that health hazard may be used to ground a criminal prohibition. Therefore, harm may be used to justify classifying the exercise of powers as properly within the federal jurisdiction. This principle was affirmed in *Keegstra, Swain, and RJR-MacDonald*. In *R v Keegstra*<sup>44</sup>, Dickson CJ (as he then was), writing for the majority stated that “[i]t is well accepted that Parliament can use the criminal law power to prevent the risk of serious harms.”<sup>45</sup> In *R v Swain*<sup>46</sup>, Lamer CJ (as he then was) stated that “it has long been recognized that there also exists a preventative branch of the criminal law

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because of its potential to cause harm, but rather was restricted by the Royal College of Dental Surgeons of Ontario. In contrast, in *RJR-MacDonald*, the advertising was being restricted because of its potential

<sup>42</sup> *Reference re Firearms Act (Can.)*, 2000 SCC 31 at para 27.

<sup>43</sup> [1980] 1 SCR 914.

<sup>44</sup> [1990] 3 SCR 697, SCJ No 131 [*Keegstra*]

<sup>45</sup> *Ibid* at para 114.

<sup>46</sup> [1991] 1 SCR 933, SCJ No 32.

power.”<sup>47</sup> In *RJR-MacDonald*, the SCC confirmed that the power to legislate with respect to dangerous goods also includes the power to introduce legislation regarding health warnings on dangerous goods.<sup>48</sup> Therefore, the concept of harm often plays a role in division of power issues, where the federal government argues that the impugned legislation is an appropriate use of their criminal law power. In *RJR-MacDonald’s* Court of Appeal decision, the Court concluded that the pith and substance of the *Tobacco Products Control Act*<sup>49</sup> was reducing tobacco use, and therefore, was an attempt to protect the public from the harmful effects of tobacco.<sup>50</sup> At the SCC, however, the court questioned whether tobacco advertising itself was harmful, entitling Parliament to prohibit or regulate it under the criminal law. When comparing tobacco advertising to other types of speech that parliament had criminalized, such as obscenity, the court had difficulty seeing a comparison.<sup>51</sup> It is likely that any challenge to the *Cannabis Act* will argue that the legislation is both *ultra vires* the federal government and that it infringes freedom of expression, and thus consideration of whether the Act prevents harm, allowing the federal government to rely on the criminal law power, is an important consideration. However, as this paper is focused on freedom of expression, it is not necessary here to categorize the pith and substance of the Act.

Second, there is some question about whether or not commercial speech should be afforded protection where the product (or service) being promoted is harmful. In *Ford v Quebec (Attorney General)*<sup>52</sup>, the Court supported the argument that Parliament cannot “suppress truthful and non-misleading advertising of lawful products on the grounds that

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<sup>47</sup> *Ibid* at 999.

<sup>48</sup> *RJR-MacDonald (SCC)*, *supra* note 5 at para 41.

<sup>49</sup> SC 1988, c-20 [TPCA].

<sup>50</sup> *RJR-MacDonald Inc. v Canada (Attorney General)*, [1993] 102 DLR (4th) 289, RJQ 375 (QL) at 34 (CA) [*RJR-MacDonald (1993)*].

<sup>51</sup> *RJR-MacDonald (SCC)*, *supra* note 5 at paras 203, 206.

<sup>52</sup> [1988] 2 SCR 712, SCJ No 88 [*Ford*].



the information to be conveyed would have a harmful effect”<sup>53</sup>, suggesting that harm is not a sufficient reason to strip commercial expression of protection. In contrast, the Attorney General in *RJR-MacDonald*, at the trial level, argued that freedom of expression does not protect “promotion activities relating to a product described as being harmful, if not fatal to one’s health.”<sup>54</sup> The Attorney General filed evidence in an attempt to demonstrate the harmful nature of tobacco use, and that advertising is used to increase consumption.<sup>55</sup> The trial court was not convinced by this argument. Chabot J held: “[a]ssuming...that the evidence before the Court clearly established the harmfulness of tobacco, the Court must nonetheless conclude that the *T.P.C.A.* does not in any way address this harm.”<sup>56</sup> Chabot J stressed that it was not the advertising that causes harm, but using tobacco.<sup>57</sup> Chabot J interpreted the Attorney General’s argument to be that tobacco is so harmful that any expression connected to it, except for the State’s, should be prohibited, and found this position to be “unacceptable under the Canadian Charter.”<sup>58</sup> At the Court of Appeal, the respondent tobacco companies defended their right to advertise a product widely recognized to be harmful.<sup>59</sup> The Court recognized that the issue was a balancing of the Respondent’s right to promote their economic interests and the public health concerns connected to smoking tobacco.<sup>60</sup> The SCC acknowledged that the harms associated with tobacco, and the profit motive of the advertisers resulted in the specific form of expression existing far from the core values underlying freedom of expression, entitling it to a very low degree of protection. In contrast, expression that is closely linked to the underlying rationales will be afforded a higher degree of protection.

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<sup>53</sup> *Ibid* at para 47 [in reaching this decision, the court referred to the American case *Virginia State Board of Pharmacy v Virginia Citizens Consumer Council Inc.* 425 US 748 (1976)].

<sup>54</sup> *RJR-MacDonald Inc. v Canada (Attorney General)*, [1991] RJQ 2260, 82 DLR (4th) 449 (QL) (Sup Ct) at 3 [*RJR-MacDonald (1991)*].

<sup>55</sup> *Ibid* at 9-10

<sup>56</sup> *Ibid* at 14.

<sup>57</sup> *Ibid.*

<sup>58</sup> *Ibid* at 25.

<sup>59</sup> *RJR-MacDonald (1993)*, *supra* note 50 at 20.

<sup>60</sup> *Ibid* at 25.

Tobacco advertising serves no political, scientific, or artistic purposes, instead its purpose is to inform consumers about a product that is harmful and to persuade them to purchase it.<sup>61</sup> While the Attorney General may advance the same reasoning should Bill C-45 be challenged, it is unlikely to be successful based on the jurisprudence, which clearly confirms that potential or actual harm of a product or service is not sufficient to strip it of constitutional protection entirely. It may be sufficient, however, to justify a lower threshold to pass section 1 scrutiny.

Third, courts have inconsistently utilized scientific evidence for assessing risk and/or harm; in some cases, significant amounts of scientific evidence have ultimately informed the section 1 analysis, while in others a common sense causal relationship has been satisfactory. In the trial decision of *RJR-MacDonald*, the Attorney General introduced a significant amount of evidence relating to the health harms of tobacco use; however, Chabot J stated that it was not the court's role to decide whether tobacco is or is not harmful, stating "the expert scientific evidence...was...irrelevant to the case."<sup>62</sup> This failure to rule on the harmful effects of tobacco was the Appellant's first ground of appeal to the Court of Appeal.<sup>63</sup> At the SCC, La Forest J (in dissent) disagreed with Chabot J's finding, instead finding "the nature and scope of the health problems raised by tobacco consumption are highly relevant to the s. 1 analysis, both in determining the appropriate standard of justification and in weighing the relevant evidence."<sup>64</sup> In contrast, in *R v Butler*<sup>65</sup> the Court accepted that it would be difficult to show a direct link between obscenity and harm, but accepted that "it is reasonable to presume that exposure to images bears a causal relationship to changes and attitudes and beliefs."<sup>66</sup> Further, the Court noted "[w]hile the accuracy of this perception is not susceptible of exact proof,

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<sup>61</sup> *RJR-MacDonald (SCC)*, *supra* note 5 at para 75.

<sup>62</sup> *RJR-MacDonald (1991)*, *supra* note 54 at 28- 29.

<sup>63</sup> *RJR-MacDonald (1993)*, *supra* note 50 at 28.

<sup>64</sup> *RJR-MacDonald (SCC)*, *supra* note 5 at para 66.

<sup>65</sup> [1992] 2 SCR 452, SCJ No 15 [*Butler*].

<sup>66</sup> *Ibid* at para 103

there is a substantial body of opinion that holds that the portrayal of persons being subjected to degrading or dehumanizing sexual treatment results in harm, particularly to women and therefore to society as a whole.”<sup>67</sup> In the case of cannabis, harm is not nearly as clear-cut as it is for tobacco or obscenity, and so how much evidence the Court considers, if any, could have a significant impact on the *Oakes* analysis. For example, in *R v Malmo-Levine*, a case which involved hearing the appeals of two separate challenges to the constitutionality of cannabis prohibition, demonstrates the inconsistencies regarding the acceptance of evidence by the courts. In the case of the first plaintiff, Malmo-Levine, the trial judge refused to hear evidence regarding the unconstitutionality of the offence of possession of cannabis; a decision that was later held by the SCC to be an error.<sup>68</sup> In contrast, in the case of the second plaintiff, the trial judge heard extensive evidence regarding the harm caused by cannabis.<sup>69</sup>

Fourth, judicial reasoning suggests that the degree of harmfulness of the product being advertised may affect all stages of the *Oakes* analysis. Each stage of the *Oakes* analysis will be discussed in turn. In determining whether the objective of the impugned legislation is pressing and substantial, harm is a central concept. Courts have consistently accepted the avoidance or mitigation of harm as sufficient to satisfy this step. In *Butler*, the avoidance of harm was identified by the applicant as one pressing and substantial objective for overriding the constitutional protection afforded to the distribution of obscene materials. The respondents re-characterized this as the state acting as a “moral custodian.”<sup>70</sup> In its decision, the majority referred to *Keegstra*, where the SCC accepted that the prevention of the effects of hate propaganda was a legitimate objective.<sup>71</sup> In *Keegstra*, the harm was two-fold: hate speech directly harms those to whom the speech is

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<sup>67</sup> *Ibid* at para 50

<sup>68</sup> *R v Malmo-Levine* (1998) 54 CRR (2d) 291 (BCSC) [the SCC later held that trial judge erred in excluding this evidence].

<sup>69</sup> *R v Caine* (1998) BCJ No 885 (QL) (Prov Ct) [the SCC held that this approach to hearing evidence was more appropriate]

<sup>70</sup> *Butler*, *supra* note 65 at para 77.

<sup>71</sup> *Ibid* 15 at para 87.

directed and it harms society at large.<sup>72</sup> The majority questioned whether hate propaganda was significant enough in Canada to warrant Parliamentary intervention, before ultimately concluding that it “was not insignificant.”<sup>73</sup> In fact, the majority noted that hate propaganda harms not only the persons on the receiving end of the hate propaganda, but also those who spew hate propaganda, noting, “breeding hate is detrimental to society for psychological and social reasons and that it can easily create hostility and aggression which leads to violence”.<sup>74</sup> Based on the jurisprudence, avoidance of harm appears to be sufficient to pass the pressing and substantial requirement of the section 1 analysis.

The avoidance of harm, when used as the pressing and substantial objective, will impact the remainder of the *Oakes* test depending on how narrowly or broadly it is categorized. If the harm being avoided or mitigated is defined broadly, it is generally easier for it to pass the rational connection test, because it will be easier to connect the infringement to the objective of avoiding or mitigating the harm in question. In *Butler*, Sopinka J, writing for the majority, conceptualized the harm in question broadly, and in so doing, made it difficult for the statutory definition of obscenity that was under consideration to fail the rational connection test.<sup>75</sup> When harm is defined more narrowly, however, it will be more difficult to pass the rational connection test, because it will necessarily be more difficult to connect the infringement to the objective.<sup>76</sup> Harm is also considered in the minimal impairment analysis. In *RJR-MacDonald*, the SCC advised the legislature that it needed to differentiate between harmful advertising and benign advertising, suggesting that

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<sup>72</sup> *Supra* note 44 at paras 60-62.

<sup>73</sup> *Ibid* at para 59.

<sup>74</sup> *Ibid* at para 10.

<sup>75</sup> *Supra* note 65 at paras 88, 92 [Sopinka J categorized the harm generally as “the harm associated with the dissemination of pornography.” Earlier, he stated that the materials in question cause similar harms as those recognized by the courts in the past, namely, they “seriously offend the values fundamental to our society”] See also Jamie Cameron, “Abstract Principle v. Contextual Conceptions of Harm: A comment on *R v Butler*” (1992) 37 *McGill LJ* 1135 at 1148 [as an example of a more specific articulation of the harms being avoided by section 163(8), Cameron suggests that protecting victims of sexual assault or victims of sexual exploitation could have been listed as objective rather than a more generalized protection against societal level harms.]

<sup>76</sup> *Ibid* at 1150.

restrictions must be sufficiently specific to prevent the articulated harm, and no more.<sup>77</sup> If the harm is defined more broadly, this will afford the defendant government greater latitude than if the harm is articulated more specifically, which will require an equally specific response.

The nature of the harm also impacts the proportionality analysis. In Sopinka J's dissenting decision in *RJR-MacDonald*, he stated: "I believe that any concern arising from this technical infringement of their rights is easily outweighed by the pressing health concerns raised by tobacco consumption."<sup>78</sup> In that case, the significant harms associated with tobacco use made it easy for the dissenting opinion to justify the negative impact of the legislation on the advertiser's rights, a position that was later affirmed in *Canada (Attorney General) v JTI-MacDonald*<sup>79</sup>. In *JTI-MacDonald*, the Court found significant benefits associated with decreasing tobacco use and discouraging young people from becoming addicted to tobacco, and that the deleterious effects on the right to freedom of expression were slight in comparison. Specifically, a unanimous Court noted, "[w]hen commercial expression is used, as alleged here, for the purpose of inducing people to engage in harmful and addictive behavior, its value becomes tenuous", suggesting that it will be easier to restrict commercial expression if a product is harmful.<sup>80</sup> From this, it is likely that the harms associated with cannabis use will play a role in the *Oakes* analysis. What is less clear is just how important harm will be in this analysis. This will be further explored in Chapter 5.

### 2.3. Introduction to Cannabis & Cannabinoids

Before providing a summary of the medical and scientific evidence regarding the harms of cannabis use, it is worthwhile to explore some of the basic properties of cannabis.

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<sup>77</sup> *Supra* note 5 at para 188.

<sup>78</sup> *Ibid* at para 118.

<sup>79</sup> 2007 SCC 30 [*JTI-MacDonald*]

<sup>80</sup> *Ibid* at para 47.

Cannabis is an incredibly unique<sup>81</sup> and heterogeneous product, which makes it particularly challenging to regulate. Rather than viewing cannabis as one product –or one drug – it is more appropriate to view it as a family of drugs, called cannabinoids.<sup>82</sup> In the next chapter, the longstanding relationship between cannabis and the law in Canada is discussed, but in this chapter the broader history and evolution of the human use of cannabis is explored. Cannabis is one of the world’s oldest cultivated plants, having been used by humans for religious, medical, recreational, and spiritual purposes for millennia.<sup>83</sup> Despite its lengthy history of human use, little was understood about the plant until recently. More than 100 different cannabinoids, which are chemical compounds in the cannabis plant, have been identified in the cannabis plant, in addition to other components.<sup>84</sup> Of the identified cannabinoids, the two most frequently studied are delta-9-tetrahydrocannabinol (THC), and cannabidiol (CBD). CBD was first isolated in 1940, and is touted for its medical applications because it lacks the impairing properties of THC, and it has antioxidant and anti-inflammatory properties.<sup>85</sup> THC, however, was not isolated until 1964.<sup>86</sup> Of all the cannabinoids, THC receives the most

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<sup>81</sup> Johnathan P Caulkins et al, *Marijuana Legalization: What Everyone Needs to Know* (New York: Oxford University Press, 2012) [Caulkins] at 6 [Cannabis is the only known substance that works on the endocannabinoid system, and does not fit well into any defined categories of drugs – it is often categorized as a hallucinogen, but it does not always have a psychotropic effect. Similarly, depending on the strain, it could be a depressant, similar to alcohol, or energizing, similar to a stimulant. Furthermore, while most drugs influence dopamine, serotonin, or GABA receptors, cannabis reacts to unique receptors and a unique neurotransmitter].

<sup>82</sup> Kathryn Greenaway, “Medical Marijuana proven to help manage pain and ease symptoms” (March 15, 2017) *Montreal Gazette* online: <<http://montrealgazette.com/news/local-news/west-island-gazette/medical-marijuana-proven-to-help-manage-pain-and-ease-symptoms>>.

<sup>83</sup> Ethan B. Russo, “History of Cannabis and its Preparations in Saga, Science, and Sobriquet” (2007) 4:8 *Chemistry and Biodiversity* 1614; Tengwen Long et al, “Cannabis in Eurasia: Origin of Human Use and Bronze Age Trans-Continental Connections” (2017) 26:2 *Vegetation History and Archaeobotany* 245.

<sup>84</sup> Mahmoud ElSohly & Waseem Gul, “Constituents of Cannabis Sativa” in Roger Pertwee, ed, “Handbook of Cannabis” (Oxford: Oxford University Press, 2014) [ElSohly & Gul].

<sup>85</sup> Roger Adams, Madison Hunt & J.H. Clark, “Structure of Cannabidiol, a Product isolated from the Marihuana Extract of Minnesota Wild Hemp. I” (1940) 62:1 *Journal of the American Chemical Society* 196; National Academies of Sciences, *supra* note 8 at 2-4; Caterina Scuderi et al, “Cannabidiol in Medicine: A Review of its Therapeutic Potential in CNS Disorders” (2009) 23 *Phytotherapy Research* 597.

<sup>86</sup> Maisto, Galizio & Connors, *supra* note 10 at 269.

attention because of its impairing abilities.<sup>87</sup> Other components of the cannabis plant include terpenes, nitrogenous compounds, and plant molecules.<sup>88</sup> While cannabinoids are unique to the cannabis plant, terpenes, which are essential oil components, are present in a wide variety of plants, and in some insects. For example, pinene, a terpene found in some strains of cannabis, is also present in conifers, such as pine trees.<sup>89</sup> These components are all important because they work together in what is called the “entourage effect” to create a unique outcome depending on the extent to which each compound is present.<sup>90</sup> For example, the terpene myrcene is known to have analgesic and sedative effects, and it is believed that when myrcene is combined with THC, the two together may produce ‘couch-lock.’<sup>91</sup> The entourage effect makes it difficult to both assess the effects of individual components, because their effects may be altered by the other compounds present in cannabis, and the effect of the cannabis plant as a whole, because there is so much variability.

Cannabis works primarily on the endocannabinoid system. Two cannabinoid receptors have been identified: CB1 and CB2. They are uniquely stimulated by THC.<sup>92</sup> CB1

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<sup>87</sup> National Academies, *supra* note 8 at 2-2.

<sup>88</sup> Roy Upton R.H. Dayu et al, eds, “Cannabis Inflorescence: Standards of Identity, Analysis, and Quality Control” American Herbal Pharmacopoeia (Scott’s Valley, CA: American Herbal Pharmacopoeia, 2013); See also Justin Sinclair, “An Introduction to Cannabis and the Endocannabinoid System” (2016) 28:4 *Australian Journal of Herbal Medicine* 107 at 112.

<sup>89</sup> See Ethan B. Russo, “Taming THC: Potential Cannabis Synergy and Phytocannabinoid-terpenoid Entourage Effects” (2011) 163 *British Journal of Pharmacology* 1344 at 1350 [Russo] [for more discussion on terpenes and their potential medical applications].

<sup>90</sup> Shimon Ben-Shabat et al, “An Entourage Effect: Inactive Endogenous Fatty Acid Glycerol Esters Enhance 2-arachidonoyl-glycerol Cannabinoid Activity” (1998) 353:1 *European Journal of Pharmacology* 23; Raphael Mechoulam & Shimon Ben-Shabat, “From gan-zi-gun-nu to anandamide and 2-arachidonoylglycerol: the ongoing story of cannabis” (1999) 16:2 *Natural Product Reports* 131; Russo, *supra* note 89 at 1345.

<sup>91</sup> *Ibid* at 1350.

<sup>92</sup> William A. Devane et al, “Determination and Characterization of a Cannabinoid Receptor in the Rat Brain” (1988) 34 *Molecular Pharmacology* 605; Miles Herkenham et al, “Cannabinoid Receptor Localization in the Brain” (1990) 87 *Proceedings of the National Academy of Sciences* 1932; Lisa A. Matsuda et al, “Structure of a Cannabinoid Receptor and Function Expression of the Cloned cDNA” (1990) 346 *Nature* 561; Sean Munro, Muna Abu-Shaar & Kerrie L. Thomas, “Molecular Characterization of a Peripheral Receptor of Cannabinoids (1993) 365:6441 *Nature* 61.

receptors are located primarily in the areas of the brain that control memory, cognition, the motor system, and mood, while CB2 receptors are most prevalent in the immune system, but are also found in other tissues, including the brain.<sup>93</sup> The endocannabinoid system plays a role in brain development and maturation, the regulation of appetite, memory and cognition, mood, pain, sleep, inflammation, and other physical and mental functions.<sup>94</sup> As a result, cannabis can have incredibly wide-ranging effects on users.

Additionally, there are two species of cannabis plant that are commonly used recreationally: Indica and Sativa. Although no statistically based studies have been published regarding the differentiation between Indica and Sativa strains, they are viewed as two ends of a spectrum, with hybrids, or cross-breeds, in-between.<sup>95</sup> Sativa plants tend to be taller, with narrower leaflets, higher levels of THC, and little or no CBD.<sup>96</sup> Sativas are generally more potent than Indicas, producing a euphoric, uplifting, and energizing impairment that is desired for daytime cannabis use.<sup>97</sup> In contrast, Indica plants are shorter with large and wide leaves, containing moderate levels of THC and CBD.<sup>98</sup> The result is a more subdued impairment, characterized by a relaxing ‘body buzz’, stress relief, and drowsiness, making it more suitable for nighttime use.<sup>99</sup>

Cannabinoids are not readily available in raw cannabis plant material, but cannabis can be manufactured into a variety of products that allow for the release of cannabinoids. The product most commonly associated with cannabis is the dried flower buds, commonly

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<sup>93</sup> Maisto, Galizio & Connors, *supra* note 10 at 271; Jerrold S. Meyer & Linda F. Quenzer, 2nd ed, *Psychopharmacology: Drugs, the Brain, and Behavior* (Sunderland, MA: Sinuer Associates Inc.2013) at 405 [Meyer & Quenzer].

<sup>94</sup> Michael T. Compton “An Introduction to Marijuana and Mental Health” in Michael T. Compton, ed, *Marijuana and Mental Health* (Arlington, VA: American Psychiatric Association Publishing, 2016) at 3.

<sup>95</sup> Ernest Small, *Cannabis: A Complete Guide* (Boca Raton, Florida: CRC Press, 2017) at 245 [Small] [stating, “[n]o adequate statistically based study of differences has been published.”]

<sup>96</sup> *Ibid* at 245-6.

<sup>97</sup> Jacob L. Erkelens & Arno Hazekamp, “That Which We Call Indica, by any Other Name Would Smell as Sweet” (2014) 9:1 *Cannabinoids* 9 at 14 [Erkelens & Hazekamp].

<sup>98</sup> Small, *supra* note 95 at 246.

<sup>99</sup> Erkelens & Hazekamp, *supra* note 97 at 14.



referred to as marijuana. Marijuana is most commonly combusted (via application of heat), to release the cannabinoids into smoke or vapour that is inhaled by the user. The resin from cannabis plants, referred to as hash, can also be combusted and inhaled. Additionally, cannabis oil can be manufactured in several ways: dried marijuana can be cooked in an oil (such as butter or coconut oil) to release the cannabinoids, or a solvent (such as butane or isopropyl alcohol) can be used to strip the cannabinoids and then boiled off, leaving behind the oil. Oil can be ingested by baking it into an edible (such as a brownie or cookie), or in its pure form. Some oil preparations can also be combusted and inhaled. More recently, alternative cannabis preparations have become more popular, such as tinctures, topical creams or lotions, and oral sprays. The mode of administration can affect the onset, intensity, and duration of the psychotropic effects, effects on organ systems, addictive potential, and negative consequences associated with cannabis use, resulting in a wide-range of outcomes for users.<sup>100</sup>

Besides those already mentioned, there are several other properties of cannabis that make assessing the harms associated with its use problematic. Cannabis has a bi-phasic effect: low doses often produce outcomes opposite to those resulting from higher doses.<sup>101</sup> Additionally, other factors, such as environment, expectations, individual personality, degree of tolerance, and time-frame, to name a few, will all impact the experience of the user.<sup>102</sup> Differences in individual rate of absorption and metabolism of THC can also impact the effects of using cannabis.<sup>103</sup> Another relevant property of cannabis is that it is fat soluble, which means that traces of cannabis can remain in the blood and urine samples much longer than impairment is experienced.<sup>104</sup>

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<sup>100</sup> Stéphanie Baggio et al, “Routes of Administration of Cannabis Used for Nonmedical Purposes and Associations with Patterns of Drug Use” (2014) 54:2 *Journal of Adolescent Health* 235 at 235-6.

<sup>101</sup> Small, *supra* note 95 at 223.

<sup>102</sup> C.H. Ashton et al, “Cannabinoids in Bipolar Affective Disorder: A Review and Discussion of Their Therapeutic Potential” (2005) 19:3 *Journal of Psychopharmacology* 193.

<sup>103</sup> National Academies, *supra* note 8 at 2-8.

<sup>104</sup> Meyer & Quenzer, *supra* note 93 at 404.

Consequently, the experience of being under the influence of cannabis can vary, depending on a variety of factors, including: the dose, the type of strain, the user and their purpose in using, and the social circumstances.<sup>105</sup> Although the degree of impairment experienced by cannabis users varies widely, there are four generally recognized stages of impairment: buzz, high, stoned, and the comedown. The buzz stage begins shortly after inhalation<sup>106</sup>, and users may experience tingling in the extremities, dizziness, light-headedness, feelings of warmth, increased heart rate, and dry mouth.<sup>107</sup> The high stage is typically accompanied by feelings of euphoria, exhilaration, and disinhibition.<sup>108</sup> If a sufficient dose is taken by the user, the high will progress to the stoned stage. At this stage, the user typically feels calm and relaxed, and may experience altered sensations, such as enhanced visual perception, illusions, and slowing of time.<sup>109</sup> Lastly, during the comedown the user will experience a gradual decline of the before-mentioned effects. The length of the comedown depends on the dose taken and the method of administration.<sup>110</sup> Other acute physiological and psychological responses to cannabis use will be discussed later in this chapter.

## 2.4. Cannabis Use in Canada

One of the difficulties in determining the risks associated with cannabis use is differentiating between the risks to an individual and the risks on a population level. To assess the population-level burden of cannabis use, it is necessary to understand how

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<sup>105</sup> Referred to as “drug set and setting” in Norman Zinberg, *Drug, Set, and Setting: The Basis for Controlled Intoxicant Use* (New Haven, CT: Yale University Press, 1986).

<sup>106</sup> If cannabis is ingested, the onset of the buzz will be delayed, up to 1-2 hours because the cannabis is processed through the stomach rather than the lungs. Similarly, cannabis applied topically will have a different range of time for onset of effects, depending on where it is applied. Sublingual tinctures will have a cause effects to occur more rapidly than if ingested, but more slowly than inhalation. Additionally, the effects of cannabis use will be different based on the mode of administration, and may not follow these stages.

<sup>107</sup> Iversen, Leslie L. *The Science of Marijuana* (New York: Oxford University Press, 2000) at 80 [Iversen].

<sup>108</sup> Meyer & Quenzer, *supra* note 93 at 413.

<sup>109</sup> *Ibid* at 82.

<sup>110</sup> *Ibid* at 414.

prevalent cannabis use is in Canada, and how that might change upon legalization. To determine the impact legalization may have on use, the experiences following legalization or decriminalization in other jurisdictions can be instructive.<sup>111</sup> Cannabis is the most commonly used illicit substance in the world, and the third most commonly used recreational drug after alcohol and tobacco.<sup>112</sup> According to the 2012 Canadian Community Health Survey – Mental Health, 43% of Canadians aged 15 or older reported having used cannabis at some point in their lives, and 12% reported using it in the past year.<sup>113</sup> Between 2002 and 2012, rates of cannabis use declined among those aged 15-17, remained stable among 18-24 year olds, and increased slightly among older populations. Daily use was reported by 1.8% of Canadians aged 15 or older, and weekly use was reported by an additional 3.2%.<sup>114</sup> Comparatively, 18.1% of Canadians aged 12 or older reported being current cigarette smokers in 2014. Of the roughly 5.4 million current smokers, approximately 4 million were daily smokers.<sup>115</sup> Therefore, it is reasonable to conclude that the population-level health burden of tobacco is much higher than that of cannabis.

One of the concerns driving the regulation of the recreational cannabis market is youth use of cannabis. In Ontario, a 2013 survey of approximately 10,000 students in grades 7 through 12 found that 21.3% reported using cannabis in the past year, down from 28% in

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<sup>111</sup> That being said, it is important to consider the differences between the different jurisdictions. In Canada, possession of cannabis will be legal for 12-18 year olds (so long as it is 5 grams or less), and the federal age for purchasing cannabis will be set at 18. In contrast, the age of purchase in most American states that have legalized is 21. Therefore, possession by individuals younger than 21 is still illegal in those states, and can impact the collection of accurate cannabis use data.

<sup>112</sup> United Nations Office of Drugs and Crime, “World Drug Report, 2012” (United Nations Publication, Sales No.E.12.X1.1) [UNODC].

<sup>113</sup> Michelle Rotermann & Kellie Langlois, “Prevalence and Correlates of Marijuana Use in Canada, 2012” (2015) 26:4 *Health Reports* 10 at 11.

<sup>114</sup> *Ibid* at 10 [weekly use defined as using one or more times in a week].

<sup>115</sup> Statistics Canada, “Smoking, 2014” (November 27, 2015) online: <<http://www.statcan.gc.ca/pub/82-625-x/2015001/article/14190-eng.htm>>.

1999.<sup>116</sup> The 2013 study found that males and females were equally likely to use, and that rates of use increased with each grade level.<sup>117</sup> Only 2% of surveyed students reported using cannabis daily or experiencing symptoms of cannabis dependence.<sup>118</sup> While there is some data from Colorado suggests that rates of youth use may increase following legalization, the majority of the evidence suggests otherwise. In the two years following legalization of recreational cannabis in Colorado, reported past month marijuana use in youth increased 20%, while national past month cannabis youth in youth decreased 4% in the same time.<sup>119</sup> A similar increase was found in college-age Coloradans; past month use increased 17% in the two years following legalization in Colorado, compared to a national increase of 2% during the same time.<sup>120</sup> However, the most significant increase was among adult Coloradans. Adult past month cannabis use increased 63% in the two years following legalization; interestingly, adult past month use also increased 21% nationally in the same time.<sup>121</sup>

In contrast, a study conducted by Healthy Kids Colorado found that youth use of cannabis decreased after legalization, with only 21% of youth reporting use of cannabis in the last 30 days in 2015, compared to 25% in 2009.<sup>122</sup> This finding is more consistent with the findings in other jurisdictions. Data from Washington state shows that there was no significant increase in youth use of cannabis in the two years following legalization; in fact the rates of 8<sup>th</sup> and 10<sup>th</sup> grade students who reported using cannabis in the past 30

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<sup>116</sup> Angela Boak et al, “Drug Use Among Ontario Students 1977-2013” Detailed OSDUHS findings (CAMH Research Document Series No.41, 2015) (Toronto, ON: Centre for Addiction and Mental Health) [Boak et al].

<sup>117</sup> *Ibid* at vi.

<sup>118</sup> *Ibid*.

<sup>119</sup> Rocky Mountain High Intensity Drug Trafficking Area, “The Legalization of Marijuana in Colorado: The Impact” Vol 4 (September 2016) at 2 [RMHIDTA, vol 4]

<sup>120</sup> *Ibid*.

<sup>121</sup> *Ibid*.

<sup>122</sup> Colorado Department of Public Health & Environment, “Marijuana Use Among Youth in Colorado- Executive Summary” (2015) online: <[https://www.colorado.gov/pacific/sites/default/files/PF\\_Youth\\_HKCS-2015-Exec-Summary.pdf](https://www.colorado.gov/pacific/sites/default/files/PF_Youth_HKCS-2015-Exec-Summary.pdf)>.

days decreased.<sup>123</sup> Similarly, the prevalence of cannabis use in the Netherlands, where cannabis has been decriminalized for over 40 years, is lower than other European countries, Canada, and the United States.<sup>124</sup> Therefore, while it is possible that Canada will experience an increase in use following legalization, data from other jurisdictions suggests it is not a certainty. Additionally, legalization may mitigate potential risks, such as fewer people using adulterated or harmful products, and less interaction with black market drug dealers, resulting in a net positive benefit.<sup>125</sup>

## 2.5. The Problem of Researching Cannabis

One of the reasons that regulating recreational cannabis is so challenging is because of the difficulties associated with cannabis research that prevent policy makers and politicians from creating policies based on evidence. Cannabis has been prohibited for nearly a century, making it difficult for researchers to acquire cannabis material. Additionally, prohibition makes it difficult to capture accurate data on use, because participants may be hesitant to admit to using an illegal substance. Notably, it remains a Schedule I substance in the United States, categorized as having no medical benefit,

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<sup>123</sup> Washington State Institute for Public Policy, “I-502 Evaluation Plan and Preliminary Report on Implementation” (September 2015) online: <[http://www.wsipp.wa.gov/ReportFile/1616/Wsipp\\_I-502-Evaluation-Plan-and-Preliminary-Report-on-Implementation\\_Report.pdf](http://www.wsipp.wa.gov/ReportFile/1616/Wsipp_I-502-Evaluation-Plan-and-Preliminary-Report-on-Implementation_Report.pdf)>; Similar results were reported in Oregon and Alaska. See Alaska Department of Health and Social Services Division of Public Health, “Alaska Youth Risk Behavior Survey – 2015 Highlights” (October 2016) online: <[http://dhss.alaska.gov/dph/Chronic/Documents/yrbs/2015YRBS\\_Highlights.pdf](http://dhss.alaska.gov/dph/Chronic/Documents/yrbs/2015YRBS_Highlights.pdf)> [youth reporting using marijuana during the last 30 days decreased from 20.5% in 2007 to 19% in 2015]; Oregon Health Authority “2015 Oregon Healthy Teens Survey” (December 2015) online: <[http://www.oregon.gov/oha/ph/BirthDeathCertificates/Surveys/OregonHealthyTeens/Documents/2015/2015\\_OHT\\_State\\_Report.pdf](http://www.oregon.gov/oha/ph/BirthDeathCertificates/Surveys/OregonHealthyTeens/Documents/2015/2015_OHT_State_Report.pdf)> [reporting that current use of cannabis among youth remained stable following legalization in 2014]; Similarly, a report by the CATO institute reports that legalization had minimal effects on marijuana use. See Angela Dills, Sietse Goffard & Jeffrey Miron, “Dose of Reality: The Effect of State Marijuana Legalizations” *Policy Analysis* (September 16, 2016) CATO Institute, online <<https://object.cato.org/sites/cato.org/files/pubs/pdf/pa799.pdf>>.

<sup>124</sup> UNODC, *supra* note 112.

<sup>125</sup> For example, with proper standardization and regulations in place, the American Public Health Association notes that legalization will help protect consumers from adulterants: American Public Health Association, “Regulating Commercially Legalized Marijuana as a Public Health Priority” (November 18, 2014) online: <<https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2015/01/23/10/17/regulating-commercially-legalized-marijuana-as-a-public-health-priority>>.

significantly impeding research.<sup>126</sup> As discussed earlier, cannabis is a heterogeneous product. The cannabis plant can grow in a wide range of varieties with different cannabinoid profiles<sup>127</sup>, it can be ingested in numerous methods with different effects, and standardized dosages do not exist. Furthermore, some research may look at chronic use, while others focus only on past use, medical use, or occasional use. So, while one study may, for example, find that cannabis helps to alleviate the symptoms of anxiety, the findings cannot definitively be extrapolated to different strains, doses, or methods of delivery. This limits the conclusions that can be drawn from cannabis research, and amplifies the number of studies that would need to be undertaken to have a thorough understanding of cannabis. Presently, while there is a growing body of literature that examines cannabis use, the findings may only be applicable in very narrow circumstances, and often research results in seemingly conflicting results.<sup>128</sup>

Another concern, although not specific to cannabis research, involves the type and quality of study conducted. Results from an animal study cannot be conflated to human effects, though they often are in the media.<sup>129</sup> Additionally, because various personal characteristics can impact the effects of cannabis, such as past use and metabolism, studies in one human population may not be replicated in a different one.<sup>130</sup>

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<sup>126</sup> National Academies, *supra* note 8 at 15-1.

<sup>127</sup> Caulkins, *supra* note 81 at 34 [for example, until recently, very little research documented or studied the amount of cannabidiol in products being tested].

<sup>128</sup> For example, one study might find an association between cannabis and symptoms of anxiety, but the opposite may be found when a different strain or dose is used. See e.g. Jodi M. Gilman et al, “Cannabis Use is Quantitatively Associated with Nucleus Accumbens and Amygdala Abnormalities in Young Adult Recreational Users” (2014) 34:16 *Journal of Neuroscience* 5529 [finding that marijuana exposure is associated with alteration of neural reward structures]; Barbara J. Weiland et al, “Daily Marijuana Use is Not Associated with Brain Morphometric Measures in Adolescents or Adults” (2015) 35:4 *Journal of Neuroscience* 1505 [no difference in the size and shape of the amygdala and nucleus accumbens was found between cannabis users and non-users].

<sup>129</sup> Daniel G. Hackam, “Translation of Research Evidence from Animals to Humans” (2006) 296:14 *Journal of the American Medical Association* 1731 [reporting that only about one- third of highly cited animal research in leading journals was replicated in randomized trials involving humans].

<sup>130</sup> John P.A. Ioannidis, “Contradicted and Initially Stronger Effects in Highly Cited Clinical Research” (2005) 294:2 *Journal of the American Medical Association* 218 at 220 [found that of forty- five highly cited medical studies where the authors claimed an intervention was effective, “7 (16 percent) were contradicted

Differentiating between correlation and causation in cannabis research is also troubling. For example, while research may find that adolescents who use cannabis miss more days of school, this does not tell us that cannabis use causes absenteeism.<sup>131</sup> Unfortunately, that is often how associations are reported in media.<sup>132</sup> In the same vein, the inability to prove causation does not mean that there are no causal effects. While care must be taken not to be too quick to find a causal relationship, the difficulties in proving causal relationships are not reason enough to ignore research that finds associations.<sup>133</sup> Lastly, ethical guidelines that govern scientific and medical research prevent a lot of cannabis research from taking place.<sup>134</sup> For example, given the lack of conclusive knowledge regarding the impact of cannabis use on fetal and adolescent development, it would be unethical for researchers to give cannabis to pregnant women in a study looking at the effects of cannabis on birth weight, or to give cannabis to some children, but not others, in order to be able to control for factors that would allow us to better understand the causal relationship between cannabis and educational attainment.<sup>135</sup> The issues inherent to understanding and researching cannabis use complicate the ability to project what harms might or might not arise out of cannabis legalization. Because of the difficulties associated with researching cannabis, there is still a lot to learn about cannabis and its

by subsequent studies, 7 others (16 percent) had found effects that were stronger than those of subsequent studies, 20 (44 percent) were replicated, and 11 (24 percent) remained largely unchallenged.”]

<sup>131</sup> For more discussion on this, see Caulkins, *supra* note 81 at 35

<sup>132</sup> See e.g., Barry Bard, “Study: Cannabis Use May Subside Effects of Aging” (May 30, 2017) online: Marijuana <<https://www.marijuana.com/news/2017/05/study-cannabis-use-may-subside-effects-of-aging/>> [while the title suggests cannabis use may mitigate the effects of aging, the study they refer to was conducted on mice]; Nick McDermott, “Teens who smoke a lot of cannabis ’26 times more likely to use OTHER drugs’ and drink, study claims” The Sun (June 7th, 2017) online: <<https://www.thesun.co.uk/living/3749463/teens-cannabis-likely-drug-drink-smokers-study/>> [this article references the ‘gateway theory’ despite no evidence to suggest cannabis use causes increased use of alcohol and other drugs, simply that there is a correlation].

<sup>133</sup> See Caulkins, *supra* note 81 at 36.

<sup>134</sup> See Michael H. Andreae et al, “An Ethical Exploration of Barriers to Research on Controlled Drugs” (2016) 16:4 *American Journal of Bioethics* 36.

<sup>135</sup> Caulkins, *supra* note 81 at 36.

effects, and of the research that has been conducted, very little can be stated conclusively. Despite the hurdles mentioned here in this section, there has been an immense amount of research conducted on cannabis in recent years. The following section will look at the evidence on the medical use of cannabis.

## 2.6. Medical Uses of Cannabis

While they are treated differently, medical and recreational cannabis are the same substance. The line between medical and recreational use of cannabis is not clear; many medical users prefer using cannabis over other conventional medications because of its desirable side effects (or lack thereof), and many recreational users self-medicate with recreational cannabis, again because of cannabis' desirable effects. Upon legalization, it is probable that many medical users will purchase their cannabis from the recreational market, and there is anecdotal evidence that medical users use cannabis for recreational purposes in addition to using it for medical concerns.<sup>136</sup> Therefore, it is prudent to provide a brief history of the medicinal uses of cannabis as well as the current evidence supporting the medical uses of cannabis.

Cannabis has long been touted for its medical applications. Chinese and Indian medicine have long histories of using cannabis medicinally. A Chinese Herbal Medicine compendium from 2800 BCE recommended using cannabis to treat constipation, gout, malaria, rheumatism, and menstrual problems.<sup>137</sup> The Indian Athava Veda, dated from 2000-1400 BCE, references the use of cannabis for its decongestant, astringent, soothing, anesthetic, aphrodisiac, appetite stimulating, and digestion promotion effects.<sup>138</sup> The earliest documented reference to the use of cannabis as medicine is most often credited to Chinese emperor Shen Nung, in 2800 BCE, but the earliest physical evidence of medical

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<sup>136</sup> See e.g. Sheryl Ubelacker, "Nearly 130K Canadians have medical pot prescriptions" CP24 (February 23, 2017) online: <<http://www.cp24.com/lifestyle/health/nearly-130k-canadians-have-medical-pot-prescriptions-1.3298804>>.

<sup>137</sup> Iversen, *supra* note 107 at 122.

<sup>138</sup> *Ibid.*



cannabis use is traced to approximately 400 AD.<sup>139</sup> Similar indications of cannabis use during childbirth have been documented in Egyptian Papyri and Assyrian tablets.<sup>140</sup> More widespread use of cannabis as a medicine did not begin until the 1800s, when physicians such as William O’Shaughnessy, the author of one of the first published studies on cannabis, popularized its use.<sup>141</sup> Cannabis continued to be used medically well into the 1930s as an ingredient in various over the counter medicines, such as remedies for stomach pain, restlessness, and coughs, until being taken off the market after prohibition.<sup>142</sup>

After decades of total prohibition of cannabis use, both medically and recreationally, modern science has once again supported the efficacy of cannabis use for many medical applications. A 2017 National Academies of Science Report analyzed more than 10,700 abstracts involving scientific studies on cannabis use for medical purposes.<sup>143</sup> The report found conclusive or substantial evidence that cannabis/cannabinoids are effective for treating: chronic pain in adults; chemotherapy-induced nausea and vomiting; and, improving patient reported multiple-sclerosis spasticity symptoms.<sup>144</sup> However, with cannabis legalization on the political agenda of many jurisdictions, providing the motivation to conduct research, there is new research being published every day. A significant amount of research supports the effectiveness of cannabis for pain relief, both chronic and neuropathic.<sup>145</sup> There is also a significant amount of research supporting the

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<sup>139</sup> Maisto, Galizio & Connors, *supra* note 10 at 260, 273 [Scientists found residue of cannabis buried with the body of a woman who appeared to have died in childbirth during that time].

<sup>140</sup> Billy R. Martin et al “International Cannabis Research Society Meeting Summary, Keystone, CO (June 19-20, 1992)” (1993) 31 *Drug and Alcohol Dependence* 219.

<sup>141</sup> Maisto, Galizio & Connors, *supra* note 10 at 273; Hand, *supra* note 38 at 388 [Shaughnessy is thought to be responsible for introducing the Western world to cannabis after he authored one of the first published works on the medical applications of cannabis].

<sup>142</sup> Iversen, *supra* note 107 at 130.

<sup>143</sup> *Supra* note 8.

<sup>144</sup> National Academies, *supra* note 8 at S-10.

<sup>145</sup> See e.g., Ben Amar, “Cannabinoids in medicine: A review of their therapeutic potential” (2006) 105 *Journal of Ethnopharmacology* 1 [Amar]; Arno Hazekamp & Franjo Grotenhermen, “Review on clinical studies with cannabis and cannabinoids 2005-2009” (2010) 5 (special issue) *Cannabinoids* 1 [Hazekamp &

use of cannabis to: enhance appetite in HIV/AIDS patients<sup>146</sup>; ameliorate nausea in cancer patients receiving chemotherapy<sup>147</sup>; reduce the severity and occurrence of epileptic seizures<sup>148</sup>; temporarily reduce intraocular pressure caused by glaucoma<sup>149</sup>; mitigate the side-effects of Hepatitis C treatment<sup>150</sup>; improve appetite and sleep and

Grotenhermen]; Barth Wilsey et al, “A Randomized, placebo-controlled, crossover trial of cannabis cigarettes in neuropathic pain” (2008) 9:6 *The Journal of Pain* 506; Donald I. Abrams et al “Cannabis in painful HIV-associated sensory neuropathy” (2007) 68 *Neurology* 515; Ronald J. Ellis et al, “Smoked Medical Cannabis for Neuropathic Pain in HIV: A Randomized, Crossover Clinical Trial” (2009) 34(3) *Neuropsychopharmacology* 672; Mark A. Ware et al, “Smoked Cannabis for Chronic Neuropathic pain: A Randomized controlled trial” (2010) 182(14) *CMAJ* E694; Mark Wallace et al, “Dose-Dependent Effects of Smoked Cannabis on Capsaicin-induced Pain and Hyperalgesia in Healthy Volunteers” (2007) 107(5) *Anesthesiology* 785; Mary E. Lynch & Fiona Campbell, “Cannabinoids for treatment of chronic non-cancer pain: a systemic review of randomized trials” (2011) 72:5 *British Journal of Clinical Pharmacology* 735; Penny F. Whiting et al, “Cannabinoids for Medical Use: A Systemic Review of Meta-analysis” (2015) 313:24 *JAMA* 2456 [Whiting et al].

<sup>146</sup> See e.g. Donald I. Abrams et al, “Short-term Effects of Cannabinoids in Patients with HIV-1 Infection: A Randomized, Placebo-Controlled Clinical Trial” (2003) 139:4 *Annals of Internal Medicine* 258; National Academies of Sciences, *supra* note 8 at S-10 [Limited evidence that cannabis/cannabinoids are effective for Increasing appetite and decreasing weight loss associated with HIV/AIDS].

<sup>147</sup> See e.g., Amar, *supra* note 145; Hazekamp & Grotenhermen, *supra* note 145; David J. Shiling et al, “A prospective evaluation of delta-9-tetrahydrocannabinol as an antiemetic in patients receiving Adriamycin and Cytosin chemotherapy” (1981) 47:7 *Cancer* 1746; Alfred E. Chang et al, “Delta-9-Tetrahydrocannabinol as an Antiemetic in Cancer Patients Receiving High Dose Methotrexate: A Prospective, Randomized Evaluation” (1979) 91:6 *Annals of Internal Medicine* 819; Martin R. Tramèr et al, “Cannabinoids for control of chemotherapy induced nausea and vomiting: quantitative systemic review” (2001) 323 *BMJ* 16.

<sup>148</sup> See e.g., Brenda E. Porter & Catherine Jacobson, “Report of a parent survey of cannabidiol-enriched cannabis use in pediatric treatment-resistant epilepsy” (2013) 29:3 *Epilepsy and Behavior* 574; David Gloss & Barbara Vickery, “Cannabinoids for epilepsy” (2014) *Cochrane Database of Systematic Reviews* Issue 3, Art No CD009270 DOI 10.1002/14651858.CD009270.pub3; Nicholas A. Jones et al, “Cannabidiol Exerts Anti-Convulsant Effects in Animal Models of Temporal Lobe and Partial Seizures” (2012) 21:5 *Seizure* 344.

<sup>149</sup> See e.g., John C. Merritt et al, “Effect of Marijuana on Intraocular and Blood Pressure in Glaucoma” (1980) 87:3 *Ophthalmology* 222; Eugenio A. Maul & Henry D. Jampel, “Glaucoma Screening in the Real World” (2010) 117:9 *Ophthalmology* 1665; Janet E. Joy, Stanley J. Watson Jr & John A. Benson Jr, eds, *Marijuana and Medicine: Assessing the Science Base* (Washington, DC: National Academies Press, 1999) [Joy, Watson Jr & Benson Jr]; National Academies, *supra* note 8 at S-10 [Limited evidence that cannabis/cannabinoids are ineffective for improving intraocular pressure associated with glaucoma (cannabinoids)].

<sup>150</sup> See e.g., Diana L. Sylvestre, Barry J. Clements & Yvonne Malibu, “Cannabis use improves retention and virological outcomes in patients treated for hepatitis C” (2006) 18 *European Journal of Gastroenterology & Hepatology* 1057; Julie H. Ishida et al., “Influence of Cannabis Use on Severity of Hepatitis C Disease” (2008) 6:1 *Clinical gastroenterology and hepatology* 69; Christophe Hezode et al.,

reduce steroid dependency in patients with Crohn's Disease<sup>151</sup>; and, reduce symptoms of appetite loss, depression, pain, spasticity, and drooling associated with amyotrophic lateral sclerosis (ALS)<sup>152</sup>. There is also some research suggesting that cannabis may have applications in treating or managing: dementia/Alzheimer's<sup>153</sup>; psychosis<sup>154</sup>; mania<sup>155</sup>; depression<sup>156</sup>; anxiety<sup>157</sup>; Post-Traumatic Stress Disorder (PTSD)<sup>158</sup>; Parkinson's<sup>159</sup>; and

"Daily Cannabis Use: A Novel Risk Factor of Steatosis Severity in Patients with Chronic Hepatitis C" (2008) 134:2 *Gastroenterology* 432.

<sup>151</sup> See e.g., Timna Naftali et al., "Cannabis Induces a Clinical Response in Patients with Chron's Disease: A Prospective Placebo-Controlled Study" (2013) 11 *Clinical Gastroenterology and Hepatology* 1276;

<sup>152</sup> See e.g., Gregory T. Carter et al., "Cannabis and Amyotrophic Lateral Sclerosis: Hypothetical and Practical Applications, and a Call for Clinical Trials" (2010) 27:5 *American Journal of Hospice & Palliative Medicine* 347, Dagmar Amtmann et al., "Survey of cannabis use in patients with amyotrophic lateral sclerosis" (2004) 21:2 *American Journal of Hospice & Palliative Medicine* 95.

<sup>153</sup> See e.g., V.A. Campbell and A. Gowran, "Alzheimer's Disease: Taking the edge off with cannabinoids?" (2007) 152 *British Journal of Pharmacology* 655; Sarada Krishnan, Ruth Cairns & Robert Howard, "Cannabinoids for the treatment of dementia" (2009) Cochrane Database of Systematic Reviews 2009, Issue 2.Art.No.: CD007204, DOI: 10.1002/14651858.CD007204.pub2; National Academies, *supra* note 8 at S-10 [Limited evidence that cannabis/cannabinoids are ineffective for improving symptoms associated with dementia (cannabinoids)].

<sup>154</sup> See e.g., F. Markus Leweke et al., "Cannabidiol enhances anandamide signaling and alleviates psychotic symptoms of schizophrenia" (2012) 2 *Translational Psychiatry* 1; Whiting et al, *supra* note 145; Benjamin McLoughlin et al., "Cannabis and Schizophrenia" (2014) Cochrane Database of Systematic Reviews, Issue 10, Art No CD004837, DOI: 10.1002/14651858.CD004837.pub3; Nora D. Volkow et al., "Adverse Health Effects of Marijuana Use" (2014) 370:23 *NEJM* 2219 [Volkow].

<sup>155</sup> See e.g., Melanie Gibbs et al, "Cannabis use and mania symptoms: A Systematic review and meta-analysis" (2015) 171 *Journal of Affective Disorders* 39 [Gibbs et al]; I. Zorrilla et al., "Cannabis and bipolar disorder: does quitting cannabis use during manic/mixed episode improve clinical/functional outcomes?" (2015) 131 *Acta Psychiatrica Scandinavica* 100; But see: Antonio Waldo Zuardi et al, "Cannabidiol was ineffective for manic episode of bipolar affective disorder" (2010) 24:1 *Journal of Psychopharmacology* 135.

<sup>156</sup> See e.g., Margriet Van Laar et al, "Does cannabis use predict the first incidence of mood and anxiety disorders in the adult population" (2007) 102:8 *Addiction* 1251 [Van Laar et al]; S. Lev-Ran et al, "The Association between cannabis use and depression: A systematic review and meta-analysis of longitudinal studies" (2014) 44 *Psychological Medicine* 797.

<sup>157</sup> See e.g., Whiting et al, *supra* note 145; José Alexandre Crippa et al, "Cannabis and anxiety: A critical review of the evidence" (2009) 24 *Human Psychopharmacology: Clinical & Experimental* 515; Alexandre Rafael de Mello Schier et al, "Cannabidiol, a Cannabis Sativa constituent, as an anxiolytic drug" (2012) 34:Suppl1 *Revista Brasileira de Psiquiatria* S104; Ravi K. Das et al, "Cannabidiol Enhances Consolidation of Explicit Fear Extinction in Humans" (2013) 226:4 *Psychopharmacology* 781; Mateus M. Bergamaschi et al, "Cannabidiol Reduces the Anxiety Induced by Simulated Public Speaking in Treatment-Naïve Social

sleep disorders<sup>160</sup>. Despite this research, the National Academies of Sciences reported that there is insufficient evidence to support or refute the conclusion that cannabis or cannabinoids are effective for treating cancer, cancer-related anorexia, irritable bowel syndrome, epilepsy, spinal cord injury-related spasticity, ALS, Huntington's, motor system symptoms associated with Parkinson's, dystonia, addiction, and schizophrenia.<sup>161</sup> More high-quality, clinical trials on the various medical applications of cannabis are needed to ascertain the efficacy of cannabis as a treatment option for these conditions.

Phobia Patients" (2011) 36:6 *Neuropsychopharmacology* 1219 [Bergamaschi et al]; But, see also National Academies of Sciences, *supra* note 8 at S-10 [Limited evidence that cannabis/cannabinoids is effective for improving anxiety symptoms in individuals with social anxiety disorders].

<sup>158</sup> See e.g., Marcel O. Bonn-Miller, Alex H. Harris & Jodie A. Trafton, "Prevalence of cannabis use disorder among veterans in 2002, 2008 and 2009" (2012) 9:4 *Psychological Services* 404; A. Neumeister et al, "Elevated brain cannabinoid CB1 receptor availability in post-traumatic stress disorder: a positron emission tomography study" (2013) 18 *Molecular Psychiatry* 1034; Katherine A. Belendiuk, Lisa L. Baldini & Marcel O. Bonn-Miller, "Narrative review of the safety and efficacy of marijuana for the treatment of commonly state-approved medical and psychiatric disorders" (2015) 10:1 *Addiction Science & Clinical Practice* 10; But see also, National Academies, *supra* note 8 at S-10 [there is limited evidence that cannabis/cannabinoids are effective for improving symptoms of PTSD].

<sup>159</sup> See e.g., Antonio Waldo Zuardi et al, "Cannabidiol for the treatment of psychosis in Parkinson's Disease" (2009) 23:8 *Journal of Psychopharmacology* 979; Marcos Hortes N. Chagas et al, "Effect of cannabidiol in the treatment of patients with Parkinson's disease: An exploratory double-blind trial" (2014) 28:11 *Journal of Psychopharmacology* 1088.

<sup>160</sup> See e.g., Antonio Waldo Zuardi, "Cannabidiol: from an inactive cannabinoid to a drug with wide spectrum of action" (2008) 30:3 *Revista Brasileira de Psiquiatria* 271; José Alexandre Crippa, Antonio Waldo Zuardi & Jaime E.C. Hallak, "Therapeutic use of the cannabinoids in psychiatry" (2010) 2:Suppl1 *Revista Brasileira de Psiquiatria* S56; Peter J. Gates, Lucy Albertella & Jan Copeland, "The effects of cannabinoid administration on sleep: a systematic review of human studies" (2014) 18 *Sleep Medicine Reviews* 477; Thomas Schierenbeck et al, "Effect of Illicit Recreational Drugs Upon Sleep: Cocaine, Ecstasy and Marijuana" (2008) 12:5 *Sleep Medicine Reviews* 381 [Schierenbeck et al]; National Academies, *supra* note 8 at S-10 [there is moderate evidence that cannabis/cannabinoids are effective for improving short term sleep outcomes in individuals with sleep disturbances associated with sleep apnea, fibromyalgia, chronic pain, and MS.

<sup>161</sup> *Ibid* at S10-11.

## 2.7. Harm & Risk

### 2.7.1. History of Assessing the Harm of Cannabis

In the past century, many attempts have been made to assess the risks of cannabis use, and though the results have been consistent, they have largely failed to influence the public or legal discourse regarding the safety of cannabis use. In 1893, the British Government commissioned a report on cannabis use in India. The Indian Hemp Drugs Commission studied the issue and published a 6-volume report that found moderate use of hemp drugs was “practically attended by no evil results at all.”<sup>162</sup> In 1925, the United States Army investigated cannabis use by soldiers in the Panama Canal zone after the Army expressed concerns about the effects of cannabis use on military discipline. The committee reviewed literature, consulted with experts, collected testimony from army officials, examined personnel records, and found no evidence that marijuana had any appreciably deleterious influence on the individuals using it. It also concluded that marijuana was neither habit forming nor risky.<sup>163</sup> These studies were published at a time when information was not easily disseminated, so these reports were not widely available, which may explain why the results were not widely acknowledged and prohibition persevered.<sup>164</sup>

Still puzzled about the harms of cannabis use, New York Mayor La Guardia appointed a committee of scientists in 1944 to investigate the safety of cannabis use. The committee concluded that there was no link between cannabis use and crime or violent behavior. It also refuted the common misperception that cannabis use among school children was

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<sup>162</sup> Iversen, *supra* note 107 at 242.

<sup>163</sup> *Ibid.*

<sup>164</sup> The reasons prohibition continued to dominate for so long are multi-faceted; the lack of information sharing and the pervasiveness of misinformation regarding the dangers of cannabis are just two. For more discussion on the politics of cannabis prohibition see Alyson Martin & Nushin Rashidian, *A New Leaf: the End of Cannabis Prohibition* (New York, The New Press, 2014); See also, Harry G. Levine, “Global Drug Prohibition: Its Uses and Crises” (2003) 14:2 *International Journal of Drug Policy* 145; See also David T. Courtwright, *Forces of Habit: Drugs and the Making of the Modern World* (Cambridge, Mass.: Harvard University Press, 2001) at 193 [cannabis liberalization has always been a predominately grassroots movement, unlike other industries such as tobacco, alcohol, or pharmaceuticals, that have historically been backed by powerful companies with the resources to lobby for legal changes that support their bottom line].

widespread and acted as a gateway drug to the use of other drugs.<sup>165</sup> A few years later, in 1968, the British Home Office established an Advisory Committee on Drug Dependence and a subcommittee to review evidence on cannabis. The Wootton Report, as it was known, concluded that while the effects of cannabis should not be underestimated, the gateway theory was overstated and the criminal sanctions attached to cannabis offences were overly severe.<sup>166</sup> Around the same time, United States President Richard Nixon appointed the National Commission on Marihuana and Drug Abuse, also known as the Shafer Commission, created pursuant to the *Comprehensive Drug Abuse Prevention and Control Act*<sup>167</sup>. The purpose of the Commission was to analyze the nature and scope of cannabis use, the effects of its use, the relationship between cannabis use and other behaviors, and the efficacy of the existing laws.<sup>168</sup> The Shafer Commission Report, titled “Marihuana: A Signal of Misunderstanding”, presented to Congress in 1972, recommended decriminalizing private possession and distribution of small quantities of cannabis for personal use.<sup>169</sup> The Canadian equivalent of the Shafer Commission was the Commission of Inquiry Into the Non-Medical Use of Drugs (commonly known as the Le Dain Report), appointed by the Canadian Government following the recommendation the Honourable John Munro, then Minister of National Health and Welfare. The Commission was formed to address concerns about the social and individual implications of the non-medical use of drugs. It recommended repealing the prohibition against the simple

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<sup>165</sup> Emily Brooks, “Marijuana in La Guardia’s New York City: The Mayor’s Committee and Federal Policy, 1938-1945” (2016) 28:4 *Journal of Policy History* 568 at 583 [this is also known as the ‘gateway theory’].

<sup>166</sup> Advisory Committee on Drug Dependence, “Cannabis: Report by the Advisory Committee on Drug Dependence” (October 4th, 1968) (Chairman: Sir Edward Wayne) online: <<https://peopleofstort.files.wordpress.com/2014/09/woottonreport1969.pdf>>.

<sup>167</sup> Pub L No 91-513, 84 Stat 1236 (October 27, 1970).

<sup>168</sup> Daniel Bessner, “National Commission on Marihuana and Drug Abuse (1972)” in Mark A.R. Kleiman & James E. Hawdon, *Encyclopedia of Drug Policy* (SAGE Publications Inc., 2011) online:<DOI:10.4135/9781412976961>.

<sup>169</sup> *Ibid.*

possession of cannabis upon concluding that there was little evidence that cannabis is addictive.<sup>170</sup>

Canadian courts have also been tasked with assessing the harms associated with cannabis in the past, most notably in *R v Malmo-Levine; R v Caine*<sup>171</sup>. In that case, the appellants filed a joint statement of legislative facts in which they admitted that cannabis use was associated with the following risks: dependency, driving a vehicle or operating machinery, damage to lung, schizophrenia and psychosis, amotivational syndrome, effects on fetus/newborns, and effects on the reproductive system.<sup>172</sup> Ultimately, the SCC found that “[i]t seems clear that the use of marihuana has less serious and permanent effects than was once claimed, but its psychoactive and health effects can be harmful, and in the case of members of vulnerable groups the harm may be serious and substantial.”<sup>173</sup>

Most recently, in 2015 two researchers published a study confirming that the risk of cannabis has been overstated in the past. They found that the margin for exposure (MOE)<sup>174</sup> for cannabis on both an individual and population level was high, meaning that the toxicological threshold was high compared to the estimated human intake. In comparison, alcohol and heroin had low MOE, meaning the ratio of the toxicological threshold to intake was low.<sup>175</sup> Despite repeated reports of the relative safety of cannabis, it remains illegal in most parts of the world and many remain convinced of its harmfulness. These next sections will provide a brief overview of the evidence of the acute effects and risks of cannabis use, as well as risks associated with long-term or regular cannabis use.

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<sup>170</sup> Commission of Inquiry into the Non-Medical Use of Drugs, *Final Report of the Commission of Inquiry into the Non-Medical Use of Drugs* (Ottawa, 1973) (Chair: Gerald Le Dain).

<sup>171</sup> 2003 SCC 74 [*Malmo-Levine*].

<sup>172</sup> *Ibid* at para 42

<sup>173</sup> *Ibid* at para 61

<sup>174</sup> The margin of exposure is the ratio between the toxicological threshold and estimated human intake.

<sup>175</sup> Lachenmeier & Rehm, *supra* note 11.

### 2.7.2. Acute Effects

Though cannabis clearly has valid medical applications, it is most commonly used recreationally, inferring that it has desirable effects. Potential desirable effects of use include euphoria, relaxation, decreased anxiety, and reduced inhibitions.<sup>176</sup> Because cannabis can help people feel relaxed and less self-conscious, it often serves as a social lubricant.<sup>177</sup> Some users also report a positive change to sensory perceptions, such as hunger and music.<sup>178</sup> CBD has also been reported to be effective in assisting with public speaking related anxiety.<sup>179</sup> However, there are some undesirable side effects that can occur following cannabis use.<sup>180</sup> Users may experience psychological side effects including: anxiety, panic, undesirable perceptual alterations or sensory experiences, paranoia, delusions, hallucinations, and dysphoria.<sup>181</sup> There are also numerous physiological effects of cannabis impairment that may occur, including: dizziness, increase in heart rate, elevated blood pressure, dry mouth, fluctuations in respiration and body temperature, hunger, headache, nausea, and dizziness.<sup>182</sup> Additionally, cannabis use may impair short term memory, ability to learn and retain information, motor coordination, and judgment.<sup>183</sup> While many of these effects are unwanted, they typically

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<sup>176</sup> Small, *supra* note 95 at 224.

<sup>177</sup> J. Michael Bostwick, “Blurred boundaries: The Therapeutics and Politics of Medical Marijuana” (2012) 87:2 *Mayo Clinic Proceedings* 172.

<sup>178</sup> Small, *supra* note 95 at 224.

<sup>179</sup> Bergamaschi et al, *supra* note 157.

<sup>180</sup> Side effects are a specific type of risk, which here refers to unwanted outcomes following use that are transient, or resolve following discontinuation of use. It is important to remember that there is considerable variation in individual reaction and personality, and while some of these effects may be unwanted by some users, they may be desirable, or even sought out purposefully by other users.

<sup>181</sup> Small, *supra* note 95 at 225.

<sup>182</sup> Institute of Medicine, *Marijuana and Health* (Washington, DC: National Academy Press, 1982); Franjo Grotenhermen, “The Toxicology of Cannabis and Cannabis Prohibition” (2007) 4 *Chemistry & Biodiversity* 1744 [Grotenhermen]; T.H. Kelly, R.W. Foltin & M.W. Fischman, “Effects of smoked marijuana on heart rate, drug ratings and task performance by humans” (1993) 4 *Behavioural Pharmacology* 167; Maisto, Galizio & Connors, *supra* note 10 at 277.

<sup>183</sup> J. Ludovic Croxford, “Therapeutic Potential of Cannabinoids in CNS Disease” (2003) 17:3 *CNS Drugs* 179 [Croxford]; Volkow, *supra* note 154.



resolve after impairment dissipates. The greater concern is what long-term, irreversible damage may be caused by using cannabis – these will be discussed in the next section.

### 2.7.3. Long term Risks: Physical Health

Beyond the acute effects of impairment, considerable research has been conducted on the long-term effects of cannabis use. This section examines the effects of cannabis on physical health. One article suggests that long term studies have confirmed that regular cannabis use over long periods of time does not lead to a decline in lung function, high blood pressure, diabetes, or any other deterioration of physical health, and in fact, that the only negative consequence is more gum disease.<sup>184</sup> Other research, however, suggests this may not be the case. For clarity, this section proceeds by body system, starting with the respiratory system, followed by the immune, cardiovascular, and endocrine/reproductive systems, which have been the primary areas of study in the existing research.<sup>185</sup>

#### 2.7.3.1. Lungs

One of the most commonly thought of risks associated with using cannabis is harm to the lungs. There is good reason for this concern, as cannabis contains more tar than tobacco cigarettes, and cannabis tar contains more cancerous agents.<sup>186</sup> Additionally, cannabis contains similar carcinogenic chemicals to tobacco, but is typically inhaled more deeply at a higher combustion temperature, resulting in greater inhalation and retention of tar.<sup>187</sup> A significant amount of research has focused on the effects of cannabis on human lungs,

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<sup>184</sup> Madeline H. Meier et al, “Associations Between Cannabis Use and Physical Health Problems in Early Midlife: A longitudinal comparison of persistent cannabis versus tobacco users” (2016) 73:7 *JAMA Psychiatry* 731.

<sup>185</sup> There is some research on the presence of cannabinoid receptors and the effects of cannabis on other systems, including the digestive, exocrine, lymphatic, skeletal, nervous, and renal systems, but they are primarily focused on potential therapeutic applications. For brevity, this section focuses on the body systems which have identified cannabis-related risks.

<sup>186</sup> Reese T. Jones, “Human Effects: An Overview” in Robert C. Petersen, ed, *Marijuana Research Findings: 1980* (NIDA Research Monograph 31, 1980) [Jones].

<sup>187</sup> Kelly P. Owen et al, “Marijuana: Respiratory Tract Effects” (2014) 46:1 *Clinical Reviews in Allergy & Immunology* 65.

specifically relating to bronchitis symptoms, lung function, lung cancer, and infection. Research has shown that people who smoke cannabis are more likely to experience chronic bronchitis symptoms, coughing, wheezing, and poorer lung function than non-smokers.<sup>188</sup> However, these effects appear to be reversible following abstinence.<sup>189</sup> Additionally, they seem to only occur in chronic cannabis users; occasional use was not associated with adverse effects on the lungs.<sup>190</sup> Another possible concern is the increased risk of infection. A study conducted in 1992 found that smoking cannabis may expose individuals to pulmonary infection, particularly where the user is immunocompromised, but this finding has not been replicated in later studies.<sup>191</sup>

A lot of the research regarding the effects of cannabis use on lung function has produced conflicting results. One study found that the rate of decline in respiratory function over eight years was the same between cannabis smokers and non-smokers, but another study found that respiratory function declined more rapidly in marijuana smokers than in tobacco smokers.<sup>192</sup> The National Academies of Sciences found moderate evidence that cannabis smoking is associated with improved airway dynamics in acute use, but not chronic use. Additionally, they concluded that there is moderate evidence that stopping smoking cannabis is associated with improved respiratory symptoms.<sup>193</sup> There is limited evidence that cannabis smoking is associated with an increased risk of Chronic Obstructive Pulmonary Disease (COPD), and no or insufficient evidence to support or refute the association between cannabis smoking and hospital admissions for COPD or

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<sup>188</sup> Croxford, *supra* note 183; Volkow, *supra* note 154; Donald P. Tashkin et al, “Effects of habitual use of marijuana and/or cocaine on the lungs” (1990) 99 *NIDA RES Monograph* 63.

<sup>189</sup> Maisto, Galizio & Connors, *supra* note 10 at 278.,

<sup>190</sup> Mark J. Pletcher et al, “Association Between Marijuana Exposure and Pulmonary Function Over 20 Years” (2012) 307:2 *JAMA* 173.

<sup>191</sup> Donald P. Tashkin et al, “Respiratory and Immunologic consequences of marijuana smoking” (2002) 42:Suppl11 *Journal of Clinical Pharmacology* 71s.

<sup>192</sup> Donald P. Tashkin et al, “Heavy habitual marijuana smoking does not cause accelerated decline in FEV1 with age” (1997) 155 *American Journal of Respiratory Critical Care Medicine* 141; Duane L. Sherrill et al, “Respiratory effects of non-tobacco cigarettes: a longitudinal study in general population” (1991) 20 *International Journal of Epidemiology* 132.

<sup>193</sup> National Academies, *supra* note 8 at S-12.

asthma development or exacerbation.<sup>194</sup> The National Academies of Sciences states that there is moderate evidence that there is no statistical association between cannabis smoking and lung cancer.<sup>195</sup> This finding is consistent with a study that followed 64,000 participants over 8 years and found no increased risk of respiratory cancer among those who had ever used cannabis or had used cannabis in the past.<sup>196</sup> However, case-control studies in Tunisia, Morocco, and New Zealand all found an increased risk of lung cancer in cannabis smokers.<sup>197</sup> Cannabis smoking also poses potential risks for oral, head, and neck cancers, however, epidemiological studies have reported mixed results. One study (with less than 200 study participants) found that cannabis users had an increased risk of squamous cell carcinoma of the head and neck<sup>198</sup>, but these findings were not replicated in two similar studies.<sup>199</sup> There is some evidence that long-term cannabis use may increase the risk of respiratory cancer and other pulmonary disease, although no epidemiological studies show a causal relationship between lung disease and cannabis use.<sup>200</sup> All of these risks are associated with smoking cannabis, and therefore can be avoided by using alternative delivery methods.

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<sup>194</sup> *Ibid.*

<sup>195</sup> *Ibid* at S-11.

<sup>196</sup> Stephen Sidney et al, “Marijuana Use and Cancer Incidence (California, United States)” (1997) 8:5 *Cancer Causes and Control* 722.

<sup>197</sup> Reena Mehra et al, “The Association Between Marijuana Smoking and Lung Cancer: A Systematic Review” (2006) 166 *Archives of Internal Medicine* 1359; S. Aldington et al, “Cannabis Use and Risk of Lung Cancer: A Case-Control Study” (2008) 31:2 *European Respiratory Journal* 280.

<sup>198</sup> Zuo-Feng Zhang et al, “Marijuana Use and Increased Risk of Squamous Cell Carcinoma of the Head and Neck” (1999) 8:12 *Cancer Epidemiology, Biomarkers and Prevention* 1071

<sup>199</sup> Carrie Diane Llewellyn et al, “An Analysis of Risk Factors for Oral Cancer in Young People: A Case-Control Study” (2004) 40:3 *Oral Oncology* 304; Karin A. Rosenblatt et al, “Marijuana Use and Risk of Oral Squamous Cell Carcinoma” (2004) 64:11 *Cancer Research* 4049.

<sup>200</sup> Suzanne E.G. Fliegel et al, “Tracheobronchial histopathology in habitual smokers of cocaine, marijuana and/or tobacco” (1997) 112:2 *Chest* 319; Khalsa, Jag H., “Medical and Health Consequences of Marijuana” in Mahmoud A. ElSohly, ed, *Forensic Science and Medicine: Marijuana and the Cannabinoids* (Totowa, NJ: Humana Press Inc., 2007) at 241 [Khalsa].

### 2.7.3.2. Immune System

While there is some evidence that cannabis can act as an immunosuppressant, decreasing resistance to some viruses and bacteria, there does not appear to be sufficient evidence to suggest that cannabis use poses any significant long term threat to the immune system.<sup>201</sup> One animal study found that cannabis impairs immunity and resistance to bacterial and viral infections, but these findings have not been replicated in humans.<sup>202</sup> Though not directly related to cannabis, there is some evidence to suggest that various methods of cannabis use can increase the risk of contracting a bacterial or viral disease. The practice of sharing joints, bongs, vaporizers, and other methods of using cannabis, can spread bodily fluids and may assist in the transmission of human papilloma virus (HPV) or hepatitis.<sup>203</sup> The National Academies of Sciences' position is that there is limited evidence to suggest that cannabis smoking is associated with a decrease in the production of several inflammatory cytokines in healthy individuals.<sup>204</sup> Additionally, there is limited evidence to support or refute the assertion that cannabis use is associated with other adverse immune cell responses in healthy individuals, adverse effects on immune status in individuals with HIV, and increased incidence of oral HPV.<sup>205</sup>

### 2.7.3.3. Cardiovascular

Cannabis also affects the cardiovascular system. Acutely, cannabis increases heart rate, supine blood pressure, orthostatic hypotension, and cardiac output, while decreasing peripheral vascular resistance and exercise performance.<sup>206</sup> With prolonged exposure, supine blood pressure falls, orthostatic hypotension disappears, blood volume increases,

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<sup>201</sup> Maisto, Galizio & Connors, *supra* note 10 at 278.

<sup>202</sup> A.E. Munson & K.O. Fehr, "Immunological effects of Cannabis" in Harold Kalant & K.O. Fehr, eds, *Cannabis and Health Hazards* (Toronto, Canada: Addiction Research Foundation: 1983); Leo E. Hollister, "Marijuana and Immunity" (1992) 24 *Journal of Psychoactive Drugs* 159.

<sup>203</sup> Sam R. Zwenger, "Bogarting that Joint Might Decrease Oral HPV Among Cannabis Users" (2009) 16:6 *Current Oncology* 5.

<sup>204</sup> National Academies, *supra* note 8 at S12.

<sup>205</sup> *Ibid.*

<sup>206</sup> Khalsa, *supra* note 200 at 239.

heart rate slows, and circulatory responses to exercise diminish.<sup>207</sup> These cardiovascular effects do not appear to cause serious health problems in young, healthy users, however, older users with cardiovascular disease are at greater risk because of the increased cardiac work associated with the above-mentioned effects.<sup>208</sup> The National Academies of Sciences has stated that there is limited evidence that cannabis use is associated with triggering acute myocardial infarction, ischemic stroke or sub arachnoid hemorrhage, decreased risk of metabolic syndrome and diabetes, and increased risk of pre-diabetes.<sup>209</sup> However, no association has been found between cannabis use and hospitalizations for cardiovascular disease.<sup>210</sup>

#### 2.7.3.4. Endocrine and Reproductive Systems

Cannabis also affects the endocrine and reproductive systems, including the pituitary gland, ovary and testes.<sup>211</sup> Animal and human studies suggest that cannabis disrupts the reproductive system in both males and females by decreasing sperm viability and testosterone secretions in males and producing nonovulatory menstrual cycles in women.<sup>212</sup> But, to date, no epidemiological studies have shown that cannabis use impairs sexual maturation or reproduction in humans.<sup>213</sup> If used chronically, cannabis may reduce plasma testosterone, retard sperm maturation, reduce sperm count and motility, and

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<sup>207</sup> *Ibid*; Croxford, *supra* note 183; Volkow, *supra* note 154.

<sup>208</sup> Reese T. Jones, “Cardiovascular system effects of marijuana” (2002) 42:Suppl11 *Journal of Clinical Pharmacology* 58s; Maisto, Galizio & Connors, *supra* note 10 at 278.

<sup>209</sup> National Academies, *supra* note 8 at S-11.

<sup>210</sup> Stephen Sidney, “Cardiovascular Consequences of marijuana use” (2002) 42:Suppl11 *Journal of Clinical Pharmacology* 64s; More recently, the National Academies, *supra* note 8, found no or insufficient evidence to support or refute a statistical association between cannabis smoking and hospital admissions for COPD, but did not comment on the association between cannabis use and hospitalizations for cardiovascular disease more generally.

<sup>211</sup> Khalsa, *supra* note 200 at 241.

<sup>212</sup> Maisto, Galizio & Connors, *supra* note 10 at 278; Croxford, *supra* note 183; Volkow, *supra* note 154; Marco Rossato, Thomas C. Pagano & R. Vettor, “The Cannabinoid System and Male Reproductive Functions” (2008) 20:1 *Journal of Neuroendocrinology* 90; E. Bloch, “Effects of marijuana and cannabinoids on reproduction, endocrine function, development and chromosomes” in K.O. Fehr & Harold Kalant, eds, *Cannabis and Health Hazards* (Toronto: Addiction Research Foundation, 1983) [Bloch].

<sup>213</sup> Khalsa, *supra* note 200 at 242 [largely because of ethical issues and not lack of interest].

increase abnormal sperm production, however, the mechanism of these actions is unclear.<sup>214</sup> Studies of the effects of cannabis on human males have produced mixed results. One study found that cannabis reduced testosterone, sperm production, sperm motility, and increased sperm abnormalities,<sup>215</sup> however these findings were not replicated in later studies.<sup>216</sup> Very few studies on the effects of cannabis on the human female reproductive system have been conducted, however one study observed hormonal levels in female cannabis users that had their tubes tied, and failed to find any evidence the chronic cannabis use affected sex hormones.<sup>217</sup> A more recent study found that both the timing and quantity of cannabis use had a negative impact on in vitro fertilization and gamete intrafallopian transfer outcomes.<sup>218</sup>

#### 2.7.4. Long term Risks: Cognitive Function and Mental Health Risks

This section will look at the impact of cannabis use on various aspects of cognitive function and mental health. Numerous studies have concluded that cannabis use poses some risk for mental status, however, it is very difficult to separate the effects of cannabis use from other factors often seen in cannabis users, such as temperament, personality, and socio-economic status.<sup>219</sup> Cannabis use can affect cognition, motivation, attention, decision making, and sleep. Additionally, cannabis use can impact the onset and severity of various mental disorders. Each of these areas of concern will be discussed here.

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<sup>214</sup> Bloch, *supra* note 212; L. Murphy, “Cannabis Effects on Endocrine and Reproductive Function” in Harold Kalant et al, eds, *The Health Effects of Cannabis* (Toronto: Centre for Addiction and Mental Health, 1999).

<sup>215</sup> Robert C. Kolodny et al, “Depression of Plasma Testosterone Levels After Chronic Intensive Marihuana Use” (1974) 290 *New England Journal of Medicine* 872.

<sup>216</sup> Todd T. Brown & Adrian S. Dobs, “Endocrine Effects of Marijuana” (2002) 42 *Journal of Clinical Pharmacology* 90S.

<sup>217</sup> Jack H. Mendelson et al, “Acute Effects of Marihuana on Luteinizing Hormone in Menopausal Women” (1984) 23 *Pharmacology Biochemistry* 765.

<sup>218</sup> H. Klonoff-Cohen et al, “A Prospective Study of the Effects of Female and Male Marijuana Use on in Vitro Fertilization (IVF) and Gamete Intrafallopian Transfer (GIFT) Outcomes” (2006) 194 *American Journal of Obstetrics and Gynecology* 369.

<sup>219</sup> Small, *supra* note 95 at 226.

The National Academies of Sciences' concluded that there is moderate evidence that acute cannabis use is associated with impaired cognitive domains of learning, memory, and attention, but limited evidence that sustained abstinence from cannabis use is associated with the same impaired cognitive domains, suggesting that the effects are reversible upon cessation of use.<sup>220</sup> While one study found that frequent cannabis users performed worse than non-users on numerous measures of cognitive functioning, other studies have not replicated the same findings.<sup>221</sup> Another study found that longer histories of cannabis use are associated with greater cognitive impairment that persisted even after cessation.<sup>222</sup> However, other research suggests that intellectual impairments associated with heavy cannabis use are reversible with abstinence.<sup>223</sup> Interestingly, medical cannabis users do not experience the executive functioning deficits which are often observed in recreational users, and in fact, medical cannabis users showed improvement in various tasks.<sup>224</sup> Additionally, longitudinal studies have associated cannabis use with a reduction in Intellectual Quotient, even when adjusted for socioeconomic factors.<sup>225</sup> All of this considered, "studies on long-term effects of cannabis on cognition have failed to find

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<sup>220</sup> National Academies, *supra* note 8 at S-13.

<sup>221</sup> Lamros Messinis et al, "Neuropsychological deficits in long-term frequent cannabis users" (2006) 66 *Neurology* 737; Constantine G. Lyketsos et al, "Cannabis Use and Cognitive Decline in Persons under 65 Years of Age" (1999) 149:9 *American Journal of Epidemiology* 794; Harrison G. Pope et al, "Neuropsychological Performance in Long-term Cannabis Users" (2001) 58:10 *Archives of General Psychiatry* 909 [Pope et al].

<sup>222</sup> Wayne Hall & N. Solowij, "Adverse effects of cannabis" (1998) 352:9140 *Lancet* 1611; Rebecca D. Crean, Natania A. Crane & Barbara J. Mason, "Evidence-Based Review of Acute and Long-Term Effects of Cannabis Use on Executive Cognitive Functions" (2011) 5:1 *Journal of Addiction Medicine* 1 [Crean, Crane & Mason]; Madeline H. Meier et al, "Persistent Cannabis Users Show Neuropsychological decline from Childhood to Midlife" (2012) 109:40 *Proceedings of the National Academy of Sciences of the United States of America* E2657 [Meier et al].

<sup>223</sup> Pope et al, *supra* note 221.

<sup>224</sup> Staci A. Gruber et al, "Splendor in the Grass? A Pilot Study Assessing the Impact of Medical Marijuana on Executive Function" (2016) 7:Article 255 *Frontiers in Pharmacology* 1.

<sup>225</sup> Meier et al, *supra* note 222; Terrie E. Moffitt et al, "Reply to Rogeberg and Daly: No Evidence that socioeconomic status or personality differences confound the association between cannabis use and IQ decline" (2013) 110:11 *Proceedings of the National Academic of Sciences of the United States of America* E980.

proof of gross abnormalities, but there is some evidence of mild cognitive impairments, particularly in the domain of memory and learning.”<sup>226</sup>

Another commonly held belief about cannabis is that frequent use will lead to ‘amotivational syndrome’, or, reduced desire to participate in social activities, general apathy, decreased effectiveness, lost ambition, and difficulty concentrating.<sup>227</sup> However, a causal relationship between cannabis use and this syndrome has never been shown. Anthropological research on cannabis use in other countries has not found the presence of amotivational syndrome, and similarly, laboratory studies do not support the existence of the syndrome.<sup>228</sup> The World Health Organization reported that “it is doubtful that cannabis use produces a well-defined amotivational syndrome.”<sup>229</sup> However, some research findings support the premise of amotivational syndrome, that cannabis affects productivity. One of the most consistent findings is that cannabis use causes problems with episodic memory.<sup>230</sup> Research also shows that cannabis use is associated with impaired attention and impulse control, difficulty tracking conversations, and deficits in

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<sup>226</sup> G. Jager, “Cannabis”, in J. Verster et al, eds, *Drug Abuse and Addiction in Medical illness: Causes Consequences and Treatment* (New York: Springer-Verlag, 2012) at 58.

<sup>227</sup> Maisto, Galizio & Connors, *supra* note 10 at 284; William H. McGlothlin & Louis Jolyon West, *The Marijuana Problem: An Overview* (Los Angeles: University of California Institute of Government and Public Affairs, 1968)

<sup>228</sup> See e.g. William E. Carter, *Cannabis in Costa Rica: A Study of Chronic Marijuana Use* (Institute for the Study of Human Issues, 1980); William E. Carter & Paul L. Doughty, “Social and Cultural Aspects of Cannabis Use in Costa Rica” (1976) 282 *Annals of the New York Academy of Sciences* 2; Lambros Comitas, “Cannabis and Work in Jamaica: A Refutation of the Amotivational Syndrome” (1976) 282 *Annals of the New York Academy of Sciences* 24; David F. Duncan, “Lifetime prevalence of ‘amotivational syndrome’ among users and non-users of hashish” (1987) 1:2 *Psychology of Addictive Behaviors* 114; Brian J. Page, “The amotivational syndrome hypothesis and the Costa Rica study: Relationships between methods and results” (1983) 15:4 *Journal of Psychoactive Drugs* 261; Richard W. Foltin et al, “Motivational effects of smoked marijuana: Behavioural contingencies and high-probability recreational activities” (1989) 34:4 *Pharmacology Biochemistry and Behavior* 871.

<sup>229</sup> Sara Smucker Barnwell, Mitch Earleywine & Rand Wilcox “Cannabis, motivation, and life satisfaction in an internet sample” (2006) 1:2 *Substance Abuse Treatment, Prevention, and Policy* online: <<https://substanceabusepolicy.biomedcentral.com/track/pdf/10.1186/1747-597X-1-2?site=substanceabusepolicy.biomedcentral.com>>.

<sup>230</sup> Natania A. Crane et al, “Effects of Cannabis on Neurocognitive Functioning: Recent Advances, Neurodevelopment Influences, and Sex Differences” (2013) 23 *Neuropsychology Reviews* 117.



processing speed.<sup>231</sup> Cannabis use is also associated with impaired decision making, and impaired short-term memory.<sup>232</sup>

Cannabis is often used medically to relieve sleep disorders, such as insomnia and sleep latency disorders, but recreational cannabis use can also impact the quality and quantity of sleep in users. A narrative study found that cannabis may improve subjective sleep complaints, particularly when used short-term, but the effects become less pronounced with continued use.<sup>233</sup> Additionally, cannabis has been reported to reduce sleep latency, improving the ability of users to fall asleep, and decreased time awake after sleep onset.<sup>234</sup> Cannabis use may also impact the quality of sleep by increasing or decreasing how long the user remains in a specific stage of sleep.<sup>235</sup> Chronic cannabis users may also experience adverse effects on their sleep upon discontinuation of use. Difficulty sleeping, poor sleep quality, insomnia, and strange dreams are common symptoms of cannabis withdrawal, making cessation more difficult.<sup>236</sup>

Cannabis can also affect various behavioral disorders, including anxiety, depression, and bipolar disorders, though there have been some conflicting research results. Regarding the link between cannabis use and depression, a 2002 study found only a modest

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<sup>231</sup> Maria Alice Fontes et al, “Cannabis use before age 15 and subsequent executive functioning” (2011) 198:6 *The British Journal of Psychiatry* 442; Maisto, Galizio & Connors, *supra* note 10 at 281; April D. Thames, Natalie Arbid & Philip Sayegh, “Cannabis use and neurocognitive functioning in a non-clinical sample of users” (2014) 39:5 *Addictive Behavior* 994.

<sup>232</sup> Igor Grant et al, “Medical Marijuana: Clearing Away the Smoke” (2012) 6 *The Open Neurology Journal* 18; Martin Deahl, “Cannabis and Memory Loss” (1991) 86:3 *Addiction* 249; Grotenhermen, *supra* note 182; Mohini Ranganathan & Deepak Cyril D’Souza, “The Acute Effects of Cannabinoids on Memory in Humans: A Review” (2006) 188:4 *Psychopharmacology* 425; Alecia D. Schweinsburg, Sandra A. Brown & Susan F. Tapert, “The Influence of Marijuana Use on Neurocognitive Functioning in Adolescents” (2008) 1:1 *Current Drug Abuse Reviews* 99.

<sup>233</sup> Gustavo A. Angarita et al, “Sleep Abnormalities Associated with Alcohol, Cannabis, Cocaine, and Opiate Use: A Comprehensive Review” (2016) 11 *Addiction Science & Clinical Practice* 9 [Angarita et al].

<sup>234</sup> Schierenbeck et al, *supra* note 160 at 384; Angarita et al, *supra* note 233.

<sup>235</sup> See Schierenbeck et al, *supra* note 160 at 384.

<sup>236</sup> *Ibid*; Angarita et al, *supra* note 233.

association between cannabis use and subsequent risk of a major depressive episode<sup>237</sup>, while a 2007 study found a significant association between cannabis use and an increase in the risk of a first major depression, and a stronger increase in the risk of a first bipolar episode. The risk of any mood disorder was elevated for weekly and almost daily users but not for less frequent user patterns. The associations between cannabis and anxiety were not significant after adjustment for confounders.<sup>238</sup> Another study confirmed this, further finding that early-onset and frequent cannabis use were related to symptoms of anxiety and depression independent of individual and familial factors or the use of other illicit substances.<sup>239</sup> A 2006 study found that depression among past-year cannabis users was 1.4 times higher than in the non-using comparator group, although after adjusting for group differences, this changed to 1.1 times higher odds for the cannabis-using group. They concluded that past-year cannabis use does not significantly predict later development of depression.<sup>240</sup>

Cannabis use may also impact the onset and severity of anxiety symptoms, but again, research has produced conflicting results. A 2003 study that looked at the association between cannabis use and anxiety found no significant association between the level of anxiety and cannabis use in daily life. Interestingly, they did find that a diagnosis of agoraphobia was significantly associated with cannabis use, independent of anxiety and other confounding factors. The same study found no evidence that cannabis use in daily life provided an anxiolytic or anxiogenic effect, disputing the common perception that recreational cannabis users often self-medicate.<sup>241</sup> However, a 2014 meta-analysis found

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<sup>237</sup> Chuan-Yu Chen, Fernando A. Wagner & James C. Anthony, "Marijuana Use and the Risk of Major Depressive Episode: Epidemiological Evidence from the United States National Comorbidity Survey" (2002) 37:5 *Social Psychiatry and Psychiatric Epidemiology* 199.

<sup>238</sup> Van Laar et al, *supra* note 156.

<sup>239</sup> Mohammad R. Hayatbakhsh et al, "Cannabis and Anxiety and Depression in Young Adults: A Large Prospective Study" (2007) 46:3 *Journal of the American Academy of Child & Adolescent Psychiatry* 408.

<sup>240</sup> Valerie S. Harder, Andrew R. Morral & Jeremy Arkes, "Marijuana Use and Depression Among Adults: Testing for Causal Associations" (2006) 101:10 *Addiction* 1463.

<sup>241</sup> Marie Tournier et al, "Cannabis Use and Anxiety in Daily Life: A Naturalistic Investigation in a Non-Clinical Population" (2003) 118:1 *Psychiatry Research* 1.

a small positive association between anxiety and cannabis use or cannabis use disorder, and between comorbid anxiety and depression and cannabis use. Their study controlled for substance use, psychiatric illness and demographics.<sup>242</sup> Cannabis use has also been found to exacerbate the severity of symptoms in people with bipolar disorder. A 2015 systematic review and meta-analysis found that cannabis use appears to exacerbate manic symptoms in individuals with bipolar disorders, and was associated with more new symptoms.<sup>243</sup>

One of the most prominent concerns with cannabis use is the increased risk of psychotic disorders. Research shows that cannabis users have a 40% greater chance of developing a psychotic condition, and the younger the age of the onset of cannabis use, the younger that psychosis related symptoms appear.<sup>244</sup> The increased risk is most prevalent in persons genetically predisposed, and is present only in heavy users.<sup>245</sup> However, it is important to consider that numerous substances can induce psychosis, such as alcohol, anxiolytics, hallucinogens, hypnotics, inhalants, sedatives, and stimulants; it is not unique to cannabis.<sup>246</sup> Additionally, this research does not prove that cannabis is responsible for the increased risk. Instead, it could be the case that the cannabis users being studied had other shared characteristics contributing to the increased risk.<sup>247</sup> So while there is sufficient evidence that cannabis use may increase the risk of developing a psychotic

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<sup>242</sup> Karina Karolina Kedzior & Lisa Tabata Laeber, “A Positive Association Between Anxiety Disorders and Cannabis Use or Cannabis Use Disorders in the General Population – a Meta-analysis of 31 Studies” (2014) 14 *BMC Psychiatry* 136.

<sup>243</sup> Gibbs et al, *supra* note 155.

<sup>244</sup> Theresa H.M. Moore et al, “Cannabis Use and Risk of Psychotic or Affective Mental Health Outcomes: A Systematic Review” (2007) 370:9584 *The Lancet* 319 [Moore et al]; Sara Dragt et al, “Age of Onset of Cannabis Use is Associated with Age of Onset of High-Risk Symptoms for Psychosis” (2010) 55:3 *Canadian Journal of Psychiatry* 165; Sara Dragt et al, “Cannabis Use and Age of Onset of Symptoms in Subjects at Clinical High Risk for Psychosis” (2012) 125:1 *Acta Psychiatrica Scandinavica* 45.

<sup>245</sup> Moore et al, *supra* note 244.

<sup>246</sup> World Health Organization, “International Classification of Disease and Related Health Problems” Version: 2010 online: <<http://apps.who.int/classifications/icd10/browse/2010/en#>> at ss F10.5, F12.5, F13.5, F14.5, F15.5, F16.5 [WHO-ICD].

<sup>247</sup> Maisto, Galizio & Connors, *supra* note 10 at 282.

illness, there is insufficient evidence to determine how significant (or insignificant) the risk is.<sup>248</sup>

### 2.7.5. Long term Risks: Fetal and Adolescent Development

This next section will look specifically at the impact of cannabis use on fetal development, from conception to birth, through early childhood development, to the impact of cannabis use on the developing brain in childhood and adolescence. Cannabis use during pregnancy is not advised<sup>249</sup>, but the impact of cannabis use on pregnancy is poorly understood because studying it in a controlled environment is very difficult to do ethically. Moreover, women who use cannabis are more likely to smoke cigarettes and use other drugs, have a mental illness, live in poverty, and have poor nutrition, making it difficult to isolate the effects of cannabis.<sup>250</sup> However, there is good reason to be cautious. Cannabis is known to have a teratogenic effect, meaning that when cannabis is smoked, the active agents readily cross the placental barrier and expose the fetus to cannabinoids.<sup>251</sup>

Using cannabis while pregnant can lead to neurophysiological and behavioral abnormalities in offspring.<sup>252</sup> Cannabis use in pregnant women is also associated with an

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<sup>248</sup> Moore et al, *supra* note 244.

<sup>249</sup> See e.g, Amy J. Porath-Waller, “Clearing the Smoke on Cannabis: Maternal Cannabis Use During Pregnancy – An Update” *Canadian Centre on Substance Abuse* online: <<http://www.ccsa.ca/Resource%20Library/CCSA-Cannabis-Maternal-Use-Pregnancy-Report-2015-en.pdf>>; Canadian Medical Association, “The Health Risks and Harms Associated with the Use of Marijuana” *Submission to the House of Commons Standing Committee on Health* (May 27, 2014) online:<[https://www.cma.ca/Assets/assets-library/document/en/advocacy/Brief-Marijuana-Health\\_Committee\\_May27-2014-FINAL.pdf](https://www.cma.ca/Assets/assets-library/document/en/advocacy/Brief-Marijuana-Health_Committee_May27-2014-FINAL.pdf)>.

<sup>250</sup> S.C. Jacques et al, “Cannabis, the Pregnant Woman and her Child: Weeding Out the Myths” (2014) 34:6 *Journal of Perinatology* 417.

<sup>251</sup> Maisto, Galizio & Connors, *supra* note 10 at 278.

<sup>252</sup> David L Atkinson, “Marijuana’s Effects on the Mind: Impairment, Effects on Cognition and Motivation, and Addiction” in Michael T. Compton, ed, *Marijuana and Mental Health* (Arlington, VA: American Psychiatric Association Publishing, 2016) at 31 [Atkinson].

increased risk of premature birth, shorter body length, and lower infant birth weight.<sup>253</sup> Newborns of mothers who used cannabis while pregnant have been found to exhibit tremor, startle response, and altered visual responses.<sup>254</sup> Cannabis use while pregnant may also have lasting effects on childhood development. Additionally, research has found associations between prenatal cannabis exposure and social, cognitive, and motor function, particularly executive dysfunction.<sup>255</sup> Furthermore, prenatal cannabis exposure predicts adolescent and young adult cannabis use, even after controlling for exposure to other drugs, family history, parental strictness, delinquency, and other factors.<sup>256</sup> Some research suggests that cannabis use while pregnant may increase the risk of offspring developing certain kinds of childhood cancers.<sup>257</sup> Cannabis use while pregnant may also impact the behavioural development of children. Children who were exposed to cannabis in-utero were found to show deficits on a sustained attention task at age 6<sup>258</sup>, to be more impulsive, hyperactive, and delinquent at age 10<sup>259</sup>, and to have cognitive deficits, poorer school performance, and increased risk for tobacco and cannabis use later in life.<sup>260</sup> THC can also impact gender development, because estrogen's effect on the development of the female nervous system depends on a well-regulated, functioning endocannabinoid

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<sup>253</sup> N. Day et al, "Prenatal Marijuana Use and Neonatal Outcome" (1991) 13:3 *Neurotoxicology and Teratology* 329; Peter A. Fried, "Marijuana and Human Pregnancy" in I. Chasnof, ed, *Drug Use in Pregnancy: Mother and Child* (Lancaster: MAP Press, 1986).

<sup>254</sup> Jones, *supra* note 186.

<sup>255</sup> P.A. Fried & A.M. Smith, "A Literature Review of the Consequences of Prenatal Marijuana Exposure: An Emerging Theme of a Deficiency in Aspects of Executive Function" (2001) 23 *Neurotoxicology and Teratology* 1.

<sup>256</sup> Kristen E. Sonon et al, "Prenatal Marijuana Exposure Predicts Marijuana Use in Young Adulthood" (2015) 47 *Neurotoxicology and Teratology* 10.

<sup>257</sup> Leslie L. Robison et al, "Maternal Drug Use and Risk of Childhood Nonlymphoblastic Leukemia Among Offspring. An Epidemiological Investigation Implicating Marijuana (A Report from the Children's Cancer Study Group)" (1989) 63:10 *Cancer* 1904.

<sup>258</sup> Peter A. Fried, Barbara Watkinson & Robert Gray, "A Follow-up Study of Attentional Behaviour in 6-year-old Children Exposed Prenatally to Marijuana, Cigarettes, and Alcohol" (1992) 14:5 *Neurotoxicology and Teratology* 299.

<sup>259</sup> Lidush Goldschmidt, Nancy L. Day & Gale A. Richardson, "Effects of Prenatal Marijuana Exposure on Child Behavior Problems at Age 10" (2000) 22:3 *Neurotoxicology and Teratology* 325.

<sup>260</sup> Sonia Minnes, Adelaide Lang & Lynn Singer, "Prenatal Tobacco, Marijuana, Stimulant, and Opiate Exposure: Outcomes and Practice Implications" (2011) 6:1 *Addiction Science & Clinical Practice* 57.

system.<sup>261</sup> However, the National Academies of Sciences found limited evidence that maternal cannabis smoking is associated with pregnancy complications for the mother or admission of the infant to the neonatal intensive care unit.<sup>262</sup> They also concluded there is insufficient evidence to support or refute a statistical association between maternal cannabis smoking and later outcomes in offspring, including SIDS, cognitive academic achievement, and later substance use.<sup>263</sup>

Very little is known about cannabis use and lactation. A study conducted in 1982 suggested that THC is present in the breast milk of cannabis users in moderate amounts.<sup>264</sup> Lethargy, less frequent feeding, and shorter feeding times are observed in babies following exposure to THC through breast milk.<sup>265</sup> A 1990 study found that exposure to THC in breast milk in the first month of life may lead to decreased motor development at 1 year old<sup>266</sup>, and a 2005 study found that while cannabinoid exposure through breast milk has not been shown to increase neonatal risk, it may affect brain development and should be avoided.<sup>267</sup>

Youth cannabis use is one of the prominent concerns in legalizing and regulating recreational cannabis use. While most adolescents who use cannabis do not experience harmful outcomes, there are various adverse impacts of youth cannabis use, particularly with regular use.<sup>268</sup> Additionally, adolescents are believed to be more vulnerable to the

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<sup>261</sup> T. Karasu et al, “The Role of Sex Steroid Hormones, Cytokines and the Endocannabinoid System in Female Fertility” (2011) 17:3 *Human Reproduction Update* 347.

<sup>262</sup> National Academies, *supra* note 8 at S-13.

<sup>263</sup> *Ibid.*

<sup>264</sup> Perex-Reyes, M & T.E. Wall. “Presence of delta9-tetrahydrocannabinol in human milk” (1982) 307:13 *New England Journal of Medicine* 819.

<sup>265</sup> Committee on Nutritional Status During Pregnancy and Lactation, Institute of Medicine, *Illegal drugs* (Washington, DC: National Academy Press; 1991).

<sup>266</sup> Susan J. Astley & Ruth E. Little, “Maternal Marijuana Use During Lactation and Infant Development at One Year” (1990) 12 *Neurotoxicology and Teratology* 161.

<sup>267</sup> Josephine Djulus, Myla Moretti & Gideon Koren, “Marijuana Use and Breastfeeding” (2005) 51:3 *Canadian Family Physician* 349.

<sup>268</sup> Grotenhermen, *supra* note 182.

negative effects of cannabis on the brain.<sup>269</sup> One out of every six adolescent cannabis users develop cannabis dependence by age 24, much higher than the rate for adult users.<sup>270</sup> Adolescent cannabis use is also associated with the emergence of depressive and anxiety disorders later in life.<sup>271</sup> Moreover, frequent cannabis use in adolescence may have more pronounced effects on cognitive function, and development of later mental health concerns, including addiction, when compared to adults.<sup>272</sup> While some research suggests that cannabis use may result in neurocognitive disadvantages that continue beyond abstinence and changes to white matter and neural functioning<sup>273</sup>, other research found that moderate cannabis use in adolescence did not appear to be neurotoxic.<sup>274</sup>

### 2.7.6. Population Level Risks

This section will look at public health risks of legal, recreational cannabis use. Population risks are the risk of an outcome in terms of a population, rather than an individual. There is concern that legalizing recreational cannabis use will lead to an increased prevalence of cannabis use and a subsequent increase in population level harms. This section provides an overview of the risks cannabis poses for overdose, addiction/ dependence, withdrawal, suicide, drugged driving, psychosocial effects, other substance use disorders, violence, and accidental injuries.

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<sup>269</sup> *Ibid* at 1755.

<sup>270</sup> Wendy Swift et al, “Adolescent Cannabis Users at 24 Years: Trajectories to Regular Weekly Use and Dependence in Young Adulthood” (2008) 103:8 *Addiction* 1100.

<sup>271</sup> Wayne Hall & Louisa Degenhardt, “Prevalence and correlates of cannabis use in developed and developing countries” (2007) 20:4 *Curr Opin Psychiatry* 393.

<sup>272</sup> Grotenhermen, *supra* note 182.

<sup>273</sup> Joanna Jacobus & Susan F. Tapert, “Effects of Cannabis on the Adolescent Brain” (2014) 20:13 *Current Pharmaceutical Design* 2186 at 2196.

<sup>274</sup> Lynn E. Delisi et al, “A Preliminary DTI Study Showing no Brain Structural Change Associated with Adolescent Cannabis Use” (2006) 3:17 *Harm Reduction Journal* online: <<https://harmreductionjournal.biomedcentral.com/track/pdf/10.1186/1477-7517-3-17?site=harmreductionjournal.biomedcentral.com>>.

### 2.7.6.1. Overdose

The risk of acute toxicity, or overdose, from cannabis use is extremely low, particularly when compared to other substances. One estimate suggests that a person would have to ingest 1500 pounds of cannabis in 15 minutes to die from overdose.<sup>275</sup> Another estimate suggests that a fatal dose could be anywhere between 15-70 grams, much more than even heavy users<sup>276</sup> are likely to consume in a day.<sup>277</sup> However, the prevalence of new modes of delivery, such as dabbing, which uses cannabis concentrates, increase the chance of overdose.<sup>278</sup> Although two deaths have been reported from cannabis poisoning, it is unclear whether those deaths can be fully attributed to THC.<sup>279</sup> Cannabis does not depress the respiratory system, or have a toxic effect on the heart and circulatory system, in the way that opioids or stimulants, respectively, do.<sup>280</sup> There is some possibility that cannabis use can incite myocardial infarction in young adults, but it is rare and appears to occur in persons with pre-existing conditions.<sup>281</sup> While there is insufficient evidence to support or refute that cannabis use is associated with death due to overdose, there is moderate evidence of an association between cannabis use and increased risk of overdose injuries,

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<sup>275</sup> Small, *supra* note 95 at 381.

<sup>276</sup> Niall Coggans et al, “Long-term Heavy Cannabis Use: Implications for Health Education” (2004) 11:4 *Drugs: Education, Prevention, and Policy* 299 at 304 [Chronic users are defined by their regularity of use (compared to intermittent or casual users), while heavy users are defined by how much they use when they use. This study characterized heavy users as using an average of 44.8 grams of cannabis per month (approximately 1.5 grams per day), while light users used an average of 5.6 grams per month (approximately 0.2 grams per day). For context, the average joint contains approximately 0.25 grams].

<sup>277</sup> Robert S. Gable, “Comparison of Acute Lethal Toxicity of Commonly Abused Psychoactive Substances” (2004) 99 *Addiction* 686 [Gable].

<sup>278</sup> Small, *supra* note 95 at 325.

<sup>279</sup> Gable, *supra* note 277; Harold Kalant, “Adverse Effects of Cannabis on Health: An Update of the Literature Since 1996” (2004) 28:5 *Progress in Neuro-Psychopharmacology and Biological Psychiatry* 849 [Kalant].

<sup>280</sup> Robin Room et al, *Cannabis Policy: Moving beyond Stalemate* (Oxford, UK: Oxford University Press, 2010) at 17.

<sup>281</sup> Liliana Bachs & Henny Mørland, “Acute Cardiovascular Fatalities Following Cannabis Use” (2001) 124:2-3 *Forensic Science International* 200; Kalant, *supra* note 279.



including respiratory distress, among pediatric populations in states where cannabis is legal.<sup>282</sup>

### 2.7.6.2. Dependence

Whether cannabis is addictive is a controversial subject. Physical dependence on cannabis has not been demonstrated, however, psychological dependence on cannabis has been accepted as a genuine occurrence.<sup>283</sup> Cannabis use disorder is included in the Diagnostic and Statistical Manual of Mental Disorders (DSM-V), and lists eleven criteria: using cannabis in greater amounts or for a longer period of time than intended; spending a great deal of time obtaining and using cannabis; cravings; giving up important life activities in order to use cannabis; continuing to use despite adverse physical or psychological problems caused or exacerbated by using; failure to fulfil work, school, or home obligations; continued use in physically hazardous situations; continued use despite knowledge of having a problem; tolerance; withdrawal; and, persistent unsuccessful efforts to quit.<sup>284</sup> The International Classification of Disease published by the WHO also includes cannabis use disorder, stating:

*[I]ndividuals who have cannabis dependence compulsively use the drug but do not usually develop physiological dependence, although frequently tolerance to the effects of cannabis has been reported by these individuals. Some users also reported withdrawal symptoms, although the symptoms have not usually been clinically significant. Frequently people with cannabis dependence use very potent cannabis over a period of months and sometimes years, and may spend significant time acquiring and using*

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<sup>282</sup> National Academies, *supra* note 8 at S-13 [overdose injuries refer to serious symptoms associated with cannabis use, largely in children, including respiratory depression, tachycardia, and coma].

<sup>283</sup> Adam J. Gordon, James W. Conley & Joanne M. Gordon, “Medical Consequences of Marijuana Use: A Review of Current Literature” (2013) 15 *Current Psychiatry Reports* 419.

<sup>284</sup> American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (5th ed) at 305.20, 204.30 [DSM V]; But see also, Daniela Piontek et al, “The Validity of DSM-IV Cannabis Abuse and Dependence Criteria in Adolescents and the Value of Additional Cannabis Use Indicators” (2011) 106:6 *Addiction* 1137 [suggesting revising or dropping several of the existing criteria and replacing with new indicators].

*the substance. Cannabis dependence may also persist in using this drug although knowledge of physical or psychological problems may result.*<sup>285</sup>

The number of individuals who develop cannabis use disorder after having used cannabis at least once (one out of every eleven) is considerably lower than for other drugs, signifying that the risk of addiction is much lower.<sup>286</sup> However, estimates of cannabis dependence vary; one estimate suggests that 9% of all Americans use have ever used cannabis were psychologically dependent, while another estimate suggests that 20% of worldwide users are psychologically dependent.<sup>287</sup>

There are a number of factors that may determine the risk of becoming dependent on cannabis. According to the National Academies of Sciences, there is substantial evidence that being male and smoking cigarettes, and early onset of cannabis use are risk factors for problem cannabis use.<sup>288</sup> There is moderate evidence that anxiety, personality disorders, bipolar disorders, alcohol and nicotine dependence, and adolescent ADHD are *not* risk factors for developing problem cannabis use, while major depressive disorder and frequency of use, younger age of alcohol use, nicotine use, parental substance use, poor school performance, antisocial behaviors, and childhood sexual abuse during adolescence are all risk factors for developing problematic cannabis use.<sup>289</sup>

### 2.7.6.3. Withdrawal

The existence of cannabis withdrawal syndrome is not universally accepted. While some argue that there is no identifiable withdrawal syndrome associated with cannabis use,

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<sup>285</sup> WHO-ICD, *supra* note 246.

<sup>286</sup> Atkinson, *supra* note 252 at 21.

<sup>287</sup> Alan J. Budney et al, "Marijuana Dependence and its Treatment" (2007) 4:1 *Addiction Science & Clinical Practice* 4; Crean, Crane & Mason, *supra* note 222; Louisa Degenhardt et al, "The Global Epidemiology and contribution of cannabis Use and Dependence to the Global Burden of Disease: Results from the BGD 2010 Study" (2013) 8:10 *PLOS ONE* e76635 online: <<https://doi.org/10.1371/journal.pone.0076635>> [Degenhardt et al].

<sup>288</sup> National Academies, *supra* note 8 at S-15.

<sup>289</sup> *Ibid.*

others report that withdrawal can involve symptoms of irritability, aggression, anxiety, sleep difficulty, decreased appetite, restlessness, dysphoria, abdominal pain, shakiness, sweating, fever, chills, and headaches.<sup>290</sup> Cannabis withdrawal syndrome is said to occur in frequent users shortly after they quit, with the symptoms lasting a week or more.<sup>291</sup> The DSM-V includes Cannabis Withdrawal Syndrome, and lists symptoms similar to those mentioned above.<sup>292</sup> At the very least, there is evidence to suggest that ceasing use can cause temporary physiological effects.<sup>293</sup>

#### 2.7.6.4. Suicide

Recreational cannabis use may also impact suicide rates. Some research suggests that cannabis use may be associated with suicidal ideation. For example, a longitudinal study of 50,000 Swedish men over 33 years found that cannabis use was associated with an increased risk of suicide; however, this association was eliminated after adjusting for confounding factors, such as psychological and behavioral problems.<sup>294</sup> The results suggest that cannabis is unlikely to impact suicide completion rates. However, another study found that cannabis exposure does not itself lead to depression, but it may be associated with later suicidal thoughts and attempts.<sup>295</sup> A study by Carrà et al found that substance use disorders, including cannabis, when comorbid with bipolar disorder, was

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<sup>290</sup> Neil T. Smith, “A Review of the Published Literature into Cannabis Withdrawal Symptoms in Human Users” (2002) 97:6 *Addiction* 621; Alan J. Budney et al, “Review of the Validity and Significance of Cannabis Withdrawal Syndrome (2004) 161 *American Journal of Psychiatry* 1967.

<sup>291</sup> Alan J. Budney & John R. Hughes, “The Cannabis Withdrawal Syndrome” (2006) 19:3 *Current Opinion in Psychiatry* 233.

<sup>292</sup> DSM V, *supra* note 284.

<sup>293</sup> David J. Allsop et al, “Quantifying the Clinical Significance of Cannabis Withdrawal” (2012) 7:9 *PLoS ONE* e4864; Walter Fratta & Liana Fattore, “Molecular Mechanisms of Cannabinoid Addiction” (2013) 23:4 *Current Opinion in Neurobiology* 487.

<sup>294</sup> Ceri Price et al, “Cannabis and Suicide: Longitudinal Study” (2009) 195:6 *The British Journal of Psychiatry* 492.

<sup>295</sup> Willy Pedersen, “Does Cannabis Use Lead to Depression and Suicidal Behaviours? A Population-based Longitudinal Study” (2008) 118:5 *Acta Psychiatrica Scandinavica* 395.

significantly associated with suicide attempts.<sup>296</sup> Another study looked at the association between legalizing medical cannabis and suicide rates, and found that suicides among young men (ages 20-39) dropped following medical marijuana legalization, compared to states that did not legalize, consistent with the commonly-held belief that cannabis can be used to cope with stressful life events.<sup>297</sup>

#### 2.7.6.5. Drugged Driving

Drugged driving is one of the greatest concerns associated with the legalization of recreational cannabis use, particularly because of how prevalent it is among young drivers.<sup>298</sup> Although many scholars call for adopting per se limits for cannabis<sup>299</sup>, there are several problems with this approach. Unfortunately, it is incredibly difficult to determine whether drivers are impaired by cannabis, because there is no reliable test for impairment, only for past use.<sup>300</sup> Additionally, because cannabis is fat soluble, regular or

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<sup>296</sup> Giuseppe Carrà et al, “Attempted Suicide in People with Co-Occurring Bipolar and substance Use Disorders: Systematic Review and Meta-Analysis” (2014) 167 *Journal of Affective Disorders* 125.

<sup>297</sup> D. Mark Anderson, Daniel I. Rees & Joseph J. Sabia, “Medical Marijuana Laws and Suicides by Gender and Age” (2014) 104:12 *American Journal of Public Health* 2369 [the authors admit that the correlation could be explained by alcohol consumption].

<sup>298</sup> This is expressed by Members of Parliament in the House of Commons debates regarding Bill C-45, *supra* note 37, and Bill C-46, *An Act to Amend the Criminal Code (offences relating to conveyances) and to Make Consequential Amendments to Other Acts*, 1st Sess, 42nd Parl, 2017, during which a great deal of time is spent discussing driving under the influence of cannabis. See e.g House of Commons Debates, 42nd Parl, 1st Sess, Vol 148 No 185 (1 June 2017) at 11922 (Hon Geoff Regan) [HOC Debate No 185]; House of Commons Debates, 42nd Parl, 1st Sess, Vol 148 No 190 (8 June 2017) at 12335 (Honourable Geoff Regan) [HOC Debate No 190]; This concern has also been reflected in the media: See e.g. Leia Minaker & Jacob Shelley, “Alarming stats about drug use and driving among teens” *Toronto Star* (24 May 2017) online: <<https://www.pressreader.com/canada/toronto-star/20170524/281835758644500>>; Liam Casey & Peter Cameron, “Ontario police gearing up for rise in drugged driving after pot legalization” *CTV News* (13 April 2017) online: <<http://www.ctvnews.ca/canada/ontario-police-gearing-up-for-rise-in-drugged-driving-after-pot-legalization-1.3367112>>; See also Erika Chamberlain, Robert Solomon & A. Kus, “Drug-Impaired Driving in Canada: Moving Beyond American Enforcement Models” (2013-2014) 60 *Crim LQ* 238 at 238 [“driving after drug use is commonplace and is now more prevalent among young people than driving after drinking”].

<sup>299</sup> See e.g. Robert Solomon & Erika Chamberlain, “Canada’s New Drug-Impaired Driving Law: The Need to Consider Other Approaches” (2014) 15:7 *Traffic Injury Prevention* 685 [Solomon & Chamberlain].

<sup>300</sup> Franjo Grotenhermen et al, “Developing Limits for Driving Under Cannabis” (2007) 102 *Addiction* 1910 at 1911 [“even a high dose of smoked THC typically causes acute impairment for driving skills for only 3-4 hours...blood samples taken from moderate users may still test positive for THC even when they observe a sufficiently long waiting period between cannabis use and driving and impairment has dissipated.”]

heavy users can test positive for THC hours, days, and even weeks following consumption.<sup>301</sup> Even passive exposure to cannabis smoke may result in positive blood tests, absent any impairment.<sup>302</sup> Additionally, there is no well-defined threshold for cannabis impairment.

Given that cannabis is a central nervous system depressant, and can produce drowsiness, slower reaction time, decreased memory, decreased attention, impairments in psychomotor performance, signal detection, and the ability to monitor a moving object, there are clear implications for operating a motor vehicle after using cannabis.<sup>303</sup> The National Academies of Sciences found substantial evidence that cannabis use is associated with an increased risk of motor vehicle crash.<sup>304</sup> One estimate found that cannabis use increases the risk of involvement in a motor vehicle accident twofold.<sup>305</sup> Laboratory studies using a driving simulator have revealed cannabis use is detrimental to driving skill.<sup>306</sup> However, it can be difficult to separate the effects of cannabis from other variables. A study in the United States found a statistically significant increase in adjusted crash risk for drivers who tested positive for THC, but after adjusting for age, gender, ethnicity, and alcohol eliminated the association, indicating that these other factors are much more indicative of crash risk than cannabis use.<sup>307</sup> In contrast to this, another study found that habitual cannabis users had a nine-fold higher crash risk that persisted after controlling for confounding factors.<sup>308</sup>

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<sup>301</sup> *Ibid.*

<sup>302</sup> *Ibid.*

<sup>303</sup> Maisto, Galizio & Connors, *supra* note 10 at 280; Small, *supra* note 90 at 231.

<sup>304</sup> National Academies, *supra* note 8 at S-13.

<sup>305</sup> Mark Asbridge, Jill A. Hayden & Jennifer L. Cartwright, “Acute Cannabis Consumption and Motor Vehicle Collision Risk: Systematic Review of Observational Studies and Meta-Analysis” (2012) 344 *BMJ* e536 [Asbridge, Hayden & Cartwright]; Mu-Chen Li et al, “Marijuana Use and Motor Vehicle Crashes” (2012) 34:1 *Epidemiologic Reviews* 65.

<sup>306</sup> *Ibid.*; Asbridge, Hayden & Cartwright, *supra* note 305.

<sup>307</sup> Richard P. Compton & Amy Berning, “Drug and Alcohol Crash Risk” (February 2015) Traffic Safety Facts Research Note, DOT HS 812117 (Washington, DC: United States Department of Transportation, National Highway Traffic Safety Administration) at 8.

<sup>308</sup> Stephanie Blows et al “Marijuana Use and Car Crash Injury” (2005) 100:5 *Addiction* 605.

While there are risks with drugged driving, it would be inaccurate to assume that the risks are the same as with alcohol impairment and drunk driving. While both activities carry some degree of risk, driving under the influence of cannabis is much less dangerous than driving drunk, as drugged drivers are less aggressive and more cautious than drunk drivers, and are able to mitigate their impairment because they are more aware of their own impairment.<sup>309</sup> Some users, particularly experienced users, may be able to compensate for many of the negative consequences caused by using cannabis before driving, by using behavioural strategies.<sup>310</sup> For example, drivers under the influence of cannabis drive more slowly, and focus their attention when they know a response will be required.<sup>311</sup> It is the combination of alcohol and cannabis that may be most problematic, as the two substances are synergistic, and therefore increase the risks of driving under the influence of either cannabis or alcohol alone. The combination eliminates the ability of the user to mitigate their impairment.<sup>312</sup> Another concern is the almost exclusive focus on THC in regard to impaired driving. Very little research has been conducted on the other cannabinoids or cannabis constituents, likely because they are not psychoactive. However, as mentioned earlier, cannabinoids and other components may alter the effects of THC, as well as other substances, such as alcohol, which could have implications for impaired driving. For example, one study found that participants given both CBD and alcohol showed the same level of impairment as participants given alcohol only, but their blood alcohol concentration was significantly lower.<sup>313</sup> In addition to mixing cannabis and alcohol, drugged driving is particularly problematic for young drivers, because of the

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<sup>309</sup> Alison Smiley, “Marijuana: On-road and Driving Simulator Studies” in Harold Kalant et al, eds, *The Health Effects of Cannabis* (Toronto: Centre for Addition and Mental Health, 1999) at 173-191; Small, *supra* note 95 at 231.

<sup>310</sup> Carl L. Hart et al, “Effects of Acute Smoked Marijuana on Complex Cognitive Performance” (2001) 25 *Neuropsychopharmacology* 757; R. Andrew Sewell, James Poling & Mehmet Sofuoglu, “The Effect of Cannabis Compared with Alcohol on Driving” (2009) 18(3) *American Journal of Addiction* 185 [Sewell, Poling & Sofuoglu].

<sup>311</sup> Grotenhermen, *supra* note 182.

<sup>312</sup> Sewell, Poling & Sofuoglu, *supra* note 310.

<sup>313</sup> Paul Consroe, “Interaction of Cannabidiol and Alcohol in Humans” (1979) 66 *Psychopharmacology* 45 [Though this study is old, and was conducted on a small sample size, it has not been replicated or disproven, and given the significant implications of its findings, is certainly worth further investigation].

combination of impairment and lack of driving experience. Additionally, youth younger than 21 are at the highest risk of involvement in a fatal motor vehicle crash, and are also the most likely to use cannabis.<sup>314</sup> Additionally, surveys conducted in various areas of Canada indicate that a significant number of young Canadians already drive after drug use, more than do after drinking.<sup>315</sup> In 2014-2015, 9.4% of grade 11-12 Canadian students reported ever driving after using cannabis, and 20% reported riding with a driver who had been using cannabis.<sup>316</sup>

Looking at statistics for drug-impaired driving prior to legalization may be useful in predicting the prevalence of drug-impaired driving post-legalization. In Canada, 16.4% of drivers killed in motor vehicle accidents between 2000 and 2010 tested positive for cannabis.<sup>317</sup> A random survey of nighttime drivers in British Columbia found 4.6% of all drivers tested positive for cannabis.<sup>318</sup> Another study found that in 2012, cannabis-attributable traffic collisions caused 75 deaths and 4407 injuries, costing upwards of \$1 billion dollars.<sup>319</sup> Additionally, 2.6% of Canadians report driving within two hours of using cannabis in the past year.<sup>320</sup> The concern is that the rates of drugged driving will

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<sup>314</sup> Sewell, Poling & Sofuoglu, *supra* note 310.

<sup>315</sup> See e.g. Mark Asbridge, Christiane Poulin & Andrea Donato, “Motor Vehicle Collision Risk and Driving Under the Influence of Cannabis: Evidence from Adolescents in Atlantic Canada” (2005) 37:6 *Accident Analysis & Prevention* 1025; Boak et al, *supra* note 116; Health Canada, “Canadian Alcohol and Drug Use Monitoring Survey 2012: Microdata User Guide” (September 2013) online: <[http://odesi1.scholarsportal.info/documentation/CADUMS/2012/CADUMS\\_User\\_Guide\\_2012\\_ENG.pdf](http://odesi1.scholarsportal.info/documentation/CADUMS/2012/CADUMS_User_Guide_2012_ENG.pdf)> at 159.

<sup>316</sup> Leia M. Minaker et al, “Under the Influence: Examination of Prevalence and Correlates of Alcohol and Marijuana Consumption in Relation to Youth Driving and Passenger Behaviours in Canada: A Cross-Sectional Study” (2017) 5:2 *CMAJ Open* e286.

<sup>317</sup> Canadian Centre on Substance Abuse, “Cannabis, Driving and Implications for Youth” (2015) online: <<http://www.ccsa.ca/Resource%20Library/CCSA-Cannabis-Driving-Implications-for-Youth-Summary-2015-en.pdf>> at 1 [though this does not prove that they were impaired, or that having cannabis in their system was the reason for the accident].

<sup>318</sup> *Ibid* [similar to above, this does not prove they were impaired].

<sup>319</sup> Ashley Wettlaufer et al, “Estimating the Harms and Costs of Cannabis-attributable Collisions in the Canadian Provinces” (2017) 173 *Drug and Alcohol Dependence* 185.

<sup>320</sup> Health Canada, “Canadian Alcohol and Drug Use Monitoring Survey” (April 8, 2014) online: <<https://www.canada.ca/en/health-canada/services/health-concerns/drug-prevention-treatment/drug-alcohol-use-statistics/canadian-alcohol-drug-use-monitoring-survey-summary-results-2012.html>>.

increase exponentially following legalization. Fortunately, this issue has been studied in American jurisdictions that have legalized recreational cannabis use. In Washington State, the number of drivers involved in Driving Under the Influence (DUI) or collision case that tested positive for THC increased from 20% to 30% between 2005 and 2014. Additionally, the median blood THC level of drivers involved in a collision or pulled over for a DUI increased from 4.0ng/ml in 2005 to 5.6ng/ml in 2014.<sup>321</sup> However, countries that have not legalized recreational cannabis have also experienced increases in THC levels found in drivers suspected of drug-impaired driving. For example, in Norway the mean THC concentrations in blood samples of drivers suspected of drug-impaired driving increased 58% between 2000 and 2010, while similar increases were not seen with alcohol or amphetamines<sup>322</sup>, suggesting that legalization may not be responsible for the increase seen in other jurisdictions.

In Colorado, cannabis-related traffic deaths, including not only drivers, but passengers and pedestrians, increased 48 percent in the three years following the legalization of recreational cannabis compared to the three years prior.<sup>323</sup> Additionally, the number of deaths involving drivers that tested positive for cannabis following a fatal crash doubled between 2009 and 2015 from 10% to 21%.<sup>324</sup> Scholars have indicated that flaws in the detection and subsequent criminal prosecution of impaired drivers significantly contribute to the high rates of impaired driving.<sup>325</sup> However, this may be explained by the fact that more people who drive are using cannabis, not necessarily that more people were impaired by cannabis while driving, due to the inability to test for impairment.

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<sup>321</sup> Caleb Banta-Green et al, “Cannabis Use Among Drivers Suspected of Driving Under the Influence or Involved in Collisions: Analyses of Washington State Patrol Data” AAA Foundation for Traffic Safety (May 2016) at 2 [However, it is possible that the increase is due to an increased surveillance and enforcement efforts].

<sup>322</sup> Vigdis Vindenes et al, “Has the Intake of THC by Cannabis Users Changed Over the Last Decade? Evidence of Increased Exposure by Analysis of Blood THC Concentrations in Impaired Drivers” (2013) 226 *Forensic Science International* 197.

<sup>323</sup> RMHIDTA, vol 4, *supra* note 119 at 1 [This includes the death not only of the driver, but of passengers and pedestrians too. During the same time, all traffic deaths increased 11 percent].

<sup>324</sup> *Ibid* at 2.

<sup>325</sup> See e.g, Solomon & Chamberlain, *supra* note 299.



Because there is no way of knowing whether the THC-positive drivers caused or contributed to the fatal collisions, it is not possible to conclusively state that the legalization of cannabis was responsible for the increase.<sup>326</sup>

A study conducted on bicycle riders further complicates the understanding of the relationship between cannabis use and operating a vehicle. A study of 14 participants found only a few driving faults under the influence of very high THC concentrations, and a defined THC concentration that leads to the inability to ride a bicycle could not be presented. The participants showed only slight distinctive features that can be documented using a medical test routinely run for persons under suspicion of driving under the influence of alcohol or drugs.<sup>327</sup> The characteristics of cannabis, combined with individual factors that can impact the metabolism of cannabinoids, call into question the fairness, and perhaps even the constitutionality, of several efforts suggested for combatting drug-impaired driving, such as random-breath testing (or saliva or blood in the case of cannabis), mandatory road checks, and the implementation of per se limits.<sup>328</sup>

#### 2.7.6.6. Psychosocial

There are a few psychosocial concerns with recreational cannabis use. There is concern that legalizing recreational cannabis, even if the legal age is 18, will increase use of cannabis among youth. However, research suggests that liberalizing cannabis policy will not cause an increased rate of youth use.<sup>329</sup> Because cannabis affects cognitive functions, some suggest that regular use among youth may impair learning at school, and ultimately

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<sup>326</sup> See Stacy Salomonsen-Sautel et al, “Trends in Fatal Motor Vehicle Crashes before and after Marijuana Commercialization in Colorado” (2014) 140 *Drug and Alcohol Dependence* 137 at 141.

<sup>327</sup> Benno Hartung, “The Effects of Cannabis on Regular Cannabis Consumers’ Ability to Ride a Bicycle” (2016) 130 *International Journal of Legal Medicine* 711 [However, the study was conducted on a small sample that was male dominant, and 4 people tested positive for MDMA/amphetamines]

<sup>328</sup> Robert Solomon et al, “The Case for Comprehensive Random Breath Testing Programs in Canada: Reviewing the Evidence and Challenges” (2011) 49:1 *Alberta L Rev* 37.

<sup>329</sup> Deborah S. Hasin et al, “Medical marijuana laws and adolescent marijuana use in the USA from 1991 to 2014: Results from annual, repeated cross-sectional surveys” (2015) 2:7 *Lancet Psychiatry* 601; Esther K. Choo et al, “The Impact of State Medical Marijuana Legislation on Adolescent Marijuana Use” (2014) 55:2 *Journal of Adolescent Health* 160.

interfere with achieving education goals, such as graduation.<sup>330</sup> There is some research that early cannabis use is associated with an increased risk of dropping out of school, however other research suggests that genetic and environmental factors are more likely to be responsible.<sup>331</sup> Castellanos-Ryan et al found that adolescents who use cannabis as early as 14 years old do worse than non-users of cannabis on cognitive tests and drop out of school at higher rates, but if they do not use cannabis until they are 17 or older the risk is lower.<sup>332</sup> In contrast, a study in England that sampled over 6000 young people found evidence that high academic ability was associated with temporary experimentation<sup>333</sup> with substance use, including alcohol and cannabis. Although the reason for the correlation is unknown, the authors suggest that the recognized correlation between high cognitive ability and openness to new experiences may be a factor.<sup>334</sup> Overall, there is limited evidence that cannabis use is associated with impaired academic achievement and education outcomes, increased rates of unemployment and low income, or impaired social functioning or engagement in developmentally appropriate social roles.<sup>335</sup> Lastly, there was a 40% increase in drug-related suspensions and expulsions from Colorado schools between 2008-2014, suggesting either that cannabis legalization led to higher

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<sup>330</sup> Volkow, *supra* note 154 at 2221.

<sup>331</sup> Karin J.H. Verweij et al, “Is the relationship between early-onset cannabis use and educational attainment causal or due to common liability?” (2013) 133:2 *Drug and Alcohol Dependence* 580; Michael Lynskey & Wayne Hall, “The effects of adolescent cannabis use on educational attainment: a review” (2000) 95:11 *Addiction* 621; Jeremy W. Bray et al, “The relationship between marijuana initiation and dropping out of high school” (2000) 9:1 *Health Economics* 9.

<sup>332</sup> Natalie Castellanos-Ryan et al, “Adolescent Cannabis Use, Change in Neurocognitive Function, and High-School Graduation: A Longitudinal Study from Early Adolescence to Young Adulthood” (2016) *Development and Psychopathology* 1.

<sup>333</sup> James Williams & Gareth Hagger-Johnson “Childhood Academic Ability in Relation to Cigarette, Alcohol and Cannabis Use from Adolescence into Early Adulthood: Longitudinal Study of Young People in England (LSYPE)” (2016) 7:2 *BMJ Open* 1 [defined as a temporary regular pattern of use followed by cessation].

<sup>334</sup> *Ibid.*

<sup>335</sup> National Academies, *supra* note 8 at S-13.

rates of cannabis use among school-aged children, or that schools increased their surveillance of drug use and possession among their students.<sup>336</sup>

#### 2.7.6.7. Other Substance Use Disorders

There is a lot of concern that legalizing cannabis will lead to an increase not only in cannabis use, but that cannabis use will lead to the use of other, more dangerous drugs. The “gateway theory”—also known as the stepping-stone theory or the progression hypothesis—was first proposed in the 1930s, and despite mounting evidence refuting its existence, it prevails today.<sup>337</sup> Some researchers assert that there is considerable evidence that cannabis acts as a gateway drug to other illicit drugs<sup>338</sup>, while others insist that there is no conclusive evidence that cannabis increases the likelihood of progressing to use other substances.<sup>339</sup> While many heroin or cocaine users previously used cannabis, very few cannabis users will go on to use harder substances.<sup>340</sup> Rather than acting as a gateway, researchers suggest that illicit drug users likely used cannabis first simply because it is the most widely available illegal drug and is often the first drug most people encounter.<sup>341</sup> As well, most users use alcohol or nicotine before using cannabis, suggesting instead that alcohol is the gateway substance and should be the focus of

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<sup>336</sup> Rocky Mountain High Intensity Drug Trafficking Area, “The Legalization of Marijuana in Colorado: The Impact” Vol 3 (September 2015).

<sup>337</sup> See e.g. Denise B. Kandel, *Stages and Pathways of Drug Involvement: Examining the Gateway Hypothesis* (New York: Cambridge University Press, 2002) at 4 [“[a]lthough the Gateway Hypothesis had its origins in the mid-1970s, the concept of progression in drug use...was first promulgated in the 1930s as the Stepping Stone Theory].

<sup>338</sup> K.K. Kepp & A.L. Raisch, *Marijuana and Health: A Comprehensive Review of 20 Years of Research* (Washington County, Oregon, Department of Health and Human Services, October 20, 2014) online: <[http://learnaboutmarijuanawa.org/Reports/Marijuana\\_review\\_ReppRaich\\_Oct2014.pdf](http://learnaboutmarijuanawa.org/Reports/Marijuana_review_ReppRaich_Oct2014.pdf)> at 27.

<sup>339</sup> Joy, Watson Jr & Benson Jr, *supra* note 149 at 9; Louisa Degenhardt et al, “Evaluating the Drug use “Gateway” Theory Using Cross-National Data: Consistency and Associations of the Order of Initiation of Drug Use Among Participants in the WHO World Mental Health Surveys” (2010) 108:1-2 *Drug and Alcohol Dependence* 84.

<sup>340</sup> Fergusson, David M. & L. John Horwood. “Does Cannabis Use Encourage Other Forms of Illicit Drug Use? (2000) 95:4 *Addiction* 505.

<sup>341</sup> Joy, Watson Jr & Benson Jr, *supra* note 149 at 9.

prevention programming.<sup>342</sup> An alternative to the gateway theory has been proposed, called the correlated vulnerabilities theory. It suggests that the stepping-stone pattern of substance abuse is better explained by the common characteristics of those who use cannabis and other substances.<sup>343</sup>

The National Academies of Sciences concluded that there is moderate evidence that cannabis use is associated with developing dependence or a substance use disorder for substances including alcohol, tobacco, and other illicit drugs, but there is limited evidence that cannabis use is associated with starting to use tobacco and changes in the rates and use pattern of other licit and illicit substances.<sup>344</sup> Others prefer to call cannabis an “exit drug”, because of its abilities to help drug addicts transition from other drugs, such as heroin. Various studies have identified cannabis as a potential substitute for other psychoactive substances and, in fact, cannabis may be protective against problematic use of other substances.<sup>345</sup> One study of medical cannabis users found that 71% of respondents reported substituting cannabis for prescription drugs, alcohol, tobacco/nicotine, or other illicit substances, suggesting that cannabis may have significant public health implications for replacing other, more dangerous substances.<sup>346</sup> Additionally, a study comparing the efficacy of cannabis for treating substance use disorders found comparable or superior progress at discharge for cannabis users when

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<sup>342</sup> Small, *supra* note 95 at 229; Tristan Kirby & Adam E. Barry, “Alcohol as a Gateway Drug: A Study of US 12<sup>th</sup> Graders” (2012) 82:8 *Journal of School Health* 371.

<sup>343</sup> Wayne D. Hall & Michael Lynskey, “Is Cannabis a Gateway Drug? Testing Hypotheses About the Relationship Between Cannabis Use and the Use of Other Illicit Drugs” (2005) 24:1 *Drug and Alcohol Review* 39; Andrew R. Morral, Daniel F. McCaffrey & Susan M. Paddock, “Reassessing the Marijuana Gateway Effect” (2002) 97:12 *Addiction* 1493.

<sup>344</sup> National Academies, *supra* note 8 at S-16.

<sup>345</sup> See e.g., Carol Hamelink et al, “Cannabidiol, Antioxidants, and Diuretics in Reversing Binge Ethanol-Induced Neurotoxicity” (2005) 314:2 *Journal of Pharmacology and Experimental Therapeutics* 780 [researchers found that CBD acted as a neuroprotectant in rats and prevented binge ethanol-induced brain injury].

<sup>346</sup> Phillippe Lucas et al, “Substituting Cannabis for Prescription Drugs, Alcohol and Other Substances Among Medical Cannabis Patients: The Impact of Contextual Factors” (2015) 35:3 *Drug and Alcohol Review* 326 [specifically, the study found that 63% of respondents substituted cannabis for prescription medication, 25% for alcohol, 12% for tobacco/nicotine, and 3% for illicit substances. The study had a sample size of 301].

compared to non-cannabis users in treatment.<sup>347</sup> Recently, there has been significant interest in the use of cannabis as a harm reduction technique for opioid addiction, with research suggesting that cannabis can be an effective intervention.<sup>348</sup> While more research is needed to confirm this benefit, preliminary results suggests that cannabis may be useful as a harm reduction tool. Lastly, there is some evidence to suggest that cannabis legalization may lead to an increase in tobacco consumption. Cannabis use is associated with high rates of tobacco use, may increase the risk of tobacco use initiation, and may also increase the risk of escalation to daily tobacco use and nicotine dependence.<sup>349</sup> On the other hand, cannabis legalization may decrease the use of legal synthetic cannabis products, such as Spice or K2, which are associated with much higher rates of accident and emergency room visits.<sup>350</sup>

#### 2.7.6.8. Violence

Despite commonly held beliefs that cannabis causes users to become violent<sup>351</sup>, there is conflicting evidence that is the case. There are theories that support both a positive and negative relationship between cannabis and violence.<sup>352</sup> While there is always the possibility that cannabis will cause aggression or violence in a user with pre-existing

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<sup>347</sup> Ronald Schwartz, “Medical Marijuana Users in Substance Abuse Treatment” (2010) 7:1 *Harm Reduction Journal* 3.

<sup>348</sup> See e.g. Phillippe Lucas, “Rationale for Cannabis-Based Interventions in the Opioid Overdose Crisis” (2017) 14:58 *Harm Reduction Journal* 1.

<sup>349</sup> Arpana Agrawal, Alan J. Budney & Michael T. Lynskey, “The Co-Occurring Use and Misuse of Cannabis and Tobacco: A Review” (2012) 107:7 *Addiction* 1221; George C. Patton et al, “Reverse Gateways? Frequent Cannabis Use as a Predictor of Tobacco Initiation and Nicotine Dependence” (2005) 100:10 *Addiction* 1518; Arpana Agrawal et al, “Transitions to Regular Smoking and to Nicotine Dependence in Women Using Cannabis” (2008) 95:1-2 *Drug and Alcohol Dependence* 107.

<sup>350</sup> Adam R. Winstock & Monica J. Barratt, “Synthetic Cannabis: A Comparison of Patterns of Use and Effect Profile with Natural Cannabis in a Large Global Sample” (2013) 131(1-2) *Drug and Alcohol Dependence* 106.

<sup>351</sup> This view was common during the “reefer madness” era. See e.g. Murphy, *supra* note 40; Richard J. Stringer & Scott R. Maggard, “Reefer Madness to Marijuana Legalization: Media Exposure and American Attitudes Toward Marijuana (1975-2012)” (2016) 46:4 *Journal of Drug Issues* 428 at 428 [“media coverage about marijuana differs greatly today from the negative horror stories of the 1930s Reefer Madness era when marijuana was first outlawed”].

<sup>352</sup> Michael K. Ostrowsky, “Does Marijuana Use Lead to Aggression and Violent Behavior” (2011) 41:4 *Journal of Drug Education* 369 [Ostrowsky].

conditions or predisposition to those traits, there is little evidence that cannabis use will cause aggression in users without pre-existing conditions or predispositions.<sup>353</sup> One study found that while laboratory-based studies were inconclusive regarding the relationship between cannabis use and violence, cross-sectional and longitudinal research did support the association between cannabis use and withdrawal and various types of violence.<sup>354</sup> A study conducted in Norway also found that an increase in cannabis use among youth was associated with an increased risk of violence.<sup>355</sup> Other studies, however, found no association and some even that found cannabis reduced aggressive behaviour.<sup>356</sup> The relationship between cannabis use and domestic violence has also been examined. Where one spouse is a cannabis user intercouple violence is less common than if both partners are non-users, and there is less intercouple violence where both partners are users than in instances with one partner is a user.<sup>357</sup> Additionally, individuals experiencing withdrawal symptoms from cannabis dependence have also been found to act more aggressively, although this correlation has not been extended to include violence.<sup>358</sup>

#### 2.7.6.9. Accidental Injuries

The potential increase in non-traffic related accidents is also a concern associated with cannabis liberalization. Though there is insufficient evidence to support the association between acute cannabis use and non-traffic injuries, this area of study has received relatively little attention, which could be the reason there is not enough evidence to form

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<sup>353</sup> Ernest L. Abel, "The Relationship Between Cannabis and Violence: A Review" (1977) 84:2 *Psychological Bulletin* 193.

<sup>354</sup> Todd M. Moore & Gregory L. Stuart, "A Review of the Literature on Marijuana and Interpersonal Violence" (2005) 10:2 *Aggression and Violent Behavior* 171.

<sup>355</sup> Thor Norström & Ingeborg Rossow, "Cannabis use and violence: Is there a link?" (2014) 42:4 *Scandinavian Journal of Public Health* 358.

<sup>356</sup> Ostrowsky, *supra* note 352.

<sup>357</sup> Phillip H. Smith et al, "Couples' Marijuana Use is Inversely Related to their Intimate Partner Violence over the First Nine Years of Marriage" (2014) 28:3 *Psychology of Addictive Behaviors* 734.

<sup>358</sup> Peter N.S. Hoaken & Sherry H. Stewart, "Drugs of Abuse and the Elicitation of Human Aggressive Behavior" (2003) 28 *Addictive Behaviors* 1533.

a stronger association.<sup>359</sup> Despite the lack of attention, there are a few specific concerns associated with increased cannabis use, namely, accidental ingestion of edibles (or non-accidental over-ingestion of edibles), an increased prevalence of burns, general increase in cannabis-related hospital visits, and increased risk of occupational accidents or injuries. Each will be discussed.

One of the results of liberalizing cannabis use is not only an increased rate of use, particularly among novice users, but also innovation in new ways to use and produce cannabis, which can result in unexpected health effects.<sup>360</sup> One of these unintended health effects is an increase in the number of cannabis-related burns. The University of Colorado burn centre had 31 admissions for cannabis related burns between 2013-2015, with 21 requiring skin grafts, and some cases involving burns of up to 70% of the body.<sup>361</sup> The majority of the burns occurred during THC extraction using butane as a solvent, which is a process used to create high-potency THC oil, commonly referred to as Butane Hash Oil (BHO).<sup>362</sup> BHO is a potent cannabis concentrate that can contain up to 70-90% THC (almost 5 times stronger than high potency dried cannabis currently available from licensed medical producers in Canada).<sup>363</sup> BHO is manufactured by using butane as a solvent, which is highly dangerous because during extraction, butane gas, which is highly flammable, permeates the air and can easily catch fire.<sup>364</sup> BHO is then used for ‘dabbing’, a method of inhaling a highly concentrated cannabis substance, typically by placing ‘just a dab’ of the concentrate on a heated surface. Prior to Colorado’s liberalization of

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<sup>359</sup> Gabriel Andreuccetti et al, “The Effects of Acute Cannabis Use on Nontraffic Injury Risk: Reviewing the Available Literature and Identifying Ways Forward” (2017)44:2 *Contemporary Drug Problems* 147

<sup>360</sup> Andrew A. Monte, Richard D. Zane & Kennon J. Heard, “The Implications of Marijuana Legalization in Colorado” (2015) 313:3 *JAMA* 241 [Monte, Zane & Heard]

<sup>361</sup> *Ibid* at 241

<sup>362</sup> *Ibid.*

<sup>363</sup> Cameron Bell et al, “Butane Hash Oil Burns Associated with Marijuana Liberalization in Colorado” (2015) 11 *Journal of Medical Toxicology* 422 at 422.

<sup>364</sup> *Ibid* [butane extraction is only one method of extracting THC; other methods include blasting, purging, open-column extraction, closed-loop system, and dual extracts, all of which evaporate the THC and leave behind highly potent crystalized resins].

medical cannabis use, the Colorado Hospital Burn Center received zero cases of cannabis related burns. In the three years following medical liberalization, 19 cases were seen at the Centre, and 12 were seen in the eight months following the legalization of recreational use.<sup>365</sup>

Colorado has also experienced a growth in the number of emergency room (ER) visits related to cannabis. In 2013, the number of ER visits related to cannabis was 14,148; in 2014, the number was 18,255.<sup>366</sup> The number of hospitalizations related to cannabis also increased in Colorado following legalization. In 2011, there were 6,305 hospitalizations related to cannabis; in 2014, there were 11,439.<sup>367</sup> Colorado has also witnessed an increase in cyclic vomiting presentations, the result of frequent use of high THC products. After medical liberalization in Colorado, two Denver hospitals experienced an increase in patients presenting with cyclic vomiting, from 41 cases to 87 cases.<sup>368</sup> On a positive note, there is some evidence to suggest that cannabis can be protective against the occurrence of injuries presenting in the ER. In a Swiss study looking at alcohol and cannabis as risk factors for injury, the authors found that cannabis had an inverse relationship with injury, perhaps explained by the fact that cannabis is often used in safer environments than other substances, or that cannabis users display more compensatory behaviours than users of other substances.<sup>369</sup>

Another injury concern associated with cannabis legalization is accidental ingestion of cannabis edibles, particularly by children and pets. Colorado's Children's Hospital reported only one case of cannabis ingested by a child under the age of 9 in 2009,

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<sup>365</sup> *Ibid* at 423 [it is possible that this increase may be partially attributable to increased reporting; prior to legalization people receiving these types of injuries may not have sought medical attention or may have lied about how they received the burns].

<sup>366</sup> RMHIDTA, vol 4, *supra* note 119 at 77

<sup>367</sup> *Ibid* [Again, it is possible that some of the increase is attributable to increased reporting].

<sup>368</sup> Monte, Zane & Heard, *supra* note 360 at 242.

<sup>369</sup> Gerhard Gmel et al, "Alcohol and Cannabis Use as Risk Factors for Injury - A Case-Crossover Analysis in a Swiss Hospital Emergency Department" (2009) 9:40 *BMC Public Health* 1 at 6.



compared to 16 cases in 2015.<sup>370</sup> Similarly, the number of calls to regional poison control centers in Colorado related to accidental ingestion of cannabis by children increased more than 5-fold, from 9 calls in 2009 to 47 in 2015.<sup>371</sup> Additionally, news reports suggest that veterinarians are reporting significant increases in the number of pets seen for ingesting cannabis products, primarily dogs. One veterinarian reported the increase went from an occasional incident prior to medical legalization, to approximately 2-3 cases per week of pets accidentally eating cannabis edibles.<sup>372</sup>

There is also concern about cannabis legalization and safety in the workplace. In the Task Force on Marijuana Legalization and Regulation Report<sup>373</sup>, the authors acknowledged concern expressed by industry stakeholders regarding the impact of cannabis in the workplace, particularly in safety-sensitive positions, including health-care, law-enforcement, transportation, construction, and resource extraction.<sup>374</sup> The Task Force, however, made no recommendations on this topic, and only recommended continuing research and monitoring in the area. The National Academies of Sciences concluded that there is insufficient evidence to support a relationship between recreational cannabis use and occupational accidents or injuries.<sup>375</sup>

## 2.8. Conclusion

The harmfulness of cannabis will inevitably play a role in determining whether advertising restrictions are a justified infringement on freedom of expression. How narrowly (or broadly) the government characterizes the harm will impact the rational

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<sup>370</sup> RMHIDTA, vol 4, *supra* note 119 at 77

<sup>371</sup> George Sam Wang et al, “Unintentional Pediatric Exposures to Marijuana in Colorado: 2009-2015” (2016) 180:9 *JAMA* e160971.

<sup>372</sup> Liz Field, “Colo.Vets Warn of Edible Marijuana Threat to Pets” (February 27, 2014) *ABC News* online: <<http://abcnews.go.com/US/colo-vets-warn-edible-marijuana-threat-dogs/story?id=22701750>>.

<sup>373</sup> Health Canada, “Toward the Legalization, Regulation and Restriction of Access to Marijuana”, Discussion Paper (November 2016) online: <<http://healthycanadians.gc.ca/task-force-marijuana-groupe-etude/framework-cadre/alt/framework-cadre-eng.pdf>> [Task Force Report].

<sup>374</sup> *Ibid* at 29.

<sup>375</sup> National Academies, *supra* note 8 at S-13.

connection stage of the *Oakes* test, and the degree of harm will also affect the proportionality analysis; the more potential for harm, the easier it will be for Parliament to justify their actions. Tobacco advertising litigation is informative. In both *RJR-MacDonald* and *JTI-MacDonald*, the Courts accepted the clear risks associated with tobacco use. Unfortunately, the risk is not so clear with cannabis. First, cannabis has numerous medical applications, and many more currently under investigation, and therefore has the possibility to provide benefit to Canadians. Tobacco, on the other hand, has little, if any, medical (or other) benefits to users. Non-therapeutic cannabis use also has potential benefits, such as decreasing stress. Second, determining the harmfulness of cannabis use has been complicated by politics. Canada is still transitioning from a Conservative government that focused on the adverse effects of cannabis, while ignoring the possible benefits, to a Liberal government that has prioritized legalization. Contextually, this means that Canadians are not starting from neutral ground. Care must be taken not to over-correct for the conservative views of cannabis use by overly-focusing on the benefits of cannabis use. But the historical vilification of cannabis use is a relevant contextual factor out of which cannabis legalization arises, and should inform the analysis.

There are some widely-accepted risks of using cannabis, but they are primarily acute, such as anxiety and paranoia, or associated with smoking, such as bronchitis or decreased lung function. While there are long-term effects associated with regular cannabis use, such as decreased cognitive abilities, most long-term effects appear to be reversible with the termination of cannabis use.<sup>376</sup> Additionally, most of the adverse effects are associated with long-term, regular cannabis use, and a very small portion of the Canadian population matches this description. While the majority of tobacco users smoke daily, most cannabis users use infrequently. Unfortunately, the science on the effects of cannabis are overwhelmingly unsettled, and more research is needed. However, the potency of cannabis, measured by its THC content, has increased exponentially over the last few decades. Selective breeding over the last few decades for the illicit market has

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<sup>376</sup> Maisto, Galizio & Connors, *supra* note 10 at 279.

resulted in higher concentrations, with most cannabis now containing over 10% THC, and even up to 30% in the case of some medical cannabis products.<sup>377</sup> While THC concentrations have risen, CBD content has decreased, dropping to below 0.2%.<sup>378</sup> The increasing THC-to-CBD ratio increases the risk of adverse side effects, psychosis, and addiction.<sup>379</sup> Additionally, higher potency forms of cannabis are being used with greater frequency, hash oil concentrates, also known as “wax”, “dabs”, or “shatter”, may contain as much as 80-90% THC.<sup>380</sup> The use of high potency products similarly increases the risk of adverse effects. It is beyond the scope of this chapter to provide a comprehensive summary of all the research on the safety and risks of cannabis use. What can be stated is that while cannabis use is not risk-free, compared to other common substances, including alcohol, tobacco, and opioids, cannabis attributable disease burden is lower.<sup>381</sup>

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<sup>377</sup> See e.g. ABcann Medicinals, “Products” online: < <https://www.abcann.ca/index.php#strainsSec> > [On August 7, 2017, they had 2 products listed with THC content higher than 20%]; See also Tweed Main Street, “Zaius (Sativa Blend) online: <<https://www.tweedmainstreet.com/collections/available/products/zaius-sativa-blend-2>> [Zaius is listed as having 30mg/mL of THC, the equivalent of 30%, along with two other products with THC content greater than 20%].

<sup>378</sup> Mahmoud A. ElSohly et al, “Changes in Cannabis Potency over the Last 2 Decades (1995-2014): Analysis of Current Data in the United States” (2016) 79:7 *Biological Psychiatry* 613.

<sup>379</sup> *Ibid*; Joseph M. Pierre, “Risks of Increasingly Potent Cannabis: The Joint Effects of Potency and Frequency” (2017) 16:2 *Current Psychiatry* 15.

<sup>380</sup> *Ibid*.

<sup>381</sup> Degenhardt et al, *supra* note 287; Sameer Imtiaz et al, “The Burden of Disease Attributable to Cannabis Use in Canada in 2012” (2016) 111:4 *Addiction* 653.

## 3. History of Cannabis and the Law in Canada

### 3.1. Introduction

The history of cannabis, internationally and domestically, is long and complicated. Understanding the legal and social history of cannabis is necessary to understand the context from which cannabis advertising, and restrictions on the same arise, and should be assessed. As will be seen in chapter 4, the context of both the expression, and the restriction being challenged play an important role in the constitutional analysis. The aim of this chapter is to summarize the history of the law in Canada, as it pertains to cannabis, from criminalization to the legalization of cannabis for medicinal purposes, and now to the legalization of recreational cannabis. Part two explores the development of the criminal law as it relates to cannabis, starting with the addition of cannabis to the *Opium and Narcotic Drugs Act* in 1923 up until the current statutory regime, the *Controlled Drugs and Substances Act*. Part three reviews the case law that led to the legalization of medical cannabis use, subsequent constitutional challenges to the first two regulatory schemes, the *Medical Marijuana Access Regulations* and the *Marijuana for Medical Purposes Regulations*, and the implementation of the *Access to Cannabis for Medical Purposes Regulations*, which remain in force today. The fourth section focuses on recreational cannabis use, looking at past attempts to legalize recreational cannabis use and the associated obstacles, through the “hollowing out”<sup>382</sup> period, and the 2016 promise from the federal Liberal government to legalize cannabis.

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<sup>382</sup> Hollowing out is a term used to describe the period prior to changes in the law characterized by inconsistent enforcement of the law and changing public attitudes.

### 3.2. Cannabis and the Criminal Law in Canada

In the 19<sup>th</sup> and early part of the 20<sup>th</sup> centuries, cannabis use was legal, but there is little information about cannabis use in this time.<sup>383</sup> Cannabis was first prohibited in Canada in 1923, when it was added to the *Opium and Narcotic Drugs Act*, marking the start of an almost century-long prohibition.<sup>384</sup> Cannabis was added to the list of prohibited substances without any discussion in Parliament.<sup>385</sup> Over the course of the 20th century, cannabis was subject to only three different federal criminal statutory regimes: the *Opium and Narcotic Drugs Act*, the *Narcotic Control Act*<sup>386</sup>, and the *Controlled Drugs and Substances Act*. Although there were many amendments to the *Opium and Narcotic Drugs Act*, it remained the regulatory regime for cannabis up until 1961, when the *NCA* came into effect to implement the provisions of the *United Nations Single Convention on Narcotic Drugs*.<sup>387</sup> The *NCA* initially set out cannabis possession as an indictable offence only, but an amendment in 1969 permitted possession to be tried on indictment or summary conviction.<sup>388</sup> This change significantly reduced the number of convictions for cannabis possession resulting in prison sentences, but almost quadrupled the number of possession convictions over the span of two years.<sup>389</sup>

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<sup>383</sup> Melvyn Green & Ralph D. Miller, “Cannabis Use in Canada” in Vera Rubin, ed, *Cannabis and Culture* (The Hague: Mouton Publishers, 1975) at 498.

<sup>384</sup> Senate, Special Committee on Illegal Drugs, *Cannabis: Our Position for a Canadian Public Policy* (September 2002) (Chair: Pierre Claude Nolin) [Special Committee on Illegal Drugs].

<sup>385</sup> See P.J. Giffen, Shirley Endicott & Sylvia Lambert, *Panic and Indifference: The Politics of Canada’s Drug Laws* (Ottawa: Canadian Centre on Substance Abuse, 1991) at pages 179-182.

<sup>386</sup> RSC 1970 c N-1.

<sup>387</sup> Senate Special Committee on Illegal Drugs, *supra* note 384; United Nations Conference for the Adoption of a Single Convention on Narcotic Drugs. 1962. *Single Convention on Narcotic Drugs, 1961, including schedules, final act, and resolutions, as agreed by the United Nations Conference for the Adoption of a Single Convention on Narcotic Drugs* [required signatories to adopt legislative and regulatory measures to limit the production, distribution and use of prohibited substances to medical and scientific purposes. Canada signed and ratified the convention in 1961].

<sup>388</sup> C. Michael Bryan, “Cannabis in Canada – A Decade of Indecision” (1979) 8 *Contemporary Drug Problems* 169 at 172 [Bryan].

<sup>389</sup> *Ibid* at 173 [the convictions further tripled in the subsequent three years; From 2,496 in 1969 to 34,121 in 1976]

1974 marked a major legislative attempt to change the regulation of cannabis. The Trudeau Government introduced Bill S-19, which would have removed cannabis from the *NCA* and created a new section of the *Food and Drugs Act*<sup>390</sup> solely for the purposes of cannabis.<sup>391</sup> This bill aimed to implement many of the recommendations set out in the Le Dain Commission, a report published in 1973 recommending a gradual withdrawal of the use of the criminal law regarding non-medical use of psychotropic substances<sup>392</sup>, which will be further discussed in Part four of this chapter. Under Bill S-19, maximum penalties for trafficking, importing, and simple possession would have been reduced, but the penalty for cultivating would have increased. Simple possession would be punishable on summary conviction only. The bill was passed on third reading in Senate in 1975, and referred to the House of Commons, where it did not pass second reading.<sup>393</sup> Member of Parliament Mitchel Sharp later stated that the bill would not be reintroduced because more important legislation was being considered.<sup>394</sup>

In the years following the failed implementation of Bill S-19, liberalizing cannabis offences remained on the minds of politicians. In 1979, news outlets reported that three of the major national political parties were willing to remove criminal penalties for cannabis possession.<sup>395</sup> In 1980, in the Speech from the Throne, Governor General Edward Schreyer stated, “it is time, too, to move cannabis offences to the *Food and Drugs Act* and remove the possibility of imprisonment for simple possession.”<sup>396</sup> This, of course, never happened. In 1981, reports indicated that possessory cannabis offences would be

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<sup>390</sup> RSC 1985, c F-27.

<sup>391</sup> Bryan, *supra* note 388 at 176.

<sup>392</sup> Commission of Inquiry into the Non-Medical Use of Drugs, *Final Report of the Commission of Inquiry into the Non-Medical Use of Drugs* (Ottawa, 1973) (Chair: Gerald Le Dain) [Le Dain Report] [the report looked at cannabis and other hallucinogens, opioids and other narcotics, alcohol, tobacco, and amphetamines].

<sup>393</sup> Bryan, *supra* note 388 at 176.

<sup>394</sup> Senate Special Committee on Illegal Drugs, *supra* note 384.

<sup>395</sup> Library of Parliament, Parliamentary Research Branch, *Cannabis Decriminalization* (14 March 1980) online: <<https://lop.parl.ca/Content/LOP/ResearchPublicationsArchive/cir1000/804-e.pdf>> at 14 [Library of Parliament]

<sup>396</sup> 1980 Speech from the Throne, 32<sup>nd</sup> Leg, 1<sup>st</sup> session, Federal, April 14<sup>th</sup>, 1980.

subjected to summary conviction only, and the Solicitor General suggested that the federal government was considering ways to make pardons more effective.<sup>397</sup>

Despite clear political motivation to reduce the harms associated with the criminalization of cannabis use, prohibition continued. In 1996, the *CDSA* received royal assent and became law, repealing and replacing the *NCA*. In the first version of the bill that would become the *CDSA*, Bill C-85, cannabis was included in Schedule I, the schedule containing the most dangerous substances, accompanied by the most severe penalties.<sup>398</sup> In 1996, Bill C-8, the bill that would become the *CDSA*, was introduced to replace previous iterations, and cannabis was removed from Schedule I and added to schedules II, VII, and VIII.<sup>399</sup> The *CDSA* established eight schedules of controlled substances and precursors, each with respective penalties for the various offences, including, for example, possession, trafficking, exportation, and production.<sup>400</sup> Section 56 of the *CDSA* contains a general exemption to the prohibitions contained within at the Minister's discretion, provided it is "necessary for a medical or scientific purpose or is otherwise in the public interest."<sup>401</sup> Attempts to decriminalize continued following the introduction of the *CDSA*; in 2003 and 2004, three versions of a bill to decriminalize minor cannabis offences were introduced, but none succeeded.<sup>402</sup> At the time of writing, the *CDSA*

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<sup>397</sup> Library of Parliament, *supra* note 395 at 14.

<sup>398</sup> Bill C-85, *An Act respecting the control of psychoactive substances and their precursors and to amend the Criminal Code, the Food and Drugs Act and the Proceeds of Crime (money laundering) Act and repeal the Narcotic Control Act in consequence thereof*, 3rd Sess, 34th Parl, 1992, First Reading.

<sup>399</sup> Bill C-8, *An Act respecting the control of certain drugs, their precursors and other substances and to amend certain other Acts and repeal the Narcotic Control Act in consequence thereof*, 2nd Sess, 35th Parl, 1996 [there was a total of 8 schedules. Schedule 2 included "Cannabis, its preparations, derivatives and similar synthetic preparations,"]

<sup>400</sup> *Supra* note 7 [Schedule 1 contains heroin and cocaine, considered the most dangerous drugs. Schedule II contains cannabis and its derivatives. Schedule III contains amphetamines, and LSD, Schedule IV contains drugs like barbiturates, considered dangerous but has therapeutic value, Schedule V and VI contain precursors required to produce controlled substances, and Schedules VII and VIII contain amounts of cannabis and cannabis resin required for charge and sentencing purposes].

<sup>401</sup> *Ibid.*

<sup>402</sup> Bill C-38, *An Act to Amend the Contraventions Act and the Controlled Drugs and Substances Act*, 2nd Sess, 37th Parl., 2003; Kathleen McIntosh, "Recent Development in Marijuana Possession Law" (2005) 10 *Appeal* 40 at 54; Bill C-10, *An Act to Amend the Contraventions Act and the controlled Drugs and Substances Act*, 3<sup>rd</sup> Session, 27<sup>th</sup> Parliament, 2004; Bill C-17, *An Act to Amend the Contraventions Act and*

continues to be the statutory authority criminalizing cannabis in Canada. From this statutory history, it is clear that it was not for want of political will that cannabis laws were never liberalized. The next section will focus on the introduction of medical marijuana legislation, the first significant change in cannabis law in 80 years.

### 3.3. Medical Marijuana Litigation and Regulation

Prior to any medical cannabis regulatory program, the only way to legally possess and cultivate cannabis for personal medical use was through a section 56 exemption. Section 56 of the *CDSA* allows the Minister of Health to consider applications for exemptions from the provisions of the *CDSA* on a case-by-case basis.<sup>403</sup> Initially, the *CDSA* did not include a process to apply for a section 56 exemption. This was the basis for the constitutional challenge in *Wakeford v Canada*<sup>404</sup>, the first in a long list of constitutional cases regarding the use of medicinal cannabis. Wakeford, a person living with AIDS, used cannabis under the supervision of his physician. He sought a constitutional medical exemption from the *CDSA* to allow him to possess, produce, and cultivate cannabis.<sup>405</sup> Wakeford alleged that the *CDSA* violated his section 7 right to life, liberty, and security of the person by preventing him from accessing a helpful medical treatment, and also violated his section 15 right to equality by denying him equal benefit of the law because of his disability.<sup>406</sup> Wakeford's first application for relief was unsuccessful; LaForme J found the impugned provisions violated section 7, but that this violation was in accordance with the principles of fundamental justice because of the ability to apply for an exemption under section 56, and therefore was constitutionally valid.<sup>407</sup> Wakeford

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*the Controlled Drugs and Substances Act and to make consequential amendments to other Acts*, 1<sup>st</sup> Session, 38<sup>th</sup> Parliament (introduced on 1 November 2004).

<sup>403</sup> *Supra* note 7.

<sup>404</sup> *Wakeford v Canada*, [1998] 166 DLR (4th) 131, 55 CRR (2d) 56 (Sup Ct).

<sup>405</sup> *Ibid* at para 1.

<sup>406</sup> *Ibid* at paras 6-7.

<sup>407</sup> *Ibid* at para 3 [the section 15 argument was denied].



sought leave to have the matter reheard, introducing new evidence that there was no real process to apply for a section 56 exemption, and was granted an interim constitutional exemption from the relevant sections of the *CDSA* until the Minister of Health made a decision regarding Wakeford's section 56 exemption.<sup>408</sup> Wakeford was granted one of the first section 56 exemptions in Canada on June 9, 1999, allowing him to possess and cultivate cannabis for medical purposes.<sup>409</sup> He nevertheless further challenged the exemption on the basis that it only applied to his personal use and cultivation, preventing his caregivers from assisting him.<sup>410</sup> Further, after receiving the exemption, Wakeford still had to engage with the illicit market because there was no legal supply of cannabis or cannabis seeds. This application, and subsequent appeal, were both dismissed.<sup>411</sup>

The next cannabis case that led to a significant change in the law is *R v Parker*<sup>412</sup>, which led to Canada becoming one of the first countries to legalize cannabis for the terminally ill in 2001. Parker suffered from epilepsy and had exhausted all pharmacologic and surgical interventions with little success, so he began to grow and use cannabis medically, and was subsequently charged with cultivation under the *NCA* and possession under the *CDSA*.<sup>413</sup> Parker challenged the charges against him, arguing that the prohibitions on the cultivation and possession of cannabis infringed his section 7 rights by forcing him to choose between his health and imprisonment. At trial, Sheppard J held that Parker's section 7 rights had been infringed, and the charges against him were stayed. Additionally, the trial judge read an exemption into the legislation for persons possessing or cultivating for medically approved use. The Crown appealed to the Ontario Court of Appeal, but a unanimous court dismissed the appeal, mostly agreeing with the

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<sup>408</sup> *Ibid* at para 32.

<sup>409</sup> *Ibid* at para 2; *Wakeford v Canada*, [2002] 58 OR (3d) 65, 209 DLR (4th) 124 (CA) at para 10.

<sup>410</sup> *Ibid* [in May 2000, one of Wakeford's caregivers was convicted and fined for providing Wakeford with cannabis. In 2001, Wakeford was charged with trafficking after a police raid of his home found over 200 plants. The charges were dropped].

<sup>411</sup> *Ibid*.

<sup>412</sup> *R v Parker*, [2000] OJ No 2787 49 OR (3d) 481 (CA).

<sup>413</sup> *Ibid* at para 3 [Parker was first charged under the *NCA*, and by the time the second investigation took place, the *NCA* had been repealed and Parker was charged with possession under the *CDSA*].

trial judge. However, rather than reading a medical use exemption into the legislation, the Court of Appeal instead declared sections 4 and 7 of the *CDSA* to be of no force and effect. The Court, suspended its declaration of invalidity for one year in order to give Parliament time to make the necessary amendments, and provided Parker with a personal exemption until that time.<sup>414</sup> The result of this case was the introduction of the first federal medical marijuana regulations, the *Marihuana Medical Access Regulations*.

### 3.3.1. The Marihuana Medical Access Regulations

On July 30, 2001, as a result of the above decisions, Health Canada introduced the *Marihuana Medical Access Regulations* (the “*MMAR*”).<sup>415</sup> Under the *MMAR*, an individual could apply for an Authorization to Possess (ATP) cannabis for medical purposes. If granted, an ATP allowed the holder to possess a 30-day supply of cannabis without fear of prosecution.<sup>416</sup> An ATP holder could also apply for a Personal-Use Production License (PUPL) to grow their own cannabis, or a Designated Person Production License (DPPL), to permit a designated person to grow cannabis on their behalf.<sup>417</sup> The *MMAR* had three categories of applicants, based on the risk to the individual and the evidence to support the use of cannabis in the situation. Category 1 included patients with terminal illnesses and a prognosis of death within 12 months, and therefore required a less stringent application process because the risk of harm was low.<sup>418</sup> Category 2 was for patients suffering from specific symptoms, found in a schedule to the regulations, associated with serious medical conditions, and required documents from a specialist in support of the application stating that conventional

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<sup>414</sup> *Ibid* at para 210.

<sup>415</sup> *Supra* note 32.

<sup>416</sup> *Ibid* at s 11(3) [in the application for an ATP, the physician writing the medical document had to specify how much cannabis, and the form and route of administration, the holder used per day].

<sup>417</sup> *Ibid* at ss 34 and 24.

<sup>418</sup> *Marihuana Medical Access Regulations, Regulatory Impact Analysis Statement*, Canada Gazette Part I, Vol 135, No 14 (April 7, 2001) online: <<http://gazette.gc.ca/rp-pr/p1/2001/2001-04-07/pdf/g1-13514.pdf>> at 1215

treatment was either not appropriate or had not been successful.<sup>419</sup> Symptoms and conditions were added to the regulations on the basis of scientific and medical reports confirming the potential benefit.<sup>420</sup> Category 3 was for applicants that did not fit into either Category 1 or 2, and required support from two specialists, again stating that all conventional therapies had been tried or considered.<sup>421</sup> A higher standard was required for category 3 applicants on the basis that less evidence existed to support the use of cannabis for conditions not included in Category 2.<sup>422</sup> This process was onerous, and there was still no legal supply of cannabis for those who possessed an ATP. Furthermore, numerous medical regulatory bodies and associations expressed concern about the role physicians were put in, as under the *MMAR* physicians were acting as gatekeepers for a substance they were largely unfamiliar with.<sup>423</sup> There were also concerns about the potential liability that could result from supporting the use of medical cannabis, an unapproved medicine.<sup>424</sup>

Between 2001 and 2014, the *MMAR* was amended on numerous occasions following various challenges to the regulations. In 2003, the Ontario Court of Appeal released the decision *Hitzig v Canada*<sup>425</sup>, which found various aspects of the *MMAR* to be

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<sup>419</sup> *Ibid.*

<sup>420</sup> *Ibid.*

<sup>421</sup> *Ibid.*

<sup>422</sup> *Ibid.*

<sup>423</sup> See e.g., Steven Wharry, “CMPA Warns Doctors of Risks Associated with Prescribing Marijuana” (2002) 166:1 *CMAJ* 83; Canadian Medical Association, “CMA Leery About New Medical-Marijuana Rules. Here’s Why” (2001) 2:6 *CMA Interface* 3; *Hitzig v Canada*, [2003] OJ No 12, 171 CCC (3d) 18 (Sup Ct) at para 49 [*Hitzig (Sup Ct)*]; The College of Physicians and Surgeons of Ontario, “Medical Marijuana” Policy #3-06 (May 2002) online: <[http://www.cpso.on.ca/cpso/media/uploadedfiles/policies/policies/policyitems/medical-marijuana\(1\).pdf](http://www.cpso.on.ca/cpso/media/uploadedfiles/policies/policies/policyitems/medical-marijuana(1).pdf)>; See also Nola M. Ries, “Prescribe with caution: The Response of Canada’s Medical Regulatory Authorities to the Therapeutic Use of Cannabis” (2016) 9:2 *McGill JL & Health* 215 [for a full discussion on the response of medical regulatory authorities to their role].

<sup>424</sup> *Hitzig (Sup Ct)*, *supra* note 423 at para 50 [subsection 69(a)(ii)(C) of *MMAR* authorized minister to report physicians to licensing authority if she had reasonable grounds to believe they made a false statement”, and the CMPA feared physicians might unknowingly make false statements by being asked to go beyond their scope of expertise].

<sup>425</sup> *Hitzig v Canada*, [2003] OJ No 3873, 231 DLR (4th) 104 (CA).

unconstitutional. In particular, the Court held that the requirement for the second specialist for category 3 applicants and the prohibitions against payment for and supplying cannabis to more than one person violated section 7 and were not saved by section 1.<sup>426</sup> As a result, the court struck down: the prohibitions on compensating DPPL holders; the requirement that a DPPL holder could only cultivate cannabis for one ATP holder; the rule that no more than three DPPL or PUPL holders could cultivate cannabis together; and, the provision requiring category 3 applicants to acquire a medical declaration from a second specialist.<sup>427</sup>

Following the decision in *Hitzig*, the *MMAR* was amended in 2003. These amendments allowed ATP holders to obtain marijuana from their physician, a DPPL holder, or Health Canada<sup>428</sup>, and allowed DPPL holders to mail cannabis to ATP holders and to be compensated for their services.<sup>429</sup> They also created a lawful supply of cannabis to ATP holders and cannabis seeds to PUPL and DPPL holders<sup>430</sup>, and, repealed the provision requiring category 3 applicants to obtain a medical document from a second specialist.<sup>431</sup> Contrary to the decision in *Hitzig*, the amendments did not repeal the provisions prohibiting DPPL holders from cultivating cannabis for more than one ATP holder or the provisions prohibiting PUPL and DPPL holders from cultivating cannabis with more than 2 other licensees.<sup>432</sup>

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<sup>426</sup> *Ibid* at para 150-152

<sup>427</sup> *Ibid* at paras 159 and 165 [declaring sections 4(2)(c), 7, 34(2), 41(b), 54 to be invalid].

<sup>428</sup> *MMAR*, *supra* note 32 at ss 2(1) and 14; *Regulations Amending the Marihuana Medical Access Regulations*, C Gaz II, SOR/2003-387 vol 137 No 26 online: <<http://publications.gc.ca/collections/Collection/SP2-2-137-26.pdf>>.

<sup>429</sup> *MMAR*, *supra* note 32 at ss 8(1)-(3).

<sup>430</sup> Health Canada, Interim Policy for the Provision of Marihuana Seeds and Dried Marihuana Product for Medical Purposes in Canada (9 July 2003) (White Paper).

<sup>431</sup> *MMAR*, *supra* note 32 at ss 1 and 3.

<sup>432</sup> *Ibid* at ss 9(1)-(2), 10, 11.

Finding the above *MMAR* provisions constitutionally invalid proved to be problematic in the decision *R v J.P.*<sup>433</sup> J.P. was charged with possession of marijuana on April 12, 2002, but succeeded in getting the charges dismissed on the basis that there was no offence of possession of marijuana in force at the time he was charged. Recall that in *Parker*, the Ontario Court of Appeal found section 4 of the *CDSA* (the prohibition on possession of cannabis) to be of no force and effect, suspending the declaration of validity for one year. Rosenberg JA, writing for the Court, made it clear that without a constitutionally valid medical exemption, the prohibition against possession of cannabis in the *CDSA* was of no force and effect.<sup>434</sup> The *MMAR* was brought into force one day before the suspension of declaration of invalidity would have lapsed, however the Ontario Court of Appeal subsequently found that the *MMAR* did not create a constitutionally valid exemption in *Hitzig*. Consequently, at the time J.P. was charged, there was no constitutionally acceptable medical exemption, and as a result, per *Parker*, the criminal prohibition was of no force and effect and J.P. could not be prosecuted.<sup>435</sup>

In 2005, the *MMAR* were further amended. Application Categories 1 and 2 were merged, leaving two categories, and the need to have a specialist sign the medical document was eliminated.<sup>436</sup> Further amendments permitted ATP holders to apply to access a government supply of dried marijuana from Prairie Plant Systems Inc., the sole federally licensed dealer, and allowed PUPL and DPPL holders to access seeds from the same.<sup>437</sup> The amendments streamlined the application process for an ATP, and provided limited authority for pharmacists to supply cannabis to authorized persons.<sup>438</sup>

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<sup>433</sup> [2003] OJ No 3876, 67 OR (3d) 321 (CA).

<sup>434</sup> *Ibid* at para 11.

<sup>435</sup> *Ibid*.

<sup>436</sup> *Regulations Amending the Marijuana Medical Access Regulations*, SOR/2005-1124, C Gaz Pt II Vol 139 No 13, online: <<http://publications.gc.ca/collections/Collection/SP2-2-139-13.pdf>> at 1477.

<sup>437</sup> *Ibid* at 1484.

<sup>438</sup> *Marihuana for Medical Purposes Regulations*, Regulatory Impact Analysis Statement, C Gaz Pt I, Vol 146 No 50, online: <<http://gazette.gc.ca/rp-pr/p1/2012/2012-12-15/html/reg4-eng.html#1>>.

Despite the 2005 amendments, the *MMAR* continued to be challenged. In *Sfetkopolous v Canada (Attorney General)*<sup>439</sup>, the applicants sought to have subsection 41(b.1) of the *MMAR* declared invalid as a violation of section 7 of the *Charter*. Subsection 41(b.1) gave the Minister of Health power to refuse to issue a DPPL if the designated person would be the holder of more than one licence to produce.<sup>440</sup> The Federal Court declared the impugned section to be invalid, declaring it to be of no force and effect.<sup>441</sup> This finding was based on the fact that only 20% of those eligible to possess medical cannabis could access it, or did access it, making cannabis for medical purposes not practically accessible. Further, there was no evidence to support the government's restrictions on license holders.<sup>442</sup> In the year following *Sfetkopolous*, the constitutionality of subsection 41(b.1) came before the courts again, along with a challenge to the prohibition on more than three license holders growing in any one location.<sup>443</sup> In *R v Beren and Swallow*<sup>444</sup>, the defendant was charged with production, possession, and controlling marijuana for the purposes of trafficking, contrary to the *CDSA*.<sup>445</sup> He argued that he produced large quantities for medical and research purposes only, and that his prosecution was a breach of his section 7 right to liberty and security of the person.<sup>446</sup> The British Columbia Supreme Court found both aspects of the *MMAR* to be contrary to section 7, and not saved by section 1. Following these decisions, the *MMAR* was amended again in 2009. These amendments permitted individuals to hold two DPPLs instead of one, but they had to be applied for and approved separately. Additionally, the amendments raised the number of DPPL or PUPL holders that could cultivate cannabis together from three to

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<sup>439</sup> 2008 FC 33 [*Sfetkopolous*].

<sup>440</sup> Medical Marihuana Access Regulations, SOR/2013-119, s 267 [Repealed] at s 41(b.1).

<sup>441</sup> *Sfetkopolous*, *supra* note 439.

<sup>442</sup> *Ibid* at paras 14-19.

<sup>443</sup> *MMAR*, *supra* note 32.

<sup>444</sup> 2009 BCSC 429.

<sup>445</sup> *Ibid* at para 1.

<sup>446</sup> *Ibid*.

four. An amendment also permitted ATP holders to hold both a DPPL and a PUPL, allowing them to produce cannabis for themselves and one other ATP holder.<sup>447</sup>

Again, despite the 2009 amendments to the *MMAR*, they continued to be challenged. *R v Mernagh*<sup>448</sup> proved to be the last straw. Mernagh applied for a stay of a charge of production of marijuana. He suffered from various medical conditions, and cultivated and used marijuana to ease his symptoms. Mernagh had been unable to find a doctor to sign the necessary paperwork, so his cultivation and possession was deemed illegal. Mernagh argued that his prosecution violated his section 7 *Charter* rights. In response, the Crown argued that deprivation of rights had to result from government action or legislation. Consequently, the Crown asserted that the actions of individual physicians did not engage section 7. Taliano J of the Ontario Superior Court of Justice found that it was “practically impossible to obtain the requisite support of a medical doctor for the lawful use of medicinal marihuana under the *MMAR*”<sup>449</sup>, because doctors had widely refused to participate in the program. The lack of viable exemption to the prohibitions in the *CDSA* constituted a violation of section 7 that did not accord with principles of fundamental justice. Furthermore, this violation could not be saved by section 1, because the requirement for a doctor’s declaration was not rationally connected to the objectives of the *MMAR*.<sup>450</sup> Taliano J permanently stayed the charges against Mernagh and found the entirety of the *MMAR* and relevant provisions of the *CDSA* to be constitutionally invalid and thus of no force and effect, suspending the declaration of invalidity for three months, and Mernagh was granted a personal exemption to possess and produce cannabis in the meantime.<sup>451</sup> The Government appealed the Superior Court’s decision, which was

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<sup>447</sup> *Regulations Amending the Marihuana Medical Access Regulations*, PC 2009-746 (May 14, 2009) C Gaz Pt II Vol 143 No 11 online: <<http://publications.gc.ca/gazette/archives/p2/2009/2009-05-27/pdf/g2-14311.pdf>> at 791-7.

<sup>448</sup> 2011 ONSC 2121.

<sup>449</sup> *Ibid* at paras 174, 186.

<sup>450</sup> *Ibid*.

<sup>451</sup> *Ibid* at para 345; See also paras 331-332 for judicial explanation of why the whole regulatory scheme was struck.

dismissed by the Ontario Court of Appeal.<sup>452</sup> The federal government responded to this finding by introducing the *Marihuana for Medical Purposes Regulations*.

### 3.3.2. The Marihuana for Medical Purposes Regulations

The finding in *Mernagh*, coupled with financial and administrative concerns with the *MMAR*<sup>453</sup>, ultimately led to the introduction of the *Marihuana for Medical Purposes Regulations (MMPR)*<sup>454</sup>. The *MMPR* were enacted in July 2013, and ran concurrently with the *MMAR* until its repeal on March 31, 2014.<sup>455</sup> ATPs under the *MMAR* remained in effect until March 31, 2015, after which they had to re-register under the *MMPR*. PUPPL and DPPL holders were required to sell their plants and seeds to a licensed producer. Under the *MMPR*, Health Canada authorized licensed producers to cultivate and sell medical marijuana to patients that have acquired a medical document from a physician authorizing them to order marijuana. Health Canada played no direct role in the registration of patients. Instead, licensed producers registered patients and verified the information. Patients could then order marijuana from their licensed producer by phone, fax, mail, or online, and have the marijuana shipped directly to them. This new regulatory scheme no longer specified the disease conditions required for medical authorization to use cannabis, and eliminated the need for a specialist's approval.

Like its predecessor, the *MMPR* was also challenged. There were two controversial aspects of the *MMPR* that led to constitutional challenges: the prohibition on residential cultivation of marijuana, and the exclusion of cannabis derivatives from the *MMPR*. The

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<sup>452</sup> *R v Mernagh*, 2013 ONCA 67 [the Court of Appeal did alter the Superior court's judgment, substituting and order declaring the second specialist requirement, the prohibition on paying DPLs, the prohibition on DPL's growing cannabis for more than one ATP holder, and the prohibition on DPL holders growing with other DPL holders].

<sup>453</sup> *Marihuana for Medical Purposes Regulations*, Regulatory Impact Analysis Statement, C Gaz Pt I, Vol 146 No 50, online: <<http://gazette.gc.ca/rp-pr/p1/2012/2012-12-15/html/reg4-eng.html#1>>. [For example, rapid growth in the number of authorized users created long application processing times and high program administration fees for Health Canada].

<sup>454</sup> *Supra* note 33.

<sup>455</sup> *Ibid.*



latter provided the basis for *R v Smith*<sup>456</sup>. Smith worked for a retail store selling marijuana and cannabis derivatives, including edibles and topical cannabis products such as oils and patches, but did so without authorization from Health Canada. Smith was subsequently charged under the *CDSA*. At trial, Smith argued that the prohibition on possession in combination with the exemptions under the *MMAR*<sup>457</sup> were inconsistent with the *Charter*.<sup>458</sup> The trial judge found the restriction to dried marijuana deprived Smith and other users of their liberty by imposing a threat of prosecution and depriving medical users of the liberty to choose how to take medication they are authorized to possess. These limits were found to be arbitrary, and not rationally connected to the objectives of the regulations.<sup>459</sup> The British Columbia Court of Appeal upheld the trial judge's decision<sup>460</sup>, and the SCC confirmed that prohibiting non-dried forms of medical marijuana violated section 7 in a manner not consistent with principles of fundamental justice and could not be justified under section 1.<sup>461</sup> Therefore, the restriction was deemed of no force and effect, and the appeal was dismissed. The Trial Judge initially ordered that the word "dried" and the definition of "dried marijuana" to be deleted from the *Regulations*.<sup>462</sup> The Court of Appeal varied this order, instead holding the limitations in the *MMAR* to be of no force and effect to the extent that a person who has been granted an ATP is permitted to possess only dried marijuana, suspended for one year.<sup>463</sup> The SCC varied the Court of Appeal's order by removing the suspension of its declaration, declaring sections 4 and 5 of the *CDSA* "of no force and effect to the extent that they

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<sup>456</sup> *R v Smith*, 2015 SCC 34 [*Smith*, SCC].

<sup>457</sup> Smith was charged with possession for the purpose of trafficking in 2009, when the *MMAR* were in effect.

<sup>458</sup> *R v Smith*, 2012 BCSC 544 [At the time of trial, the *MMAR* were still in effect] [*Smith*, BCSC].

<sup>459</sup> *R v Smith*, 2014 BCCA 322 at paras 122-3 [*Smith*, BCCA].

<sup>460</sup> *Ibid.*

<sup>461</sup> *Smith*, SCC, *supra* note 456.

<sup>462</sup> *Smith*, BCSC, *supra* note 458.

<sup>463</sup> *Smith*, BCCA, *supra* note 459 at paras 142-143.

prohibit a person with medical authorization from possessing cannabis derivatives for medical purposes.”<sup>464</sup> Smith was acquitted of all the charges against him.

*Allard v Canada*<sup>465</sup> was a challenge to the *MMPR* brought by four individuals regarding the restriction on residential cultivation of medical cannabis. The plaintiffs sought: a constitutionally valid exemption to cultivate or produce cannabis; a declaration that the *MMPR* was unconstitutional by unreasonably restricting the plaintiffs’ section 7 rights to access a safe and continuous supply of cannabis by failing to allow personal or designated production; and, a declaration that the prohibition on producing outdoors or in a dwelling-house and the 150 gram maximum were unreasonable restrictions not saved by section 1.<sup>466</sup> In regards to the cultivation issue, the plaintiffs demonstrated that cannabis can be produced safely with limited risk, and that the restriction on cultivation was not minimally impairing. Regarding the restriction on maximum possession quantities, the Court found the limit was not overbroad or grossly disproportionate. The Court found it was not feasible to strike out certain words or provisions, so instead declared the *MMPR* invalid and suspended invalidity for 6 months to allow Parliament to enact a new or parallel regime.<sup>467</sup>

### 3.3.3. The *ACMPR*

As a result of the decision in *Allard*, the *Access to Cannabis for Medical Purposes Regulations* came into effect on August 24, 2016. The *ACMPR*, a hybrid of the *MMAR* and *MMPR*, reintroduced cultivation by registered and designated persons, allowing patients to access medical cannabis from licensed producers, personal production, and designated production. The application process for licensed producers was streamlined, and licensed producers are permitted to supply registered growers with starting materials and interim supplies. Health Canada continues to oversee the commercial industry and

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<sup>464</sup> *Smith, SCC, supra* note 456 at para 33.

<sup>465</sup> 2016 FC 236.

<sup>466</sup> *Ibid* at paras 181-8.

<sup>467</sup> *Ibid* at paras 296-7.

register individuals for production licenses.<sup>468</sup> At the time of writing, no challenges to the *ACMPR* have been decided, however there are indications that challenges are forthcoming.

### 3.4. Legalization of Recreational Cannabis

The road to legalizing cannabis use for recreational purposes has been a long one. Canadian governments have been promising to liberalize cannabis use for decades. In 1970, then Minister of National Health and Welfare John Munroe announced that the federal government was considering transferring cannabis from the *Narcotic Control Act* to the *Food and Drug Act*.<sup>469</sup> This announcement came just one year after the formation of the Commission of Inquiry in the Non-Medical Use of Drugs (known commonly as the Le Dain Commission)<sup>470</sup>, and two years prior to the submission of their report to the House of Commons. The Le Dain Commission sought to address concerns with drug use and the appropriate government response, and to analyze the impact of criminalization both on individuals and society generally.<sup>471</sup> The Le Dain Commission made numerous recommendations, including a gradual withdrawal of the use of criminal law against non-medical uses of all drugs, repealing the offence of possession of cannabis, and a general reduction of penalties for all other cannabis offences.<sup>472</sup> This report was widely praised, but the conclusions were largely ignored for decades.<sup>473</sup> Similarly, cannabis was never moved from the *Narcotic Control Regulations* to the *Food and Drugs Act*.

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<sup>468</sup> *ACMPR*, *supra* note 3.

<sup>469</sup> Marcel Martel, *Not this time: Canadians, Public Policy, and the Marijuana Question, 1961-1975* (Toronto: University of Toronto Press, 2006) at 184-6.

<sup>470</sup> Le Dain Report, *supra* note 392.

<sup>471</sup> *Ibid* at 3.

<sup>472</sup> *Ibid* at 88-103.

<sup>473</sup> See, for example “A Look Back on Le Dain (Commission)” (1995) 24:2 *The Journal – Addiction Research Foundation* online: <<http://search.proquest.com.proxy1.lib.uwo.ca/docview/223325278/abstract/1748F84941DF43F5PQ/1?accountid=15115>>; Diane Riley, “Drugs and Drug Policy in Canada: A Brief Review and Commentary” *Canadian Foundation for Drug Policy & International Harm Reduction Association* (November 1998), prepared for Hon. Pierre Claude Nolin, online: <<http://sencanada.ca/content/sen/committee/362/ille/rep/rep-nov98-e.htm>>.

In 2002, the topic of cannabis legalization resurfaced. A report of the Senate Special Committee on Illegal Drugs, *Cannabis: Our Position for a Canadian Public Policy*, proposed a public policy self-described as “provocative.”<sup>474</sup> It expressed the following fundamental premise:

*[I]n a free and democratic society, which recognizes fundamentally but not exclusively the rule of law as the source of normative rules and in which government must promote autonomy as far as possible and therefore make only sparing use of the instruments of constraint, public policy on psychoactive substances must be structured around guiding principles respecting the life, health, security and rights and freedoms of individuals, who, naturally and legitimately, seek their own well-being and development and can recognize the presence, difference and equality of others.*<sup>475</sup>

The Senate Report, building on the work done by the Le Dain Commission, reported that “used in moderation, cannabis in itself poses very little danger to users and to society as a whole, but specific types of use represent risks for users.”<sup>476</sup> Furthermore, the Report argued that the continued prohibition of cannabis “jeopardizes the health and well-being of Canadians much more than does the substance itself or the regulated marketing of the substance.”<sup>477</sup> The Report recommended amending the *CDSA* to create an exemption scheme, making cannabis available to those over the age of 16, and permitting the production and sale of cannabis.<sup>478</sup> This Report was commended by those advocating for legalization, but ultimately was never implemented.<sup>479</sup>

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<sup>474</sup> Special Committee on Illegal Drugs, *supra* note 384 at 7.

<sup>475</sup> *Ibid.*

<sup>476</sup> *Ibid* at 42.

<sup>477</sup> *Ibid* at 45.

<sup>478</sup> *Ibid.*

<sup>479</sup> Cannabis Coalition, “PR: Response to the Special Senate Committee Report on Illegal Drugs, (September 27, 2002) online: <<http://cannabiscoalition.ca/response-to-the-special-senate-committee-report-on-illegal-drugs/>>; Centre for Addiction and Mental Health (CAMH), “Cannabis Policy Framework”

Over the past few decades, Canada has witnessed a gradual, but significant, “hollowing out” of the criminal laws relating to cannabis. Hollowing out is described by William Bogart as small changes, such as shifting public opinion or variations in the application of the law, which indicate a more significant change on the horizon, even if the path forward is not clear.<sup>480</sup> In this case, the hollowing out of cannabis policy refers to the significant reduction in the enforcement of cannabis-related criminal offences leading towards the decriminalization of cannabis.<sup>481</sup> For example, in 2015 the Deputy Chief of Police in Vancouver released a report indicating that the use of the criminal law in response to the increased presence of illegal cannabis dispensaries in the city was ineffective and not the best use of limited resources.<sup>482</sup> Even further, Vancouver decided to regulate the illegal dispensaries via business by-laws, despite being in direct violation of federal criminal laws.<sup>483</sup>

In April 2016, the federal government announced its intention to legalize and regulate recreational cannabis. Minister of Health Jane Philpott indicated that legalizing recreational cannabis would “keep marijuana out of the hands of children and profits out of the hands of criminals”.<sup>484</sup> A Task Force was assembled to conduct public

(Toronto, ON: CAMH, 2014.) online:

<[https://www.camh.ca/en/hospital/about\\_camh/influencing\\_public\\_policy/documents/camhcannabispolicyframework.pdf](https://www.camh.ca/en/hospital/about_camh/influencing_public_policy/documents/camhcannabispolicyframework.pdf)>.

<sup>480</sup> William A. Bogart, *Off the Streets: Legalizing Drugs* (Toronto: Dundurn, 2016) at 109.

<sup>481</sup> *Ibid.*

<sup>482</sup> Vancouver Police Department, Report to the Vancouver Policy Board re: Service and Policy Complaint #2015-112 regarding enforcement against marijuana dispensaries (September 1, 2015) online: <<http://vancouver.ca/police/policeboard/agenda/2015/0917/1509C01-2015-112-Marijuana-Dispensaries.pdf>>.

<sup>483</sup> City of Vancouver, revised by-law No 4450, (February 23, 2016) [This occurred after the police chief of Vancouver declared that enforcing the laws against dispensaries was not an effective use of time and resources. Because Vancouver has their own police department, and not the RCMP like other cities in British Columbia, they were able to make this decision, though it is in direct violation of the constitutional division of powers].

<sup>484</sup> CBC News, “Federal marijuana legislation to be introduced in spring 2017, Philpott says: Health minister in New York for UN talks to review global drug treaties” (April 20, 2016) online: <<http://www.cbc.ca/news/politics/philpott-un-marijuana-legislation-legalize-1.3544554>>.

consultations and consult with experts to make recommendations to the federal government. They released their final report in December 2016, containing over 80 recommendations. The primary recommendation relevant to this thesis suggests “apply[ing] comprehensive restrictions to the advertising and promotion of cannabis and related merchandise by any means, including sponsorship, endorsements, and brand, similar to the restriction on promotion of tobacco products.”<sup>485</sup> In April 2017, the government released the proposed legislation, to come into effect no later than July 2018, legalizing recreational cannabis use for adults in Canada.<sup>486</sup> The proposed *Cannabis Act* is intended to operate concurrently with the *ACMPR*. The purposes of the Act include:

- Restricting youth access to cannabis;
- Protecting young people from promotion or enticements to use cannabis;
- Deterring and reducing criminal activity;
- Protecting public health;
- Reducing the burden on the criminal justice system;
- Allowing adults to possess and access regulated, quality controlled cannabis; and,
- Enhancing public awareness of the health risks associated with cannabis.<sup>487</sup>

The recreational use of cannabis remains illegal until the bill becomes law. The proposed minimum age for purchase and possession of cannabis is 18, however the provinces will

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<sup>485</sup> Task Force Report, *supra* note 373 at 2.

<sup>486</sup> Health Canada, *Proposed Legislation Would Provide Regulated and Restricted Access to Cannabis and Crack Down on Impaired Driving*, News Release (April 13 2017) online: <[https://www.canada.ca/en/health-canada/news/2017/04/canada\\_takes\\_actiontolegalizeandstrictlyregulatecannabis.html](https://www.canada.ca/en/health-canada/news/2017/04/canada_takes_actiontolegalizeandstrictlyregulatecannabis.html)>.

<sup>487</sup> Government of Canada, *The Facts*, *supra* note 2; Bill C-45, *supra* note 37 at s 7.

be able to raise the minimum age, but not lower it.<sup>488</sup> Bill C-45 will create two new criminal offences: giving or selling cannabis to youth, and using a youth to commit a cannabis-related offence, both with maximum penalties of 14 years in jail.<sup>489</sup> It will also prohibit products that are appealing to youth, packaging or labelling cannabis in a way that makes it appealing to youth, selling cannabis through self-service or vending machines, and promoting cannabis, except in narrow circumstances where the promotion cannot be seen by a young person.<sup>490</sup> At the date of writing, Bill C-45 has passed second reading in the House of Commons and was referred to the Standing Committee on Health.<sup>491</sup>

### 3.5. Conclusion

The purpose of this chapter was to document the complex relationship between cannabis and the law. The road to legalizing cannabis, for both medical and non-medical purposes, has been plagued by fear-mongering, misinformation, and political and legal roadblocks. A prohibitionist regime has dominated for almost an entire century, despite repeated attempts to loosen, and in some cases, entirely withdraw criminal sanctions. As one of the first countries to have a government-sanctioned medical cannabis program, the Canadian government has had little international experience to draw on in the development and implementation of this program. Since its inception, the medical cannabis regulations have been subject to numerous constitutional challenges, have undergone numerous revisions with significant changes, and the current iteration is still being challenged fifteen years after the first iteration of medical marijuana regulations were implemented. Legalizing recreational cannabis use has been on the minds of Canadian politicians for decades. Now, with the proposed *Cannabis Act* poised to become law by 2018, there are concerns regarding several elements of the legislation. Concerns about the appropriate tax rate, how to prevent impaired driving, and minimum purchasing age, among others,

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<sup>488</sup> *Ibid* at ss 8(1), 10(1).

<sup>489</sup> *Ibid* at ss 9(1)(ii), 5(a)(i).

<sup>490</sup> *Ibid* at ss 16,17, 29, 30, 31, 36,37.

<sup>491</sup> HOC Debate No 190, *supra* note 298 at 12335.

highlight the difficulties of regulating recreational cannabis in a way that will protect Canadians from the risks associated with cannabis and cannabis use. One aspect of Bill C-45 that has received relatively little attention, however, is the proposed advertising restrictions, and whether they are a constitutionally valid infringement on freedom of expression. The legal foundation for freedom of expression will be discussed in the following chapter. Additionally, a historical summary of cannabis law in Canada leading up to and including Bill C-45 provides the necessary background information that plays a role in determining the purposes of the legislation, interpretation of the legislation, and contextual analysis of the infringement, which will be relevant considerations in later chapters.



## 4. Freedom of Expression & The Charter

### 4.1. Introduction

The purpose of this chapter is to chronicle the development of freedom of expression in Canada. This chapter will follow the legislative protection of freedom of expression, from the *Canadian Bill of Rights* (“*CBR*”) to the introduction of the *Charter*, and the development of jurisprudence in the area. This chapter will summarize how courts have decided commercial free speech cases in order to provide a road map for analyzing how the courts will approach cannabis advertising restrictions. Part two of this chapter begins with a discussion of pre-*Charter* rights protection, namely the *CBR*. Part three compares the protection offered by *CBR* to the protection offered by the *Charter*. Part four focuses on freedom of expression protection under the *Charter* and explores the rationales underlying the importance of this right. Part five explains the scope of the protection of section 2(b), exploring what types of expression are protected by section 2(b) and to what extent. Part six explains the judicial threshold for determining whether a governmental act has infringed upon section 2(b), either in purpose or in effect. Part seven focuses on section 1 of the *Charter*, starting with how courts determined whether a *Charter* infringement was justified prior to the introduction of the *Oakes* test, compared to after the development of the *Oakes* test. Each step of the *Oakes* test is discussed with relevant references to jurisprudence, followed by a discussion of the factors that can influence the analysis, namely, context, deference, and standard of proof. Finally, remedies available upon finding a piece of legislation, or a specific provision, unconstitutional are discussed.

## 4.2. Pre-Charter

Prior to the introduction of any enshrined protection of human rights in Canada, an implied bill of rights existed in the common law, a remnant from Canada's history as a British Colony.<sup>492</sup> The first federal expression of human rights law in Canada, the *CBR*, was enacted on August 10, 1960. Section 1 of the *CBR*, titled "Recognition and declaration of rights and freedoms" recognized freedom of speech as a human right and fundamental freedom.<sup>493</sup> Under the *CBR*, rights conflicts were resolved primarily by Parliament. The Justice Minister was responsible for examining all bills introduced to the House and reporting any inconsistencies with the *CBR*.<sup>494</sup> The consequences of a bill violating these rights were much less significant than they are under the *Charter*; the resources that go into a *Charter* challenge are significant, and the legal consequences are more severe.<sup>495</sup>

While the *CBR* was an important step in the history of human rights law in Canada, it has several deficiencies, such as its reliance of the government to self-report how bills violated the rights of Canadians.<sup>496</sup> In 1958, the standard for the Justice Minister to report inconsistencies in bills lowered; where the Minister previously had to 'ensure' that bills introduced with consistent with the *CBR*, the language changed to 'ascertain', suggesting

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<sup>492</sup> Janet Hiebert, *Charter Conflicts: What is Parliaments Role?* (Montreal: McGill-Queen's University Press, 2002) at 3-4 [Hiebert]; Peter W. Hogg, "Canada's New Charter of Rights" (1984) 32:2 *The American Journal of Comparative Law* 283 at 283-4 [Hogg].

<sup>493</sup> *Canadian Bill of Rights*, RSC 1970, App III at s 1.

<sup>494</sup> Hiebert, *supra* note 492 at 5; *Canadian Bill of Rights Examination Regulations*, PC 1960-1792, C Gaz Pt II, Vol 95 No 2 online:<[http://www.collectionscanada.gc.ca/databases/canada-gazette/093/001060-119.01-e.php?document\\_id\\_nbr=10333&f=p&PHPSESSID=ecp538v091u65bbctrlqaver45](http://www.collectionscanada.gc.ca/databases/canada-gazette/093/001060-119.01-e.php?document_id_nbr=10333&f=p&PHPSESSID=ecp538v091u65bbctrlqaver45)> at 75.

<sup>495</sup> Hiebert, *supra* note 492 at 6.

<sup>496</sup> *Ibid* at 5.

much less onus on the Department of Justice to draft bills with an eye to *Charter* rights.<sup>497</sup> Those in favor of the *CBR* hoped that the self-governance would encourage the federal government to ensure that bills were consistent with the *CBR* from the outset, though that did not appear to be the case.<sup>498</sup> Additionally, the *CBR* was widely regarded as ineffective because it was a federal statute and thus only applied to the federal government, and could be repealed at any time by Parliament.<sup>499</sup> These practical and legal limitations were a significant factor in establishing the *Charter* as an unambiguously constitutional document with the patriation of the Constitution of Canada in 1982.

### 4.3. Introduction of the *Charter*

Canada's introduction of the *Charter* shifted the balance of power in rights conflicts; where the onus was once on Parliament to avoid rights conflicts, under the *Charter* the judiciary offered the final judgement on rights conflicts.<sup>500</sup> A once hands-off judiciary was now viewed as the "Guardian of the *Charter*", responsible for evaluating conflicting values.<sup>501</sup> There are some similarities between the *CBR* and the *Charter*. For example, under the *Charter* the federal Minister of Justice has a similar reporting requirement to the one in the *CBR*, obliging the minister to certify that bills have been assessed in light

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<sup>497</sup> *Ibid.*

<sup>498</sup> *Ibid.*

<sup>499</sup> Hogg, *supra* note 492 at 286.

<sup>500</sup> Hiebert, *supra* note 492 at 4 [however, this view underestimates the continued importance of Parliament].

<sup>501</sup> See *Hunter v Southam Inc.*, [1984] 2 SCR 145, SCJ No 36 at 155 [*Hunter*]; Hiebert, *supra* note 492 at 20.

of the *Charter* and to report any inconsistencies. But, in a lot of ways, the *Charter* is very different from the *CBR*. The *Charter* is a constitutional document, which means it applies to all levels of government – including government agencies. As a constitutional document, it impacts what happens when a bill is found to be inconsistent with the *Charter*. While the impact of the *CBR* on inconsistent statutes was unclear, under the *Charter*, courts had the power not only to review legislation, but to grant remedies, such as striking down offending legislation or provisions.<sup>502</sup> Though the government process of reviewing bills is often secretive, there is some indication that analysis of bills under the *Charter* is more sensitive to rights breaches than it was under the *CBR*.<sup>503</sup> Additionally, the introduction and interpretation of the *Charter* led to a more rigorous approach to rights than the *CBR*. Under the *CBR*, only one statute was found to be inoperative, in the case *R v Drybones*<sup>504</sup>. Courts made it explicit that under the *Charter*, the government would have the burden of persuading the court that its actions were reasonable.<sup>505</sup> Early *Charter* cases, such as *Singh v Minister of Employment and Immigration*<sup>506</sup>, *Schachter v Canada*<sup>507</sup>, *R v Oakes*<sup>508</sup>, and *Hunter v Southam*<sup>509</sup>, not only

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<sup>502</sup> Hiebert, *supra* note 492 at 7; Hogg, *supra* note 492 at 287.

<sup>503</sup> Hiebert, *supra* note 492 at 7.

<sup>504</sup> [1970] SCR 282 [however, Hogg, *supra* note 492 at 304 noted that most of the cases that came to the courts under the *CBR* did not involve “a shocking violation of a civil liberty”, and the courts displayed a more restrained attitude at the time].

<sup>505</sup> Hiebert, *supra* note 492 at 9; See generally, *Law Society of Upper Canada v Skapinker*, [1984] 1 SCR 357, SCJ No 18.

<sup>506</sup> [1985] 1 SCR 177, SCJ No 11 [*Singh*]

<sup>507</sup> [1992] 2 SCR 679, SCJ No 68 [*Schachter*].

<sup>508</sup> [1986] 1 SCR 103, SCJ No 7 [*Oakes*].

<sup>509</sup> *Supra* note 501.

confirmed that the burden rested with the government responsible for the limitation, but emphasized the significance of the introduction of the *Charter* for government.<sup>510</sup> For example, in *Singh*, Wilson J stated “[i]t seems to me rather that the recent adoption of the *Charter*...has sent a clear message to the courts that the restrictive attitude which at times characterized their approach to the *CBR* ought to be re-examined.”<sup>511</sup> Despite the expansion of power that the introduction of the *Charter* afforded the courts, limits on the courts’ power existed in the forms of the section 1 limitation clause, as well as the section 33 override clause. Together, these clauses ensure that the ultimately, the power rests with the respective legislative body to draft and implemented legislation as they see fit.<sup>512</sup>

#### 4.4. Freedom of Expression and the *Charter*

One of the rights guaranteed under the *Charter* is freedom of expression. Section 2(b) of the *Charter* protects “freedom of thought, belief, opinion, and expression.”<sup>513</sup> Freedom of expression has been described as “an essential feature of Canadian parliamentary democracy”<sup>514</sup>, and “little less vital to man’s mind and spirit than breathing is to his physical existence.”<sup>515</sup> There is no question that the right to express oneself freely is an incredibly important right. Because of its importance, and the importance of all *Charter* rights, the SCC in *Hunter* adopted a purposive approach to interpreting and applying

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<sup>510</sup> Hiebert, *supra* note 492 at 9.

<sup>511</sup> *Singh*, *supra* note 506 at para 50.

<sup>512</sup> Peter W. Hogg, “Constitutional Dialogue Under a Bill of Rights” (2007/2008) 23 *National Journal of Constitutional Law* 127 at 137.

<sup>513</sup> *Charter*, *supra* note 14.

<sup>514</sup> *RWDSU v Dolphin Delivery Ltd.*, [1986] 2 SCR 573, SCJ No 75.

<sup>515</sup> *Switzman v Elbig* [1957] SCR 285 at 306.

*Charter* rights.<sup>516</sup> This approach requires interpreting each right in light of the underlying interests it protects.<sup>517</sup> With respect to the freedom of expression, in *Ford*, the Court identified the values underlying the freedom to be democracy, truth-seeking, and self-realization.<sup>518</sup> The majority in *Irwin Toy* affirmed these rationales in its articulation of the test for determining whether an infringement on freedom of expression occurred.<sup>519</sup> Similarly, in *Butler* the majority stated, “[i]n assessing whether the proportionality test is met, it is important to keep in mind the nature of expression which has been infringed.”<sup>520</sup> Despite widespread agreement that the underlying values are important, to date, section 2(b) jurisprudence has provided little guidance in defining or applying these rationales, making it difficult to predict how expression will be evaluated in the future. Each of the values underlying freedom of expression will be discussed in turn.

#### 4.4.1. Truth-Seeking

The origins of the argument that freedom of expression promotes truth-seeking is most commonly attributed to John Stuart Mill. Mill argued that the public is more likely to recognize truth if they are permitted to hear all available views, even those that may be false.<sup>521</sup> McLachlin J (as she then was) accepted truth-seeking as a valid rationale for freedom of expression in *Keegstra*, stating that “[w]hile freedom of expression provides no guarantee that the truth will always prevail...it assists in promoting the truth in ways

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<sup>516</sup> *Hunter*, *supra* note 501 at 156-7.

<sup>517</sup> See also *R v Big M Drug Mart Ltd.*, [1985] 1 SCR 295, SCJ No 17 at paras 116-7 [*Big M Drug Mart*].

<sup>518</sup> *Ford*, *supra* note 52 at para 56.

<sup>519</sup> *Irwin Toy Ltd v Québec (Attorney General)*, [1989] 1 SCR 927, SCJ No 36 at para 53 [*Irwin Toy*].

<sup>520</sup> *Butler*, *supra* note 65 at para 94.

<sup>521</sup> John Stuart Mill, *On Liberty* (London: John W. Parker and Son, 1859).

which would be impossible without the freedom.”<sup>522</sup> However, McLachlin J qualified her endorsement of the rationale by noting that justification for freedom of expression cannot be confined to truth-seeking because “many ideas and expressions which cannot be verified are valuable.”<sup>523</sup> While the SCC has been unclear about what expressive activities contribute to truth-seeking, it has found that obscenity and hate speech do not.<sup>524</sup> The truthfulness of the message, the likeliness that the expression will elicit rational responses, and the openness of the marketplace to which the expression contributes, all appear to be relevant factors in determining the degree of protection afforded.<sup>525</sup>

#### 4.4.2. Democracy

Second, freedom of expression is necessary for the proper functioning of a democratic society.<sup>526</sup> Canadian jurisprudence has not clearly defined the relationship between freedom of expression and democracy, but it has utilized the rationale to help define the scope of the right.<sup>527</sup> In a democratic society, the ability to freely hear information and ideas concerning public issues is imperative to advancing the common good. Courts have consistently emphasized the strong relationship between freedom of expression and

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<sup>522</sup> *Supra* note 44 at para 174.

<sup>523</sup> *Ibid* at para 175.

<sup>524</sup> Robin Elliot, “The Supreme Court’s Understanding of the Democratic Self-Government, Advancement of Truth and Knowledge and Individual Self-Realization Rationales for Protecting Freedom of Expression: Part I – Taking Stock” (2012) 59 SCLR (2d) 435 at para 92 [Elliot]; *Keegstra*, *supra* note 44; *Butler*, *supra* note 65.

<sup>525</sup> Elliot, *supra* note 524 at para 102.

<sup>526</sup> Richard Moon, *The Constitutional Protection of Freedom of Expression* (Toronto: University of Toronto Press, 2000) at 8 [Moon].

<sup>527</sup> Elliot, *supra* note 524 at para 88.

democracy. In fact, in *Keegstra*, Dickson CJ (as he then was) described the relationship between politics and freedom of expression as “the linchpin of the s. 2(b) guarantee.”<sup>528</sup> Furthermore, freedom of expression ensures that the political process is accessible to all persons and that the best decision can be made from all possible options.<sup>529</sup> Cory J, writing in *Edmonton Journal v Alberta (Attorney General)*<sup>530</sup>, stated “[t]he concept of free and uninhibited speech permeates all truly democratic societies and institutions.”<sup>531</sup> While this underlying reason is clearly linked to the protection of political speech, it also extends to support the protection of other types of speech. L’Heureux Dube J commented on the invaluable nature of political expression, stating “[t]he liberty to comment on and criticize existing institutions and structures is an indispensable component of a ‘free and democratic society’ ... [i]t is imperative for such societies to benefit from a multiplicity of viewpoints which can find fertile sustenance through various media of communication.”<sup>532</sup>

#### 4.4.3. Individual Self-Realization

Third, protecting freedom of expression promotes individual self-realization, or self-fulfilment.<sup>533</sup> This is the broadest rationale, and has been found to protect “commercial expression, hate speech, obscenity, child pornography, promotion of leisure activities,

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<sup>528</sup> *Supra* note 44 at para 89.

<sup>529</sup> *Ibid.*

<sup>530</sup> *Edmonton Journal v Alberta (Attorney General)*, [1989] 2 SCR 1326, SCJ No 124 [*Edmonton Journal*].

<sup>531</sup> *Ibid* at para 3.

<sup>532</sup> *Committee for the Commonwealth of Canada v Canada*, [1991] 1 SCR 139, SCJ No 3 at para 69 [*Committee for the Commonwealth*]

<sup>533</sup> This is also categorized as individual self-fulfillment or individual autonomy.



employment-related speech, consumer expression, and participation in the political expression.”<sup>534</sup> Freedom of expression promotes self-realization because it permits an individual to realize their intellectual capacities by expressing their own ideas and listening to the ideas of others.<sup>535</sup> Expression allows an individual’s identity to emerge through communication and interaction with others, and thus is more than an individual right, it is a social right.<sup>536</sup> In *Keegstra*, McLachlin J (as she then was) found this rationale too broad to support constitutional protection of speech on its own, but conceded that the intrinsic value of expression to “the self-realization of both speaker and listener” would ensure that some types of expression, such as artistic expression, that might not be protected under the other rationales, benefit from *Charter* protection.<sup>537</sup> That was the case in *Butler*, where the Attorney General for Ontario argued that pornography was only related to the underlying value of individual self-fulfilment, and even then, only because it is related to physical arousal.<sup>538</sup> However, civil liberties groups countered with the argument that “pornography forces us to question the conventional notion of sexuality and thereby launches us into an inherently political discourse”<sup>539</sup>, and that “[g]ood pornography has value because it validates women’s will to pleasure.”<sup>540</sup> The Court

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<sup>534</sup> Elliot, *supra* note 524 at para 131 [only kinds of expression that are not protected by this rationale so far are dales defamatory statements and other falsehoods that harm the self-realization of third parties].

<sup>535</sup> Moon, *supra* note 526 at 19-21.

<sup>536</sup> Richard Moon, "Justified Limits on Free Expression: The Collapse of the General Approach to Limits on Charter Rights" (2002) 40 *Osgoode Hall LJ* 337 at 341.

<sup>537</sup> *Supra* note 44 at para 177.

<sup>538</sup> *Supra* note 65 at para 95.

<sup>539</sup> *Ibid.*

<sup>540</sup> *Ibid.*

ultimately sided with the Attorney General of Ontario, finding that the expression in question was not equivalent to other types of expression that directly engage the values underlying freedom of expression.<sup>541</sup> Other types of expression are more easily connected to individual self-fulfilment. For example, in *Ford* the Court considered whether freedom of expression protected the right to express oneself in the language of their choice. Language was described as “the means by which the individual expresses his or her personal identity and sense of individuality,”<sup>542</sup> and was found to be protected under section 2(b). Similarly, in *Committee for the Commonwealth*, L’Heureux Dube J discussed the value of political expression specifically, stating that it “is valuable in part because it enhances personal growth and self-realization.”<sup>543</sup>

Of course, separating these three rationales is only necessary for the sake of clarity and organization; the lines between democracy and self-realization, or truth-seeking and democracy are not sharp, but blurry and overlapping. This has been recognized in jurisprudence. For example, L’Heureux Dube J in *Committee for the Commonwealth* noted, “reliance on any rationale in isolation is fraught with difficulty.”<sup>544</sup> Expression may promote all three rationales, or only one. Additionally, often times protecting expression that promotes one rationale will inevitably impact the other rationales as well. For example, truth-seeking helps to support not only a strong democracy but may also support individual self-realization. Additionally, the connection of a particular type of

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<sup>541</sup> *Ibid* at para 97.

<sup>542</sup> *Supra* note 52 at para 40.

<sup>543</sup> *Supra* note 532 at para 62.

<sup>544</sup> *Ibid* at para 66.

expression to these rationales is only one of many factors to be considered in balancing competing rights. This was confirmed by McLachlin J's (as she then was) dissenting opinion in *Keegstra*, when she noted that each of the rationales is useful in guiding section 2(b) analysis, but that their importance to each case will vary, confirming that expression need not be closely tied to all three rationales in order to be deserving of greater protection.<sup>545</sup>

#### 4.5. The Scope of Freedom of Expression Protection

There are three steps in a freedom of expression challenge. First, it must be determined that the expression in question is expression that is protected by section 2(b). Second, the courts will determine whether the freedom has been infringed upon, either in purpose or in effect, by the government act. Lastly, if the first two steps have been met, the courts will determine whether the infringement is justified in a free and democratic society, pursuant to section 1 of the *Charter*. This section will focus on the first step. It is well established that *Charter* rights should be interpreted broadly.<sup>546</sup> As such, the protection provided by section 2(b) is afforded a large and liberal interpretation to protect a broad scope of expression.<sup>547</sup> Courts have confirmed that “activities cannot be excluded from the scope of the guaranteed freedom on the basis of the content or meaning being conveyed”<sup>548</sup>, because the purpose of section 2(b) is to ensure that thoughts and feelings

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<sup>545</sup> *Supra* note 44 at paras 179-180.

<sup>546</sup> *Hunter, supra* note 501 at 155.

<sup>547</sup> *Ford, supra* note 52 at para 59.

<sup>548</sup> *Butler, supra* note 65 at para 67.

can be communicated freely without fear of censure.<sup>549</sup> The court in *Irwin Toy* confirmed that “[a]ll expression of the heart and mind, however unpopular, distasteful or contrary to the mainstream”<sup>550</sup> deserves constitutional protection. Additionally, the protection extends both to speakers and listeners.<sup>551</sup> But, this does not mean that all types of expression are protected or that all types of expression are equally protected.<sup>552</sup> For example, political expression is typically afforded more protection than commercial expression, as the values underlying political speech have been deemed to be of greater importance than those underlying commercial speech.<sup>553</sup> In contrast, violent speech will not be afforded the same protection.<sup>554</sup> Additionally, in *Montréal (City) v 2952-1366 Québec Inc.*, relying on *Committee for the Commonwealth*, the majority considered whether the location of the expression at issue can cause the expression to be excluded from the scope of 2(b).<sup>555</sup> The majority recognized that freedom of expression includes the right to express oneself in certain public spaces, and so a freedom of expression analysis must not only consider whether the specific activity in question is protected, but whether the freedom protects their right to do that activity in a certain place (i.e. a public

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<sup>549</sup> *Ibid* at para 69.

<sup>550</sup> *Supra* note 519 at para 41.

<sup>551</sup> *Ford*, *supra* note 52 at para 59.

<sup>552</sup> See e.g. *Keegstra*, *supra* note 44.

<sup>553</sup> *Edmonton Journal*, *supra* note 530.

<sup>554</sup> See e.g. *Keegstra*, *supra* note 44.

<sup>555</sup> *Montréal (City)*, *supra* note 12, citing *Committee for the Commonwealth*, *supra* note 532 [In *Montréal*, a club owner challenged a Montréal by-law prohibiting noise produced from sound equipment that can be heard from outside of an establishment.

street).<sup>556</sup> In *Committee for the Commonwealth*, the majority agreed that there is no *prima facie* right of free expression on all government owned property, but developed multiple tests for determining whether government-owned property is public or private in nature.<sup>557</sup> The majority in *Montréal* settled the matter, adopting the following test for the application of section 2(b) to public property: Is the place a public place where one would expect constitutional protection for free expression, on the basis that it does not conflict with the values underlying the freedom?<sup>558</sup> In answering this question, the historical or actual function of the place, as well as whether other aspects of the place suggest that expression within it would undermine the values underlying freedom of expression, should be considered.<sup>559</sup>

This step of the analysis is typically met easily. The majority in *Irwin Toy* stated that if an “activity conveys or attempts to convey a meaning, it has expressive content and *prima facie* falls within the scope of the guarantee.”<sup>560</sup> Therefore, the burden is on the defendant government to show that the activity that is restricted or banned is either a form of expression not protected by section 2(b), or that it does not convey or attempt to convey meaning.

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<sup>556</sup> *Montréal*, *supra* note 12 at para 61 [the majority went on to state that section 2(b) does not extend to private property]

<sup>557</sup> *Supra* note 532 [Lamer CJ, Cory J, and Sopinka J’s test stated that if the form of the expression contravenes the function of the place, the form of the expression will not fall under section 2(b) protection; McLachlin, Gonthier and La Forest JJ instead proposed a test based on whether the expression served the values underlying the guarantee of free speech].

<sup>558</sup> *Montréal*, *supra* note 512 at para 74.

<sup>559</sup> *Ibid.*

<sup>560</sup> *Irwin Toy*, *supra* note 519 at para 41.

Whether commercial speech constitutes expression protected by section 2(b) has been considered by the SCC in numerous cases. In *Ford*, the Court first recognized commercial advertising as deserving of constitutional protection, proclaiming: “there is no sound basis on which commercial expression can be excluded from the protection of s. 2(b).”<sup>561</sup> This overturned previous arguments<sup>562</sup> that the *Charter* was not intended to protect economic interests. The Court in *Ford*, however, refuted these claims by stressing that commercial speech involves more than just economics, identifying informed choice, individual self-fulfillment, and personal autonomy as intrinsic values of commercial expression.<sup>563</sup> This reasoning has been repeated by the Court on various occasions, solidifying the constitutional protection afforded to commercial advertising. For example, In *Irwin Toy*, when tasked with determining whether advertising aimed at children constituted expression, the Court, referring to *Ford*, found such expression to be protected.<sup>564</sup> Similarly, in *Rocket* the Court found professional advertising to meet the test set out in *Irwin Toy* for what constitutes expressive activity.<sup>565</sup> Today, little question exists as to the constitutional protection afforded to advertising.

The important role of commercial speech in modern society that justifies *Charter* protection has been recognized in jurisprudence. In the Court of Appeal decision *Rocket v*

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<sup>561</sup> *Ford*, *supra* note 52 at para 59.

<sup>562</sup> See *Re Klein and Law Society of Upper Canada*, [1985] 16 DLR (4th) 489, OJ No 2321 [the Ontario Divisional Court held that commercial expression was outside the scope of *Charter* protection; See also *Re Grier and Alberta Optometric Association*, [1987] AJ No 650, 42 DLR (4th) 327 (CA) [the Attorney General of Quebec argued that the *Charter* was not intended to protect economic rights].

<sup>563</sup> *Supra* note 52 at para 59.

<sup>564</sup> *Supra* note 519 at para 45.

<sup>565</sup> *Supra* note 41 at 244.

*Royal College of Dental Surgeons of Ontario*<sup>566</sup>, Cory JA emphasized the importance of advertising in a free market, stating that the rights of the consumer to receive information may be a better justification for protecting commercial speech than the rights of the advertiser to expression.<sup>567</sup> In contrast, the harms of advertising have equally been recognized. In *Irwin Toy*, the Court recognized that there existed a general concern with the impact of media, particularly television advertising, on the development and perceptions of young children, which motivated legislative restrictions on commercial speech.<sup>568</sup> Similarly, in *JTI-MacDonald*, the Court stated “when commercial expression is used...for the purposes of inducing people to engage in harmful and addictive behaviour, its value becomes tenuous.”<sup>569</sup> This statement establishes that the purpose of the commercial speech seeking protection will be an important factor in balancing the rights of the speaker against the government’s actions.

#### 4.6. Finding Infringement

Once it has been established that the activity constitutes expression, the second step of the analysis is determining whether freedom of expression has been infringed, either in purpose or effect.<sup>570</sup> If the government’s purpose was to restrict expression, either by restricting the content of expression or by restricting the form of expression tied to

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<sup>566</sup> [1988] OJ No 383, 64 OR (2d) 353 (CA), aff’d [1990] 2 SCR 232, SCJ No 65.

<sup>567</sup> *Ibid* at paras 64-66.

<sup>568</sup> *Supra* note 519 at para 71.

<sup>569</sup> *Supra* note 79 at para 47.

<sup>570</sup> *Big M Drug Mart*, *supra* note 517 at para 80.

content, the guarantee has been infringed.<sup>571</sup> This is differentiated from situations where the government instead aims only to control the physical consequences, in which case freedom of expression has not been infringed.<sup>572</sup> If the government's purpose was not to restrict expression, a plaintiff can still claim that the governmental action had the effect of restricting expression if a meaning being conveyed can be identified and can be related to the pursuit of truth, participation in the community, or individual self-fulfillment.<sup>573</sup>

The decision in *Irwin Toy* discussed this stage of the analysis at great length. Regarding infringement of a right in purpose, the majority stated:

*If the government's purpose is to restrict the content of expression by singling out particular meanings that are not to be conveyed, it necessarily limits the guarantee of free expression. If the government's purpose is to restrict a form of expression in order to control access by others to the meaning being conveyed or to control the ability of the one conveying the meaning to do so, it also limits the guarantee. On the other hand, where the government aims to control only the physical consequences of certain human activity, regardless of the meaning being conveyed, its purpose is not to control expression.*<sup>574</sup>

The majority held that the purpose of the advertising restrictions contained in the *Consumer Protection Act* was to restrict content and specific types of expression in order

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<sup>571</sup> *Irwin Toy*, *supra* note 519 at para 49.

<sup>572</sup> *Ibid* [here, the majority uses the example of a rule banning the handing out of pamphlets, which can be tied to content, even if its purpose is to limit littering; in contrast, a law prohibiting littering aims only to control the physical consequences of the act, regardless of whether the act seeks to convey meaning].

<sup>573</sup> *Ibid* at para 55.

<sup>574</sup> *Ibid* at para 49.



to protect children.<sup>575</sup> The impugned provisions restricted not only the manner in which a particular content must be expressed, but also directly restricted content, and therefore infringed upon section 2(b) of the *Charter*.<sup>576</sup> However, courts typically do not spend much time on this part of the analysis, as infringement is usually easily met. In fact, in both *RJR-MacDonald* and *JTI-MacDonald*, the respective Attorney Generals conceded that the impugned legislation was an infringement of freedom of expression, so the courts wasted little ink exploring this step.<sup>577</sup>

#### 4.7. Section 1 Analysis

If the government action is shown to infringe freedom of expression, either in its purpose or in its effect, then the analysis turns to the third step. The third step requires establishing whether the infringement can be justified under section 1 of the *Charter*.

Section 1 confirms that while the rights set out in the *Charter* are guaranteed, the government can limit an individual's *Charter* rights, provided that such a limitation can be justified. Section 1 has been used to justify the restriction of a variety of objectionable expression, including hate speech and obscenity.<sup>578</sup> When the government limits an individual's rights, the onus is on the Crown to show, on a balance of probabilities, that the limitation was prescribed by law, and that it be demonstrably justified in a free and democratic society. In *R v Therens*<sup>579</sup>, Le Dain J, in dissent, explained that for a limit to

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<sup>575</sup> *Ibid* at para 54.

<sup>576</sup> *Ibid*.

<sup>577</sup> *Supra* note 5 at para 124; *Supra* note 79 at para 33.

<sup>578</sup> See e.g., *Butler*, *supra* note 65; *Keegstra*, *supra* note 44.

<sup>579</sup> [1985] 1 SCR 613, SCJ No 30.

meet the prescribed by law requirement, it must either be “expressly provided for by statute or regulation, or results by necessary implication from the terms of a statute or regulation or from its operating requirements... [or] from the application of a common law rule.”<sup>580</sup> For the most part, provided it is a statute or regulation being challenged, there is little question that the prescribed by law requirement will be satisfied.

The test to determine if the purpose is demonstrably justified in a free and democratic society was set forth in *Oakes*. Prior to the adoption of the *Oakes* test, a similar section 1 analysis was employed, with slightly less structure. In *Big M Drug Mart*, for example, the similarity between the analysis employed by the majority and the *Oakes* test is obvious. In *Big M Drug Mart*, Dickson CJ, who wrote on behalf of the majority in both *Oakes* and *Big M Drug Mart*, noted that not all government objectives will be entitled to section 1 consideration, only if a “sufficiently significant government interest is recognized” will the analysis progress to the proportionality test.<sup>581</sup> At that point, he stated, “[t]he court may wish to ask whether the means adopted to achieve the end sought do so by impairing as little as possible the right or freedom in question.”<sup>582</sup> This is the same language that is now used in the minimal impairment step of the proportionality analysis in the *Oakes* test.

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<sup>580</sup> *Ibid* at page 645 [though this is a dissenting decision, it has been quoted by more than 50 Provincial Court of Appeal and Supreme Court of Canada decisions].

<sup>581</sup> *Supra* note 517 at para 139.

<sup>582</sup> *Ibid*.

The *Oakes* test asks whether the objective of the impugned legislation is of significant importance and if the means are proportional.<sup>583</sup> The first step of the *Oakes* analysis is the pressing and substantial requirement, which sets out to determine whether the objective of the impugned legislation is “of sufficient importance to warrant overriding a constitutionally protected right or freedom.”<sup>584</sup> Ascertaining the legislative objective is achieved by determining what the legislator’s intent was in drafting the limit.<sup>585</sup> The standard for this requirement is high “in order to ensure that objectives which are trivial or discordant with the principles integral to a free and democratic society do not gain s. 1 protection.”<sup>586</sup> However, jurisprudence in the area suggests that courts do not often hold parties to a high standard. In *Edmonton Journal*, Cory J accepted the objectives of protecting individual’s privacy and ensuring a fair trial as pressing and substantial, though with little conviction. Regarding the second impugned provision, which prohibited publishing specific trial information prior to a trial or other determination of the proceedings, Cory J stated, “I will assume...that s. 30(2) as well meets that first test and that both the objectives, that of securing a fair trial and that of protecting the right to privacy with regard to pre-trial documents constitute pressing and substantial objectives sufficient to permit the overriding of the right to freedom of expression.”<sup>587</sup>

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<sup>583</sup> *Oakes*, *supra* note 508 at para 69.

<sup>584</sup> *Ibid.*

<sup>585</sup> *Edmonton Journal*, *supra* note 530 at para 44.

<sup>586</sup> *Oakes*, *supra* note 508 at para 69.

<sup>587</sup> *Edmonton Journal*, *supra* note 530 at para 22.

In the context of commercial advertising restrictions, arguments for the pressing and substantial restrictions typically rely on protecting populations from the harms associated with advertising. In *Irwin Toy*, the Attorney General of Quebec demonstrated that the legislation restricting advertising to children met the pressing and substantial threshold because its goal was to protect a vulnerable population, children, from known harms associated with the impact of media.<sup>588</sup> In *RJR-MacDonald* the pressing and substantial objective was preventing Canadians from being persuaded to use tobacco products by advertising and promotion and to discourage people who see tobacco packaging from tobacco use.<sup>589</sup> Similarly, the objective of the impugned legislation in *JTI-MacDonald*, stated broadly, was to protect the health of Canadians and respond to a public health problem.<sup>590</sup> In all cases, the requirement of a pressing and substantial objective was met.<sup>591</sup>

The second part of the *Oakes* test is proportionality, which has three sub-requirements: rational connection, minimal impairment, and proportionality between the effects of the legislation and the objective. Rational connection requires the government to establish that the infringement of freedom of expression is rationally connected to the legislative goal.<sup>592</sup> The threshold for this element is not high; it must simply be plausible that the

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<sup>588</sup> *Supra* note 519 at para 71.

<sup>589</sup> *Supra* note 5 at para 146.

<sup>590</sup> *Supra* note 79 at para 38.

<sup>591</sup> A section 2(b) challenge at the SCC has never failed the pressing and substantial step. However, in *Baier v Alberta*, 2007 SCC 31, at paras 114-6, Fish J (in dissent) held that the prevention of conflicts of interest did not pass the pressing and substantial stage because “the record demonstrates that the concern asserted is in fact neither pressing nor substantial.”

<sup>592</sup> *Oakes*, *supra* note 508 at para 77.

means may help to bring about the objective. Rational connection does not require direct causal scientific information, instead, a court may find a causal connection on the basis of logic or reason. For example, in *RJR-MacDonald*, a sufficient link between certain forms of advertising, warnings, and tobacco consumption was established on a balance of probabilities, primarily relying on logic and common sense, rather than scientific causal proof.<sup>593</sup> However, McLachlin J (as she then was), found section 8 of the *TPCA*, which imposed an absolute prohibition of using tobacco trade marks on articles other than tobacco products with the objective of decreasing tobacco consumption, failed the rational connection test because “there is no causal connection based on direct evidence, nor is there, in my view, a causal connection based in logic or reason.”<sup>594</sup> In sum, either direct scientific evidence of a causal connection, or a logical connection between the objective and the measures adopted is sufficient to meet this requirement.

To pass the second proportionality requirement, “the government must show that the measures at issue impair the right of free expression as little as reasonably possible in order to achieve the legislative objective.”<sup>595</sup> This step does not require that the government implement the law that is the least impairing, but rather that the law “falls within a range of reasonable alternatives.”<sup>596</sup> However, the law may fail if the government fails to explain why a less intrusive measure was not chosen.<sup>597</sup> In *RJR-*

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<sup>593</sup> *Supra* note 5 at para 154.

<sup>594</sup> *Ibid* at para 159.

<sup>595</sup> *Ibid* at para 160.

<sup>596</sup> *Ibid*.

<sup>597</sup> *Ibid*.

*MacDonald*, McLachlin J (as she then was) found the absolute ban in the *TPCA* was not minimally impairing, referring to jurisprudence supporting that it is more difficult to justify a complete ban as opposed to a partial ban.<sup>598</sup> In contrast, the *Tobacco Act*, which was under consideration in *JTI-MacDonald*, was considered to be a partial ban on advertising that was justified under section 1.<sup>599</sup> While the *Tobacco Act* permitted information and brand-preference advertising, it prohibited lifestyle advertising and promotion, advertising appealing to young persons, and false or misleading advertising or promotion, it also increased the size of mandatory health warnings on packages from 33% to 50% of the principal display surface.<sup>600</sup> Characterized as a partial ban, the *Tobacco Act* was found to be minimally impairing.<sup>601</sup>

At the minimal impairment stage, a court may also consider whether the impugned law is overbroad, or vague. A limit will be overbroad where it catches more than necessary to meet the objective of the legislation. In contrast, a limit will be vague where the language is general or imprecise to the point that a citizen may stifle their speech too much, out of fear for being caught on the wrong side of the law. In *JTI-MacDonald*, the Court laid out two things that must be proven in order to repudiate a claim of vagueness or overbreadth: (1) the law must give sufficient guidance to those expected to abide by it; and (2) the law must limit the amount of discretion held by the state officials responsible for enforcing

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<sup>598</sup> *Ibid* at para 163, citing *Ramsden v Peterborough* [1993] 2 SCR 1084, SCJ No 87 [*Ramsden*] and *Ford*, *supra* note 52.

<sup>599</sup> *Supra* note 79 at paras 141-142.

<sup>600</sup> *Tobacco Act*, SC 1997 [*Tobacco Act*]

<sup>601</sup> *JTI-MacDonald*, *supra* note 79 at paras 141-142.

the limit.<sup>602</sup> Of course, absolute certainty of the law is impossible, and often times language is specifically general to permit flexibility for technological or societal advances, but the limit must provide enough guidance for citizens to guide their behaviour.<sup>603</sup>

The last requirement of the proportionality analysis asks whether the objective is proportional to the effect of the law. Specifically, it asks whether the negative effects of the infringement of rights are proportional to the benefits associated with the legislative goal. In *Irwin Toy*, the majority found this component easily met, stating “there is no suggestion here that the effects of the ban [on advertising to children] are so severe as to outweigh the government’s pressing and substantial objective.”<sup>604</sup> In that case, the advertisers were still able to develop new marketing strategies for children’s products, including targeting ads at the ultimate purchasers, parents. In *RJR-Macdonald*, McLachlin J (as she then was) still commented on this step of the analysis despite finding that the legislation failed on the minimal impairment step. She stated that any law that is not minimally impairing will necessarily fail the proportionality between effect and objective step as well.<sup>605</sup> In *JTI-MacDonald*, the impugned provisions passed the proportionality assessment in whole upon consideration of the low value of the prohibited

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<sup>602</sup> *Ibid* at para 78.

<sup>603</sup> *Ibid* at para 79.

<sup>604</sup> *Supra* note 519 at para 89.

<sup>605</sup> *Supra* note 5 at para 175.

commercial expression and the “matter of life or death for millions of people” associated with restricting certain types of tobacco advertising.<sup>606</sup>

## 4.8. Flexibility, deference, and standard of proof

### 4.8.1. Flexibility

There are three concepts that impact the section 1 analysis: flexibility, deference, and standard of proof. Each will be discussed in turn. The *Oakes* test is meant to be “applied flexibly, having regard to the factual and social context of each case.”<sup>607</sup> In the early days of the *Charter*, Justice Bora Laskin insisted that adjudication of *Charter* conflicts should consider the social, economic, and political factors, which may impact the application of the law.<sup>608</sup> The contextual approach can be found in early *Charter* jurisprudence, though it is not necessarily explicit. In *Big M Drug Mart*, for example, Dickson J (as he then was), writing for the majority, considered the broader legislative context, the legislative history, and prior interpretations in Canada and abroad, before turning to the impugned provision to ascertain its purpose and effects.<sup>609</sup> Similarly, in her decision in *Big M Drug Mart*, Wilson J considered the broader legislative context, domestic and international jurisprudence, and academic authorities in her assessment of the relevant *Charter* provision, summarizing her approach as follows:

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<sup>606</sup> *Supra* note 79 at para 68.

<sup>607</sup> *RJR-Macdonald*, *supra* note 5 at para 62.

<sup>608</sup> Phillip Girard, *Bora Laskin: Bringing Law to Life* (Toronto: University of Toronto Press, 2005) at page 421.

<sup>609</sup> *Supra* note 517 at paras 51-53 [historical underpinnings], 73-7 [American jurisprudence].



In my view, this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the *Charter* itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of other specific rights and freedoms with which it is associated within the text of the *Charter*. The interpretation should be... a generous rather than legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter*'s protections. At the same time, it is important not to overshoot the actual purpose of the right or freedom in question, but to recall that the *Charter* was not enacted in a vacuum, and must, therefore... be placed in its proper linguistic, philosophic, and historical contexts.<sup>610</sup>

The first formal articulation of the contextual approach to *Charter* conflicts is most often attributed to Wilson J's decision in *Edmonton Journal*, where she differentiated the contextual approach from the abstract approach. The contextual approach recognizes that the right being infringed upon may have different value depending on the context.<sup>611</sup>

According to Wilson J this approach "attempts to bring into sharp relief the aspect of the right or freedom which is truly at stake in the case as well as the relevant aspects of any values in competition with it."<sup>612</sup> In utilizing the contextual approach, the courts may be better able to find a compromise between the competing values.<sup>613</sup> The abstract approach,

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<sup>610</sup> *Ibid* at para 117.

<sup>611</sup> *Supra* note 530 at para 51.

<sup>612</sup> *Ibid*.

<sup>613</sup> *Ibid*.

in comparison, attempts to compare concepts that are incomparable, as rights such as freedom of expression or the right to privacy have little meaning without context.<sup>614</sup>

Wilson J's approach has been widely cited in subsequent *Charter* litigation<sup>615</sup>, but it has not been developed much further. For example, in *R v Laba*<sup>616</sup>, the majority of the SCC simply stated “[i]t is now well established that the *Charter* is to be interpreted in light of the context in which it is being applied.”<sup>617</sup> The social context proved to be crucial to the decision in *JTI- MacDonald*. There, the court moved away from its previous decision in *RJR-MacDonald*. As the court noted, “*RJR* was grounded in a different historical context and based on different findings supported by a different record at the time... [t]he *Tobacco Act* must be assessed in light of the knowledge, social conditions and regulatory environment revealed by the evidence presented in this case.”<sup>618</sup>

The contextual approach has been affirmed in other cases as well, but these cases tend to focus on the relation of the expression to underlying values rather than a full contextual approach considering the social, economic, and political factors surrounding both the expression and the infringement. In *Rocket*, McLachlin J (as she then was) affirmed Wilson J's approach, maintaining that “[p]lacing the conflicting values in their factual

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<sup>614</sup> *Edmonton Journal*, *supra* note 530 at para 45.

<sup>615</sup> See e.g., *Keegstra*, *supra* note 44; *R v Wholesale Travel Group*, [1991] 3 SCR 154, SCJ No 79; *R v Seaboyer*, [1991] 2 SCR 577, SCJ No 62 [*Seaboyer*].

<sup>616</sup> [1994] 3 SCR 965, SCJ No 106.

<sup>617</sup> *Ibid* at para 10 [the quote continues “[t]he importance of the contextual approach was recognized by Wilson J in *Edmonton Journal*... and her comments have been cited with approval in numerous subsequent decisions... [t]his jurisprudence reveals that the historical, social, and economic context in which a *Charter* claim arises will often be relevant in determining the meaning which ought to be given to *Charter* rights and is critical in determining whether limitations upon those rights can be justified under s.1”]

<sup>618</sup> *JTI-MacDonald*, *supra* note 79 at para 11.

and social context when performing the s. 1 analysis permits the courts to have regard to special features of the expression in question.”<sup>619</sup> This is particularly important because of the fact that not all expression is equally worthy of protection, nor are all infringements equal in their effects. In *Keegstra*, the majority justified contextualizing the expression in question, noting that “[w]hile we must guard carefully against judging expression according to its popularity, it is equally destructive of free expression values...to treat all expression as equally crucial to those principles at the core of s. 2(b).”<sup>620</sup> The majority ultimately opined that the expression in question, hate propaganda, contributed little to the values underlying the freedom and therefore “restrictions on expression of this kind might be easier to justify than other infringements of s. 2(b).”<sup>621</sup> The Court has adopted similar approaches in its assessment of pornography and prostitution, subjecting each to a lower level of protection.<sup>622</sup>

#### 4.8.2. Deference

Additionally, section 1 analysis can be affected by the degree of deference afforded to Parliamentary decisions. The type of legislation may dictate the degree of deference. In *RJR-Macdonald*, the court stated “[i]n according a greater degree of deference to social legislation than to legislation in the criminal justice context, this Court has recognized these important institutional differences between legislatures and the judiciary.”<sup>623</sup> In the

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<sup>619</sup> *Supra* note 41 at 246-7.

<sup>620</sup> *Supra* note 44 at para 82

<sup>621</sup> *Ibid* at para 94, citing *Rocket*, *supra* note 41.

<sup>622</sup> See e.g., *Butler*, *supra* note 65; See also *Reference re ss.193 and 195.1(1)(c) of the Criminal Code (Man.)*, [1990] 1 SCR 1123, SCJ No 52.

<sup>623</sup> *Supra* note 5 at para 68.

same decision, the Court stated that the *Tobacco Act* was the exact type of legislation to which a high degree of deference should be given, because the decision to legislate tobacco advertising was one best left to elected representatives with the resources to undertake them.<sup>624</sup> In affording deference to Parliament, courts recognize that it is not the job of the judiciary to strike out legislation and replace it with its own opinion just because the courts can think of an alternative scheme that seems to be less restrictive.<sup>625</sup>

The deference accorded to Parliament or the legislatures varies with the context of the limitation. For example, greater deference to Parliament or the Legislature may be appropriate if the law is concerned with competing rights between different sectors of society than if it is a contest between the individual and the state.<sup>626</sup> Additionally, the situation or problem that the limit is attempting to mitigate may impact the degree of deference accorded to Parliament.<sup>627</sup> If the focus of the limitation is a social problem that is not fully understood, for example, the degree of deference afforded may be affected. This is judicial recognition of the difficulty with drafting laws to addresses such concerns.<sup>628</sup> Such deference is necessary to allow legislature the room required to balance conflicting interests, but the amount of room that is reasonable depends on the context, including the nature of the interest infringed and the legislative limit being

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<sup>624</sup> *Ibid* at para 70.

<sup>625</sup> *Ibid* at para 106.

<sup>626</sup> *Irwin Toy*, *supra* note 519 at paras 79-80 [though in *RJR* the court noted that it may not be easy to apply this distinction].

<sup>627</sup> *RJR-Macdonald (SCC)*, *supra* note 5 at para 135.

<sup>628</sup> *Ibid*.

implemented.<sup>629</sup> However, deference “must not be carried to the point of relieving the government of the burden which the *Charter* places upon it of demonstrating that the limits it has imposed on guaranteed rights are reasonable and justifiable.”<sup>630</sup> Doing so would belittle the role of the judiciary, and “weaken the structure of rights upon which our constitution and our nation is founded.”<sup>631</sup> As a result, courts must strike a balance between affording enough deference to permit Parliament to address complex social issues, but not so much as to undermine the responsibility of Parliament to demonstrate that an infringement upon *Charter* rights is justified.

Deference may also be appropriate in the rational connection stage of the *Oakes* test, particularly where the issue being addressed is a complex social problem. That was the case in *JTI-MacDonald*, where the court recognized that there was not necessarily a clear or simple solution to the public health problems associated with tobacco use, and therefore Parliament should be given “considerable deference”.<sup>632</sup> The court afforded Parliament deference to the state at the minimal impairment stage as well, stating:

*There may be many ways to approach a particular problem, and no certainty as to which will be the most effective. It may, in the calm of the courtroom, be possible to imagine a solution that impairs the right at stake less than the solution Parliament has adopted. But one must also ask whether the alternative would be reasonably effective when weighed against the means chosen by Parliament. To complicate matters, a*

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<sup>629</sup> *Butler*, *supra* note 65 at para 178.

<sup>630</sup> *RJR-Macdonald (SCC)*, *supra* note 5 at para 136.

<sup>631</sup> *Ibid.*

<sup>632</sup> *Supra* note 79 at para 41.

*particular legislative regime may have a number of goals, and impairing a right minimally in the furtherance of one particular goal may inhibit achieving another goal. Crafting legislative solutions to complex problems is necessarily a complex task. It is a task that requires weighing and balancing. For this reason, this Court has held that on complex social issues, the minimal impairment requirement is met if Parliament has chosen one of several reasonable alternatives.*<sup>633</sup>

#### 4.8.3. Standard of Proof

Lastly, “proof to the standard required by science is not required”<sup>634</sup>, instead the civil standard of proof on a balance of probabilities is more appropriate. In *Oakes*, Dickson CJ (as he then was) explained, “the alternative criminal standard, proof beyond a reasonable doubt, would, in my view, be unduly onerous.”<sup>635</sup> The civil standard, proof by a preponderance of probability, must nevertheless be applied rigorously, to all stages of the proportionality analysis.<sup>636</sup> In practice, this means that the balance of probabilities “may be established by the application of common sense to what is known, even though what is known may be deficient from a scientific point of view.”<sup>637</sup> Together, context, deference, and standard and proof are essential aspects of the section 1 analysis, but they must not weaken the burden on the government to demonstrate that their action is reasonable and justified in a free and democratic society.<sup>638</sup>

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<sup>633</sup> *Ibid* at para 43.

<sup>634</sup> *RJR-Macdonald (SCC)*, *supra* note 5 at para 137.

<sup>635</sup> *Supra* note 508 at para 67 [“Concepts such as “reasonableness”, “justifiability” and “free and democratic society” are simply not amenable to such a standard.”]

<sup>636</sup> *Ibid*.

<sup>637</sup> *RJR-Macdonald (SCC)*, *supra* note 5 at para 137, citing *Snell v Farrell*, [1990] 2 SCR 311, SCJ No 73.

<sup>638</sup> *RJR-Macdonald (SCC)*, *supra* note 5 at para 138.

## 4.9. Remedies

Pursuant to the *Constitution Act*, there are two types of remedies available if a *Charter* challenge is successful. Section 52 is a general remedy provision, and states “any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.”<sup>639</sup> Section 24, on the other hand, is specific to the *Charter*. It states that “[a]nyone whose rights or freedoms, as guaranteed by this *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.”<sup>640</sup> Section 24 remedies are more personal in nature, with the goals of compensating the victim, vindicating the rights breached, and deterring state agents from future breaches.<sup>641</sup> Plaintiffs cannot typically apply for both section 52 and section 24 remedies, but must choose one.<sup>642</sup>

### 4.9.1. Section 52 Remedies

The general remedy available pursuant to section 52 is a declaration of invalidity of the legislation in question. As a result, the legislation or provisions will remain on the statute books but will be subject to the declaration of invalidity, to the extent of the constitutional inconsistency.<sup>643</sup> However, there are also more specific remedies available under section 52 that allow the courts to strike down only the parts of the law that are

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<sup>639</sup> *Constitution*, *supra* note 14 at s 52.

<sup>640</sup> *Ibid* at s 24.

<sup>641</sup> *Vancouver (City) v Ward*, [2010] SCJ No 27, 2 SCR 28 at para 31.

<sup>642</sup> See e.g. *Mackin v New Brunswick (Minister of Finance)* [2002] SCJ No 13, 1 SCR 405; *Rice v New Brunswick*, [2002] SCJ No 13, 1 SCR 405.

<sup>643</sup> See, e.g. *R v Martineau*, [1990] SCJ No 84, 2 SCR 633.

unconstitutional, ensuring that the remedy interferes as little as possible with legislative objectives.<sup>644</sup> Indeed, courts have some degree of flexibility in determining what course of action is most appropriate to take following a finding that the impugned legislation or provisions violate the *Charter* and are not found to be justified pursuant to section 1.<sup>645</sup>

Courts may first consider whether there is an interpretation of the statute that could remedy the constitutional problem.<sup>646</sup> For example, in *JTI-MacDonald*, the court stated:

*The minimal impairment analysis in this case will also be coloured by the relationship between constitutional review and statutory interpretation. Before engaging in constitutional review, the law must be construed. This may have a critical effect at the stage of minimal impairment, where overbreadth is alleged. The process of interpretation may resolve ambiguity in favour of a more limited meaning. This may only be done in cases of real ambiguity in the statute. In cases of ambiguity, therefore, claims of overbreadth may be resolved by appropriate interpretation.*<sup>647</sup>

Finding that one of the statutory provision before them “seems to make no sense,”<sup>648</sup> the Court interpreted the provision to resolve the ambiguity of whether the provision imposed a total ban on sponsored scientific research. After considering the primary objective of the provision in its entirety, the court interpreted “promotion” to mean commercial promotion directly or indirectly targeted at consumers. This interpretation meant that

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<sup>644</sup> See e.g. *Schachter*, *supra* note 507.

<sup>645</sup> *Ibid* at 695.

<sup>646</sup> See, e.g. *JTI-MacDonald*, *supra* note 79; and *R v Sharpe*, 2001 SCC 2 [*Sharpe*].

<sup>647</sup> *Supra* note 79 at para 44, citing *Sharpe*, *supra* note 646.

<sup>648</sup> *JTI-MacDonald*, *supra* note 79 at para 55 [referring to the exemption in section 18(2) of the *Tobacco Act*, *supra* note 87 which excluded literary, dramatic, musical, cinematographic, scientific, educational or artistic works that use or depict tobacco products so long as no consideration was given. See para 49-57].



tobacco manufacturers could not pay for a “particular brand to be included in a commercial scientific work directed at consumers”, but did not prohibit legitimate scientific research.<sup>649</sup> The Court in *JTI-MacDonald* also relied on interpretation to resolve ambiguities in an additional provision before them. Section 22(3) of the *Tobacco Act* banned advertising that “could be construed on reasonable grounds to be appealing to young persons.”<sup>650</sup> The trial and Court of Appeal decisions provided differing opinions as to the interpretation of this provision.<sup>651</sup> After ascertaining the intention of Parliament, protecting young persons from inducements to use tobacco, the Court was tasked with finding a common meaning between the English and French texts. The conclusion was that section 22(3) was interpreted to require “the prosecution in a given case to prove that there are reasonable grounds to believe that the advertisement of a tobacco product at issue could be appealing to young persons, in the sense that it could be particularly attractive and of interest to young persons, as distinguished from the general population.”<sup>652</sup> Having interpreted the provision as such, the Court then conducted the section 1 analysis, finding that the limitation in section 22(3) was justified.<sup>653</sup>

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<sup>649</sup> *Ibid* at para 56.

<sup>650</sup> *Supra* note 600 at s 22(3).

<sup>651</sup> In the trial decision, *Rothmans, Bensons & Hedges Inc. v Canada (Procureure generale)*, [2003] RJQ 181, 102 CRR (2d) 189, [2002] QJ No 5550 (QL), Denis J held that the phrases “could be” and “appealing to young persons” are well understood and are sufficient to allow a judge to determine if a violation had been made out; In *Imperial Tobacco Canada Ltée v Canada (Procureure générale)*, 2005 QCCA 725, the majority similarly held that the words were capable of interpretation, but Beauguard JA dissented, finding the provision overbroad because tobacco manufacturers could not distinguish between what is appealing to young persons and what isn’t, making the effect of the provision a total ban on all information and brand preference advertising, contrary to the purpose of section 22(2)].

<sup>652</sup> *JTI-MacDonald*, *supra* note 79 at para 89.

<sup>653</sup> *Ibid* at para 95.

Interpretation is not always sufficient for remedying a constitutional issue.<sup>654</sup> Where that is the case, the court must choose another remedy available under section 52. Other more tailored remedies available to the court include severance and reading in. Where part of a statute or provision is found unconstitutional, courts may sever that from the rest of the statute, declaring only that part to be of no force and effect, thus avoiding striking down the entire piece of legislation.<sup>655</sup> Severance allows courts to interfere with the laws adopted by legislatures as little as possible, allowing the legislative purpose of the entire statute to be realized as much as possible.<sup>656</sup> Like interpretation, severance is not appropriate in all situations, and cannot be used if the provision at issue is “inextricably bound” with the rest of the statute, such that the remaining portions cannot survive independently.<sup>657</sup> Additionally, courts may consider whether the “legislature would have enacted what survives without enacting the part that is ultra vires.”<sup>658</sup>

Another remedy available under section 52 is reading in. Reading in is a remedy that permits a court to read in words to the offending legislation to remedy constitutional deficits.<sup>659</sup> It allows courts to “fulfil the purposes of the *Charter* and at the same time minimize the interference of the court with parts of legislation that do not themselves

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<sup>654</sup> As discussed in the previous paragraph, interpretation is only sufficient to remedy ambiguities in the offending legislation.

<sup>655</sup> Halsbury’s Laws of Canada, “Remedies”, (Markham, Ont: Lexis Nexis Canada, 2014) at para HCHR-123, “Section 52 remedies” [Halsbury’s, Remedies].

<sup>656</sup> *Schachter*, *supra* note 507 at 696-7.

<sup>657</sup> *Attorney General for Alberta vs Attorney General for Canada*, [1947] J.C.J. No 5, AC 503 at page 518.

<sup>658</sup> *Ibid.*

<sup>659</sup> Kent Roach, “Enforcement of the Charter – Subsections 24(1) and 52(1)” (2013) 62 *SCLR* (2d) at 493.

violate the *Charter*.<sup>660</sup> Unlike severance, where the inconsistency is something in the statute that can be severed and struck down, reading in is useful where the inconsistency is something the statute excludes, and therefore reading in will have the effect of extending the reach of the statute.<sup>661</sup> Like severance, the purpose of reading in is to be as authentic to the scheme enacted by legislature as possible, within the requirements of the Constitution.<sup>662</sup>

In *Schachter*, the majority provided a step-by-step guide for choosing an appropriate remedy. First, the extent of the inconsistency to be struck down must be identified. This typically involves considering how the law violates the *Charter*, and where the law fails in the section 1 analysis.<sup>663</sup> For example, where legislation or particular provisions do not pass the pressing and substantial requirement of the *Oakes* test, it will “almost always” be the case that the inconsistent portion to be struck down will be defined broadly, perhaps even the entire piece of legislation.<sup>664</sup> This was the case in *Big M Drug Mart*, where Dickson CJ found the purpose of the impugned legislation, which he defined as compelling religious observance, was contrary to the values of a free and democratic society, and therefore the appropriate remedy was to strike down the legislation in its

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<sup>660</sup> *Schachter*, *supra* note 507 at 682.

<sup>661</sup> *Ibid* at 698.

<sup>662</sup> *Ibid* at 700.

<sup>663</sup> *Ibid* at 702.

<sup>664</sup> *Ibid* at 703.

entirety.<sup>665</sup> Where a statute or provision fails at the rational connection stage, the inconsistency to be struck down will typically be the whole portion of the legislation that fails the rational connection test. This type of inconsistency is typically defined more narrowly.<sup>666</sup> However, this is not a strict rule. In *RJR-MacDonald*, McLachlin J (as she then was) found one of several impugned provisions failed at the rational connection stage.<sup>667</sup> The remaining provisions failed at the minimal impairment stage. The remedy provided in *RJR-MacDonald* was a declaration that not only the impugned provisions, but also two other related provisions were to be of no force and effect because severability in this instance was not possible.<sup>668</sup> Finally, where the minimal impairment or proportionality requirements are not met, the majority in *Schachter* stated that there is more flexibility in defining the inconsistency.<sup>669</sup> In these situations, striking down, severing, or reading in may be appropriate.

After identifying the inconsistency, courts must determine whether the inconsistency can be dealt with alone by way of severance or reading in, or whether other parts of the legislation are inextricably linked.<sup>670</sup> Deciding which remedy is appropriate will be guided by considerations of precision, interference with the legislative objective, and how excision of a specific provision or part of a provision will impact the rest of the

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<sup>665</sup> *Supra* note 517 at paras 141-143; [However, in *Schachter*, *supra* note 499 at 703 the Court stated “indeed, it is difficult to imagine anything less being appropriate where the purpose of the legislation is deemed unconstitutional; however, I do not wish to foreclose that possibility prematurely”]

<sup>666</sup> *Ibid* at 718.

<sup>667</sup> *Supra* note 5. [Section 8 of the *TPCA*, *supra* note 46].

<sup>668</sup> *Ibid* at para 176.

<sup>669</sup> *Schachter*, *supra* note 507 at 704.

<sup>670</sup> *Ibid* at 717.

legislative or provision.<sup>671</sup> According to the majority in *Schachter*, “severance or reading in will be warranted only in the clearest of cases”, where: (a) the legislative objective is obvious, and severance or reading in would further that objective, or would interfere less than striking down would; (b) the means used by the legislature to achieve the objective are not so unambiguous that severance or reading in would be considered an unacceptable intrusion into legislative decision making; and (c) severance or reading in would not change the nature of the legislative scheme.<sup>672</sup>

After identifying the extent of the inconsistency and determining whether to strike down the inconsistency, sever it, or read in, the court must then determine whether to suspend the declaration of invalidity.<sup>673</sup> Doing so provides Parliament or provincial legislatures with an opportunity to fix the inconsistency. This approach will be appropriate where striking down a provision poses a risk of danger to the public, offends or threatens the rule of law, or where it will deprive a person or persons of a benefit.<sup>674</sup> The aim of suspending the declaration of invalidity is to give legislative bodies the time to appropriately respond to the court ruling and draft new legislation that does resolves the constitutional issues.<sup>675</sup> For example, many of the successful challenges to the various medical cannabis regulations were suspended to allow Parliament to bring the existing

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<sup>671</sup> *Ibid* at 705-15.

<sup>672</sup> *Ibid* at 718.

<sup>673</sup> *Ibid* at 715.

<sup>674</sup> *Ibid*; Halsbury’s, Remedies, *supra* note 655 at para HCHR-123, “Section 52 remedies”.

<sup>675</sup> See e.g. *Schachter*, *supra* note 507 at 715-7.

regulations into constitutional compliance, or to introduce new regulations.<sup>676</sup> Delayed declarations are not entirely unproblematic; in *Charter* cases, they allows an existing set of laws or rules, which have been found to violate the *Charter*, to remain in force for a designated period of time, prolonging the rights violations.<sup>677</sup>

To prevent rights claimants from being subjected to an unconstitutional law on an ongoing basis, claimants may apply for interlocutory injunction.<sup>678</sup> When considering whether an injunction should be granted, the majority in *Harper v Canada*<sup>679</sup>, set out three considerations: (a) whether there is a serious issue to be tried<sup>680</sup>; (b) whether not granting an injunction would cause irreparable harm to the individual seeking the injunction; and, (c) the balance of convenience.<sup>681</sup> In *RJR-MacDonald*, the applicants sought interlocutory relief from the *Tobacco Products Control Regulations*<sup>682</sup> in addition to challenging the constitutional validity of the *TPCA*. In 1991, the Quebec Superior Court found the *TPCA* ultra vires Parliament and unconstitutional.<sup>683</sup> The respondent appealed to the Quebec Court of Appeal, and while waiting for the Court of Appeal's judgment, the applicant applied for interlocutory relief, permitting them to breach certain

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<sup>676</sup> See Chapter 3.

<sup>677</sup> *Schachter*, *supra* note 507 at 716.

<sup>678</sup> Halsbury's, Remedies, *supra* note 655 at para HCHR-123, "Section 52 remedies".

<sup>679</sup> *Harper v Canada*, 2000 SCC 57.

<sup>680</sup> *Ibid* [In *Harper*, the decision was related solely to whether an injunction previously granted related to a constitutional challenge should be stayed. The constitutional challenge had not been decided yet.]

<sup>681</sup> *Ibid* at para 4.

<sup>682</sup> SOR/93-389.

<sup>683</sup> *RJR-Macdonald (1991)*, *supra* note 54..

provisions of the *TPCA* for up to 60 days following the judgment.<sup>684</sup> Upon consideration of the three factors articulated in *Harper*, the majority found the “balance of inconvenience weighs strongly in favor of the respondent and is not offset by the irreparable harm that the applicants may suffer if relief is denied...[t]he public interest in health is of such compelling importance that the applications for a stay must be dismissed.”<sup>685</sup>

#### 4.9.2. Section 24(1) Remedies

Where section 52 is not engaged, section 24(1) of the *Charter* may be available. This may arise in instances where the statute or provision itself is not unconstitutional, but some action taken pursuant to it infringes a person’s *Charter* rights.<sup>686</sup> Section 24(1) remedies will rarely be available where a section 52 remedy is also sought. If a provision or statute is declared unconstitutional and struck down pursuant to section 52, there is no retroactive applicability of section 24(1) remedies. Similarly, where a declaration of invalidity is suspended, section 24(1) remedies will not be available.<sup>687</sup> Where section 24(1) is available, it provides a flexible remedial power, allowing individuals whose rights have been infringed to seek “such remedy as the court considers appropriate and just in the circumstances.”<sup>688</sup> The flexibility permits judges and courts to come up with appropriate remedies for each particular case. In choosing a remedy, the court’s decision

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<sup>684</sup> *RJR-Macdonald Inc. v Canada (Attorney General)*, [1994] SCJ No 17, 1 SCR 311 at page 319.

<sup>685</sup> *Ibid* at page 354.

<sup>686</sup> *Schachter*, *supra* note 507 at page 719

<sup>687</sup> *Ibid* at page 720 [“[t]o allow for s.24 remedies during the period of suspension would be tantamount to giving the declaration of invalidity retroactive effect.”]

<sup>688</sup> *Constitution*, *supra* note 14 at s 24(1).

is to be guided by the effectiveness of the remedy in vindicating *Charter* rights, respect for the separation of powers and the role of democratic bodies, realization of the limits on courts, including procedures and precedents, and fairness for all parties.<sup>689</sup> The remedy must also be sufficiently clear to ensure parties are able to comply following the decisions.<sup>690</sup>

Where a breach of legal rights has rendered a trial unfair, a stay of proceedings may be an appropriate remedy, but only following a full consideration of the social interest in the trial proceeding and other possible remedies that could correct the wrong.<sup>691</sup> In some situations, a declaration regarding the constitutional requirements of the legislation in question may be an appropriate remedy, and additionally allows the courts to address an issue while leaving sufficient room for the government to operate.<sup>692</sup> Where declaratory relief is insufficient, an injunction ordering a specific course of action may be appropriate, particularly where a constitutional problem of inaction relating to a positive obligation on the government is involved.<sup>693</sup> Where legislation severely effects an individual or individuals, despite generally being justified, those individuals may apply for an exemption from the offending legislation, though this remedy has been rejected in

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<sup>689</sup> *Doucet-Boudreau v Nova Scotia (Minister of Education)*, [2003] SCJ No 63, 3 SCR 3 at paras 55-9 [*Doucet-Boudreau*].

<sup>690</sup> *Ibid* at para 85.

<sup>691</sup> See e.g., *R v O'Connor*, [1995] SCJ No 98, 4 SCR 411; *R v Carosella*, [1997] SCJ No 12, 1 SCR 80; *R v Macdonnell*, [1997] SCJ No 42, 1 SCR 948.

<sup>692</sup> See e.g. *Mahe v Alberta*, [1990] SCJ No 19, 1 SCR 342; *Eldridge v British Columbia (Attorney General)*, [1997] SCJ No 86, 3 SCR 624, *Khadr v Canada (Prime Minister)*, [2010] SCJ No 3, 1 SCR 44.

<sup>693</sup> *Doucet-Boudreau*, *supra* note 689.



cases where doing so contradicts the legislative intent.<sup>694</sup> Damages may also be available where there is no section 52 claim possible, for example, in cases where state action against an individual results in a *Charter* breach.<sup>695</sup> Lastly, advanced costs may be awarded to a litigant who shows an inability to pay with no realistic funding options, a meritorious case, and the presence of issues of public importance.<sup>696</sup>

#### 4.10. Conclusion

Freedom of expression litigation typically proceeds in three parts. First, the court will determine whether the expression in question is protected by section 2(b). Advertising has been found to be expression protected by section 2(b) in numerous cases, although courts have stated that it will be easier to justify infringing commercial speech than other types of speech. Second, the court will determine whether the freedom has been infringed upon, either in purpose or effect. If both steps are satisfied, then the court will turn to a section 1 analysis to determine whether the infringement can be justified. The bulk of constitutional challenge analysis takes place in the section 1 analysis utilizing the *Oakes* test. The *Oakes* test asks whether the objective of the impugned legislation or provisions is pressing and substantial, whether the means of achieving the objective are rationally connected to the objective, whether the legislation infringes the right or freedom as little as possible, and whether the negative effects of the infringement are proportional to the benefits achieved by the legislative objective. The *Oakes* analysis is meant to be a

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<sup>694</sup> For example, in the case of mandatory minimum sentences. See *R v Ferguson*, [2008] SCJ No 6, 1 SCR 96; *Seaboyer*, *supra* note 615.

<sup>695</sup> Halsbury's, Remedies, *supra* note 655 at para HCHR-123, "Section 52 remedies".

<sup>696</sup> *R v Caron*, [2011] SCJ No 5, 1 SCR 78.

contextual exercise, with consideration of the context surrounding both the expression in question and the infringement. Additionally, courts afford a significant amount of deference to Parliamentary decision making, particularly where vulnerable populations are involved, or in cases of complex social issues. There are a variety of remedies available in *Charter* challenges, though a declaration of invalidity is most common. The purpose of this chapter was to provide a road map for the following chapter, which will provide an analysis of the three-part assessment to determine the constitutionality of the proposed advertising restrictions in the *Cannabis Act*.

## 5. Analysis of Bill C-45

### 5.1. Introduction

Licensed medical cannabis producers in Canada with plans to expand into the recreational market have already expressed an intent to challenge the advertising restrictions to be placed on recreational cannabis.<sup>697</sup> The purpose of this chapter is to determine whether or not a challenge would succeed, and to recommend any changes to bring the provisions into compliance with the *Charter*, where necessary. This analysis will utilize the framework for a section 2(b) challenge set out in the previous chapter, as well as the legal, social, and evidentiary context surrounding cannabis legalization discussed in the previous chapters. Part two will summarize the relevant statutory provisions of Bill C-45, the proposed *Cannabis Act*, including an interpretation of undefined, ambiguous, or vague phrases. Part three will examine the first step of a freedom of expression challenge, by determining whether the activity in question, advertising cannabis, is expression that is protected by section 2(b). Included in this section is a contextual analysis of the value of cannabis advertising, which will inform the section 1 analysis in Part five. Part four examines whether or not Bill C-45 infringes upon freedom of expression, either in purpose or in effect. Lastly, Part five contains a section 1 analysis of the advertising restrictions. Two aspects of the advertising restrictions are focused on: the general prohibition with exceptions, and the prohibition

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<sup>697</sup> See e.g. Sunny Freeman, “Licensed marijuana producers lobbying government to allow pot advertising in hazy new legislation” (April 14, 2017) online: Financial Post <<http://business.financialpost.com/investing/marijuana-stocks-lose-ground-as-new-federal-government-legislation-remains-hazy-on-details/wcm/4369922c-b256-4c7f-be9d-41063a11f0ae>>.

on sponsorship of events or naming facilities.<sup>698</sup> In sum, this chapter determines that as a whole, it is clear that Parliament has made a sincere effort to infringe upon freedom of expression as little as possible, however, there are a few aspects that may be particularly challenging to justify. Specifically, the prohibition on point of sale promotion and the prohibition on sponsorship contained in sections 17(4), 21, and 22 should be more carefully tailored to ensure that they do not capture more than intended.

## 5.2. The Cannabis Act

The advertising provisions in Bill C-45 loosely follow the recommendations of the Task Force, with a few changes. The Task Force recommended applying “comprehensive restrictions to the advertising and promotion of cannabis and related merchandise by any means...[and] allowing limited promotion in areas accessible to adults.”<sup>699</sup> Bill C-45 contains a general prohibition on promoting<sup>700</sup> cannabis or cannabis accessories, including communications regarding price and distribution, promotions that are appealing to young persons, the use of testimonials or endorsements, the depiction of characters,

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<sup>698</sup> It is possible that other sections may be challenged, however, for the sake of brevity I have selected these two to focus on. For example, the prohibition on false promotion is unlikely to be challenged, and even if it was, it is unlikely to be successful, but the prohibition on using foreign media could possibly be challenged. Additionally, I think that the provision prohibiting the use of certain terms, expressions, logos, symbols, or illustrations could also be challenged, but without the accompanying regulations there is not enough information to provide a meaningful analysis of whether the restrictions represent a constitutionally valid limit on freedom of expression. Lastly, the prohibition on the publication of industry-sponsored scientific research could potentially be challenged, but the language is very similar to the language in the *Tobacco Act*, which was interpreted by the SCC in *JTI-MacDonald* in a way that brought it into compliance. It is likely that the same would be the case with Bill C-45.

<sup>699</sup> Task Force Report, *supra* note 373 at 20.

<sup>700</sup> Bill C-45, *supra* note 37 at s 2(1) [Promote is defined as “to promote, in respect of a thing or service, means to make, for the purpose of selling the thing or service, a representation — other than a representation on a package or label — about the thing or service by any means, whether directly or indirectly, that is likely to influence and shape attitudes, beliefs and behaviours about the thing or service.”]

whether real or fictional, and lifestyle advertising.<sup>701</sup> There is an exemption from the restrictions on promoting cannabis for ‘literary, dramatic, musical, cinematographic, scientific, educational, or artistic work, production or performance.’<sup>702</sup> There are also exemptions for reports, commentaries, and opinions, promotions between those authorized to produce, sell, or distribute cannabis, and similarly, between those who sell or distribute cannabis accessories or that provide a service relating to cannabis.<sup>703</sup> Bill C-45 is less stringent than the Task Force recommendations in that it permits informational or brand-preference promotion in limited circumstances. Subsections 17(2) and (3) of Bill C-45 permit the promotion of cannabis and cannabis accessories or services by means of informational or brand-preference promotion subject to the following conditions: the communication is addressed and sent to an individual who is at least 18 years old and is identified by name; the promotion is in a place where people under the age of 18 are not permitted; the promotion is via telecommunication and reasonable steps have been taken to ensure the promotion is not accessible by persons under the age of 18; or, the promotion is in a prescribed place or manner.<sup>704</sup> Subsections 17(4) and (5) permit promotion of cannabis and cannabis accessories and services at the point of sale, but only through indication of availability, price, or availability and price.<sup>705</sup> Bill C-45 also includes an exemption for the promotion of cannabis, cannabis accessories or services by

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<sup>701</sup> *Ibid* at s 17.

<sup>702</sup> *Ibid* at s 16.

<sup>703</sup> *Ibid*.

<sup>704</sup> *Ibid* at s 17(2) [the place and manner exemptions will be prescribed by regulations which have not yet been drafted].

<sup>705</sup> *Ibid* at ss 17(4)-(5).

displaying a brand element on items that are not cannabis or cannabis accessories, so long as the item is not associated with young persons, is not appealing to young persons, and is not associated with a way of life such as glamour, recreation, excitement, vitality, risk or daring.<sup>706</sup> Sections 21 and 22 prohibit the display of a brand element of cannabis, or the name of a person or corporation that produces, sells, or distributes cannabis or cannabis accessories<sup>707</sup>, or provides a service related to cannabis via sponsorship of a person, entity, event, activity, or facility, or to display the same on a facility.<sup>708</sup> Bill C-45 also prohibits publishing, broadcasting, or otherwise disseminating any promotion that is prohibited on behalf of another person, except for imported publications.<sup>709</sup> Additionally, those who sell cannabis or cannabis accessories are prohibited from offering or providing cannabis or cannabis accessories, or the right to participate in a contest, for free or in consideration of the purchase of cannabis or a cannabis accessory.<sup>710</sup> There are several aspects of the advertising restrictions that require interpretation before undertaking a freedom of expression analysis. They will be discussed in the next section.

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<sup>706</sup> *Ibid* at s 17(6).

<sup>707</sup> *Ibid* at s (2)-(3) [cannabis accessory is defined as “(a) a thing, including rolling papers or wraps, holders, pipes, water pipes, bongs and vaporizers, that is represented to be used in the consumption of cannabis or a thing that is represented to be used in the production of cannabis; or (b) a thing that is deemed under subsection (3) to be represented to be used in the consumption or production of cannabis.” Subsection (3) states “[f]or the purposes of the definition *cannabis accessory*, a thing that is commonly used in the consumption or production of cannabis is deemed to be represented to be used in the consumption or production of cannabis if the thing is sold at the same point of sale as cannabis

<sup>708</sup> *Ibid* at ss 21-22.

<sup>709</sup> *Ibid* at s 23.

<sup>710</sup> *Ibid* at s 24.

### 5.2.1. Interpretation

The modern principle of statutory interpretation that has been accepted and endorsed by the SCC is that “the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.”<sup>711</sup> Additionally, as a federal law, Bill C-45 must be interpreted in accordance with the *Interpretation Act*<sup>712</sup>. Section 12 of the *Interpretation Act* requires that courts use the purposive method of statutory interpretation, which means the statute must be interpreted in a manner that is consistent with its intended purpose.<sup>713</sup> There are several aspects of the promotion provisions that require interpretation. Interpretation of the phrases brand characteristic, character, reasonable steps, and appealing to youth will all be discussed here.

#### 5.2.1.1. Brand Characteristic

Brand-preference promotion is defined as the “promotion of cannabis by means of its brand characteristics, promotion of a cannabis accessory by means of its brand characteristics or promotion of a service related to cannabis by means of the brand characteristics of the service”<sup>714</sup>, however neither brand characteristic, nor characteristic is defined in the bill. Turning to the ordinary meaning, characteristic is defined in the Oxford English Dictionary as “a feature or quality belonging typically to a person, place,

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<sup>711</sup> *Re Rizzo & Rizzo Shoes Ltd*, [1998] SCJ No 2, 1 SCR 27 at para 21.

<sup>712</sup> RSC 1985, c I-21 [*Interpretation Act*].

<sup>713</sup> *Ibid* [“[e]very enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects”].

<sup>714</sup> Bill C-45, *supra* note 37 at s 2(1).

or thing and serving to identify them.”<sup>715</sup> Similarly, Merriam-Webster defines characteristic as “a distinguishing trait, quality, or property.”<sup>716</sup> Brand element, on the other hand, which is present in sections 16, 17, 20, 21, 22, and others, is defined in Bill C-45 as “a brand name, trademark, tradename, distinguishing guise, logo, graphic arrangement, design or slogan that is reasonably associated with, or that evokes, (a) cannabis...or (b) a brand of any cannabis.”<sup>717</sup> It would be reasonable to presume that brand element is intended to be synonymous with brand characteristic, as the definition of element is similar to characteristic.<sup>718</sup> However, this interpretation is contradictory to the presumption of consistent expression, which states that the use of a different word implies a different meaning.<sup>719</sup> Based on that interpretation principle, it can be assumed that brand characteristic is intended to mean something different than brand element. The specific definition of brand element, in comparison to the broader ordinary meaning of characteristic, suggests that brand characteristic should be interpreted more broadly than brand element.

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<sup>715</sup> Oxford English Dictionary, sub verbo “characteristic” online: <<http://en.oxforddictionaries.com/definition/characteristic>>.

<sup>716</sup> Merriam-Webster, *sub verbo* “characteristic” online: <<https://www.merriam-webster.com/dictionary/characteristic>>.

<sup>717</sup> Bill C-45, *supra* note 76 at s 2(1)

<sup>718</sup> Oxford English Dictionary, *sub verbo* “element” online: <<https://en.oxforddictionaries.com/definition/element>>. [Element is defined as “[a]n essential or characteristic part of something abstract”, and “[t]he rudiments of a subject”, which is similar to the definition of characteristic].

<sup>719</sup> See e.g., *R v Trang*, 2001 ABQB 106 at para 21.



### 5.2.1.2. Character

Character is not defined in the bill, and it was not interpreted in *RJR-MacDonald* or *JTI-MacDonald*. However, it could have several meanings. Indeed, Merriam-Webster dictionary has several definitions for character, including “a conventionalized graphic device placed on an object as an indication of ownership, origin, or relationship; a graphic symbol; a magical or astrological emblem; the alphabet; style of writing or printing; and, a symbol.”<sup>720</sup> It seems unlikely that Parliament intended for such a comprehensive interpretation of the word character, as this would leave no means for advertisers to advertise, rendering the promotion provisions meaningless. Instead, based on the other categories included in this provision, it is more likely that Parliament intended for the word character to be interpreted more along the lines of the definition provided by Oxford English Dictionary: “a person in a novel, play, or film, or a part played by an actor.”<sup>721</sup> This definition may be too narrow to capture some of the characters that Parliament intended to capture, particularly taking into consideration the objective of protecting children. Parliament likely intended for the phrase “character” to include not only a person in a novel, play, film, but also cartoons and mascots, which is more aligned with the definition for character provided by The Free Dictionary: “a person portrayed in an artistic piece, such as a drama or novel; a person or animal portrayed with a personality in comics or animation.”<sup>722</sup> This broader definition is likely more accurate

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<sup>720</sup> Merriam-Webster Dictionary, *sub verbo* “character”, online: <<https://www.merriam-webster.com/dictionary/character>>.

<sup>721</sup> Oxford English Dictionary, *sub verbo* “character” online: <<https://en.oxforddictionaries.com/definition/character>>.

<sup>722</sup> The Free Dictionary, *sub verbo* “character” online: <<http://www.thefreedictionary.com/character>>.

in consideration of the purpose of the provisions, which is to protect children. In utilizing a purposive approach, it is likely a court would read the word character as broader than the definition provided by the Oxford English Dictionary, to include mascots and cartoons.

### 5.2.1.3. Reasonable Steps

It is unclear upon reading subsections 17(2) and 17(3) what would be considered “reasonable steps” for ensuring that youth cannot access cannabis promotions. A similar issue was encountered in *JTI-MacDonald*, where the Court pointed out that the phrase “on reasonable grounds” was problematic.<sup>723</sup> Ultimately, the Court determined that the common meaning of “on reasonable grounds” was “reasonable grounds to believe that the advertising in question falls within the prohibition.”, an objective standard with clear legal content.<sup>724</sup> However, this does not offer much assistance for determining what would or would not be considered “reasonable steps” to ensure cannabis promotion is not accessible by minors. For example, would putting an age-gate on a cannabis retailers website be sufficient as a reasonable step to preventing youth from accessing the promotion materials? Age-gates require the user to self-report their date of birth, or age, before they can view a specific website. They are commonly used in the tobacco and alcohol industries, despite the fact that the evidence is clear that they are not effective for preventing minors from viewing their advertisements.<sup>725</sup> Notwithstanding the evidence to

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<sup>723</sup> *Supra* note 79 at para 81-82; *Tobacco Act*, *supra* note 600 at s 22(3).

<sup>724</sup> *JTI-MacDonald*, *supra* note 79 at para 82.

<sup>725</sup> Jennifer A. Jensen et al, “Availability of tobacco to youth via the internet” (2004) 291:15 *JAMA* 1837; Kurt M. Ribisl, Rebecca S. Williams & Annie E. Kim, “Internet Sales of Cigarettes to Minors” (2003)

the contrary, the Federal Trade Commission and the Food and Drug Administration in the United States still recommend that alcohol and tobacco vendors utilize age-gates, giving the perception that putting up an age-gate would be considered a reasonable step.<sup>726</sup>

The prevailing rule of statutory interpretation provides some guidance in determining what is meant by “reasonable steps.” Nowhere else in the legislation itself or the debates leading up to the bill is there a discussion about what amounts to reasonable steps to preventing youth from accessing advertisements. Moreover, the provision applies to all promotion via telecommunication, which includes television, telephone, broadcasting, and the internet, and each of those mediums would presumably require different reasonable steps to be taken to prevent youth from being exposed to the promotion. The phrase reasonable steps suggest that actual outcome is not important in evaluating whether reasonable steps were taken, just that some steps were taken. The vagueness of this provision makes it difficult for those permitted to advertise to know whether they are satisfying the requirement of taking reasonable steps or not. Furthermore, transitioning cannabis from an illicit product to a legal product may influence what is considered reasonable, further confusing the issue.

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290:10 *JAMA* 1356; Rebecca S. Williams & Kurt M. Ribisl, “Internet Alcohol Sales to Minors” (2012) 166:9 *Archives of Pediatrics & Adolescent Medicine* 808.

<sup>726</sup> Federal Trade Commission, “*Self-Regulation in the Alcohol Industry: Report of the Federal Trade Commission*” (March 2014) online: <<https://www.ftc.gov/system/files/documents/reports/self-regulation-alcohol-industry-report-federal-trade-commission/140320alcoholreport.pdf>>; United States Food and Drug Administration, “Advertising & Promotion” (May 17, 2017) online: <<https://www.fda.gov/TobaccoProducts/Labeling/MarketingandAdvertising/>>; Sandra C. Jones et al, “Internet filters and entry pages do not protect children from online alcohol marketing” (2014) 35:1 *Journal of Public Health Policy* 75.

Another useful principle of statutory interpretation for this phrase is that Parliament does not speak in vain.<sup>727</sup> This principle means that Parliament is presumed to have a purpose for each provision included in a statute, and to avoid superfluous or meaningless language.<sup>728</sup> Therefore, no provision should be interpreted in a way that renders it surplusage.<sup>729</sup> Therefore, the phrase “reasonable steps” must be interpreted to mean something above and beyond what steps are already required by the legislation. To do otherwise would render the phrase reasonable steps, and the provision that contains it, meaningless. Additionally, reading “reasonable steps” with the rest of the provision, which states that reasonable steps must be taken to “ensure that the promotion cannot be accessed by a young person”, implies that persons responsible for promotion cannot simply take one step that will stop some youth from accessing the promotion, but that advertisers will be held to a higher standard.

Another tool useful for statutory interpretation is to look at other legislation that uses the same words or phrases. The statutory interpretation maxim, *in pari materia*, states that two statutes on the same subject matter may be interpreted in the same way. This is further supported by the *Federal Interpretation Act*.<sup>730</sup> However, this principle does not mean that a definition can be imported from one statute to another; other factors must be considered, such as the purpose of the provision.<sup>731</sup> Furthermore, *in pari materia* does not

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<sup>727</sup> *Attorney General of Quebec v Carrières Ste-Thérèse Ltée*, [1985] 2 SCR 831 at 838 [*Carrières*].

<sup>728</sup> See e.g. *Medovarski v Canada*, 2005 SCC 51 at paras 31-38; *R v Plummer*, [2006] OJ No 4530 (CA) at para 19.

<sup>729</sup> *R v Proulx*, 2000 SCC 61 at para 25

<sup>730</sup> *Interpretation Act*, *supra* note 727 at s15(2)(b).

<sup>731</sup> *Claridge Development (Hawthorne) Ltd v British Columbia*, 2000 BCCA 104 at para 11.

replace the presumption that the ordinary meaning of the phrase should be imported.<sup>732</sup>

Just because two statutes are similar, does not automatically permit the usage of a definition from one statute in the other, or vice versa. For example, in *Claridge Development (Hawthorne) Ltd v British Columbia*, Duff J held that relying upon *in pari materia* was inappropriate after consideration of the Legislature’s intention to utilize the ordinary meaning of the word in question, parcel.<sup>733</sup> Additionally, Duff J noted that the word had been defined in other statutes, signaling that, with the lack of definition, the Legislature intended for the ordinary meaning to be used.<sup>734</sup> Unfortunately, in this case, the plain meaning of “reasonable steps” is not very helpful, as reasonableness varies depending on the context. The phrase “reasonable steps” is not defined in dictionaries, or in case law. Importing the plain meaning of reasonable offers little assistance also. Merriam-Webster defines reasonable as “being in accordance with reason; not extreme or excessive.”<sup>735</sup> This definition is hardly precise enough to assist in the interpretation of the relevant provisions.

The phrase “reasonable steps” has been discussed by courts in relation to the offences of child internet luring and sexual assault. Though the subject matter is not similar to Bill C-45, the purpose of both statutes is to protect children, so it may still be persuasive. In *R v Morrison*<sup>736</sup>, Gage J of the Ontario Court of Justice stated “[t]he ‘reasonable steps’

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<sup>732</sup> *Ibid* at para 20.

<sup>733</sup> *Ibid* at para 21.

<sup>734</sup> *Ibid* at para 223.

<sup>735</sup> Merriam-Webster, *sub verbo* “reasonable” online: <<https://www.merriam-webster.com/dictionary/reasonable>>.

<sup>736</sup> *R v Morrison*, 2014 ONCJ 673.

requirement...does nothing more than require the accused to demonstrate a degree of care in ensuring that he was not dealing with a minor.”<sup>737</sup> In *R v Ghotra*<sup>738</sup>, Durno J of the Ontario Superior Court of Justice stated that reasonable steps “does not require active steps on the part of the accused to ascertain the other person’s age. It requires the accused have information upon which it would be reasonable to conclude the other person was an adult. It does not require that all reasonable steps be taken.”<sup>739</sup> He went on to say “[r]easonable steps’ does not require the accused to have taken active steps nor to have asked questions. It requires him or her to take the steps reasonable people possessed of the same information as the accused would to ascertain the other person’s age.”<sup>740</sup> In consideration of all the above reasons, ‘reasonable steps’ in the context of Bill C-45 does not mean that all steps need to be taken by the advertiser to prevent youth from accessing the promotion, but that some steps must be taken.

Additionally, had Parliament intended for every reasonable step to be taken, they would have used the phrase “all reasonable steps” instead of “reasonable steps”. In *R v Barton*, the Alberta Court of Appeal stated that “[r]easonable steps depend on the circumstances and they may be as many and varied as the cases in which the issue arises. That said, we reject the view that reasonable steps can equal no steps whatsoever.”<sup>741</sup> Leaving the meaning of ‘reasonable steps’ fluid also allows for its meaning to change over time,

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<sup>737</sup> *Ibid* at para 11 [it is further qualified that the degree of care is one that the accused is capable of giving].

<sup>738</sup> *R v Ghotra*, 2016 ONSC 1324.

<sup>739</sup> *Ibid* at para 139.

<sup>740</sup> *Ibid* at para 153.

<sup>741</sup> *R v Barton*, 2017 ABCA 216 at para 259.

allowing for technological advances or new evidence to inform what would be considered reasonable steps in the context of cannabis advertising. This is particularly relevant given the changing nature of advertising towards the use of smart phones, social media, and location-based advertising for product promotions. Based on all of this, “reasonable steps” would require the person responsible for advertising to take some steps that a reasonable person in their position, having all the same information and knowledge of the advertiser, would take to ensure, as much as is possible, that the promotion will not be accessible by minors.

#### 5.2.1.4. Appealing to Young Persons

The phrase appealing to young persons appears in subsections 17(1) and 17(6) of Bill C-45. As mentioned briefly in the previous chapter, the phrase “appealing to young persons” was interpreted in *JTI-MacDonald*.<sup>742</sup> The Court grappled over whether the word “appealing” was meant to be read as an adjective, or a verb. The Court stated:

*In the English version, “appealing” could arguably be read as a verb, in the sense of “making an appeal to”, although its adjectival sense of something that is “attractive [and] of interest” appears to be more natural (Canadian Oxford Dictionary (2nd ed. 2004), at p. 61). In French, the phrase “attrayante” is clearly adjectival — the question is whether the advertisement could be “attrayante” or appealing to young persons. I conclude that “appealing” must be read as an adjective in English as well.<sup>743</sup>*

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<sup>742</sup> *Tobacco Act*, *supra* note 600 at s 22(3).

<sup>743</sup> *JTI-MacDonald*, *supra* note 79 at para 85

Next, the Court grappled with the scope and breadth of what types of advertising might be captured by the phrase “appealing to young persons”. On this point, the Court held that “appealing to young persons” was not meant to include advertising that is primarily appealing to adults, but could be appealing to young persons, but rather that the exception was intended to capture advertising that is primarily appealing to young persons.<sup>744</sup> The Court concluded that the provision containing the phrase ‘appealing to young persons’ “must be read as creating a ban for information and brand-preference advertising that could be appealing to a particular segment of society, namely young people...as distinguished from the general adult population.”<sup>745</sup> The reasoning for this finding was that the purpose of s 22(3) was to protect a specific subset of the population. To read it as inclusive of all advertising would render the section permitting information and brand-preference advertising meaningless. Additionally, the words “young persons” must have been included for a specific purpose, and to interpret the provision as extended to all persons would render the phrase “young persons” meaningless, which is contrary to the rule that the legislator does not speak in vain.<sup>746</sup> Therefore, in following the precedent set in *JTI-MacDonald*, “appealing to young persons” in the context of Bill C-45 is likely be interpreted in the same manner, that its purpose is to target advertising that is specifically appealing to young persons, not advertising directed at adults that could possibly be construed as appealing to young persons. The remainder of this chapter will consider whether these provisions are a justified infringement on freedom of expression.

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<sup>744</sup> *Ibid* at para 86.

<sup>745</sup> *Ibid* at para 88

<sup>746</sup> *Ibid* at para 87, citing *Carrières*, *supra* note 727.



### 5.3. Is it Expression?

The first step in a freedom of expression challenge is to determine whether the activity in question is protected by section 2(b). As discussed in Chapter 4 it is well established that advertising is a protected form of expression. Nevertheless, it is worthwhile to consider why cannabis advertising is worth protecting.<sup>747</sup> Determining how cannabis advertising promotes (or obstructs) the rationales underlying freedom of expression informs the justification threshold for infringing upon it. This is consistent with the approach proposed in *Hunter*, where the court held that it must interpret each right in light of the interests it protects.<sup>748</sup> This approach was confirmed in *Keegstra* where Dickson CJC applied a contextual approach, finding that not all forms of expression are closely linked to the rationales underlying freedom of expression.<sup>749</sup> Delineating between high and low value expression has no bearing on whether the expression in question is constitutionally protected, instead it speaks only to what standard of justification the Court will hold the infringement to.

Quantifying the value of cannabis advertising can be ascertained through an analysis of how closely related cannabis advertising is to the values that underlying freedom of expression discussed in chapter 5: truth-seeking, democracy, and individual self-realization.<sup>750</sup> Cannabis advertising has strong connections to the values underlying the

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<sup>747</sup> The test set out in *Montréal*, *supra* note 524, is not considered here, as this thesis is analyzing restrictions on content of expression, not place of expression.

<sup>748</sup> *Hunter*, *supra* note 501 at 155-6.

<sup>749</sup> *Keegstra*, *supra* note 44 at paras 86-94.

<sup>750</sup> Autonomy and individual self-realization are often used interchangeably.

right, and should be subjected to a high threshold to justify infringement. However, whether or not listener's rights are advanced as part of the argument could have a significant effect on the outcome. The connection of cannabis advertising to each of the rationales underlying freedom of discussion will be discussed in turn.

### 5.3.1. Truth Seeking

The first value underlying freedom of expression and the one that cannabis advertising is most closely linked to, is truth-seeking. As mentioned in the previous, the truthfulness of the message, the likeliness that the expression will elicit rational responses, and the openness of the marketplace to which expression contributes are all relevant factors in determining the connection of the expression in question to the rationale of truth seeking. Restricting advertising of cannabis fails to promote truth-seeking by limiting the informational market. If Canadians cannot hear information via advertisements, they can only receive information about recreational cannabis through alternative channels, most likely through word-of-mouth, the media, or via the internet. These channels are much more likely to disseminate incorrect, or biased information about cannabis, increasing the likelihood that those exposed to such messaging will misuse cannabis, or develop an incorrect perception of the safety of cannabis.<sup>751</sup> For example, a study that analyzed

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<sup>751</sup> See Patricia Cavazos-Rehg et al, "Characterizing the Followers and Tweets of a Marijuana-Focused Twitter Handle" (2014) 16:6 *Journal of Medical Internet Research* e157 [highlighting the far reach of a pro-cannabis twitter handle][Cavazos-Rehg et al]; See also, Charlotte Meredith, "'Marijuana Overdoses Kill 37 in Colorado On First Day of Legalization': Daily Currant Hoax Story Causes Confusion" *Huffington Post UK* (23 January 2014) online: <[http://www.huffingtonpost.co.uk/2014/01/04/daily-currant-marijuana-hoax\\_n\\_4540193.html](http://www.huffingtonpost.co.uk/2014/01/04/daily-currant-marijuana-hoax_n_4540193.html)>; Amanda Razani, "Chatbot can answer all of your cannabis questions" *Readwrite* (12 May 2016) online: <<https://readwrite.com/2016/05/12/chatbot-can-answer-cannabis-questions-vt4/>> [On the creation of Elevator, a chatbot specifically designed to answer questions pertaining to cannabis in response to the large amount of misinformation about cannabis]; Leslie Bocskor, "The Cannabis Industry is Afflicted by 'Fake News' Too" *Civilized* (2 May 2017) online: <<https://www.civilized.life/articles/leslie-bocskor-cannabis-industry-fake-news/>>.

tweets from a popular pro-cannabis twitter handle, with over 1 million followers (primarily under the age of 19) found that 82% of the tweets were positive about cannabis, while only 0.31% appeared negative, inundating followers with positive messaging regarding cannabis while ignoring the harms.<sup>752</sup> Furthermore, in a survey of Canadian youth, participants cited the media and the internet as major influencers of their understanding of cannabis.<sup>753</sup>

The ability to share product information is particularly important with a heterogeneous product such as cannabis. Over 500 different constituents have been identified in cannabis.<sup>754</sup> These components are not equally present in all strains, and therefore different strains can have a variety of effects on users. If sellers are unable to share information about the specific properties of the strains they sell that are supported by evidence, it makes it difficult for consumers to purchase the products that are most suitable for their needs, or to predict the outcome of using specific products. Ultimately, while restrictions on cannabis advertising may lower consumption levels, it may also prevent Canadians who do choose to use cannabis from using from doing it as safely as possible. For example, if a consumer wanted to purchase cannabis, but had never used cannabis before, then it is much safer for them to use a product with lower cannabinoid levels.<sup>755</sup> If they are unable to determine the cannabinoid levels by viewing the products,

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<sup>752</sup> Cavazos-Rehg et al, *supra* note 751 at 5.

<sup>753</sup> Canadian Centre on Substance Abuse, “Canadian Youth Perceptions on Cannabis” (January 2017) online: <<http://www.ccsa.ca/Resource%20Library/CCSA-Canadian-Youth-Perceptions-on-Cannabis-Report-2017-en.pdf>>.

<sup>754</sup> ElSohly & Gul, *supra* note 84 at 20.

<sup>755</sup> See Chapter 1.

or if retailers cannot label their products as suitable for novice users, then users may end up selecting and using a product that is inappropriate for them. Similarly, even just being aware of the common side effects of a specific strain could prove useful to consumers. If a retailer was able to label a product as commonly causing dry mouth, for example, this information is useful to the consumer, and could help to prevent health anxiety in the event that the side effects do occur. Not being able to display common side effects is also antithetical to the purpose of promoting safety, as the absence of such information may be construed by potential consumers to mean that there are no side effects, which is not the case.

Furthermore, due to the complexity of cannabis and its long history with prohibition, there is still a lot that is unknown or unsettled about the substance. As new scientific information becomes available, producers, retailers and other industry players need to be able to share that information with potential consumers. The unique properties of this substance, combined with the complex social and cultural factors associated with it make it vital that information can flow freely, so that misconceptions can be dispelled and emerging research can be shared with those it will affect. The prevalence of misinformation on cannabis is immense. Even Parliament falls prey to it. A review of House of Commons debates reveals that many elected officials believe and rely upon information about cannabis that has long been disproven, or is supported by flawed evidence. For example, on June 1, 2017, The Honorable Gérard Deltell of the Conservative Party of Canada stated “Why is it dangerous to legalize cannabis? Because it is a gateway drug. Cannabis can directly kill brain cells...and they do not

regenerate.”<sup>756</sup> This is problematic because cannabis has not been proven to kill brain cells, and in fact, may even be neuroprotective, and the gateway theory has been widely dispelled.<sup>757</sup>

While it may be possible for individuals to seek out information on their own, in order to promote safe and healthy consumption of cannabis the information should be easily available, rather than possible to access with some difficulty. While advertising restrictions may not entirely impede a retailer’s ability to share information, the restrictions will make it more difficult to access. Additionally, as misleading or false advertising is prohibited, allowing cannabis retailers and producers to share information ensures that the information is regulated to some degree. Information shared on the internet by lay citizens, medical professionals, and other individuals or organizations is entirely unregulated and they are not responsible for the consequences of those who take their information at face value.

### 5.3.2. Democracy

Democracy is another rationale that underlies the Charter’s protection of freedom of expression. Though it is not necessary to demonstrate a specific type of expression’s ties to all the rationales for protecting freedom of expression, cannabis advertising can be linked to the remaining two rationales, though perhaps not as strongly. Advertising

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<sup>756</sup> HOC Debate No 185, *supra* note 298 at 11922 [in Chapter 1, the validity of the gateway theory was discussed in great detail. Additionally, there is no evidence that cannabis destroys brain cells, and in fact, as alluded to in Chapter 1, there is some evidence that cannabis is neuroprotective. Additionally, the Honourable Member compared cannabis to alcohol, stating “Alcohol does affect the brain, but it does not kill brain cells”, in an attempt to vilify cannabis as more harmful than alcohol, even though Lachenmeier and Rehm, *supra* note 11 found alcohol to be exponentially more harmful than cannabis.

<sup>757</sup> See section 2.7.6.7.

cannabis may not be as closely related to democracy as political speech, however, it is more closely related than other types of commercial speech, such as advertising directed at children. Cannabis has a distinctly political element. Advocates have been fighting for access to medical and recreational cannabis for decades, and the fight will not stop upon legalization. Future issues that will need to be resolved include cannabis use in the workplace, private and public health insurance coverage of cannabis, and cannabis use and operating motor vehicles, to name a few. In this case, the line between commercial and political speech becomes a little less clear, particularly where you have employees or management of a cannabis producer or retailer promoting a specific political stance. For example, would lobbying for national coverage of medical cannabis by an investor in a cannabis producer be considered political or commercial speech? If commercial speech is defined as coming from someone who stands to earn a profit from the speech in question, then that definition will be met, but there is also a clear political element to that speech. While the relationship between cannabis advertising and democracy is not as strong as to the other rationales, a strong connection to all rationales is not required to require a high standard of justification.

### 5.3.3. Individual Self-Realization

Lastly, advertising cannabis promotes individual self-realization and autonomy, both from the perspective of the advertiser, and the consumer. Many of the arguments that pertain to truth-seeking are also relevant to autonomy, and will not be reproduced here.

Autonomy is defined as “freedom from external control or influence; independence.”<sup>758</sup> If retailers, producers, and other actors in the legal cannabis industry are not allowed to disseminate information to individuals about the properties and quality of their product or their facilities, individuals cannot be truly autonomous in their decision whether to use cannabis or not, or, if they do decide to use cannabis, which product to use. Censorship does not promote autonomy, and disrespects an individual’s right to receive and assess the messages of others as they see fit. Censoring cannabis advertising makes it difficult for individuals to develop or change their opinions and perspectives as new information becomes available. It also impedes socially-driven change about the value of cannabis in society. Additionally, advertising promotes consumer autonomy by allowing legal retailers, producers, and others permitted to advertise cannabis to differentiate themselves in a variety of ways, including but not limited to: growing methods, products used on the plants, environmental stewardship, sustainable business practices, self-imposed production standards, craftsmanship, innovation, and treatment of employees. Making this information available to consumers allows them to use their purchasing power to support the organizations they wish to. In sum, the ability to advertise cannabis has a strong connection to the values underlying freedom of expression, particularly to truth-seeking and individual self-fulfilment, if it is limited to purely informational promotion, and should be subjected to a high justification threshold to be lawfully infringed. The next section will look at whether Bill C-45 infringes upon freedom of expression, either in purpose or effect.

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<sup>758</sup> Oxford English Dictionary, *sub verbo* “autonomy” online: <  
<https://en.oxforddictionaries.com/definition/autonomy>>.

#### 5.4. Is there an Infringement

Based on the past jurisprudence<sup>759</sup>, it is likely that the Attorney General will concede that Bill C-45 infringes upon freedom expression, while maintaining that it is a justified infringement. This assumption is supported by the *Charter* Statement released by the Department of Justice in 2017 following the introduction of Bill C-45, stating “[t]he restrictions on promotion, packaging, and labelling would limit the right to freedom of expression.”<sup>760</sup> If that is not the case, there is little argument to support the notion that the relevant provisions in Bill C-45 do not infringe upon the right to freedom of expression, both in purpose and effect. Recall that to meet this step, the government act must restrict the content of expression or the form of expression tied to content.<sup>761</sup> It is clear that the intent, or purpose, of the promotion provisions in Bill C-45 is to limit advertising, therefore meeting the requirement of infringing freedom of expression in purpose. There is no information to suggest that the government is actually aiming to control only the physical consequences of cannabis advertising, which would not be sufficient to meet this step.<sup>762</sup> While highly unlikely, if a court deems that the provisions of an act do not infringe freedom of expression in purpose, it may still be argued that they infringe freedom of expression in effect. To do so, a plaintiff must show that a meaning being conveyed can be identified and related to the rationales underlying freedom of

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<sup>759</sup> See e.g. *JTI-MacDonald*, *supra* note 79.

<sup>760</sup> Department of Justice, *Bill C-45: An Act Respecting Cannabis and to Amend the controlled Drugs and Substances Act, the Criminal Code and other Acts* “Freedom of expression (section 2(b))” (May 29, 2017) online: <<http://www.justice.gc.ca/eng/csj-sjc/pl/charter-charte/c45.html>>.

<sup>761</sup> *Irwin Toy*, *supra* note 519 at para 49.

<sup>762</sup> *Ibid.*



expression.<sup>763</sup> Again, it is clear that cannabis advertising, regardless of the medium or the specific content, seeks to convey a meaning, whether that is categorized as product information, service availability, or some other meaning. As shown above, should the analysis progress to this step, a plaintiff will likely be able to successfully argue that cannabis advertising has at least some relation to the values underlying freedom of expression.

## 5.5. Section 1 Analysis

Having determined that the cannabis promotion provisions in Bill C-45 infringe upon freedom of expression, the next step is to determine whether the provisions are saved by section 1. Recall that section 1 of the *Charter* permits government infringement on rights and freedoms, provided the infringement can be “demonstrably justified in a free and democratic society.”<sup>764</sup> Having determined that cannabis advertising is closely linked to the values underlying the freedom, and is therefore more valuable than certain types of expression, such as tobacco advertising or hate speech, but less valuable than political speech<sup>765</sup>, it follows then that it will not be subjected to the high standard of justification afforded to political speech, or to the low standard of justification, which was the case in *JTI-MacDonald*.<sup>766</sup> As noted in chapter 1, if cannabis is categorized as harmful, that may provide another ground for lowering the justification threshold, as was the case in *JTI-MacDonald*. Whether or not cannabis is harmful was discussed thoroughly in chapter 1,

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<sup>763</sup> *Ibid* at para 55.

<sup>764</sup> *Supra* note 14.

<sup>765</sup> See section 5.3.1., 5.3.2, and 5.3.3.

<sup>766</sup> *Supra* note 79 at para 47.

with the conclusion that there is not enough research to definitively categorize cannabis as inherently harmful or non-harmful, and the research that does exist is flawed for many reasons. For example, research that uses specific strains, methods of administration, or doses cannot be extrapolated to other strains, methods of administration, or doses. Consequently, the cannabis industry will have many opportunities to challenge or undermine evidence that is submitted as part of an attempt to prove the harmfulness of cannabis. In this respect, cannabis differs from tobacco, where the harm of tobacco use has been widely accepted.<sup>767</sup> Additionally, unlike tobacco, there is research that establishes the benefits of cannabis and that it can be used safely. Therefore, the potential harmfulness of cannabis is likely insufficient to lower the section 1 justification threshold to the same level as the court did in *JTI-MacDonald*. The next section will begin with a section 1 analysis of section 17, followed by a section 1 analysis of sections 21 and 22.

### 5.5.1. Section 17

Section 17 of Bill C-45 sets out the following:

#### Promotion

17 (1) Unless authorized under this Act, it is prohibited to promote cannabis or a cannabis accessory or any service related to cannabis, including

- (a) by communicating information about its price or distribution;
- (b) by doing so in a manner that there are reasonable grounds to believe could be appealing to young persons;
- (c) by means of a testimonial or endorsement, however displayed or communicated;
- (d) by means of the depiction of a person, character or animal, whether real or fictional; or
- (e) by presenting it or any of its brand elements in a manner that associates it or the brand element with, or evokes a positive or negative emotion about or image of, a way of life such as one that includes glamour, recreation, excitement, vitality, risk or daring

Exception — informational promotion — cannabis

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<sup>767</sup> See e.g. Lachenmeier & Rehm, *supra* note 11; L. Kim Baraona et al, “Tobacco Harms, Nicotine Pharmacology, and Pharmacologic Tobacco Cessation Interventions for Women” (2017) 62:3 *Journal of Midwifery & Women’s Health* 253.

(2) Subject to the regulations, a person that is authorized to produce, sell or distribute cannabis may promote cannabis by means of informational promotion or brand- preference promotion if the promotion is

- (a) in a communication that is addressed and sent to an individual who is 18 years of age or older and is identified by name;
- (b) in a place where young persons are not permitted by law;
- (c) communicated by means of a telecommunication, where the person responsible for the content of the promotion has taken reasonable steps to ensure that the promotion cannot be accessed by a young person;
- (d) in a prescribed place; or
- (e) done in a prescribed manner.

Exception — informational promotion — cannabis accessories and services

(3) Subject to the regulations, a person may promote a cannabis accessory or a service related to cannabis by means of informational promotion or brand-preference promotion if the promotion is

- (a) in a communication that is addressed and sent to an individual who is 18 years of age or older and is identified by name;
- (b) in a place where young persons are not permitted by law;
- (c) communicated by means of a telecommunication, where the person responsible for the content of the promotion has taken reasonable steps to ensure that the promotion cannot be accessed by a young person;
- (d) in a prescribed place; or
- (e) done in a prescribed manner.

Exception — point of sale — cannabis

(4) Subject to the regulations, a person that is authorized to sell cannabis may promote it at the point of sale if the promotion indicates only its availability, its price or its availability and price.

Exception — point of sale — cannabis accessory and services

(5) Subject to the regulations, a person that sells a cannabis accessory or provides a service related to cannabis may promote it at the point of sale if the promotion indicates only its availability, its price or its availability and price.

Exception — brand element on other things

(6) Subject to the regulations, a person may promote cannabis, a cannabis accessory or a service related to cannabis by displaying a brand element of cannabis, of a cannabis accessory or of a service related to cannabis on a thing that is not cannabis or a cannabis accessory, other than

- (a) a thing that is associated with young persons;
- (b) a thing that there are reasonable grounds to believe could be appealing to young persons;
- or
- (c) a thing that is associated with a way of life such as one that includes glamour, recreation, excitement, vitality, risk or daring.<sup>768</sup>

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<sup>768</sup> Bill C-45, *supra* note 37 at s 17.

#### 5.5.1.1. Pressing and Substantial

The first step of the section 1 analysis asks whether the objective of the infringement relates to a concern that is pressing and substantial. To answer this, the objective of the statute as a whole, and specific provisions must be ascertained. Ideally, legislative intent is explicitly stated in the preamble or purpose section of the legislation in question.

Where that is not the case, courts may look to the text of the bill, amendments, the record of hearings on the topic, legislative records or journals, speeches or floor debates, or other relevant statutes to shed light on the objective. Courts have recognized the difficulties inherent to ascertaining the objective of legislation, as “[s]tatutes may have different objectives, at different levels of abstraction.”<sup>769</sup> This is certainly the case with Bill C-45, as there are many stated reasons for legalizing recreational cannabis use, coupled with more specific reasons for various aspects of the bill. The Task Force Report recommended advertising restrictions in their section on “Minimizing Harms of Use”, noting that “[i]n taking a public health approach to the regulation of cannabis, the Task Force proposes measures that will maintain and improve the health of Canadians by minimizing the harms associated with cannabis use.”<sup>770</sup> This is similar to the purpose in the preamble of Bill C-45, which states that, “[t]he objectives of the Act are to prevent young persons from accessing cannabis, to protect public health and public safety by establishing strict product safety and product quality requirements and to deter criminal activity by imposing serious criminal penalties for those operating outside the legal

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<sup>769</sup> *JTI-MacDonald*, *supra* note 79 at para 38.

<sup>770</sup> *Supra* note 373 at 2.

framework.”<sup>771</sup> Additionally, the Honourable Jody Wilson-Raybould, Minister of Justice and Attorney General of Canada, stated the following purpose of the act in the second reading of Bill C-45 before the House of Commons:

*Simply put, its purpose is to protect the health and safety of Canadians. Specifically, it aims to protect the health of young people by restricting their access to cannabis; to protect young people and others from advertising and other promotional activities that are likely to encourage them to use cannabis; to provide for the lawful protection of cannabis to reduce illegal activities in relation to cannabis; to deter illegal activities in relation to cannabis through appropriate sanctions and enforcement measures; to reduce the burden on the criminal justice system in relation to cannabis; to provide Canadians with access to a quality-controlled supply of cannabis; and to enhance public awareness of the health risks associated with cannabis use.*<sup>772</sup>

Liberal Member of Parliament Pat Finnigan similarly summarized the objectives of the legislation to include delaying the first use of cannabis, reducing frequency of use, but still ensuring that adults can access clear and objective information that will allow them to make informed decisions.<sup>773</sup> Liberal Member of Parliament Marco Mendicino further confirmed that the objectives of Bill C-45 are: to protect youth; to prevent them from accessing and using cannabis; and, to ensure the public is aware of the risks associated

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<sup>771</sup> Bill C-45, *supra* note 37 at summary.

<sup>772</sup> House of Commons Debates, 42nd Parl, 1st Sess, Vol 148 No 183 (30 May 2017) (Hon Geoff Regan) at 11648 [HOC Debate No 183].

<sup>773</sup> *Ibid* at 11707.

with cannabis use.<sup>774</sup> Specifically referring to the advertising restriction, Mendicino stated the purpose as “to protect youth from being persuaded through marketing or advertising to consume cannabis. At the same time, consumers need access to clear, objective information to help make informed decisions about consumption.”<sup>775</sup>

From this, the purposes of the legislation as a whole can be summarized as protecting health and safety, specifically youth, as well as reducing illegal activity, reducing the burden on the criminal justice system, providing access to safe cannabis, and enhancing public awareness. From the above ascertained purposes, the objectives of the proposed advertising restrictions include: preventing young persons from accessing cannabis or being encouraged to use cannabis, and ensuring that Canadians are presented with only accurate information regarding cannabis, including the harms and risks. The former is supported by the numerous references to preventing young persons from viewing cannabis promotions, while the latter is supported by the presence of the exception for informational and brand-preference promotion contained in section 17 of Bill C-45. It is likely that Parliament will categorize the objectives broadly, because, as discussed in the previous chapter, it will be easier for broad objectives to pass the rational connection stage, as well as the minimal impairment stage, which is clearly advantageous for the Federal government.<sup>776</sup>

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<sup>774</sup> *Ibid* at 11714 [he continued on to say, “to deter illicit activities through appropriate measures proportionate to the crime, and to reduce the burden on the criminal justice system for minor cannabis offences.”]

<sup>775</sup> *Ibid* at 11715.

<sup>776</sup> See section 2.2.

Renowned constitutional law scholar Peter Hogg stated that an objective “will be deemed proper if it is for the realization of collective goals of fundamental importance.”<sup>777</sup>

Protecting Canadians from the harms associated with advertising has been accepted as sufficiently important to warrant overriding a constitutionally protected right or freedom, meeting the first step of the section 1 analysis in cases such as *Irwin Toy*<sup>778</sup>, *RJR-MacDonald*<sup>779</sup>, and *JTI-MacDonald*<sup>780</sup>. Though the threshold for this step is meant to be high, considerable deference is often afforded to Parliament in drafting legislation. Based on past jurisprudence, it is likely that the above-mentioned objectives will be sufficient to pass the pressing and substantial requirement.

As a counter argument, while preventing young people from starting to smoke tobacco makes sense because it is addictive and places an incredible burden on the health care system, the consequences of smoking cannabis are not the same. As discussed in Chapter 1, a much smaller portion of cannabis users become addicted or regular users, and their burden on the health care system is much less significant, even when considering that consumption may rise after legalization. Most tobacco smokers begin smoking during childhood or adolescence, and nicotine addiction begins during the first few years of tobacco use. Extensive research shows that if people do not begin to use tobacco when they are young, they are unlikely to initiate use as adults.<sup>781</sup> However, smoking cannabis

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<sup>777</sup> Peter Hogg, *Constitutional Law of Canada, 5th ed* (Scarborough, Thomson Carswell, 2007) at 132.

<sup>778</sup> *Supra* note 519 at para 75.

<sup>779</sup> *Supra* note 5 at para 61.

<sup>780</sup> *Supra* note 79 at para 65.

<sup>781</sup> Richard J. Bonnie, “Tobacco and Public Health Policy: A Youth-Centered Approach” in Paul Slovic, *Smoking: Risk, Perception, and Policy* (Thousand Oaks, California: Sage Publications, 2001) at page 279.

at a young age poses different risks.<sup>782</sup> The concern most commonly cited for discouraging youth use of cannabis is the effect that cannabis use has on the developing brain.<sup>783</sup> While the connection between cannabis use among youth and adverse cognitive effects or impact on brain development is not as strong as the connection between youth tobacco use and the risk of addiction or tobacco use and cancers, the seriousness of the claim would almost certainly be considered pressing and substantial.

Similarly, *JTI-MacDonald* supports the finding that ensuring Canadians are also exposed to accurate claims regarding cannabis is a pressing and substantial objective sufficient to meet the first step of the *Oakes* test. The SCC stated that “Parliament’s objective of combating the promotion of tobacco products by half-truths and by invitation to false inference constitutes a pressing and substantial objective.”<sup>784</sup> In fact, it may even be more important in the case of cannabis, which has been plagued by misinformation and unreliable research, both from cannabis legalization proponents and opponents. Strict regulation of cannabis advertising will help to ensure that untruthful claims do not influence Canadian consumers.<sup>785</sup>

#### 5.5.1.2. Rational Connection

The next step asks whether there is a rational connection between the infringement and the objective. In this case, the question is whether restricting advertising is rationally

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<sup>782</sup> See Chapter 1.

<sup>783</sup> See, e.g. HOC Debate No 183, *supra* note 772 at 11650-4.

<sup>784</sup> *JTI-MacDonald*, *supra* note 79 at para 65.

<sup>785</sup> Tatiana Bierut et al, “Exploring Marijuana Advertising on Weedmaps, a Popular Online Directory” (2017) 18 *Preventative Science* 183 [researchers reveal the high prevalence of cannabis dispensaries making false health claims, despite rules explicitly prohibiting them from doing so].



connected to ensuring Canadians are only presented accurate information about cannabis and preventing young persons from being encouraged to use cannabis? As stated in *JTI-MacDonald*, to demonstrate a rational connection “[a]t the very least, it must be possible to argue that the means may help to bring about the objective.”<sup>786</sup> Parliament is often afforded significant deference in cases where clear answers to complex social problems are not evident, as was the case with tobacco consumption, and is similarly the case with cannabis legalization. Each component of section 17 will be discussed and analyzed in terms of rational connection to the stated objective, with this low threshold in mind.

#### 5.5.1.3. Prohibition on appealing to young persons

Unfortunately, there is not a lot of data to support or refute the effect of cannabis advertising on youth consumption, as recreational cannabis is a nascent industry in the United States, and the only other countries to liberalize cannabis, Portugal, the Netherlands, and Uruguay, have very different regulatory schemes that do not permit advertising. There has been one study conducted that looked at whether medical cannabis advertisements impacted intent to use and use of cannabis among middle school-aged children in California.<sup>787</sup> This study found that greater exposure to medical cannabis ads was associated with greater probability of cannabis use and stronger intentions to use one year later. However, the authors acknowledge the study was limited because it relied on self-reported data and it lacked control for variables such as whether the child’s parents

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<sup>786</sup> *Supra* note 79 at para 40

<sup>787</sup> D’Amico, Miles & Tucker, *supra* note 17.

were medical cannabis users.<sup>788</sup> Additionally, since initiation of cannabis use is common among middle-school age children, it is possible that initiation of use may have occurred regardless of exposure to cannabis advertisements.

While there may not be much evidence specific to cannabis advertising, it is well established that limiting exposure to marketing and advertising can assist in reducing the favourable attitudes towards substance use that come from exposure to promotions.<sup>789</sup> There is a well-established link between exposure to alcohol and tobacco marketing, branding and advertising (including product placement in movies, television, and radio) and increased use of those drugs, making it reasonable to assume that cannabis promotion would have a similar effect, supporting the rational connection between the objectives and proposed restrictions.<sup>790</sup> For example, a meta-analysis of longitudinal studies found that exposure to tobacco advertising was associated with the initiation of tobacco use in

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<sup>788</sup> *Ibid* at 616.

<sup>789</sup> Jennifer C. Duke et al, “Exposure to Electronic Cigarette Television Advertisements Among Youth and Young Adults” (2014) 134:1 *Pediatrics* e29; Shirley S. Ho et al, “Examining How Presumed Media Influence Affects Social Norms and Adolescents’ Attitudes and Drinking Behavior Intentions in Rural Thailand” (2014) 19:3 *Journal of Health Communications* 282; Auden C. McClure et al, “Alcohol Marketing Receptivity, Marketing-Specific Cognitions, and underage binge drinking” (2013) 37:s1 *Alcoholism: Clinical and Experimental Research* E404.

<sup>790</sup> See e.g. Transform Drug Policy Foundation, *How to Regulate Cannabis: A Practical Guide*, 2nd ed (October 2016) online: < <http://www.tdpf.org.uk/resources/publications/how-regulate-cannabis-practical-guide> > at page 134 [Transform]; Thomas Babor et al, eds, *Alcohol: No Ordinary Commodity: Research and Policy*, 2nd ed (Oxford: Oxford University Press, 2010); National Cancer Institute, “The Role of the Media in Promoting and Reducing Tobacco Use” (Bethesda, MD: US Department of Health and Human Services, National Institutes of Health, 2008) Tobacco Control Monograph No 19; Henry Saffer & Frank Chaloupka, “The Effect of Tobacco Advertising Bans on Tobacco Consumption” (2000) 19 *Journal of Health Economics* 1117; Peter Anderson et al, “Impact of alcohol advertising and media exposure on adolescent alcohol use: a systematic review of longitudinal studies” (2009) 44:3 *Alcohol and Alcoholism* 229.

adolescents.<sup>791</sup> Further, a study of teenagers found that the influence of cigarette advertisements outweighed whether the teenagers' parents, siblings, or peers smoked as a predictor of cigarette use initiation, providing further proof of the power of advertising to encourage youth use.<sup>792</sup> Based on this, coupled with the amplified risks associated with youth cannabis use, there is a very clear connection between the proposed restrictions on advertising to minors and the objective of protecting minors from being encouraged to use cannabis, sufficient to pass this step of the analysis.

#### 5.5.1.3.1. Prohibition of testimonials or endorsements

Subsection 17(1)(b) of Bill C-45, which prohibits promoting cannabis via testimonials or endorsements, is analogous to subsection 21(2) of the *Tobacco Act*.<sup>793</sup> The sole difference between the two provisions is the *Tobacco Act* specifies that *no person* shall use testimonials or endorsements for promotion purposes, while Bill C-45 instead states that it is prohibited to promote cannabis by endorsements or testimonials. Promote is defined in Bill C-45 as making a representation about the thing or service for the purpose of selling the thing or service.<sup>794</sup> This definition implies that the prohibition on the use of testimonials or endorsements only applies to persons who sell cannabis products, which will be up to the provinces to regulate. In contrast, promotion is defined in the *Tobacco*

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<sup>791</sup> Chris Lovato, Allison Watts & Lindsay F. Stead, "Impact of Tobacco Advertising and Promotion on Increasing Adolescent Smoking Behaviours" *Cochrane Database of Systematic Reviews* 2011, Issue 10.Art.No.: CD003439.DOI: 10.1002/14651858.CD003439.pub2.

<sup>792</sup> B.K. Armstrong et al, "Influence of Education and Advertising on the Uptake of Smoking by Children" (1990) 152:3 *Medical Journal of Australia* 117.

<sup>793</sup> *Supra* note 600 ["No person shall promote a tobacco product by means of a testimonial or an endorsement, however displayed or communicated."]

<sup>794</sup> *Supra* note 37 at s 2(1)

*Act* as a representation about a product or service that is likely to influence attitudes, beliefs, and behaviours, which implies that it could apply to anyone representing a tobacco product.<sup>795</sup> Therefore, Bill C-45 differs from the *Tobacco Act* in that it does not apply to third parties who provide an opinion, including a testimonial or an endorsement, so long as it is not in exchange for consideration.<sup>796</sup> In sum, testimonials, endorsements, or other opinions relating to cannabis products, services, or accessories are permitted, provided they are not made for the purpose of selling the thing or service (by a legal seller or retailer), and no consideration is provided for the opinion, endorsement or testimonial.

Various countries have imposed restrictions on the use of endorsements and testimonials in advertising, a testament to their power to influence consumers. Indeed, testimonials and endorsements are recognized as being able to more easily gain the trust of consumers and facilitate the decision of the consumer to purchase the product or service being advertised.<sup>797</sup> Endorsements and testimonials could include celebrity testimonials, expert testimonials, and lay testimonials.<sup>798</sup> Of the three, celebrity endorsements are likely the most concerning. Celebrity endorsements have been found to be particularly effective, as they affect advertising effectiveness, brand recall and recognition, and purchase

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<sup>795</sup> *Supra* note 600 at s 18(1)

<sup>796</sup> Section 16 of Bill C-45, *supra* note 37, permits opinions of cannabis, cannabis services, or cannabis accessories provided no consideration is given for the opinion.

<sup>797</sup> See Hwa Meei Liou, “Endorsements and Testimonials in Advertising – In the Perspective of Competition Law” (2016) 19:1 *Journal of Legal, Ethical and Regulatory Issues* 79.

<sup>798</sup> Gerard J. Tellis, *Effective Advertising: Understanding When, How, and Why Advertising Works* (Thousand Oaks, California: Sage Publications, 2004) at 180.

intentions and follow through.<sup>799</sup> Role models, such as athletes and celebrities, have been shown to influence adolescents' consumption intentions and behaviors in studies conducted in the United States as well as South Africa.<sup>800</sup> Since the threshold of the rational connection step is not meant to be high, this is likely sufficient evidence to support a connection between the prohibition on celebrity testimonials and endorsements and the objective of preventing children from being encouraged to use cannabis.

The impact of lay person or expert testimonials is not quite as clear as with celebrity endorsers. In fact, prohibiting expert testimonials may be counterproductive to the other objective of restricting advertising, ensuring that Canadians have access to accurate information about cannabis. However, advertising literature suggests that expert testimonials or endorsements are effective because of their ability to persuade consumers through their inherent credibility as experts.<sup>801</sup> Lastly, lay testimonials or endorsements are able to persuade consumers because of the similarity between the endorser and the consumer.<sup>802</sup> That being said, there is some research to support that lay person or patient testimonials and endorsements may potentially be misleading, or at the very least, do not

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<sup>799</sup> Amanda Spry, Ravi Pappu & T. Bettina Cornwell, "Celebrity Endorsement, Brand Credibility and Brand Equity" (2011) 45:6 *European Journal of Marketing* 882.

<sup>800</sup> C.A. Martin & A.J. Bush, "Do role models influence teenagers' purchase intentions and behavior?" (2000) 17:5 *Journal of Consumer Marketing* 441; R Makgosa, "The influence of vicarious role models on purchase intentions of Botswana teenagers" (2010) 11:4 *Young Consumers: Insight and Ideas for Responsible Marketers* 307.

<sup>801</sup> Hershey H. Friedman & Linda Friedman, "Endorser Effectiveness by Product Type" (1979) 19:5 *Journal of Advertising Research* 63.

<sup>802</sup> Dwayne H. Dean & Abhijit Biswas, "Third-Party Organization Endorsement of Products: An Advertising Cue Affecting Consumer Prepurchase Evaluation of Goods and Services" (2001) 30:4 *Journal of Advertising* 41.

often provide a comprehensive covering of information.<sup>803</sup> Based on this evidence, there is likely sufficient evidence, both scientific, and common sense, to meet the rational connection threshold for all three types of testimonials.

#### 5.5.1.3.2. Prohibition of the use of persons, animals, and characters

Whether this prohibition is rationally connected to either objective can be answered both with logic and evidence. It is logical that the use of persons, animals, and characters may be particularly appealing to children, and thus prohibiting their use in advertising cannabis is rationally connected to the objective of not encouraging youth to use cannabis. Additionally, research suggests that the use of animated spokes-characters influence children's attention to an ad, and also influences the positive attitude towards the product.<sup>804</sup> Another study found that the use of animals with human characteristics in commercials was one of the most common elements used to attract the attention of children.<sup>805</sup> This research further supports the rational connection between prohibiting the use of animals, persons, and characters and not encourage youth use of cannabis.

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<sup>803</sup> See e.g. Adrian Ho, Colman McGrath & Nikos Mattheos, "Social Media Patient Testimonials in Implant Dentistry: Information or Misinformation?" (2017) 28:7 *Clinical Oral Implants Research* 791.

<sup>804</sup> Sabrina M. Neeley & David W. Schumann, "Using Animated Spokes-Characters in Advertising to Young Children: Does Attention to Advertising Necessarily Lead to Product Preference?" (2004) 33:3 *Journal of Advertising* 7 [while the authors found that the relationship between the use of spokes-characters and children's preference, intention, and choice of product was uncertain, this is less important with cannabis advertising where the objective is not to encourage preference for the product at all, not just a specific type of product].

<sup>805</sup> Randy M. Page & Aaron Brewster, "Frequency of Promotional Strategies and Attention Elements in Children's Food Commercials During Children's Programming Blocks on US Broadcast Networks" (2007) 8:3 *Young Consumers* 184.

#### 5.5.1.3.3. Prohibition on lifestyle advertising

This wording is identical to the wording used in the *Tobacco Act*, which was found to be constitutional in *JTI-MacDonald*.<sup>806</sup> Specifically, the SCC held that even advertising that does not appear on its face to connect a lifestyle with a tobacco product is prohibited if it subliminally connects it with a lifestyle, but should not be read so broadly as to encompass every possible impression. In addition, the Court stated that the words ‘such as’ in the phrase ‘such as one that includes glamour, recreation, excitement, vitality, risk, or daring’ indicated that the list is meant to be examples of lifestyle advertising, not as a complete list of the types of lifestyle advertising that are prohibited.<sup>807</sup> The Court was convinced that the evidence “amply establishes the power of such advertising to induce non-smokers to begin to smoke and to increase tobacco consumption among addicted smokers.”<sup>808</sup> Based on existing jurisprudence, there is likely satisfactory evidence to establish a rational connection between the ban on lifestyle advertising contained in section 17 and the objective of preventing youth from being encouraged to smoke, and also from ensuring that Canadians are only presented with accurate information regarding cannabis products.

#### 5.5.1.3.4. Exception for informational or brand-preference promotion

Subsection 17(2) permits the use of informational or brand-preference promotion, provided that the promotion meets a number of criteria, including: it is in a communication addressed and mailed or an adult; it is in a place where young people are

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<sup>806</sup> *Supra* note 79 at para 114.

<sup>807</sup> *Ibid* at para 113.

<sup>808</sup> *Ibid* at para 114.

not permitted by law; it is communicated by telecommunications, and reasonable steps have been taken to ensure young people cannot access the promotion; or, it is in a prescribed place or prescribed manner.<sup>809</sup> There is a very obvious connection between the objective of ensuring that adults have access to accurate information about cannabis products, and the provisions in section 17 that permit information and brand-preference advertising. Additionally, the restriction on addressing and sending such advertisements to a person 18 years of age or older is also easily connected to the objective of not encouraging youth use of cannabis by limiting their exposure to advertising. Similarly, restricting information and brand preference advertising to places where young persons are not allowed, or where reasonable steps have been taken to ensure young persons cannot access it, are both logically connected to the objective of preventing young persons from being exposed to cannabis advertising. This provision should easily pass the rational connection step.

However, it is difficult to comment on the rational connection of the exception for information and brand-preference advertising in prescribed places or prescribed manners, because they have not yet been prescribed. It is possible that regulations may be passed permitting promotion in retail storefronts, provided that it is not a place that also sells alcohol or tobacco, or to persons who appear to be impaired or under the influence of another substance. Both of these would likely pass the rational connection test, as there is sufficient evidence regarding the dangers of mixing cannabis with other substances.<sup>810</sup>

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<sup>809</sup> Bill C-45, *supra* note 37.

<sup>810</sup> Caffeine may be an exception.



Similarly, restrictions based on proximity to things such as schools, parks, playgrounds, or other areas commonly frequented by children are likely restrictions, that would easily pass the rational connection stage, provided they are not so onerous as to make it practically impossible to operate a retail storefront within the regulations.

Restrictions on the manner in which cannabis is sold may include times of the day when cannabis may not be sold, much like with alcohol. Such a restriction would likely be sufficiently connected both to ensuring that consumers don't mix cannabis with other substances (by prohibiting the sale of cannabis after 11p.m., for example), and that consumers do not overuse, or misuse cannabis products. Another possible regulation that could stipulate the manner in which cannabis is sold may include maximum quantities that can be sold at one time, a mandatory certification or other educational or professional requirement for persons selling cannabis (similar to Smart Serve for alcohol), or the collection of consumer information, all of which would likely be sufficient to pass the rational connection test.

#### 5.5.1.3.5. Exception for point of sale promotion

Subsection 17(4) permits point of sale promotion, but only pertaining to the availability and price of cannabis. While it permits point of sale promotion, what is permitted is so limited that it may still be challenged. Permitting point of sale promotion can logically be connected to the objective of ensuring that adults have access to accurate information about cannabis products, as it allows legal customers to gain more information about the products or services they may purchase. Additionally, point of sale advertising is recognized as being particularly effective, because, unlike more traditional advertising where there is a time and geographical distance between seeing the advertisement and

purchasing the produce, point of sale advertising reduces or removes that gap.<sup>811</sup>

Restricting other types of information, such as health claims, is also logically connected to the objective of ensuring that Canadians are only presented with accurate information. One possible complication with this restriction is not permitting the display of various of cannabis characteristics at the point of sale, including, but not limited to: terpene content, growing conditions, use of specific pesticides or other chemicals, or the age of the cannabis. All of this information can be useful to potential consumers in informing what products they would like to use and how to use them. For example, as cannabis ages, some cannabinoids and terpenes degrade, lowering their availability, and create by-products that can impact the effects of the product. In fact, many cannabis users purposefully age cannabis to achieve a specific cannabinoid or terpene content, and so it is not unlikely that a retailer may do the same. However, these concerns are likely better addressed at the minimal impairment stage. Restricting point of sale advertising will likely be held to be rationally connected to the objective of ensuring that Canadians are only exposed to accurate information about cannabis, but not the objective of preventing youth from being encouraged to use cannabis by advertisements.

#### 5.5.1.3.6. Exception for promoting brand elements of cannabis

This exception permits the promotion of brand elements of cannabis on things that are not cannabis accessories, provided they are not on a thing associated with, or appealing to, young persons or on a thing associated with a specific way of life. This restriction can clearly be linked to preventing youth from being exposed to cannabis advertising that

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<sup>811</sup> Robert East, *The Effect of Advertising and Display: Assessing the Evidence* (Boston: Kluwer Academic Publishers, 2003) at page 73.

would encourage them to use cannabis. For example, it makes sense that promotion of a cannabis brand element on a Frisbee or basketball might influence a child perception of cannabis, or that cannabis branding on fidget spinners may increase an adolescent's exposure to cannabis advertisements. However, there are examples that come to mind that are less clear. Would a cannabis brand element on a clothing item be prohibited under this restriction? It is unclear whether it is only items that are exclusively appealing to young persons are prohibited, or whether items that are appealing to a person regardless of age would also be prohibited. Certainly, a children's sized clothing item would be considered to be associated with young persons, but can the same be said about adult sized clothing, which could fit many teenagers? Another example is alcohol. Alcohol is not a thing that is legally associated with young persons, however, we know that young persons are regularly exposed to alcohol advertising, so promoting brand elements of cannabis on a beer cozy is not a thing that should be appealing to young persons, but likely would be. However, based on the interpretation of "appealing to young persons" in *JTI-MacDonald*, it is likely that a court would find this restriction is meant to apply to things that are specifically appealing to young persons, not things that are directed towards adults but could possibly be construed as appealing to young persons.<sup>812</sup> Again, given the low threshold at this stage of the analysis, it is likely that this specific aspect will pass the rational connection step, with most of the analysis taking place in the later steps.

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<sup>812</sup> See section 5.2.2.5.

#### 5.5.1.4. Minimal Impairment

Having determined that all aspects of section 17 will likely pass the rational connection test, although some more easily than others, the analysis will progress to the minimal impairment stage. The minimal impairment step requires that the means are carefully tailored to the objective. Again, deference to Parliament is appropriate when tackling a complex social problem, and the SCC has held that when tackling complex social issues, the minimal impairment step will be satisfied where Parliament has chosen one of several reasonable alternatives, not necessarily the one that is the least impairing.<sup>813</sup> As well, the broad categorization of the objectives of the advertising restrictions will not require as specific of a response that a narrower objective would, giving Parliament greater latitude in crafting a legislative response. This section will analyze whether the advertising restriction scheme contained in section 17 of Bill C-45 would satisfy the minimal impairment requirement in the *Oakes* test.

To determine if the regulatory scheme contained in section 17 is a reasonable alternative, it is worthwhile to canvass alternative options that could have been implemented, or have been implemented in other jurisdictions. This is particularly important because the crux of the analysis in *RJR-MacDonald* was that Parliament failed to explain why they did not implement a less impairing option.<sup>814</sup> There are many other policy options that Parliament could have chosen to implement to achieve the goals of preventing youth from being encouraged to use cannabis, and ensuring that Canadians have access to only

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<sup>813</sup> *Supra* note 79 at para 42-43.

<sup>814</sup> *Supra* note 5 at para 160.

accurate information about cannabis. For example, media literacy education may help to mitigate the harms of pro-cannabis media messaging. These prevention efforts have had encouraging results on reducing intentions to use alcohol and tobacco, and have been recommended by both the Centers for Disease Control and the American Association of Pediatrics.<sup>815</sup> Other options proposed include: denying tax deductions for advertising or marketing expenses, imposing marketing budget limits or caps, mandatory warnings or messages in advertisements, advertising review boards, and time and place restrictions.<sup>816</sup> All of these, or some combination of them, would likely constitute a reasonable alternative to the proposed regime.

It is also instructive to see how other jurisdictions have regulated cannabis advertising.<sup>817</sup> Courts have considered international examples in other contexts, including tobacco advertising<sup>818</sup>, and medical assistance in dying.<sup>819</sup> In the Netherlands, the only permitted form of promotion is the use of Rastafari imagery, palm leaf images, using trade names such as ‘Grasshopper’, and the words ‘coffee shop’ to identify the cafes.<sup>820</sup> In contrast,

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<sup>815</sup> American Academy of Pediatrics, “Policy Statement - Media Education” (2010) 126:5 *Pediatrics* 1012; Centers for Disease Control, “In Designing and Implementing an Effective Tobacco Counter-Marketing Campaign (Atlanta, Georgia: U.S. Department of Health and Human Services, 2003) online: <[https://www.cdc.gov/tobacco/stateandcommunity/counter-marketing/pdfs/tobacco\\_cm\\_manual.pdf](https://www.cdc.gov/tobacco/stateandcommunity/counter-marketing/pdfs/tobacco_cm_manual.pdf)>.

<sup>816</sup> Transform, *supra* note 790 at 88; Pat Oglesby, “How Bob Dole got America addicted to marijuana taxes” (December 18, 2015) online: Brookings Institute <<https://www.brookings.edu/blog/fixgov/2015/12/18/how-bob-dole-got-america-addicted-to-marijuana-taxes/>>.

<sup>817</sup> International examples are canvassed solely to demonstrate that there are various ways to regulate cannabis advertising. These examples cannot be compared to any approach taken in Canada, because there are so many societal differences between the countries.

<sup>818</sup> *JTI-MacDonald*, *supra* note 79 at para 10.

<sup>819</sup> *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 8.

<sup>820</sup> Government of the Netherlands, “Toleration policy regarding soft drugs and coffee shops” online: <<https://www.government.nl/topics/drugs/toleration-policy-regarding-soft-drugs-and-coffee-shops>>.

States that have legalized recreational cannabis have taken a much less restrictive approach. For example, in California, advertising is banned within 1000 feet of where children congregate, and can only be displayed on broadcast, cable, radio, print, and digital communications where at least 71.6% or more of the audience is reasonably expected to be 21 or over.<sup>821</sup> In Colorado, advertising is permitted in adult-oriented newspapers and magazines, while marketing campaigns, including online advertising, that have a high likelihood of reaching minors are prohibited. Pop-up advertisements are banned, but banner ads are permitted on adult-oriented websites. Branding on packaging is permitted, because minors are not permitted in retail outlets, but any health or physical benefit claims are prohibited in any form of advertising.<sup>822</sup> In Washington, retailers may not display products to the general public, and advertising is prohibited in any form or through any medium within 1000 feet of school grounds, playgrounds, child care, public parks, libraries, or game arcades that allow minors to enter. In addition, advertisements on public transit vehicles or shelters, or any publicly owned or operated property is also prohibited. Washington has also specifically forbidden promotion that encourages over-consumption of cannabis.<sup>823</sup>

Another crucial factor at the minimal impairment stage in *RJR-Macdonald* was that the *TPCA* was a total ban on tobacco advertising, not a partial ban. In *RJR-MacDonald*, McLachlin J stated that a total ban on expression will be more difficult to justify than a

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<sup>821</sup> Cal. Bus. & Prof. Code § 26151(b), 26152(g) (Deering, LEXIS through Ch.9 of 2017 Reg. Sess.)

<sup>822</sup> US, SR, Permanent Rules Related to the Colorado Retail Marijuana Code, 2013, Reg Sess, Colo.

<sup>823</sup> Washington Administrative Code, Title 314, chapter 55, section 155

partial ban.<sup>824</sup> The same sentiment has been expressed in *Ramsden*<sup>825</sup> and *Irwin Toy*<sup>826</sup>. The restrictions contained in Bill C-45 constitute a partial ban, as they contain exemptions for information and brand-preference advertising in limited circumstances. Consequently, the bill should be easier to justify as minimally impairing than a total ban. Indeed, the Honourable Jody Wilson-Raybould, stated that “Bill C-45 would allow cannabis producers to promote their brands and provide information about their products, but only where young persons would not be exposed to it. These limits are reasonable. They would allow adult consumers to make informed decisions, but they respond to the greater risks cannabis poses for young people.”<sup>827</sup> Additionally, as discussed in Chapter 4, courts have recognized that legislation rarely has one sole goal, and that impairing a right minimally may further the achievement of one goal at the expense of another. This is certainly true of Bill C-45, which has multiple goals that are often contradictory.<sup>828</sup> This reality does not relieve Parliament of their obligation to ensure infringements are minimally impairing, but instead recognizes that minimal impairment, particularly in complex social contexts, does not require the government to adopt the least impairing option, but instead one of several reasonable alternatives.

By permitting information and brand-preference advertising aimed at adults, Parliament has shown that they at least attempted to tailor the legislation to impair the rights of

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<sup>824</sup> *Supra* note 5 at para 160.

<sup>825</sup> *Supra* note 598 at para 41.

<sup>826</sup> *Supra* note 519 at para 83.

<sup>827</sup> HOC Debate No 183, *supra* note 772 at 11648

<sup>828</sup> For example, efforts to reduce youth consumption often contradict the goal of keeping profits out of the hands of criminals. By restricting youth use, youth will continue to access cannabis via the black market.

Canadians as little as possible. In *RJR-MacDonald*, the Court stipulated that Parliament was required to differentiate between harmful advertising and benign advertising, suggesting that restrictions must be sufficiently specific to prevent the expressed harms, and no more.<sup>829</sup> It is clear that Parliament has endeavoured to tailor the restrictions to ensure, as much as possible, that only harmful advertising is prohibited. However, there are two aspects of section 17 that may be more difficult to justify at the minimal impairment stage: (1) the vagueness of ‘reasonable steps’ in subsections 17(2) and 17(3), and (2) the restriction on point of sale promotion in subsection 17(4).

#### 5.5.1.4.1. Vagueness of Reasonable Steps

As discussed earlier, the vagueness of the phrase ‘reasonable steps’ in subsections 17(2) and 17(3) may prove problematic at the minimal impairment stage. As shown in section 5.2.2.4., statutory interpretation of the phrase provides little guidance to those expected to abide by it. Following the two requirements set out in *JTI-MacDonald* to refute a claim of vagueness, Parliament may be tasked with proving that the law provides sufficient guidance to those expected to abide by it, and that the amount of discretion by those who enforce it is limited. In this case, without further clarification, it is unlikely that subsections 17(2) and 17(3) provide sufficient guidance to the advertisers expected to follow it. However, this specific problem provides a unique scenario, because it would be difficult, if not impossible, to provide specific steps to advertisers for every type of advertising, while still providing some flexibility to allow for technological advances, or new evidence on the impacts of cannabis advertising. As it is currently written, the limit

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<sup>829</sup> *Supra* note 5 at para 188.



is vague enough that it may result in those permitted to advertise cannabis refraining from advertising all together out of fear of infringing the law. Additionally, subsection 111(1) of Bill C-45 sets out a punishment of up to \$1,000,000 for contravention of any provisions of the Act or the regulations to promote compliance with the Act.<sup>830</sup> This significant penalty, coupled with the inability of those expected to abide by the law to determine whether they are acting within the confines of the law or not, suggest that these provisions, as currently written, may be vague to the point of not being minimally impairing.

#### 5.5.1.4.2. Point of Sale Promotion

The point of sale promotion prohibits retailers from promoting cannabis products at the point of sale, with the exception of price and availability. As mentioned earlier, there are several other pieces of information that may be useful to a potential consumer for making an educated decision, including but not limited to the cannabinoid content, terpene content, age, and how/where the product was grown. In fact, prohibiting retailers from displaying or promoting the cannabinoid content of a cannabis product could even be counterproductive to the objective of ensuring that Canadians are given enough information to make safe and educated decisions. While consumers may be able to get this information in other ways, for example by speaking with a salesperson, it may not always be possible or realistic (a salesperson would be required to potentially know data about hundreds of products). Additionally, naïve consumers may not know to ask these types of questions, and may not understand the importance of being aware of the

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<sup>830</sup> *Supra* note 37.

cannabinoid content in particular. Allowing retailers to display this information would ensure that consumers are aware of the potency of the products that they purchase, and will help retailers to ensure that consumers are using cannabis as safely as possible.

While it is impossible at this point to predict how the Federal government would justify not permitting the above information from being promoted at the point of sale, it is difficult to think of a reason why. Perhaps the concern is that consumers will seek out the highest potency cannabis products that are available, however, that seems preferable to consumers potentially having no idea how potent the product they use is. Additionally, there could be concern that retailers will promote their products via enticing, but otherwise unproven health benefits. However, there are already provisions in place to prohibit retailers from promoting cannabis in a way that may create an erroneous impression about its “design, construction, performance, intended use, characteristics, value, composition, merit, safety, health effects, or health risks,”<sup>831</sup> which would ban promotion of that type. Additionally, the point of sale restriction becomes more difficult to rationally connect to the objective of the legislation in consideration of the entire piece of legislation. By permitting informational and brand-preference advertising in specific circumstances, Parliament sent a message that it is permissible for adults to hear such information. It does not follow then that the same messaging would be prohibited in a space where only adults are permitted.

There is also a slight discrepancy in the advertising provisions. Subsection 17(2)(b) permits informational and brand-preference promotion in places where minors are not

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<sup>831</sup> *Ibid* at s 18(1).

allowed by law. It is possible, perhaps even likely, that the regulations stipulating the prescribed places in which cannabis can be sold might include places where minors are not permitted by law, or the regulations regarding the prescribed manner in which cannabis can be sold may include a requirement that minors are not permitted in places where cannabis is sold. If that is the case, then storefronts would be permitted to promote cannabis products in the store, but only if it is informational or brand-preference promotion. This results in a slight contradiction in the legislation, as subsection 17(4) permits point of sale promotion, but only regarding the price and availability, while subsection 17(2)(b) permits much broader promotion in places where minors are not allowed. While it would be possible to comply with both by complying with the stricter restrictions in subsection 17(4), it is unclear whether this was intentional or not. It does not appear that Parliament has sufficiently drafted these provisions in accordance with the harm they are trying to prevent, but instead capture more than intended. Therefore, it is likely that a court may agree that prohibiting informational and brand-preference promotion at the point of sale is not minimally impairing. The point of sale restriction could easily be brought into compliance if it permitted information and brand-preference promotion in addition to price and availability. Rather than striking down the legislation as unconstitutional, a court may find it more suitable instead to read in an exception for informational and brand-preference promotion at the point of sale.

#### 5.5.1.5. Proportionality

Having found that the advertising restrictions minimally impair freedom of expression, with the exception of the point of sale restrictions, the analysis progresses to the proportionality stage. This last requirement of the *Oakes* test asks whether the objective

of the infringement is proportional to the effect of the infringement. Specifically, it asks whether the negative effects of the infringement of rights is proportional to the benefits associated with the legislative goal. In this case, the benefits associated with the legislative goal are significant. After determining that the reasonable steps requirement in subsections 17(2) and 17(3), as well as the point of sale exception may fail at the minimal impairment stage, they will necessarily fail at the proportionality stage, because a provision that does not minimally impair cannot be proportional to the objective.<sup>832</sup>

The remainder of the legislation will likely be found to be sufficiently proportional to pass the last step of the *Oakes* test. Parliament has clearly made an effort to tailor the legislation closely to the objectives, including protecting children from promotion that may entice them to use or misuse cannabis products, while still recognizing that Canadian adults should be able to gain information necessary to make safe and educated decisions regarding cannabis use. Though cannabis advertising should be held to a high threshold of protection, the objectives sought by restricting advertising are equally important, particularly given the social and political context surrounding cannabis. Preventing children from being encouraged to use cannabis by restricting advertising will help to ensure, but not entirely prevent, children from being exposed to the risks associated with using cannabis in adolescence. The risks of using cannabis as a minor include potential effects on brain development, the possibility of developing cannabis dependence, and the onset of psychiatric disorders where already predisposed. While the evidentiary link is not concrete, the consequences are certainly significant enough to warrant restricting

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<sup>832</sup> *RJR-Macdonald*, *supra* note 5 at para 175

rights, and the regulatory scheme of cannabis promotion has sufficiently balanced the incredibly important objective of protecting youth from enticement, and also protecting adults from misleading information, while still permitting promotion that will allow legal cannabis consumers to make educated decisions relating to cannabis consumption.

### 5.5.2. Sections 21 and 22

Sections 21 and 22 of Bill C-45 set out the following:

#### Sponsorship

21 It is prohibited to display, in a promotion that is used, directly or indirectly, in the sponsorship of a person, entity, event, activity or facility,

- (a) a brand element of cannabis, of a cannabis accessory or of a service related to cannabis; or
- (b) the name of a person that
  - (i) produces, sells or distributes cannabis,
  - (ii) sells or distributes a cannabis accessory, or
  - (iii) provides a service related to cannabis.

#### Name of facility

22 It is prohibited to display on a facility, as part of the name of the facility or otherwise, if the facility is used for a sports or cultural event or activity,

- (a) a brand element of cannabis, a cannabis accessory or a service related to cannabis; or
- (b) the name of a person that
  - (i) produces, sells or distributes cannabis,
  - (ii) sells or distributes a cannabis accessory, or
  - (iii) provides a service related to cannabis.<sup>833</sup>

#### 5.5.2.1. Pressing and Substantial

Having already determined above in section 5.5.1.1. that the objectives of the legislation, and the advertising restrictions are very likely to be found to be pressing and substantial, it is unnecessary to reconsider the pressing and substantial stage of the *Oakes* test here.

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<sup>833</sup> *Supra* note 37.

### 5.5.2.2. Rational Connection

Sections 21 and 22 of Bill C-45 prohibit the display of brand elements and the name of producers, retailers, distributors, or service providers of cannabis or cannabis accessories<sup>834</sup> in the sponsorship of a person, entity, event, activity, or facility, whether it is displayed on the facility or used in directly or indirectly in promotion of the sponsorship.<sup>835</sup> These sections are analogous to sections 24 and 25 of the *Tobacco Act*, which were challenged in *JTI-MacDonald*.<sup>836</sup> One notable difference, however, is that while the prohibition in the *Tobacco Act* specifically forbids the display of brand elements or industry player's names on permanent facilities, Bill C-45 does not include the same restriction. In *JTI-MacDonald*, the Court held that the prohibition of sponsorship promotion contained in the *Tobacco Act* was rationally connected to the legislative goal for the same reasons that the prohibition on lifestyle advertising was rationally connected, including the evidence establishing the power of lifestyle advertising to induce non-smokers to smoke and increasing tobacco consumption among addicted smokers. This was found to be rationally connected to Parliament's goal of preventing young persons from taking up smoking and becoming addicted to tobacco.<sup>837</sup>

Given the low threshold of this step, these sections will likely be found to be rationally connected to the objective of ensuring that Canadians are only exposed to accurate information about cannabis, by preventing Canadians from being inundated with positive

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<sup>834</sup> For brevity, I will use the term industry players to refer to the group that the section applies to.

<sup>835</sup> Bill C-45, *supra* note 37.

<sup>836</sup> *JTI-MacDonald*, *supra* note 79 at para 30; *Tobacco Act*, *supra* note 600 at ss 24-5.

<sup>837</sup> *JTI-MacDonald*, *supra* note 79 at paras 126-8.

messaging about cannabis use. Additionally, it is likely that they will be found to be rationally connected to the objective of preventing youth from being encouraged to use cannabis. Sponsorship of concerts or events with a target audience of young adults or teenagers would not be consistent with the objective of preventing children from being encouraged to use cannabis. Again, given the low threshold for this step, it is likely that this will pass the rational connection test but will be further scrutinized in the minimal impairment analysis.

#### 5.5.2.3. Minimal Impairment

These provisions may prove troublesome at the minimal impairment stage, as a literal reading suggests that it will capture persons and organizations well outside the scope of the objectives of the legislation, making the provision overbroad. For example, if the provision is read literally, a lawyer providing commercial legal services to cannabis producers, distributors, or retailers, this section would prohibit that lawyer from sponsorship or purchasing the rights to name a facility. It hardly seems within the scope of this legislation that this was the intended effect, given that the intent was more likely to prevent minors from being exposed to media imagery that may increase their positive associations with the substance. Furthermore, this section could also conceivably capture persons or organizations that are not involved in the cannabis industry at all, but who have name or brand imagery was related to cannabis. For example, it is unclear whether hemp products that utilize imagery related to cannabis would be caught by this provision. Additionally, the prohibition on sponsorship and facility naming rights for persons that sell or distribute a cannabis accessory could capture persons and organizations outside of the intended scope, as it is unclear whether this provision applies to persons that sell or

distribute accessories used solely for cannabis, or accessories that are used for cannabis in addition to other products. Cannabis accessory is defined in the bill to include a thing that is represented to be used in the consumption of cannabis or to be used in the production of cannabis.<sup>838</sup> For example, a company that manufactures and sells equipment used by a variety of agricultural or horticultural organizations, but is also used by cannabis growers, would be captured by this provision, as they are an organization that “sells or distributes a cannabis accessory”, as would investors who advise cannabis organizations, or organizations that offer assistance to persons struggling with cannabis dependence. As discussed in *RJR-MacDonald*, this stage requires Parliament to differentiate between harmful advertising and benign advertising<sup>839</sup>, which has not been done here.

Referring again to the steps for refuting a claim of overbreadth in *JTI-MacDonald*, these provisions do not provide adequate guidance to those who are expected to abide by it. A person who provides manufacturing equipment to a cannabis producer may refrain from sponsorship or facility-naming rights opportunities out of fear of penalty, even if such promotion would not impede the objectives of the provisions. These sections clearly capture persons and organizations beyond the intent of the provision, including benign promotion, and as such, is likely to fail at the minimal impairment stage.

#### 5.5.2.4. Proportionality

Having found that sections 21 and 22 are likely to fail at the minimal impairment stage, it is not necessary to proceed to the proportionality stage. In the event that the provisions

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<sup>838</sup> Bill C-45 *supra* note 37 at s 2(1).

<sup>839</sup> *RJR-Macdonald*, *supra* note 5 at para 188.



are found by a court to be minimally impairing, however, it is also likely that they would fail at the proportionality step. This step of the *Oakes* test asks whether the objective is proportional to the effects of the infringement. For the same reasons expressed in the minimal impairment analysis, the objective of protecting youth from promotion that might induce them to use cannabis is not likely to be found to be proportional to the effects of section 21 and 22, which, if read literally, will prohibit the promotion of products and services that are unlikely to encourage a youth to use cannabis, such as a piece of farming or agricultural equipment used to grow cannabis, or a financial manager who specializes in investing in cannabis companies. The significant implications are not proportional to the objective.

## 5.6. Remedies

As discussed in the previous chapter, the general remedy available pursuant to section 52 is a declaration of invalidity of the legislation in question. However, this does not seem appropriate given that the majority of the provisions will likely be found to be constitutional. Instead, it may be more appropriate to use a more tailored remedy, such as striking only the parts of the law that are unconstitutional: sections 17(2), 17(3), 17(4), 21, and 22 with a suspended declaration of invalidity to give Parliament time to draft more appropriate restrictions. Additionally, reading in may be an appropriate remedy for the offending provisions. For example, reading in a definition of “reasonable steps” or further clarification to subsections 17(2) and 17(3) may be sufficient to make those provisions sufficiently clear so as to no longer be vague. As mentioned earlier, a court may decide to read in informational and brand-preference advertising as permitted at the point of sale in section 17(4), which would likely be sufficient to bring it into

compliance. Regarding sections 21 and 22, a court may find it more appropriate to strike out only subsection (b) in both sections 21 and 22, which reads: “the name of a person that (i) produces, sells or distributes cannabis, (ii) sells or distributes a cannabis accessory, or (iii) provides a service related to cannabis.”<sup>840</sup> Doing so would still prohibit the display of cannabis brand elements in sponsorship or facility naming, which would achieve the objective of ensuring children are not exposed to advertising. Even striking out the offending portion would still leave the remainder of the provision, which would capture a significant amount of the sponsorship and naming that was intended to be captured, and furthers the objectives of the legislation.

## 5.7. Conclusion

To conclude, it is likely that most of the advertising restrictions will be found to be a constitutionally-valid infringement upon the right to freedom of expression as guaranteed in the *Charter*. Protecting minors from advertising and imagery that may persuade them to begin using cannabis, or to use cannabis in an unsafe way is a pressing and substantial objective. Similarly, ensuring that Canadians are protected from fraudulent or misleading messaging regarding cannabis is imperative to protecting the health and safety of those who do decide to use cannabis, and is a pressing and substantial objective. All of the advertising restrictions in Bill C-45 are rationally connected to at least one of those objectives, supported either by common sense or scientific evidence. Overall, Parliament has clearly shown that they attempted to tailor the restrictions to infringe upon the rights of Canadians as little as possible, evidenced by permitting informational and brand-

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<sup>840</sup> *Supra* note 37.

preference advertising in limited circumstances, however, subsections 17(2) and 17(3) are too vague to allow citizens to know whether they are operating within the confines of the law, and sections 17(4), 21 and 22 are overbroad, capturing some circumstances which are not related to the objectives. Lastly, the benefits that will be realized by the implementation of the advertising restrictions is proportional to the infringement upon freedom of expression.

## 6. Conclusion

Ten years ago, the SCC released its decision of *JTI-MacDonald*, finding that the federal government's restrictions on tobacco advertising were a constitutionally-valid infringement on freedom of expression. Now, it is likely that Canadian courts will be tasked with assessing similar prohibitions on cannabis advertising. The purpose of this thesis was to predict how a court might analyze the proposed restrictions contained in Bill C-45, knowing that they may change as they are reviewed by the Standing Committee on Health and then Senate.

After a brief introductory chapter that provided the theoretical framework and methodology utilized in the project, Chapter 2 provided a discussion on the role that harm plays in freedom of expression litigation in Canada. The purpose of doing so was to explain the importance and relevance of categorizing the harms associated with cannabis use. Four ways in which evidence of harm can impact the constitutional analysis were identified: in the division of powers analysis; when determining whether 2(b) has been infringed; in the use of evidence; and, during the *Oakes* analysis. First, harm is necessary to permit Parliament to use their criminal law powers, classifying the legislation solely within Federal jurisdiction. Second, arguments have been raised in the past that commercial speech that promotes a harmful product or service should not be afforded protection by the *Charter*. Despite the fact that this has never been successful, it is possible it will be raised again by the Attorney General in a challenge against the cannabis advertising provisions, but it is unlikely to be successful. Third, an inconsistent pattern of the use scientific evidence in SCC decisions was identified, followed by a

discussion of how this could impact the analysis of the cannabis advertising provisions. Lastly, how the degree of harm assigned to cannabis use could impact all four stages of the *Oakes* analysis was considered.

Chapter 2 then proceeded to introduce the reader to cannabis and cannabinoids in order to provide an basic understanding of the substance. Physical components of cannabis, modes of administration, how cannabis affects users, and other relevant properties of cannabis were discussed. The relevance of the heterogeneity of cannabis was discussed, both in reference to how it impacts scientific research, and how it impacts regulation. Next, a snapshot of cannabis use in Canada was provided, which is necessary to assist in understanding the scope of population level risks associated with cannabis use.

Specifically, trends in youth use of cannabis and how legalization has affected youth use rates in other jurisdictions was discussed because preventing youth from using cannabis is an objective driving the advertising restrictions. This chapter continued to provide reasons why researching cannabis can be problematic, particularly when it comes to translating research evidence into generalizable claims. The remainder of the chapter summarized evidence on the medical uses of cannabis, and the harms and risks associated with cannabis use. Before providing a summary of the evidence on the risks of cannabis use, a brief summary of historical attempts to assess the harms of cannabis use is provided, primarily to highlight the longstanding evidence supporting the relative safety of cannabis use. The purpose of this chapter was not to provide a thorough summary of all the evidence on cannabis risks and harms, but rather to provide the reader with sufficient information to support the argument that while there is certainly sufficient

evidence that cannabis poses some potential harms, the harm is not as certain, nor as well understood as the harms of tobacco use are.

In Chapter 3, a brief history of cannabis and the law in Canada was provided, beginning with how the criminal law in Canada pertaining to cannabis has evolved over the last century. Next, this chapter followed the legalization of medical cannabis, starting with the use of section 56 exemptions prior to any formal regulations. The landmark cases that led to the introduction of the first medical cannabis regulations, the *MMAR*, were discussed. Following that, this chapter provides a timeline of challenges to the *MMAR*, and each subsequent amendment or new regulatory scheme, namely, the *MMPR* and the *ACMPR*. Next, this chapter looked at prior attempts to legalize recreational cannabis in Canada, focusing on the Le Dain Commission, the 2002 Senate Report on Cannabis, and the ‘hollowing out’ that preceded the Federal government’s introduction of Bill C-45. The purpose of this chapter was to demonstrate the historically complex relationship between cannabis and the law in Canada, characterized by almost a century of prohibition and repeated, unsuccessful attempts to liberalize cannabis laws.

Chapter 4 focused on the protection of freedom of expression in Canada, beginning with the *Canadian Bill of Rights*, through the introduction of the *Charter*, and the development of jurisprudence over the last 40 years. The purpose of this chapter was to provide a framework outlining how freedom of expression challenges are analyzed by the courts in order to analyze the relevant provisions of Bill C-45 in the subsequent chapter. Part IV of this chapter outlined the scope of protection afforded by section 2(b), and the hierarchy of protection offered to different types of expression. Then, this chapter looked at each respective step in a freedom of expression challenge, starting with the determination of

whether the activity that is being infringed upon is activity protected by section 2(b) of the *Charter*. This is followed by a discussion of the test for determining whether a governmental act has infringed upon freedom of expression, either in purpose or effect. The bulk of the chapter discussed the last part of a freedom of expression challenge, the section 1 analysis. This section outlined how the courts determine whether a *Charter* infringement is justified prior to the development of the *Oakes* test, before discussing the four steps of the *Oakes* test with reference to how each step has been used by the courts. Next, this chapter explored factors that can influence the section 1 analysis, namely flexibility, deference, and standard of proof, with discussion of how each factor can have significant implications for the success or failure of a freedom of expression challenge. Finally, this chapter outlined what remedies are available in the event that a freedom of expression challenge is successful, and how courts decide which remedy is most suitable.

Lastly, Chapter 5 provided an analysis of the proposed advertising restrictions on recreational cannabis contained in Bill C-45, *An Act Respecting Cannabis*. In this chapter, two aspects of the legislation were focused on: the general prohibition on promotion with exceptions, and, the prohibition on sponsorship and facility naming rights. Based on past jurisprudence, this chapter argued that it is extremely likely that the objective of the legislation as a whole, in addition to the objective of the advertising restrictions, will be sufficiently pressing and substantial to satisfy the first stage of the *Oakes* test. Additionally, it is also likely that, due to the low threshold required at the rational connection stage of the *Oakes* test, there is enough common sense and scientific evidence to pass this step, though some provisions will do so with more ease than others. The bulk of this chapter focused on the minimal impairment stage, commensurate with

the judicial attention given to this stage. It is at this stage where it is argued that three aspects of the regulations will be particularly vulnerable: the phrase “reasonable steps”; the restrictions on point of sale advertising; and, the sponsorship and naming-rights. It is argued that those provisions have not been carefully drafted to achieve the objectives, but are overbroad or vague, and therefore, are not minimally impairing. This chapter proceeded to discuss the last step of the *Oakes* test, both for the provisions found to pass all the prior stages of the *Oakes* test, and those argued to not be minimally impairing, in the event that the two provisions do not fail at the minimal impairment stage. Again, it is argued that, while the advertising restrictions as a whole are largely proportional, the same two provisions that would likely fail at the minimal impairment stage would similarly fail at the proportionality stage. Finally, what remedies would be most appropriate upon finding that sections 17(2), 17(3), 17(4), 21, and 22 are not a constitutionally valid infringement upon the guaranteed right to freedom of expression are discussed.

It is possible that the restrictions on cannabis advertising may change in the months leading up to legalization. Even if they do, it is likely that they will still be challenged, due to the high stakes for legal cannabis retailers and producers to get a strong foothold in the nascent market of recreational cannabis, which is estimated to be worth billions of dollars. Whichever way the decision falls, it will affect the bottom line of those legally permitted to produce and sell cannabis in Canada upon legalization, and it will impact the informational landscape of cannabis in popular media. The outcome will also direct the future of commercial speech litigation. A finding that the restrictions are unconstitutional will draw a line in the sand, differentiating tobacco from cannabis and other products that



do not have a clearly defined risk of harm. On the other hand, a finding that the provisions are constitutional will open the door for regulating the advertising of other products and services that pose a possible risk, such as advertising of food and beverages.

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# Appendices

## Appendix A: Bill C-45

Interpretation

Definitions

2 (1) The following definitions apply in this Act.

***brand element*** includes a brand name, trademark, tradename, distinguishing guise, logo, graphic arrangement, design or slogan that is reasonably associated with, or that evokes,

- (a) cannabis, a cannabis accessory or a service related to cannabis; or
- (b) a brand of any cannabis, cannabis accessory or service related to cannabis.

***brand-preference promotion*** means promotion of cannabis by means of its brand characteristics, promotion of a cannabis accessory by means of its brand characteristics or promotion of a service related to cannabis by means of the brand characteristics of the service.

***cannabis*** means a cannabis plant and anything referred to in Schedule 1 but does not include anything referred to in Schedule 2

***cannabis accessory*** means

- (a) a thing, including rolling papers or wraps, holders, pipes, water pipes, bongs and vaporizers, that is represented to be used in the consumption of cannabis or a thing that is represented to be used in the production of cannabis; or
- (b) a thing that is deemed under subsection (3) to be represented to be used in the consumption or production of cannabis.

***cannabis plant*** means a plant that belongs to the genus *Cannabis*.

***dried cannabis*** means any part of a cannabis plant that has been subjected to a drying process, other than seeds

***informational promotion*** means a promotion by which factual information is provided to the consumer about

- (a) cannabis or its characteristics;

- (b) a cannabis accessory or its characteristics;
- (c) a service related to cannabis; or
- (d) the availability or price of cannabis, a cannabis accessory or a service related to cannabis.

***person*** means an individual or organization.

***promote***, in respect of a thing or service, means to make, for the purpose of selling the thing or service, a representation — other than a representation on a package or label — about the thing or service by any means, whether directly or indirectly, that is likely to influence and shape attitudes, beliefs and behaviours about the thing or service.

***young person*** means

- (a) for the purposes of sections 8, 9 and 12, an individual who is 12 years of age or older but under 18 years of age; and
- (b) for the purposes of any other provision of this Act, an individual who is under 18 years of age.

## SUBDIVISION A

Promotion

Non-application

16 Subject to the regulations, this Subdivision does not apply

- (a) to a literary, dramatic, musical, cinematographic, scientific, educational or artistic work, production or performance that uses or depicts cannabis, a cannabis accessory or a service related to cannabis, or a brand element of any of those things, whatever the mode or form of its expression, if no consideration is given, directly or indirectly, for that use or depiction in the work, production or performance;
- (b) to a report, commentary or opinion in respect of cannabis, a cannabis accessory or a service related to cannabis or a brand element of any of those things, if no consideration is given, directly or indirectly, for the reference to the cannabis, cannabis accessory, service or brand element in that report, commentary or opinion;
- (c) to a promotion, by a person that is authorized to produce, sell or distribute cannabis, that is directed at any person that is authorized to produce, sell or distribute cannabis, but not, either directly or indirectly, at consumers; or
- (d) to a promotion, by a person that sells or distributes cannabis accessories or that provides a service related to cannabis, that is directed at any person that sells or



distributes cannabis accessories, at any person that is authorized to produce, sell or distribute cannabis, but not, either directly or indirectly, at consumers.

#### Promotion

17 (1) Unless authorized under this Act, it is prohibited to promote cannabis or a cannabis accessory or any service related to cannabis, including

- (a) by communicating information about its price or distribution;
- (b) by doing so in a manner that there are reasonable grounds to believe could be appealing to young persons;
- (c) by means of a testimonial or endorsement, however displayed or communicated;
- (d) by means of the depiction of a person, character or animal, whether real or fictional; or
- (e) by presenting it or any of its brand elements in a manner that associates it or the brand element with, or evokes a positive or negative emotion about or image of, a way of life such as one that includes glamour, recreation, excitement, vitality, risk or daring

#### Exception — informational promotion — cannabis

(2) Subject to the regulations, a person that is authorized to produce, sell or distribute cannabis may promote cannabis by means of informational promotion or brand-preference promotion if the promotion is

- (a) in a communication that is addressed and sent to an individual who is 18 years of age or older and is identified by name;
- (b) in a place where young persons are not permitted by law;
- (c) communicated by means of a telecommunication, where the person responsible for the content of the promotion has taken reasonable steps to ensure that the promotion cannot be accessed by a young person;
- (d) in a prescribed place; or
- (e) done in a prescribed manner.

#### Exception — informational promotion — cannabis accessories and services

(3) Subject to the regulations, a person may promote a cannabis accessory or a service related to cannabis by means of informational promotion or brand-preference promotion if the promotion is

- (a) in a communication that is addressed and sent to an individual who is 18 years of age or older and is identified by name;
- (b) in a place where young persons are not permitted by law;

- (c) communicated by means of a telecommunication, where the person responsible for the content of the promotion has taken reasonable steps to ensure that the promotion cannot be accessed by a young person;
- (d) in a prescribed place; or
- (e) done in a prescribed manner.

Exception — point of sale — cannabis

(4) Subject to the regulations, a person that is authorized to sell cannabis may promote it at the point of sale if the promotion indicates only its availability, its price or its availability and price.

Exception — point of sale — cannabis accessory and services

(5) Subject to the regulations, a person that sells a cannabis accessory or provides a service related to cannabis may promote it at the point of sale if the promotion indicates only its availability, its price or its availability and price.

Exception — brand element on other things

- (6) Subject to the regulations, a person may promote cannabis, a cannabis accessory or a service related to cannabis by displaying a brand element of cannabis, of a cannabis accessory or of a service related to cannabis on a thing that is not cannabis or a cannabis accessory, other than
- (a) a thing that is associated with young persons;
  - (b) a thing that there are reasonable grounds to believe could be appealing to young persons; or
  - (c) a thing that is associated with a way of life such as one that includes glamour, recreation, excitement, vitality, risk or daring.

False promotion — cannabis

18 (1) It is prohibited to promote cannabis in a manner that is false, misleading or deceptive or that is likely to create an erroneous impression about its characteristics, value, quantity, composition, strength, concentration, potency, purity, quality, merit, safety, health effects or health risks.

False promotion — cannabis accessory

(2) It is prohibited to promote a cannabis accessory in a manner that is false, misleading or deceptive or that is likely to create an erroneous impression about its design, construction, performance, intended use, characteristics, value, composition, merit, safety, health effects or health risks.

Use of certain terms, etc.

19 It is prohibited to use any term, expression, logo, symbol or illustration specified in regulations made under paragraph 139(1)(z.1) in the promotion of cannabis, a cannabis accessory or a service related to cannabis.

Promotion using foreign media

20 It is prohibited to promote, in a way that is prohibited by this Part, cannabis, a cannabis accessory, a service related to cannabis or a brand element of any of those things in a publication that is published outside Canada, a broadcast that originates outside Canada or any other communication that originates outside Canada.

Sponsorship

21 It is prohibited to display, in a promotion that is used, directly or indirectly, in the sponsorship of a person, entity, event, activity or facility,

- (a) a brand element of cannabis, of a cannabis accessory or of a service related to cannabis; or
- (b) the name of a person that
  - (i) produces, sells or distributes cannabis,
  - (ii) sells or distributes a cannabis accessory, or
  - (iii) provides a service related to cannabis.

Name of facility

22 It is prohibited to display on a facility, as part of the name of the facility or otherwise, if the facility is used for a sports or cultural event or activity,

- (a) a brand element of cannabis, a cannabis accessory or a service related to cannabis; or
- (b) the name of a person that
  - (i) produces, sells or distributes cannabis,
  - (ii) sells or distributes a cannabis accessory, or

- (iii) provides a service related to cannabis.

#### Publication, etc. of prohibited promotions

23 (1) It is prohibited to publish, broadcast or otherwise disseminate, on behalf of another person, with or without consideration, any promotion that is prohibited by any of sections 17 to 22.

#### Exception

(2) Subsection (1) does not apply

- (a) in respect of the distribution for sale of an imported publication;
- (b) in respect of broadcasting, as defined in subsection 2(1) of the Broadcasting Act, by a distribution undertaking, as defined in that subsection 2(1), that is lawful under that Act, other than the broadcasting of a promotion that is inserted by the distribution undertaking; and
- (c) in respect of a person that disseminates a promotion if they did not know, at the time of the dissemination, that it includes a promotion that is prohibited under any of sections 17 to 22.

#### Inducements

24 (1) Unless authorized under this Act, it is prohibited for a person that sells cannabis or a cannabis accessory

- (a) to provide or offer to provide cannabis or a cannabis accessory if it is provided or offered to be provided without monetary consideration or in consideration of the purchase of any thing or service or the provision of any service;
- (b) to provide or offer to provide any thing that is not cannabis or a cannabis accessory, including a right to participate in a game, draw, lottery or contest, if it is provided or offered to be provided as an inducement for the purchase of cannabis or a cannabis accessory; or
- (c) to provide or offer to provide any service if it is provided or offered to be provided as an inducement for the purchase of cannabis or a cannabis accessory.

#### Exception — cannabis

(2) Subject to the regulations, subsection (1) does not apply in respect of a person that is authorized to sell cannabis that provides or offers to provide any thing, including cannabis or a cannabis accessory, or service referred to in any of paragraphs (1)(a) to (c) to a person that is authorized to produce, sell or distribute cannabis.

#### Exception — cannabis accessory

(3) Subject to the regulations, subsection (1) does not apply in respect of a person that sells a cannabis accessory that provides or offers to provide any thing, including cannabis or a cannabis accessory, or service referred to in any of paragraphs (1)(a) to (c) to a person that is authorized to produce, sell or distribute cannabis.

### SUBDIVISION C

#### Display

##### Display of cannabis

29 Unless authorized under this Act, it is prohibited for a person that is authorized to sell cannabis to display it, or any package or label of cannabis, in a manner that may result in the cannabis, package or label being seen by a young person.

##### Display of cannabis accessory

30 Unless authorized under this Act, it is prohibited for a person that sells a cannabis accessory to display it, or any package or label of a cannabis accessory, in a manner that may result in the cannabis accessory, package or label being seen by a young person.

#### Promotion-related information — cannabis

43 (1) Every person that is authorized under this Act to produce, sell or distribute cannabis must provide to the Minister, in the prescribed form and manner and within the prescribed time, information that is required by the regulations about any promotion of cannabis that they conduct, including a promotion referred to in paragraph 16(c).

#### Promotion-related information — cannabis accessories and services

(2) Every person that sells or distributes a cannabis accessory, or that provides a service related to cannabis, must provide to the Minister, in the prescribed form and manner and within the prescribed time, information that is required by the regulations about any promotion of cannabis accessories or their service related to cannabis, as the case may be, that they conduct, including a promotion referred to in paragraph 16(d).

## Curriculum Vitae

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2008-2013 B.A.H.

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