R. *v.* Smith, [1987] 1 S.C.R. 1045

**Edward Dewey Smith** *Appellant*

*v.*

**Her Majesty The Queen** *Respondent*

and

**Attorney General for Ontario** *Intervener*

**indexed as: r. *v.* smith**

File No.: 18561.

1985: December 10; 1987: June 25.

Present: Dickson C.J. and McIntyre, Chouinard\*, Lamer, Wilson, Le Dain and La Forest JJ.

\*Chouinard J. took no part in the judgment.

on appeal from the court of appeal for british columbia

*Constitutional law ‑‑ Charter of Rights ‑‑ Cruel and unusual punishment ‑‑ Minimum sentence for importing narcotics notwithstanding degrees of seriousness of the offence ‑‑ Whether or not minimum sentence cruel and unusual punishment contrary to s. 12 of Charter ‑‑ If so, whether or not justifiable under s. 1 of the Charter ‑‑ Canadian Charter of Rights and Freedoms, ss. 1, 12 ‑‑ Narcotic Control Act, R.S.C. 1970, c. N‑1, s. 5(2).*

Appellant pleaded guilty to importing seven and a half ounces of cocaine into Canada contrary to s. 5(1) of the *Narcotic Control Act*. Before submissions on sentencing were made the accused challenged the constitutional validity of the seven‑year minimum sentence imposed by s. 5(2) of the *Narcotic Control Act* as being inconsistent with ss. 7, 9 and 12 of the *Charter*. The trial judge found the minimum mandatory imprisonment of seven years in s. 5(2) to be cruel and unusual punishment contrary to the *Charter* because of the potential disproportionality of the mandatory sentence. He nevertheless imposed an eight‑year sentence. The Court of Appeal ruled that s. 5(2) was not inconsistent with the *Charter* and found the sentence imposed to be appropriate. The constitutional question before the Court was whether or not s. 5(2) of the *Narcotic Control Act* was contrary to the *Charter*, and in particular, to ss. 7, 9 and 12.

*Held* (McIntyre J. dissenting): The appeal should be allowed.

*Per* Dickson C.J. and Lamer J.: The minimum sentence provided for by s. 5(2) of the *Narcotic Control Act* breaches s. 12 of the *Charter* and this breach is not justified under s. 1.

The undisputed fact that the purpose of s. 5(2) of the *Narcotic Control Act* is constitutionally valid is not a bar to an analysis of s. 5(2) in order to determine if the mandatory minimum sentence will oblige the judge to impose a cruel and unusual punishment and thereby is a *prima facie* violation of s. 12; if it is, it must be reconsidered under s. 1 as to purpose and any other considerations relevant to determining whether the impugned legislation may be salvaged.

The protection offered by s. 12 of the *Charter* governs the quality of the punishment and is concerned with the effect that the punishment may have on the person on whom it is imposed. The test for review under s. 12 of the *Charter* is one of gross disproportionality because s. 12 is aimed at punishments more than merely excessive. The court in assessing whether a sentence is grossly disproportionate must consider the gravity of the offence, the personal characteristics of the offender, and the particular circumstances of the case to determine what range of sentences would have been appropriate to punish, rehabilitate, deter or protect society from this particular offender. The court must also measure the effect of the sentence, which is not limited to its quantum or duration but includes also its nature and the conditions under which it is applied. The determination of whether the punishment is necessary to achieve a valid penal purpose, whether it is founded on recognized sentencing principles and whether valid alternative punishments exist, are all guidelines, not determinative of themselves, to help assess whether a sentence is grossly disproportionate. Arbitrariness is a minimal factor in determining whether a punishment or treatment is cruel and unusual.

The minimum term of imprisonment provided for by s. 5(2) of the *Narcotic Control Act* fails the proportionality test and therefore *prima facie* infringes the guarantees established by s. 12 of the *Charter*. A minimum mandatory term of imprisonment is not in and of itself cruel and unusual. The Legislature may provide for a compulsory term of imprisonment upon conviction for certain offences without infringing the rights protected by s. 12 of the *Charter*. A guilty verdict under s. 5(1), however, will inevitably lead to the imposing of a totally disproportionate term of imprisonment for s. 5(1) covers many substances of varying degrees of danger, totally disregards the quantity imported and treats as irrelevant the reason for importing and the existence of any previous convictions. The effect of the minimum is to insert the certainty that, in some cases, a violation will occur on conviction. It is this certainty, and not just the potential, which causes s. 5(2) to violate *prima facie* s. 12. The minimum must, subject to s. 1, be declared of no force or effect.

The section cannot be salvaged by relying on the discretion of the prosecution not to charge for importation in those cases where conviction, in the opinion of the prosecution, would result in a violation of the *Char‑ ter*. To do so would be to disregard totally s. 52 of the *Constitution Act, 1982*.

The section, too, cannot be salvaged under s. 1 of the *Charter*. The first criterion under s. 1 was met: the fight against the importing and trafficking of hard drugs is an objective of sufficient importance to override a constitutionally protected right. The second criterion‑‑proportionality of the means chosen‑‑was not met. The minimum will surely deter people from importing narcotics. However, it is not necessary to sentence the small offenders to seven years in prison in order to deter the serious offender.

*Per* Wilson J.: Section 12 of the *Charter*, although primarily concerned with the nature or type of treatment or punishment, is not confined to punishments which are in their nature cruel and extends to those that are "grossly disproportionate". The mandatory imposition of the minimum seven‑year sentence provided in s. 5(2) of the *Narcotic Control Act* on a youthful offender with no previous record would contravene s. 12 of the *Charter* in that it would be a cruel and unusual punishment "so excessive as to outrage standards of decency". The mandatory feature of s. 5(2) is not saved by s. 1 because the means employed to achieve the legitimate government objective of controlling the importation of drugs impairs the right protected by s. 12 of the *Charter* to a greater degree than necessary.

The arbitrary nature of the mandatory minimum sentence is fundamental to its designation as cruel and unusual under s. 12 of the *Charter*. The seven‑year minimum sentence is not *per se* cruel and unusual but it becomes so because it must be imposed regardless of the circumstances of the offence or the offender. Its arbitrary imposition will inevitably result in some cases in a legislatively ordained grossly disproportionate sentence.

Some punishments may be cruel and unusual within the meaning of s. 12 without being arbitrarily imposed while others may be arbitrary within the meaning of s. 9 without also being cruel and unusual. Sections 9 and 12 are not mutually exclusive.

*Per* Le Dain J.: Imprisonment for seven years for the unauthorized importation or exportation of a small quantity of cannabis for personal use would be cruel and unusual punishment within the meaning of s. 12 of the *Charter* and for this reason the words "but not less than seven years" in s. 5(2) of the *Narcotic Control Act* must be held to be of no force or effect. Notwithstanding his conclusion to the contrary, the test for cruel and unusual punishment under s. 12 of the *Charter* should generally be that of McIntyre J., including his approach to the application of disproportionality and arbitrariness. Punishment found to be cruel and unusual could not be justified under s. 1 of the *Charter*.

The mandatory minimum sentence of seven years' imprisonment cannot be held to be valid on its face because of the general seriousness of the offence created by s. 5(1), subject to the power of a court to find that it is constitutionally inapplicable in a particular case. Such an approach must be rejected because of the uncertainty it would create and the prejudicial effects which the assumed validity or application of the mandatory minimum sentence provision might have in particular cases. In coming to this conclusion no assumption is made as to whether the mandatory minimum sentence provision in s. 5(2) might be restructured in such a manner, with distinctions as to nature of narcotic, quantities, purpose and possibly prior conviction, as to survive further challenge and still be a feasible and workable legislative alternative with respect to the suppression of a complex and multi‑faceted phenomenon.

With respect to the question of interest or standing, an accused should be recognized as having standing to challenge the constitutional validity of a mandatory minimum sentence, whether or not, as applied to his case, it would result in cruel and unusual punishment. In such a case the accused has an interest in having the sentence considered without regard to a constitutionally invalid mandatory minimum sentence provision.

*Per* La Forest J.: While in substantial agreement with Lamer J., nothing was said about the role of arbitrariness in determining whether there has been cruel and unusual treatment or punishment.

*Per* McIntyre J. (dissenting): Section 12 of the *Charter* is a special constitutional provision which is not concerned with general principles of sentencing or with related social problems. Its function is to provide the constitutional outer limit beyond which Parliament, or those acting under parliamentary authority, may not go in imposing punishment or treatment respecting crime or penal detention. Parliament retains, while acting within the limits so prescribed, a full discretion to enact laws and regulations concerning sentencing and penal detention. The courts, on the other hand, in the actual sentencing process have a duty to prevent an incursion into the field of cruel and unusual treatment or punishment and, where there has been no such incursion, to impose appropriate sentences within the permissible limits established by Parliament. In so doing, the courts will apply the general principles of sentencing accepted in the courts in an effort to make the punishment fit the crime and the individual criminal.

The *Charter* right to be free from cruel and unusual punishment or treatment is absolute. The concept is a "compendious expression of a norm" drawn from evolving standards of decency and has been judicially broadened to encompass not only the quality or nature of punishment but also extent or duration under the heading of proportionality. (Proportionality is to be determined on a general rather than an individual basis.) The inclusion of the word "treatment" in the *Charter* has advanced this broadening process for the nature and quality of treatment or conditions under which a sentence is served are now subject to the proscription.

A punishment will be cruel and unusual and violate s. 12 of the *Charter* if it has any one or more of the following characteristics:

(1) The punishment is of such character or duration as to outrage the public conscience or be degrading to human dignity;

(2) The punishment goes beyond what is necessary for the achievement of a valid social aim, having regard to the legitimate purposes of punishment and the adequacy of possible alternatives; or

(3) The punishment is arbitrarily imposed in the sense that it is not applied on a rational basis in accordance with ascertained or ascertainable standards.

Appellant would not be able to show that the minimum punishment in s. 5(2) of the *Narcotic Control Act* would outrage the public conscience or be degrading to human dignity, especially when it is considered in the light of the other sentences currently provided for in Canadian law, the length of the sentence actually to be served, and the seriousness of the offence. This sentence did not go beyond what is necessary to achieve the valid social aim of deterring the traffic in drugs; Parliament considered the matter carefully and extensively and there was a want of evidence before the Court as to adequate alternatives capable of realizing this valid social aim. Finally, this punishment was imposed in accordance with standards or principles rationally connected to the purposes of the legislation.

Parliament, in legislating a minimum sentence, merely concluded that the gravity of the offence alone warranted that sentence. The legislation does not restrain the discretion of the trial judge to weigh and consider the circumstances of the offence in determining the length of sentence and it cannot be considered arbitrary and therefore cruel and unusual.

As far as arbitrariness may arise in the actual sentencing process, judicial error will not affect constitutionality and would, ordinarily, be correctable on appeal.

Appellant could not succeed under s. 7 of the *Charter*. Section 7 sets out broad and general rights which often extend over the same ground as other rights set out in the *Charter*. These rights cannot be read so broadly as to render other rights nugatory, and for this reason, s. 7 cannot raise any rights or issues not already considered under s. 12.

**Cases Cited**

By Lamer J.

**Applied**: *R. v. Oakes*, [1986] 1 S.C.R. 103; **considered**: *Miller and Cockriell v. The Queen*, [1977] 2 S.C.R. 680, aff'g [1975] 6 W.W.R. 1, (1975), 24 C.C.C. (2d) 401; *R. v. Shand* (1976), 30 C.C.C. (2d) 23, rev'g (1976), 29 C.C.C. (2d) 199; **referred to**: *Bell v. The Queen*, [1983] 2 S.C.R. 471; *R. v. Konechny* (1983), 10 C.C.C. (3d) 233; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486; *R. v. Dick, Penner and Finnigan*, [1965] 1 C.C.C. 171; *Ex parte Kleinys*, [1965] 3 C.C.C. 102; *Re Laporte and The Queen* (1972), 8 C.C.C. (2d) 343; *R. v. Natrall* (1972), 32 D.L.R. (3d) 241; *Ex parte Matticks* (1973), 15 C.C.C. (2d) 213 (S.C.C.), aff'g (1972), 10 C.C.C. (2d) 438; *Pearson v. Lecorre*, Supreme Court of Canada, October 3, 1973, unreported; *R. v. Hatchwell*, [1976] 1 S.C.R. 39, affirming (1973), 14 C.C.C. (2d) 556; *Re Rojas and The Queen* (1978), 40 C.C.C. (2d) 316; *R. v. Buckler*, [1970] 2 C.C.C. 4; *Dowhopoluk v. Martin* (1971), 23 D.L.R. (3d) 42; *R. v. Roestad* (1971), 5 C.C.C. (2d) 564; *McCann v. The Queen*, [1976] 1 F.C. 570, 29 C.C.C. (2d) 337; *Re Mitchell and The Queen* (1983), 6 C.C.C. (3d) 193; *Re Moore and The Queen* (1984), 10 C.C.C. (3d) 306; *Belliveau v. The Queen*, [1984] 2 F.C. 384, 13 C.C.C. (3d) 138; *Piche v. Solicitor‑General of Canada* (1984), 17 C.C.C. (3d) 1; *R. v. Langevin* (1984), 11 C.C.C. (3d) 336; *R. v. Morrison*, Ont. Co. Ct., Judge Mossop, July 7, 1983, unreported; *In re Gittens*, [1983] 1 F.C. 152, 68 C.C.C. (2d) 438; *R. v. Tobac* (1985), 20 C.C.C. (3d) 49; *R. v. Simon (No. 3)* (1982), 69 C.C.C. (2d) 557; *R. v. Kroeger* (1984), 13 C.C.C. (3d) 277; *R. v. Krug* (1982), 7 C.C.C. (3d) 324; *R. v. Slaney* (1985), 22 C.C.C. (3d) 240; *R. v. Randall and Weir* (1983), 7 C.C.C. (3d) 363; *R. v. Lewis* (1984), 12 C.C.C. (3d) 353; *R. v. Lyons* (1984), 15 C.C.C. (3d) 129; *R. v. Guiller*, Ont. Dist. Ct., Borins Dist. Ct. J., September 23, 1985, unreported; *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *Solem v. Helm*, 463 U.S. 277 (1983); *Furman v. Georgia*, 408 U.S. 238 (1972); *Hunter v. Southam Inc.*, [1984] 2 S.C.R. 145.

By Wilson J.

**Referred to**: *Miller and Cockriell v. The Queen*, [1977] 2 S.C.R. 680; *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486.

By McIntyre J. (dissenting)

*R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295; *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713; *North Carolina v. Pearce*, 395 U.S. 711 (1969); *Gooding v. Wilson,* 405 U.S. 518 (1971); *Hobbs v. State*, 32 N.E. 1019 (1893); *McCann v. The Queen*, [1976] 1 F.C. 570, 29 C.C.C. (2d) 337; *Miller and Cockriell v. The Queen*, [1977] 2 S.C.R. 680, aff'g [1975] 6 W.W.R. 1, (1975), 24 C.C.C. (2d) 401; *R. v. Bruce, Wilson and Lucas* (1977), 36 C.C.C. (2d) 158; *In re Gittens*, [1983] 1 F.C. 152, 68 C.C.C. (2d) 438; *Re Mitchell and The Queen* (1983), 6 C.C.C. (3d) 193; *Re Moore and The Queen* (1984), 10 C.C.C. (3d) 306; *R. v. Tobac* (1985), 20 C.C.C. (3d) 49; *Trop v. Dulles*, 356 U.S. 86 (1958); *R. v. Shand* (1976), 30 C.C.C. (2d) 23; *Re Konechny* (1983), 10 C.C.C. (3d) 233; *R. v. Langevin* (1984), 11 C.C.C. (3d) 336; *Coker v. Georgia*, 433 U.S. 584 (1977); *People v. Broadie*, 371 N.Y.S.2d 471 (1975); *Carmona v. Ward*, 576 F.2d 405 (1978); *Solem v. Helm*, 463 U.S. 277 (1983); *Furman v. Georgia*, 408 U.S. 238 (1972); *Gregg v. Georgia*, 428 U.S. 153 (1976); *Coker v. Georgia*, 433 U.S. 584 (1977); *R. v. Shand* (1976), 29 C.C.C. (2d) 199 (Ont. Co. Ct.); *Watts v. Indiana*, 338 U.S. 49 (1949); *Roncarelli v. Duplessis*, [1959] S.C.R. 121; *R. v. Simon (No. 1)* (1982), 68 C.C.C. (2d) 86; *Levitz v. Ryan*, [1972] 3 O.R. 783.

**Statutes and Regulations Cited**

*Bill of Rights*, (Eng.), 1 Wm. & M. sess. 2, c. 2, s. 10.

*Canadian Bill of Rights*, R.S.C. 1970, App. III, s. 2(*a*), (*b*).

*Canadian Charter of Rights and Freedoms*, ss. 1, 2(*a*), 7, 9, 12.

*Constitution Act, 1982*, s. 52.

*Constitution of the United States of America*, Eighth Amendment, Fourteenth Amendment.

*Criminal Code*, R.S.C. 1970, c. C‑34, ss. 219, 294, 303, 306, 325, 361.

*European Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 222 (1950), art. 3.

*International Covenant on Civil and Political Rights*, G.A. Res. 2200 A (XXI), 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc A/6316 (1966), art. 7.

*Motor Vehicle Act*, R.S.B.C. 1979, c. 288.

*Narcotic Control Act*, R.S.C. 1970, c. N‑1, ss. 2, 4, 5(1), (2).

*Parole Act*, R.S.C. 1970, c. P‑2, s. 15, as am.

*Parole Regulations*, SOR/78‑428, ss. 5, 9, as am.

*Penitentiary Act*, R.S.C. 1970, c. P‑6, s. 24, as am.

*Universal Declaration of Human Rights*, G.A. Res. 217 A (III), U.N. Doc A/810, at 71 (1948), art. 5.

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Tarnopolsky, W. S. "Just Deserts or Cruel and Unusual Treatment or Punishment? Where Do We Look for Guidance?" (1978), 10 *Ottawa L. Rev.* 1.

APPEAL from a judgment of the British Columbia Court of Appeal (1984), 11 C.C.C. (3d) 411, 39 C.R. (3d) 305, dismissing an appeal from sentence imposed by Wetmore Co. Ct. J. and overturning his ruling finding s. 5(2) of the *Narcotic Control Act* to be a contravention of s. 12 of the *Canadian Charter of Rights and Freedoms*, and hence of no force or effect. Appeal allowed, McIntyre J. dissenting.

*A. P. Serka* and *Ann Cameron*, for the appellant.

*S. David Frankel* and *James A. Wallace*, for the respondent.

*John C. Pearson*, for the intervener the Attorney General for Ontario.

The judgment of Dickson C.J. and Lamer J. was delivered by

Lamer J.‑‑

Introduction

Those who import and market hard drugs for lucre are responsible for the gradual but inexorable degeneration of many of their fellow human beings as a result of their becoming drug addicts. The direct cause of the hardship cast upon their victims and their families, these importers must also be made to bear their fair share of the guilt for the innumerable serious crimes of all sorts committed by addicts in order to feed their demand for drugs. Such persons, with few exceptions (as an example, the guilt of addicts who import not only to meet but also to finance their needs is not necessarily the same in degree as that of cold‑blooded non‑users), should, upon conviction, in my respectful view, be sentenced to and actually serve long periods of penal servitude. However, a judge who would sentence to seven years in a penitentiary a young person who, while driving back into Canada from a winter break in the U.S.A., is caught with only one, indeed, let's postulate, his or her first "joint of grass", would certainly be considered by most Canadians to be a cruel and, all would hope, a very unusual judge.

Yet, there is a law in Canada, s. 5(2) of the *Narcotic Control Act*, R.S.C. 1970, c. N‑1, that gives no judge in the land any other choice.

**5.**(1) Except as authorized by this Act or the regulations, no person shall import into Canada or export from Canada any narcotic.

(2) Every person who violates subsection (1) is guilty of an indictable offence and is liable to imprisonment for life but not less than seven years.

While no such case has actually occurred to my knowledge, that is merely because the Crown has chosen to exercise favourably its prosecutorial discretion to charge such a person not with the offence that that person has really committed, but rather with a lesser offence. However, the potential that such a person be charged with importing is there lurking. Added to that potential is the certainty that upon conviction a minimum of seven years' imprisonment will have to be imposed. It is because of that certainty that I find that the minimum mandatory imprisonment found in s. 5(2) is in violation of s. 12 of the *Canadian Charter of Rights and Freedoms*, which guarantees to each and every one of us that we shall not be subjected to any cruel and unusual treatment or punishment.

The appellant returned to Canada from Bolivia with seven and a half ounces of 85 to 90 percent pure cocaine secreted on his person. He pleaded guilty in the County Court of Vancouver, B.C., to importing a narcotic contrary to s. 5(1) of the *Narcotic Control Act* and was sentenced to eight years in the penitentiary.

The Issue

The following constitutional question which was stated by the Chief Justice is, as a result of appellant's having abandoned all others at the hearing, the only issue in this Court:

Whether the mandatory minimum sentence of seven years prescribed by s. 5(2) of the *Narcotic Control Act,* R.S.C. 1970, c. N‑1 is contrary to, infringes, or denies the rights and guarantees contained in the *Canadian Charter of Rights and Freedoms*, and in particular the rights contained in ss. 7, 9 and 12 thereof?

For reasons I will give later I will address only s. 12 of the *Charter.* Since the appellant does not dispute the constitutionality of the maximum penalty of life imprisonment but only the minimum seven years' imprisonment, the question in issue is therefore limited to whether the concluding six words of s. 5(2) of the *Narcotic Control Act* will, under certain circumstances, leave the judge no other alternative but that of subjecting those convicted under the section to cruel and unusual punishment.

The Legislation

*Importing*

Importing has been judicially defined as fol‑ lows in *Bell v. The Queen*, [1983] 2 S.C.R. 471, *per*McIntyre J., speaking for the majority, at pp. 488‑89:

In my view, since the *Narcotic Control Act* does not give a special definition of the word, its ordinary meaning should apply and that ordinary meaning is simply to bring into the country or to cause to be brought into the country.

In separate reasons, Dickson J., as he then was, agreed with this definition; his disagreement was on another aspect of the notion of importing, which is irrelevant to this case.

*A Narcotic*

A narcotic is defined at s. 2 of the Act:

**2.** ...

"narcotic" means any substance included in the schedule or anything that contains any substance included in the schedule;

This definition refers to a schedule which lists some twenty substances and the preparations, derivatives, alkaloids and salts thereof, and for some, such as cannabis, the similar synthetic preparations. The schedule covers a wide variety of drugs which range, in dangerousness, from "pot" to heroin.

The purpose of the importing, namely whether it is for trafficking or for personal consumption, and the quantity imported are irrelevant to guilt under s. 5. For example, the serious hard drugs dealer who is convicted of importing a large quantity of heroin and the tourist convicted of bringing a "joint" back into the country are treated on the same footing and must both be sentenced to at least seven years in the penitentiary.

*Canadian Bill of Rights*

Section 2(*a*) and (*b*) of the Bill states:

**2.** Every law of Canada shall, unless it is expressly declared by an Act of the Parliament of Canada that it shall operate notwithstanding the *Canadian Bill of Rights*, be so construed and applied as not to abrogate, abridge or infringe or to authorize the abrogation, abridgement or infringement of any of the rights or freedoms herein recognized and declared, and in particular, no law of Canada shall be construed or applied so as to

(*a*) authorize or effect the arbitrary detention, imprisonment or exile of any person;

(*b*) impose or authorize the imposition of cruel and unusual treatment or punishment;

*Canadian Charter of Rights and Freedoms*

Sections 7, 9 and 12 of the *Charter* guarantee the following rights:

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

**9.** Everyone has the right not to be arbitrarily detained or imprisoned.

**12.**Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

The Judgments

*County Court of Vancouver*

After pleading guilty before Wetmore Co. Ct. J., the accused challenged the constitutional validity of the seven‑year minimum sentence found in s. 5(2) of the *Narcotic Control Act* as being inconsistent with the provisions of ss. 7, 9 and 12 of the *Charter* and requested that the judge make a determination in that regard before submissions on sentencing were made. The trial judge in his reasons ((1983), 35 C.R. (3d) 256) disposed of ss. 7 and 9 as follows, at p. 258:

Counsel did not press the argument under s. 7 of the Charter. On the issue of arbitrariness, s. 9, I conclude in the interests of judicial comity that the argument is resolved in favour of the Crown in *R. v. Newall* (1982), 70 C.C.C. (2d) 10, 141 D.L.R. (3d) 26, 2 C.R.R. 156 (B.C.S.C.). That case and others may have to be given limited interpretation in due course if it is concluded that the Charter not only protects citizens before the courts but also places upon the courts power to protect the citizen from legislative arbitrariness.

The gist of Wetmore Co. Ct. J.'s reasoning concerning s. 12 is in the following passage of his judgment, at p. 261:

Section 5 of the Narcotic Control Act is capable of imprisoning for seven years a single possessor of a minimum quantity of any narcotic brought into Canada. It purports to leave a sentencing judge powerless to relieve against the harshness of such a sentence.

In the situation I have described of the cigarette of marihuana, it varies only notionally from the possessor of the same narcotic within the country. That domestic possessor would be unlikely to face any imprisonment, or at most modest incarceration. Given that situation, the disparity is so gross it is shocking to contemporary society, is unnecessary in narcotic control and results, therefore, in a punishment which is cruel and unusual.

Accordingly, I propose to treat the concluding words "but not less than seven years" in s. 5(2) of the Narcotic Control Act inoperable as being in contravention of s. 12 of the Charter, and hence beyond the power of Parliament.

It appears to me that his conclusion rests upon the potential disproportionality of the mandatory sentence when considering the range of offences, the variety of ways the offence may be committed, and the great disparity of the sentence with that imposed on others who have committed offences identical in gravity and nature. Having made this determination, he then held a pre‑sentence hearing and imposed a sentence of eight years in the penitentiary.

*The Court of Appeal*

Smith's appeal was dismissed by the Court of Appeal for British Columbia ((1984), 11 C.C.C. (3d) 411). Craig J.A. relied on *R. v. Konechny* (1983), 10 C.C.C. (3d) 233, also a decision of the British Columbia Court of Appeal. In that case, it was decided that the seven day minimum sentence mandatorily imposed by the *Motor Vehicle Act*, R.S.B.C. 1979, c. 288, on those found guilty of driving their vehicle while knowing that their licence was suspended, was not inconsistent with ss. 9 and 12 of the *Charter.* He also relied on *R. v. Shand* (1976), 30 C.C.C. (2d) 23, a decision of the Ontario Court of Appeal under the *Canadian Bill of Rights.*  The Court there found that the seven‑year minimum in s. 5(2) of the *Narcotic Control Act*, the same provision under consideration in this appeal, was "not so disproportionate to the offence that the prescribed penalty [was] cruel and unusual". In the present case Craig J.A. found that the section was not inconsistent with the *Charter* and, of the opinion that the eight‑year sentence imposed by Wetmore Co. Ct. J. was appropriate, he dismissed the appeal from sentence.

Macdonald J.A. agreed with Craig J.A., but expanded somewhat on the scope and meaning of s. 9. In that regard, he quoted a passage from *R. v. Konechny*, *supra*, where Macfarlane J.A., said at p. 254:

The courts have been given the power under s. 52 of the *Constitution Act, 1982* to review, and in appropriate cases to strike down legislation. But that does not mean that judges have been authorized to substitute their opinion for that of the Legislature which under our democratic system is empowered to enunciate public policy. The basis for such policy may be reviewed if the policy is said to conflict with individual rights under the Charter, but, in my opinion, the policy ought not to be struck down, in the case of a challenge under s. 9, unless it is without any rational basis. If there be a rational reason for the policy then I do not think it is for a judge to say that the policy is capricious, unreasonable or unjustified.

Macdonald J.A., obviously referring to the words "capricious, unreasonable or unjustified", then added, at p. 434:

I agree with that passage with the reservation that those three words should not be taken as a complete definition of arbitrariness.

In conclusion, he said at p. 434:

The correct approach is, in my view, indicated in the passage which I have quoted from Mr. Justice Macfarlane's judgment. Employing it here, and considering what was said in *R. v. Shand* with respect to the enactment of s. 5(2) of the *Narcotic Control Act* I am not persuaded that it violates either s. 7 or s. 9 of the Charter.

Thus he found, as did Craig J.A., that the sentence was appropriate.

Lambert J.A., dissenting, only addressed s. 9 and found that s. 5(2) of the *Narcotic Control Act* was *prima facie* inconsistent with the rights guaranteed by that section. He summarized his reasons at p. 425 of his judgment:

In short, the effect of s. 5(2) is that guilt or innocence on a charge of importing or exporting a narcotic is determined judicially by a judge or jury, but the sentence is not determined by a judge or a jury, but is predetermined by Parliament. That predetermination by Parliament pays no attention to the individual offender or the circumstances of his offence. In that respect the determination is arbitrary, and the resulting imprisonment is arbitrary imprisonment.

He was uncertain as regards the proper approach to be taken when assessing whether legislation, which *prima facie* violates a section, can be salvaged under s. 1 of the *Charter*. This is understandable, as the decision of the Court of Appeal in this case was delivered long before this Court's decision in *R. v. Oakes*, [1986] 1 S.C.R. 103. In any event, Lambert J.A. was not satisfied by the Crown's efforts to salvage the section. However, he chose not to make an order "declaring s. 5(2) of the *Narcotic Control Act*, or the last six words of it, to be unconstitutional", and decided only that s. 5(2) was not applicable to the accused Smith. He would have imposed a sentence of five years' imprisonment.

Having concluded that the minimum sentence imposed by s. 5(2) of the *Narcotic Control Act* is in violation of s. 12 of the *Charter*, I do not find myself obliged to address ss. 9 and 7 of the *Char‑ ter*. I rather welcome this opportunity as I prefer not to address s. 9, given the proceedings throughout. Indeed, little or nothing was really argued as regards s. 7, while argument under s. 9 was rather limited. Of course, Lambert J.A. dealt thoroughly and exclusively with s. 9. His conclusion that a predetermination of a sentence by Parliament is arbitrarily imposed, if right, would mean that all minimum sentences are invalid and probably also all maximum sentences.

Furthermore, s. 7 was not really considered in relation to s. 9. This is understandable as at the time this Court had not yet handed down its decision in *Re B.C. Motor Vehicle Act,* [1985] 2 S.C.R. 486, wherein the relationship between s. 7 and ss. 8 to 14 was commented on and where the "principles of fundamental justice" were defined as providing more than just procedural protection under the section. I do not think it wise to address s. 9 without the benefit of the views of the courts below with regard to its relationship to s. 7. Finally, there are fixed and minimum sentences to be found throughout provincial laws and any decision striking down minimum sentences *per se* would affect all those laws. Yet only one attorney general intervened. I imagine this might be so because cases under s. 5(2) of the *Narcotic Control Act* are instituted and prosecuted by the "Federal Crown". Whatever be the reason, I should not want to decide the validity of all minimum sentences under s. 9 without the benefit of a thorough discussion on these issues and without any argument being made under s. 1 of the *Charter*.

Cruel and Unusual Punishment

*History*

We in Canada adopted through the preamble of our Constitution the legislative restraint set out in s. 10 of the English *Bill of Rights* of 1688, 1 Wm. & M. sess. 2, c. 2, which states:

10. That excessive Bail ought not to be required, nor excessive Fines imposed; nor cruel and unusual Punishments inflicted. [Emphasis added.]

It was therefore open to our courts to interpret the laws of Canada and to choose between various meanings so as to avoid the infliction of cruel and unusual punishment. I know of no reported instances where the courts invoked that part of s. 10 of the English *Bill of Rights*.

Article 7 of the *International Covenant on Civil and Political Rights*, G.A. Res. 2200 A (XXI), 21 U.N. GAOR, Supp. (No. 16) 52, U.N. Doc. A/6316 (1966) is also worthy of note. It provides that:

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Experience in other countries regarding the *Covenant* and the *Optional Protocol*, to which Canada acceded in 1976, may on occasion be of assistance in attempting to give meaning to relevant provisions of the *Charter*. However, I am not aware of any international jurisprudence on the interpretation of art. 7 that would be of assistance to us in the present appeal, as most of the cases that have addressed the provision have dealt with the conditions of imprisonment or the type of treatment to which those being detained are subject.

Article 3 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, 213 U.N.T.S. 222 (1950), and art. 5 of the *Universal Declaration of Human Rights* (G.A. Res. 217 A (III), U.N. Doc. A/810 (1948), at 71) also provide similar protection against cruel or inhuman punishment but, here too, little assistance can be had for the present appeal.

It is not until the enactment of our own *Canadian Bill of Rights*, more particularly s. 2(*b*), that the courts addressed the meaning of those very words, cruel and unusual punishment. Even though the protection against cruel and unusual treatment or punishment found in s. 2(*b*) of the *Canadian Bill of Rights* was raised in many cases, the Canadian courts were often reluctant to examine the merits of the argument. Indeed, in the majority of cases, the courts summarily rejected the s. 2(*b*) argument without giving any reasons. (See *R. v. Dick, Penner and Finnigan*, [1965] 1 C.C.C. 171 (Man. C.A.); *Ex parte Kleinys*, [1965] 3 C.C.C. 102 (B.C.S.C.); *Re Laporte and The Queen* (1972), 8 C.C.C. (2d) 343 (Que. Q.B.); *R. v. Natrall* (1972), 32 D.L.R. (3d) 241 (B.C.C.A.); *Ex parte Matticks* (1972), 10 C.C.C. (2d) 438 (Que. C.A.), affirmed by (1973), 15 C.C.C. (2d) 213 (S.C.C.); *Pearson v. Lecorre*, S.C.C., Oct. 3, 1973, unreported; *R. v. Hatchwell* (1973), 14 C.C.C. (2d) 556 (B.C.C.A.), affirmed by [1976] 1 S.C.R. 39; *Re Rojas and The Queen* (1978), 40 C.C.C. (2d) 316 (Ont. H.C.))

In the early years of the *Canadian Bill of Rights*, in those rare cases where s. 2(*b*) was the object of some judicial analysis, the application of the prohibition was either limited to the protection against the infliction of excessive and unusual physical pain (*R. v. Buckler*, [1970] 2 C.C.C. 4 (Ont. Prov. Ct.), and *Dowhopoluk v. Martin* (1971), 23 D.L.R. (3d) 42 (Ont. H.C.)), or dismissed out of deference to Parliament's wisdom in enacting the challenged legislation (*R. v. Dick, Penner and Finnigan*, *supra*, and *R. v. Roestad* (1971), 5 C.C.C. (2d) 564 (Ont. Co. Ct.))

It was not until fifteen years after the enactment of the *Canadian Bill of Rights* that a more in depth analysis of the protection afforded by s. 2(*b*) was undertaken. The only decision finding a treatment or punishment to be cruel and unusual under the *Canadian Bill of Rights* was *McCann v. The Queen*, [1976] 1 F.C. 570.

In this judgment, Heald J., of the Trial Division of the Federal Court, declared that the prison conditions to which certain prisoners were subjected in the solitary confinement unit of the British Columbia Penitentiary amounted to cruel and unusual treatment or punishment. In his view, the treatment served no "positive penal purpose", and even if it did, "it [was] not in accord with public standards of decency and propriety". Furthermore, in his opinion, there existed "adequate alternatives" to the treatment.

The Court of Appeal for British Columbia decided, in *R. v. Miller and Cockriell* (1975), 24 C.C.C. (2d) 401, that the death penalty for murder was not cruel and unusual punishment.

Emphasizing the non‑constitutional nature of the *Canadian Bill of Rights*, Robertson J.A., speaking for Farris C.J.B.C. and Maclean and Carrothers JJ.A., did not think it necessary to undertake an extensive analysis of the meaning of "cruel and unusual". A summary of his reasons can be found in the following passage at p. 456:

To sum up: s. 2 of the *Bill of Rights* does not prevent the application of s. 214(1) and (2) and s. 218 of the *Criminal Code* on the ground that the punishment of death prescribed by the *Code* is a cruel and unusual one, because (1) punishment by death for murder is not unusual in the ordinary and natural meaning of the word; (2) Parliament, when it enacted the amendments to the *Code*, was of the opinion that the punishment was not an unusual one and the Court cannot substitute its opinion (if it is different) for Parliament's; and (3) Parliament wished its enactment to prevail and by necessary implication excluded the application of s. 2 of the *Bill of Rights*.

Dissenting, McIntyre J.A., as he then was, undertook a more detailed analysis of the protection afforded by s. 2(*b*) of the *Canadian Bill of Rights*. In his opinion, the words "cruel and unusual" were to be read disjunctively so that "cruel punishments however usual in the ordinary sense of the term could come within the proscription". He emphasized the need for a deterrent value in any punishment but affirmed that there were other factors to be considered and weighed against it, at p. 468:

In my view, capital punishment would amount to cruel and unusual punishment if it cannot be shown that its deterrent value outweighs the objections which can be brought against it. Furthermore, even assuming some deterrent value, I am of the opinion it would be cruel and unusual if it is not in accord with public standards of decency and propriety, if it is unnecessary because of the existence of adequate alternatives, if it cannot be applied upon a rational basis in accordance with ascertained or ascertainable standards, and if it is excessive and out of proportion to the crimes it seeks to restrain.

After a review of statistics and other data, McIntyre J.A. concluded that capital punishment did not come within these criteria and was therefore cruel and unusual punishment.

The approach undertaken by McIntyre J.A. was followed by Borins Co. Ct. J. of the County Court of Ontario in *R. v. Shand* (1976), 29 C.C.C. (2d) 199. Borins Co. Ct. J. decided that the mandatory minimum of seven years' imprisonment imposed by s. 5(2) of the *Narcotic Control Act* was cruel and unusual. Relying heavily on American cases dealing with the Eighth Amendment of the Constitution of the United States, which provides that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted", and the analysis undertaken by McIntyre J.A. in *Miller and Cockriell*, *supra*, Borins Co. Ct. J. said, at p. 216:

Thus, two factors to be taken into consideration in determining whether the mandatory minimum sentence in this case constitutes "cruel and unusual treatment or punishment" are the effect of the severity or excessiveness of the penalty in relation to the "dignity and worth of the human person" and the potential for the absence of "equality before the law" resulting from the exercise of prosecutorial discretion resulting, in turn, in an arbitrary punishment.

In his opinion, found at p. 234, s. 5(2) came within these criteria:

In my view a compulsory sentence of seven years for a non‑violent crime imposed without consideration for the individual history and background of the accused is so excessive that it "shocks the conscience" and because of its arbitrary nature fails to comport with human dignity. Such a provision is an unnecessary encroachment upon the traditional discretion accorded to the trial Judge in matters of sentencing.

The Court of Appeal for Ontario ((1976), 30 C.C.C. (2d) 23) reversed the decision of Borins Co. Ct. J. and held that s. 5(2) did not impose a punishment that was so disproportionate to the offence as to be cruel and unusual. Arnup J.A., speaking for Brooke, Dubin, Martin and Blair JJ.A., took the position that it was preferable not to interfere with Parliament's expressed intention to deter the serious crime of importing drugs, at pp. 38‑39:

Assuming that disproportionality is a matter to be considered, it is to be applied, certainly in the first instance, to "the law of Canada" that is to be "construed or applied". In our view a minimum sentence of seven years for importing a drug contrary to the Act is not so disproportionate to the offence that the prescribed penalty is cruel and unusual. The drug problem in Canada is still of major proportions. The particular drugs that from time to time are in the greatest demand, or widest use, or are the greatest danger, may vary, but the basic problem remains.

The legislative approach is clear and direct. Most of the drugs of vegetable origin are not native to Canada. If their importation is prohibited, with heavy penalties for breach, the drugs cannot get into the country. Their cultivation is also prohibited. So is the unauthorized manufacture of the proscribed chemical drugs. Trafficking in any of them is a serious offence.

This type of national evil requires the opinion of Parliament as to appropriate penalties, not that of individual Judges. The prosecutorial discretion is then exercised in selecting the appropriate charges. The judicial discretion‑‑still a very wide one‑‑is then exercised, within the framework of the penalties legislated, to decide what penalty is appropriate for the particular offender in all of the circumstances of the particular case.

The debate between those favouring a restrictive application of the *Canadian Bill of Rights*, as a result of a great reluctance to interfere with the expressed intention of Parliament through the use of a non‑constitutional document, and those determined to give s. 2(*b*) greater effect culminated in this Court's decision in *Miller and Cockriell v. The Queen*, [1977] 2 S.C.R. 680.

In that case, all the judges of this Court agreed that capital punishment for murder did not constitute cruel and unusual punishment, but different routes were taken to reach this conclusion. Ritchie J., with whom Martland, Judson, Pigeon and de Grandpré JJ. concurred, favoured the attitude of judicial deference to the expressed purpose sought by Parliament. In his opinion, the non‑ constitutional nature of the *Canadian Bill of Rights* required the application of traditional rules of interpretation. Furthermore, recourse to American jurisprudence on the Eighth Amendment as an aid to interpreting s. 2(*b*) of the *Canadian Bill of Rights* was considered inappropriate as the documents involved were quite different. Finally, even though in his opinion it was unnecessary to provide an exhaustive definition of "cruel and unusual" for the purpose of disposing of the appeal, Ritchie J. added the following comments, at pp. 705‑06:

Having reached this conclusion I do not find it necessary, in considering the meaning of "cruel and unusual treatment or punishment" as employed in s. 2(*b*) of the *Bill of Rights*, to make any assessment of current community standards of morality or of the deterrent effect of the death penalty. These matters in my view raise what are essentially questions of policy and as such they are of necessity considerations effecting the decision of Parliament as to whether or not the death penalty should be retained; . . .

In my opinion the words "cruel and unusual" as they are employed in s. 2(*b*) of the *Bill of Rights* are to be read conjunctively and refer to "treatment or punishment" which is both cruel and unusual. In this latter regard I share the view of Mr. Justice Robertson that, having regard to the fact that the death penalty for murder had been a part of the law of England from time immemorial and that, at the time when this murder was committed and the trial was held, it had been a feature of the criminal law of Canada since Confederation, it cannot be said to have been an "unusual" punishment in the ordinary accepted meaning of that word.

In separate reasons, Beetz J. agreed with Ritchie J. that the words "cruel and unusual" were to be read conjunctively. Without addressing the question whether the *Canadian Bill of Rights* created new rights, Beetz J. concurred in Ritchie J.'s conclusion.

Laskin C.J., supported by Spence and Dickson JJ., delineated more thoroughly the protection afforded by s. 2(*b*). He said, at pp. 689‑90:

The various judgments in the Supreme Court of the United States, which I would not discount as being irrelevant here, do lend support to the view that "cruel and unusual" are not treated there as conjunctive in the sense of requiring a rigidly separate assessment of each word, each of whose meanings must be met before they become effective against challenged legislation, but rather as interacting expressions colouring each other, so to speak, and hence to be considered together as a compendious expression of a norm. I think this to be a reasonable appraisal, in line with the duty of the Court not to whittle down the protections of the *Canadian Bill of Rights* by a narrow construction of what is a quasi‑constitutional document.

After a detailed analysis of the American jurisprudence on point, he urged upon the courts the following test, at p. 688:

...whether the punishment prescribed is so excessive as to outrage standards of decency. This is not a precise formula for s. 2(*b*), but I doubt whether a more precise one can be found.

He concluded that capital punishment for murder of a peace officer did not contravene this norm and concurred with his colleagues in dismissing the appeal.

This Court's decision in *Miller and Cockriell*, *supra*, is the last important decision that addressed s. 2(*b*) of the *Canadian Bill of Rights*.

The disparity between the two main approaches reflects the reluctance of some courts to find a warrant in the *Canadian Bill of Rights* to interfere with a valid purpose of Parliament. Since they limited their comments to delineating Parliament's purpose, acknowledging it to be valid and then refusing to interfere, little was said by them as regards the meaning of cruel and unusual treatment or punishment. Therefore, in seeking guidance for the meaning to be given to the phrase, we can only refer to those criteria elaborated upon by a minority of judges under the *Canadian Bill of Rights*.

These criteria are very usefully synthesized in an article by Professor Tarnopolsky, as he then was, "Just Deserts or Cruel and Unusual Treatment or Punishment? Where Do We Look for Guidance?" (1978), 10 *Ottawa L. Rev.* 1. In a summary he wrote, at pp. 32‑33:

Without specific attribution as to the court that suggested it, it would be useful to consider the various specific tests that have been suggested:

(1)  Is the punishment such that it goes beyond what is necessary to achieve a legitimate penal aim?

(2)  Is it unnecessary because there are adequate alternatives?

(3)  Is it unacceptable to a large segment of the population?

(4)  Is it such that it cannot be applied upon a rational basis in accordance with ascertained or ascertainable standards?

(5)  Is it arbitrarily imposed?

(6)  Is it such that it has no value in the sense of some social purpose such as reformation, rehabilitation, deterrence or retribution?

(7)  Is it in accord with public standards of decency or propriety?

(8)  Is the punishment of such a character as to shock general conscience or as to be intolerable in fundamental fairness?

(9)  Is it unusually severe and hence degrading to human dignity and worth?

An overview of the cases since decided under s. 12 of the *Charter* reveals that these tests are those substantially resorted to (see for example, *Re Mitchell and The Queen* (1983), 6 C.C.C. (3d) 193 (Ont. H.C.); *Re Moore and The Queen* (1984), 10 C.C.C. (3d) 306 (Ont. H.C.); *Belliveau v. The Queen*, [1984] 2 F.C. 384, 13 C.C.C. (3d) 138 (T.D.); *Piche v. Solicitor‑General of Canada* (1984), 17 C.C.C. (3d) 1 (F.C.T.D.); *R. v. Langevin* (1984), 11 C.C.C. (3d) 336 (Ont. C.A.); *R. v. Morrison*, Ont. Co. Ct., Mossop Co. Ct. J., July 7, 1983, unreported). Abandoning the debate as to whether "cruel and unusual" should be read disjunctively or conjunctively, most courts have clearly taken the Laskin approach as set out in *Miller and Cockriell* and have treated the phrase "cruel and unusual" as a "compendious expression of a norm" (*In re Gittens*, [1983] 1 F.C. 152, 68 C.C.C. (2d) 438 (T.D.); *Re Mitchell and The Queen*, *supra*; *Re Moore and The Queen*, *supra*; *R. v. Tobac* (1985), 20 C.C.C. (3d) 49 (N.W.T.C.A.); see also *R. v. Morrison*, *supra*).

Relying on the guidelines enunciated under the *Canadian Bill of Rights*, judges deciding cases under s. 12 of the *Charter* have been somewhat more willing, and understandably so, to put legislation to the test. However, be that as it may, the courts have shown some lingering reluctance to interfere with the wisdom of Parliament in enacting the laws that are challenged. Thus, despite the constitutional nature of the *Canadian Charter of Rights and Freedoms* and the command therein to the courts to oversee the constitutionality of our laws, the approach taken when interpreting laws under the *Canadian Bill of Rights*, has, to some extent, guided the judiciary when considering a constitutional challenge to laws under the *Charter*.

For example, Lacourcière J.A., in *R. v. Langevin*, *supra*, stated, at p. 360:

In the cases considered under s. 2(*b*) of the *Bill of Rights* such as *Hatchwell v. The Queen* (1973), 14 C.C.C. (2d) 556, [1974] 1 W.W.R. 307, and *Miller and Cockriell*, *supra*, the court took into account the over‑all objective of Parliament in the protection of society. I see no reason to depart from this overriding consideration in the interpretation of s. 12 of the Charter.

This deference to Parliament has been repeated in many cases (*R. v. Simon (No. 3)* (1982), 69 C.C.C. (2d) 557 (N.W.T.S.C.); *R. v. Kroeger* (1984), 13 C.C.C. (3d) 277 (Alta. C.A.); *R. v. Krug* (1982), 7 C.C.C. (3d) 324 (Ont. Dist. Ct.); *R. v. Slaney* (1985), 22 C.C.C. (3d) 240 (Nfld. C.A.); *R. v. Tobac*, *supra*; *R. v. Randall and Weir* (1983), 7 C.C.C. (3d) 363 (N.S.C.A.); *R. v. Lewis* (1984), 12 C.C.C. (3d) 353 (Ont. C.A.); *R. v. Lyons* (1984), 15 C.C.C. (3d) 129 (N.S.C.A.); *R. v. Morrison*, *supra*). As regards this subject the comments by Borins Dist. Ct. J. in *R. v. Guiller*, Ont. Dist. Ct., Sept. 23, 1985, unreported, provide a good example, at p. 15:

It is not for the court to pass on the wisdom of Parliament with respect to the gravity of various offences and the range of penalties which may be imposed upon those found guilty of committing the offences. Parliament has broad discretion in proscribing conduct as criminal and in determining proper punishment. While the final judgment as to whether a punishment exceeds constitutional limits set by the *Charter* is properly a judicial function the court should be reluctant to interfere with the considered views of Parliament and then only in the clearest of cases where the punishment prescribed is so excessive when compared with the punishment prescribed for other offences as to outrage standards of decency.

*The Purpose and Effect of a Law*

I do not see any reason to depart from the tradition of deference to Parliament that has always been demonstrated by the Canadian courts. However, the pursuit of a constitutionally valid purpose is not, in and of itself, a guarantee of constitutional validity. The courts, the *Charter* so commands, must examine challenged legislation in order to determine whether it infringes a right protected by the *Charter*. As stated by the majority of this Court in *Re B.C. Motor Vehicle Act*, *supra*, at p. 496:

In neither case, be it before or after the *Charter*, have the courts been enabled to decide upon the appropriateness of policies underlying legislative enactments. In both instances, however, the courts are empowered, indeed required, to measure the content of legislation against the guarantees of the Constitution.

In measuring the content of the legislation, the courts are to look to the purpose and effect of the legislation. Dickson J., as he then was, in *R. v. Big M Drug Mart Ltd*., [1985] 1 S.C.R. 295, speaking for the majority of this Court, stated at p. 331:

In my view, both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation.

And further, at p. 334:

... I agree with the respondent that the legislation's purpose is the initial test of constitutional validity and its effects are to be considered when the law under review has passed or, at least, has purportedly passed the purpose test....Thus, if a law with a valid purpose interferes by its impact, with rights or freedoms, a litigant could still argue the effects of the legislation as a means to defeat its applicability and possibly its validity. In short, the effects test will only be necessary to defeat legislation with a valid purpose; effects can never be relied upon to save legislation with an invalid purpose.

Thus, even though the pursuit of a constitutionally invalid purpose will result in the invalidity of the impugned legislation irrespective of its effects, a valid purpose does not end the constitutional inquiry. The means chosen by Parliament to achieve that valid purpose may result in effects which deprive Canadians of their rights guaranteed under the *Charter*. In such a case it would then be incumbent upon the authorities to demonstrate under s. 1 that the importance of that valid purpose is such that, irrespective of the effect of the legislation, it is a reasonable limit in a free and democratic society.

The undisputed fact that the purpose of s. 5(2) of the *Narcotic Control Act* is constitutionally valid is not a bar to an analysis of s. 5(2) in order to determine if the minimum has the effect of obliging the judge in certain cases to impose a cruel and unusual punishment, and thereby is a *prima facie* violation of s. 12; and, if it is, to then reconsider under s. 1 that purpose and any other considerations relevant to determining whether the impugned legislation may be salvaged.

*The meaning of s. 12*

It is generally accepted in a society such as ours that the state has the power to impose a "treatment or punishment" on an individual where it is necessary to do so to attain some legitimate end and where the requisite procedure has been followed. The *Charter* limits this power: s. 7 provides that everyone has the right not to be deprived of life, liberty and security of the person except in accordance with the principles of fundamental justice, s. 9 provides that everyone has the right not to be arbitrarily detained or imprisoned, and s. 12 guarantees the right not to be subjected to any cruel and unusual treatment or punishment.

The limitation at issue here is s. 12 of the *Charter.* In my view, the protection afforded by s. 12 governs the quality of the punishment and is concerned with the effect that the punishment may have on the person on whom it is imposed. I would agree with Laskin C.J. in *Miller and Cockriell*, *supra*, where he defined the phrase "cruel and unusual" as a "compendious expression of a norm". The criterion which must be applied in order to determine whether a punishment is cruel and unusual within the meaning of s. 12 of the *Charter* is, to use the words of Laskin C.J. in *Miller and Cockriell*, *supra*, at p. 688, "whether the punishment prescribed is so excessive as to outrage standards of decency". In other words, though the state may impose punishment, the effect of that punishment must not be grossly disproportionate to what would have been appropriate.

In imposing a sentence of imprisonment, the judge will assess the circumstances of the case in order to arrive at an appropriate sentence. The test for review under s. 12 of the *Charter* is one of gross disproportionality, because it is aimed at punishments that are more than merely excessive. We should be careful not to stigmatize every disproportionate or excessive sentence as being a constitutional violation, and should leave to the usual sentencing appeal process the task of reviewing the fitness of a sentence. Section 12 will only be infringed where the sentence is so unfit having regard to the offence and the offender as to be grossly disproportionate.

In assessing whether a sentence is grossly disproportionate, the court must first consider the gravity of the offence, the personal characteristics of the offender and the particular circumstances of the case in order to determine what range of sentences would have been appropriate to punish, rehabilitate or deter this particular offender or to protect the public from this particular offender. The other purposes which may be pursued by the imposition of punishment, in particular the deterrence of other potential offenders, are thus not relevant at this stage of the inquiry. This does not mean that the judge or the legislator can no longer consider general deterrence or other penological purposes that go beyond the particular offender in determining a sentence, but only that the resulting sentence must not be grossly disproportionate to what the offender deserves. If a grossly disproportionate sentence is "prescribed by law", then the purpose which it seeks to attain will fall to be assessed under s. 1. Section 12 ensures that individual offenders receive punishments that are appropriate, or at least not grossly disproportionate, to their particular circumstances, while s. 1 permits this right to be overridden to achieve some important societal objective.

One must also measure the effect of the sentence actually imposed. If it is grossly disproportionate to what would have been appropriate, then it infringes s. 12. The effect of the sentence is often a composite of many factors and is not limited to the quantum or duration of the sentence but includes its nature and the conditions under which it is applied. Sometimes by its length alone or by its very nature will the sentence be grossly disproportionate to the purpose sought. Sometimes it will be the result of the combination of factors which, when considered in isolation, would not in and of themselves amount to gross disproportionality. For example, twenty years for a first offence against property would be grossly disproportionate, but so would three months of imprisonment if the prison authorities decide it should be served in solitary confinement. Finally, I should add that some punishments or treatments will always be grossly disproportionate and will always outrage our standards of decency: for example, the infliction of corporal punishment, such as the lash, irrespective of the number of lashes imposed, or, to give examples of treatment, the lobotomisation of certain dangerous offenders or the castration of sexual offenders.

The numerous criteria proposed pursuant to s. 2(*b*) of the *Canadian Bill of Rights* and the Eighth Amendment of the American Constitution are, in my opinion, useful as factors to determine whether a violation of s. 12 has occurred. Thus, to refer to tests listed by Professor Tarnopolsky, the determination of whether the punishment is necessary to achieve a valid penal purpose, whether it is founded on recognized sentencing principles, and whether there exist valid alternatives to the punishment imposed, are all guidelines which, without being determinative in themselves, help to assess whether the punishment is grossly disproportionate.

There is a further aspect of proportionality which has been considered on occasion by the American courts: a comparison with punishments imposed for other crimes in the same jurisdiction (*Solem v. Helm*, 463 U.S. 277 (1983), at p. 291). Of course, the simple fact that penalties for similar offences are divergent does not necessarily mean that the greater penalty is grossly disproportionate and thus cruel and unusual. At most, the divergence in penalties is an indication that the greater penalty may be excessive, but it will remain necessary to assess the penalty in accordance with the factors discussed above. The notion that there must be a gradation of punishments according to the malignity of offences may be considered to be a principle of fundamental justice under s. 7, but, given my decision under s. 12, I do not find it necessary to deal with that issue here.

On more than one occasion the courts in Canada have alluded to a further factor, namely, whether the punishment was arbitrarily imposed. As regards this factor, some comments should be made, because arbitrariness of detention and imprisonment is addressed by s. 9, and, to the extent that the arbitrariness, given the proper context, could be in breach of a principle of fundamental justice, it could trigger a *prima facie* violation under s. 7. As indicated above, s. 12 is concerned with the effect of a punishment, and, as such, the process by which the punishment is imposed is not, in my respectful view, of any great relevance to a determination under s. 12. For example, s. 12 would not be infringed if a judge, after having refused to hear any submissions on sentencing, indicated that he would not take into consideration any relevant factors, but then went on to impose arbitrarily a preconceived but appropriate sentence. In my view, because this result would be appropriate, the sentence cannot be characterized as grossly disproportionate and violative of s. 12.

This reference to the arbitrary nature of the punishment as a factor is a direct import into Canada of one of the tests elaborated upon by the American judiciary in dealing with the Eighth Amendment of their Constitution. Although the tests developed by the Americans provide useful guidance, they stem from the analysis of a constitution which is different in many respects from the *Canadian Charter of Rights and Freedoms*.

Both countries protect roughly the same rights but the means by which this has been achieved are not identical. In addition to the protection afforded by s. 12, our *Charter* provides express protection against arbitrary imprisonment (s. 9) and against deprivations of the right to life, liberty and security of the person in breach of the principles of fundamental justice (s. 7). Furthermore, as there is no parallel to ss. 1 and 24 of the *Charter* in the American Constitution, the dynamics of challenges to the validity of American laws are different. As a result, judicial interpretation of the Eighth Amendment has had to be more expansive than would be necessary under s. 12 of the *Charter*. In Canada, the protection of one's liberty is to be found in various provisions of the *Charter* and the content of each of those sections must be determined in light of the guarantees enunciated in the other sections and the content the courts will be putting into those sections. Thus, any comments on the meaning of s. 12 must be made with s. 9 in mind and, as whenever ss. 8 to 14 are at issue, in light of s. 7 (see *Re B.C. Motor Vehicle Act*, *supra*).

The criterion of arbitrariness developed by the Supreme Court of the United States pursuant to the Eighth Amendment of their Constitution involved, for the most part, cases that dealt with the validity of the death penalty. In the United States, where criminal law is within the competence of the state legislatures and thus varies from state to state, the judiciary was concerned with possible discrepancies in the imposition of the death penalty throughout their country. The judges were also concerned with the fact that the law often leaves in the U.S. "to the uncontrolled discretion of judges or juries the determination whether defendants committing these crimes should die or be imprisoned", and that one cannot read the history of the Eighth Amendment "without realizing that the desire for equality was re‑ flected in the ban against `cruel and unusual punishments' contained in the Eighth Amendment" (*per* Douglas J. in *Furman v. Georgia*, 408 U.S. 238 (1972), at pp. 253 and 255). This introduction of arbitrariness for the precise purpose of ensuring equality under the law, however appropriate in the United States, should not simply be transplanted into the Canadian context where the criminal law power is within the competence of the federal government and thus uniform throughout the country. We in Canada also have other sections in the *Charter* to protect the equality of all in face of the law, amongst others, s. 15(1). In any event, I find it would be dangerous to approach our "cruel and unusual" punishment section on the rationale of equality and conclude that uniformly applied, through mandatory imposition or otherwise, a sentence could no longer, on the basis of arbitrariness, be considered cruel and unusual. I therefore find arbitrariness a minimal factor in the determination of whether a punishment or treatment is cruel and unusual.

Of course because we live in a free, democratic and progressive society, cruelty and gross discrepancy of treatment of those we punish has generally, under the rule of law, been kept in check through legislation imposing limitations on what we can do to others under the law and through the development of elaborate sentencing guidelines and review through appeals. Therefore when a cruel and unusual punishment is inflicted it will often be the result of a disregard for those laws and guidelines and as such will be the result of arbitrariness in the choice of the punishment. However, as I said, a sentence is or is not grossly disproportionate to the purpose sought or a punishment is or is not cruel and unusual irrespective of why the violation has taken place.

*Section 5(2) of the Narcotic Control Act*

At issue in this appeal is the minimum term of imprisonment provided for by s. 5(2) of the *Narcotic Control Act*. It thus is not necessary to delimit the scope of the terms "treatment" and "punishment", since they clearly include the imposition by a judge of a term of imprisonment. The minimum seven‑year imprisonment fails the proportionality test enunciated above and therefore *prima facie* infringes the guarantees established by s. 12 of the *Charter.* The simple fact that s. 5(2) provides for a mandatory term of imprisonment does not by itself lead to this conclusion. A minimum mandatory term of imprisonment is obviously not in and of itself cruel and unusual. The legislature may, in my view, provide for a compulsory term of imprisonment upon conviction for certain offences without infringing the rights protected by s. 12 of the *Charter*. For example, a long term of penal servitude for he or she who has imported large amounts of heroin for the purpose of trafficking would certainly not contravene s. 12 of the *Charter*, quite the contrary. However, the seven‑year minimum prison term of s. 5(2) is grossly disproportionate when examined in light of the wide net cast by s. 5(1).

As indicated above, the offence of importing enacted by s. 5(1) of the *Narcotic Control Act* covers numerous substances of varying degrees of dangerousness and totally disregards the quantity of the drug imported. The purpose of a given importation, such as whether it is for personal consumption or for trafficking, and the existence or nonexistence of previous convictions for offences of a similar nature or gravity are disregarded as irrelevant. Thus, the law is such that it is inevitable that, in some cases, a verdict of guilt will lead to the imposition of a term of imprisonment which will be grossly disproportionate.

This is what offends s. 12, the certainty, not just the potential. Absent the minimum, the section still has the potential of operating so as to impose cruel and unusual punishment. But that would only occur if and when a judge chose to impose, let us say, seven years or more on the "small offender". Remedy will then flow from s. 24. It is the judge's sentence, but not the section, that is in violation of the *Charter*. However, the effect of the minimum is to insert the certainty that, in some cases, as of conviction the violation will occur. It is this aspect of certainty that makes the section itself a *prima facie* violation of s. 12, and the minimum must, subject to s. 1, be declared of no force or effect.

In its factum, the Crown alleged that such eventual violations could be, and are in fact, avoided through the proper use of prosecutorial discretion to charge for a lesser offence.

In my view the section cannot be salvaged by relying on the discretion of the prosecution not to apply the law in those cases where, in the opinion of the prosecution, its application would be a violation of the *Charter*. To do so would be to disregard totally s. 52 of the *Constitution Act, 1982* which provides that any law which is inconsistent with the Constitution is of no force or effect to the extent of the inconsistency and the courts are duty bound to make that pronouncement, not to delegate the avoidance of a violation to the prosecution or to anyone else for that matter. Therefore, to conclude, I find that the minimum term of imprisonment provided for by s. 5(2) of the *Narcotic Control Act* infringes the rights guaranteed by s. 12 and, as such, is a *prima facie* violation of the *Charter*. Subject to the section's being salvaged under s. 1, the minimum must be declared of no force or effect.

*Section 1 of the Charter*

Section 1 of the *Charter* provides that:

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

This Court has already had occasion to address s. 1. In *Hunter v. Southam Inc*., [1984] 2 S.C.R. 145; *R. v. Big M Drug Mart Ltd.*, *supra*; *Re B.C. Motor Vehicle Act*, *supra*; and *R. v. Oakes*, *supra*, this Court indicated that once there has been a *prima facie* violation of the *Charter* the burden rests upon the authorities to salvage the legislative provision in question. In *Oakes*, this Court set out the criteria which must be met in order to discharge this burden. Dickson C.J., speaking for the majority, stated the following at p. 138:

To establish that a limit is reasonable and demonstrably justified in a free and democratic society, two central criteria must be satisfied. First, the objective, which the measures responsible for a limit on a *Charter* right or freedom are designed to serve, must be "of sufficient importance to warrant overriding a constitutionally protected right or freedom": *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 352.

And further, at p. 139:

Second, once a sufficiently significant objective is recognized, then the party invoking s. 1 must show that the means chosen are reasonable and demonstrably justified. This involves "a form of proportionality test": *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 352. Although the nature of the proportionality test will vary depending on the circumstances, in each case courts will be required to balance the interests of society with those of individuals and groups. There are, in my view, three important components of a proportionality test. First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question: *R. v. Big M Drug Mart Ltd.*, *supra*, at p. 352. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the *Charter* right or freedom, and the objective which has been identified as of "sufficient importance". [Emphasis in original.]

In the present appeal, the Crown had but one argument. It urged upon us that the imposition of severe punishments on drug importers will discourage the perpetration of such a serious crime. Those non‑users, who import and traffic in such noxious drugs as heroin, are slave masters and responsible not only for the destruction of numerous human beings, but also for the very extensive criminal activity which is spawned by the drug trade. In my view, the fight against the importing and trafficking of hard drugs is, without a doubt, an objective "of sufficient importance to warrant overriding a constitutionally protected right or freedom".

This then brings us to the next phase of the test, the proportionality of the means chosen to reach that "important" result. Of course, the means chosen do "achieve the objective in question". The certainty that all those who contravene the prohibition against importing will be sentenced to at least seven years in prison will surely deter people from importing narcotics. Therefore, rationality, the first prong of the proportionality test, has been met. But the Crown's justification fails the second prong, namely minimum impairment of the rights protected by s. 12. Clearly there is no need to be indiscriminate. We do not need to sentence the small offenders to seven years in prison in order to deter the serious offender. Indeed, the net cast by s. 5(2) for sentencing purposes need not be so wide as that cast by s. 5(1) for conviction purposes. The result sought could be achieved by limiting the imposition of a minimum sentence to the importing of certain quantities, to certain specific narcotics of the schedule, to repeat offenders, or even to a combination of these factors. But the wording of the section and the schedule is much broader. I should add that, in my view, the minimum sentence also creates some problems. In particular, it inserts into the system a reluctance to convict and thus results in acquittals for picayune reasons of accused who do not deserve a seven‑year sentence, and it gives the Crown an unfair advantage in plea bargaining as an accused will be more likely to plead guilty to a lesser or included offence. For these reasons, the minimum imprisonment provided for by s. 5(2) breaches s. 12 of the *Charter* and this breach has not been justified under s. 1.

Having written these reasons some time ago, I have not referred to recent decisions of the courts or recent publications. However, I wish to refer to the Report of the Canadian Sentencing Commission entitled *Sentencing Reform: A Canadian Approach* (1987), which gives some support to my conclusion. The Commission recommended the abolition of mandatory minimum penalties for all offences except murder and high treason because it was of the view that (p. 188):

... existing mandatory minimum penalties, with the exception of those prescribed for murder and high treason, serve no purpose that can compensate for the disadvantages resulting from their continued existence.

Conclusion

In my view, the constitutional question should be answered in the affirmative as regards s. 12 of the *Charter*, and the minimum sentence provided for by s. 5(2) of the *Narcotic Control Act* should therefore be declared to be of no force or effect. It is not necessary, for reasons discussed above, to answer the question as regards ss. 7 and 9.

Now to deal with the appellant. The majority of the Court of Appeal upheld the eight year sentence imposed by the trial judge. Because this is not a sentence appeal and because there was no suggestion that the sentence of eight years imposed on the appellant was cruel and unusual, I would normally dismiss this appeal. However, the Court of Appeal considered the fitness of the sentence in the context of a seven year minimum, and we cannot ascertain whether or not they were influenced by that minimum, though I am inclined to think that they were not as they held that an eight year sentence was not inappropriate. Counsel for the Crown, however, stated at the hearing that, were we to declare the minimum of no force or effect, the disposition preferable in his view of the appeal would be to allow the appeal and remit the matter to the Court of Appeal for a reconsideration of the sentence appeal in that court. Given this concession and my conclusion that the minimum is of no force or effect, I would so order.

I should add that I do not wish this manner of disposition to be taken as any indication whatsoever of what I may think the appropriate sentence in this particular case might be.

The following are the reasons delivered by

McIntyre J. (dissenting) ‑‑This appeal concerns the question whether s. 5(2) of the *Narcotic Control Act*, R.S.C. 1970, c. N‑l, as amended, infringes ss. 7, 9 and 12 of the *Canadian Charter of Rights and Freedoms*. The principal issue raised concerns the application of s. 12, which prohibits cruel and unusual treatment or punishment in these terms:

**12.** Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.

A constitutional question was stated by the Chief Justice in the following terms:

Whether the mandatory minimum sentence of seven years prescribed by s. 5(2) of the *Narcotic Control Act*, R.S.C. 1970, c. N‑1 is contrary to, infringes, or denies the rights and guarantees contained in the *Canadian Charter of Rights and Freedoms*, and in particular the rights contained in ss. 7, 9 and 12 thereof?

I have had the benefit of reading the reasons for judgment prepared in this appeal by my colleagues, Lamer and Wilson JJ. The facts of the case are sufficiently set out in the reasons of Lamer J. and I will not repeat them. I am, with all respect for the views of my colleagues, unable to reach their conclusion for reasons which I will endeavour to set out.

As a preliminary matter, I would point out that there is an air of unreality about this appeal because the question of cruel and unusual punishment, under s. 12 of the *Charter*, does not appear to arise on the facts of the case. The appellant pleaded guilty to the offence of importing a narcotic into Canada. The "street value" of the narcotic, after dilution, was estimated to be between $126,000 and $168,000. While the trial judge found that the minimum sentence of seven years, prescribed by s. 5(2) of the *Narcotic Control Act*, violated s. 12 of the *Charter*, he nevertheless imposed a sentence of eight years' imprisonment on the appellant. On appeal, the majority of the Court of Appeal affirmed the sentence imposed by the trial judge. The dissenting judge would have imposed a sentence of five years. The judges who have considered the case, then, are unanimously of the view that a long sentence of imprisonment is appropriate and no one has suggested that the appellant has been sentenced to cruel and unusual punishment. Recognizing this fact, the appellant does not attack s. 5(2) of the *Narcotic Control Act* on the ground that it violates s. 12 of the *Charter* in general, but rather on the ground that the imposition of "a mandatory minimum sentence of seven years" on a hypothetical "first time importer of a single marijuana cigarette" would constitute cruel and unusual punishment. In effect, the appellant is stating that while the law is not unconstitutional in its application to him, it may be unconstitutional in its application to a third party and, therefore, should be declared of no force or effect. In my view, this is not a sound approach to the application of s. 12. Under s. 12 of the *Charter*, individuals should be confined to arguing that *their* punishment is cruel and unusual and not be heard to argue that the punishment is cruel and unusual for some hypothetical third party.

This is not to say, as a general proposition, that parties can only challenge laws on constitutional grounds if they can show that their individual rights have been violated. In *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, this Court expressly held that a corporation charged with a criminal offence under the *Lord's Day Act* could argue that the Act violated freedom of religion, under s. 2(*a*) of the *Charter*, without also alleging that the statute specifically infringed its religious beliefs. "A law which itself infringes religious freedom is, by that reason alone, inconsistent with s. 2(*a*) of the *Charter* and it matters not whether the accused is a Christian, Jew, Muslim, Hindu, Buddhist, atheist, agnostic or whether an individual or a corporation" (p. 314). While the *Lord's Day Act* was attacked primarily because it was enacted for a religious purpose, individuals may also challenge enactments on the ground that their effect is to infringe the religious rights of third parties (see *R. v. Edwards Books and Art Ltd*., [1986] 2 S.C.R. 713). The reason for allowing parties to challenge legislation which does not directly infringe their constitutional rights but which does infringe the rights of others, is simply that there may never be a better party. Third parties whose rights are violated or threatened by legislation may never be in a position to challenge the legislation because they are deterred from engaging in the prohibited activity and do not find themselves before the courts, or they are simply unable to incur the expense of launching a constitutional challenge. Since it is essential that individuals be free to exercise their constitutional rights as far as is reasonably possible without being forced to incur the expense of litigation or to run the risk of violating the law, parties who have run afoul of a statute may on occasion be permitted to invoke the rights of others in order to challenge the overall validity of the law. In my opinion, however, this rationale should apply in general only to laws which could be said‑‑to adopt a term known in American constitutional usage‑‑to have a "chilling effect" upon the exercise by others of their constitutional rights. The chilling effect will be present in respect of any law or practice which has the effect of seriously discouraging the exercise of a constitutional right: see *North Carolina v. Pearce*, 395 U.S. 711 (1969), and *Gooding v. Wilson*, 405 U.S. 518 (1971), at p. 521. If the impugned law or practice does not prohibit any individual from engaging in a constitutionally protected activity, there is no basis for allowing parties before the court to invoke the rights of hypothetical third parties in support of their challenge. But that is precisely what has occurred in this case. The appellant does not allege that any individual has a right to import narcotics into Canada. The importation of narcotics is not a constitutionally protected activity. There would be no risk of an individual being unable to exercise lawfully the full scope of his or her constitutional rights or being deterred from engaging in a constitutionally protected activity if the appellant were denied status in this case. There is therefore no basis for allowing the appellant to invoke in the present appeal the rights of a hypothetical third party in order to challenge the validity of legislation. Nevertheless, leave to appeal was granted and the constitutional question was stated. I will therefore address the question of cruel and unusual punishment under s. 12 of the *Charter*.

Cruel and unusual treatment or punishment is treated as a special concept in the *Charter*. The prohibition is in absolute terms. No discretion to any sentencing authority is permitted, no exception to its application is provided. In this, s. 12 differs from many other sections conferring rights and benefits which speak of reasonable time, or without unreasonable delay or reasonable bail, or without just cause. Section 12, in its terms and in its intended application, is absolute and without qualification. It may well be said that, in s. 12, the *Charter* has created an absolute right, that is, a right to be free or exempt from cruel and unusual punishment.

The expression "cruel and unusual punishment" was first found in the English *Bill of Rights* of 1688, 1 Wm. & M sess. 2., c. 2, and was aimed at preventing resort to the barbarous punishments of earlier times, particularly of the recent Stuart past. As time passed, the civilizing influence of the late nineteenth and twentieth centuries eliminated, or at least greatly reduced, the danger of such barbarous punishments. The concept was considered by some to have become obsolete by the early twentieth century (see *Hobbs v. State*, 32 N.E. 1019 (1893), at p. 1021). The belief grew that resort would no longer be had to the savage punishments of more primitive times. Nonetheless, in view of the fact that the prohibition in s. 10 of the English *Bill of Rights*, repeated in the Eighth Amendment to the American Constitution a century later, has now been restated in the *Canadian Charter of Rights and Freedoms*, it must not be considered obsolete. A meaning must be ascribed to it. In this, we are assisted by the fact that over the years the concept has become broadened by judicial interpretation to encompass more than a consideration of the quality or nature of punishment and to include, as well, under the heading of proportionality, considerations of the extent or duration of punishment in deciding whether it would fall within the prohibition. This broadening process has been advanced, I suggest, in the *Charter* by the inclusion of the word "treatment" in s. 12, which was not in the original formulation of the prohibition in the English *Bill of Rights* nor in the Eighth Amendment to the American Constitution. The addition of treatment to the prohibition has, in my view, a significant effect. It brings within the prohibition in s. 12 not only punishment imposed by a court as a sentence, but also treatment (something different from punishment) which may accompany the sentence. In other words, the conditions under which a sentence is served are now subject to the proscription. It becomes clear, then, that while the barbarous punishments of the past which called into being the prohibition of some three centuries ago are mercifully unlikely to recur, the prohibition is saved from any suggestion of obsolescence by the addition of the word "treatment". There are conditions associated with the service of sentences of imprisonment which may become subject to scrutiny, under the provisions of s. 12 of the *Charter*, not only on the basis of disproportionality or excess but also concerning the nature or quality of the treatment. Solitary confinement as practised in certain circumstances affords an example: see *McCann v. The Queen*, [1976] 1 F.C. 570, 29 C.C.C. (2d) 337. Section 12 might also be invoked to challenge other kinds of treatment, such as the frequency and conditions of searches within prisons, dietary restrictions as a disciplinary measure, corporal punishment, surgical intervention including lobotomies and castration, denial of contact with those outside the prison, and imprisonment at locations far distant from home, family and friends, a condition amounting to virtual exile which is particularly relevant to women since there is only one federal penitentiary for women in Canada. I offer no opinion as to what a court would decide in respect of any of these examples of treatment should a challenge be made. I merely note that there exists a field for the exercise of s. 12 scrutiny in modern penal practice. It has not become obsolete. A finding that s. 5(2) of the *Narcotic Control Act* does not offend s. 12 of the *Charter* will not deprive the section of scope for application.

How then should the concept of cruel and unusual treatment or punishment be defined? There has been a division of opinion in Canadian judicial and academic writing as to whether the words "cruel and unusual" should have a disjunctive or a conjunctive meaning. I am said to have adopted a disjunctive meaning in my dissent in *Miller and Cockriell v. The Queen*, [1975] 6 W.W.R. 1 (B.C.C.A.), (see, for example, W. S. Tarnopolsky, "Just Deserts or Cruel and Unusual Treatment or Punishment? Where do we Look for Guidance?" (1978), 10 *Ottawa L.R.* 1, p. 28, and S. Berger, "The Application of the Cruel and Unusual Punishment Clause under the Canadian Bill of Rights" (1978), 24 *McGill L.J.* 161, at p. 170). When *Miller and Cockriell v. The Queen*, [1977] 2 S.C.R. 680, was heard in this Court, the majority (Martland, Judson, Ritchie, Pigeon, Beetz and de Grandpré JJ.) expressed the view that a conjunctive reading of the words was required, while Laskin C.J., speaking for the minority (Laskin C.J., Spence and Dickson JJ.), expressed the following view, at pp. 689-90:

The various judgments in the Supreme Court of the United States, which I would not discount as being irrelevant here, do lend support to the view that "cruel and unusual" are not treated there as conjunctive in the sense of requiring a rigidly separate assessment of each word, each of whose meanings must be met before they become effective against challenged legislation, but rather as interacting expressions colouring each other, so to speak, and hence to be considered together as a compendious expression of a norm. I think this to be a reasonable appraisal, in line with the duty of the Court not to whittle down the protections of the *Canadian Bill of Rights* by a narrow construction of what is a quasi‑constitutional document.

I am not satisfied that on this question there is a truly significant difference between the views of the majority and the minority. In each view, elements of both cruelty and unusualness are involved in a consideration of the total expression. On this basis, I would adopt Laskin C.J.'s interpretation of the phrase as a "compendious expression of a norm". The approach has been frequently adopted in other cases and, in my view, provides a sound approach to the interpretation of the words in question (see *R. v. Bruce, Wilson and Lucas* (1977), 36 C.C.C. (2d) 158 (B.C.S.C.), at pp. 169‑70; *In re Gittens*, [1983] 1 F.C. 152, 68 C.C.C. (2d) 438, at p. 445; *Re Mitchell and The Queen* (1983), 6 C.C.C. (3d) 193 (Ont. H.C.), at p. 213; *Re Moore and The Queen* (1984), 10 C.C.C. (3d) 306 (Ont. H.C.), at p. 311; *R. v. Tobac* (1985), 20 C.C.C. (3d) 49 (N.W.T.C.A.), at p. 53). While the interpretation was given in respect of the *Canadian Bill of Rights*, it is equally applicable to the phrase as used in the *Charter*.

How then is this compendious expression of a norm to be defined? There is no problem of definition nor of recognition of cruel and unusual treatment or punishment at the extreme limit of the application, but of course the day has passed when the barbarous punishments of earlier days were a threat to those convicted of crime. In my view, in its modern application the meaning of "cruel and unusual treatment or punishment" must be drawn "from the evolving standards of decency that mark the progress of a maturing society", *Trop v. Dulles*, 356 U.S. 86 (1958), at p. 101. A definition which satisfies this requirement and fits modern conditions is again supplied by Laskin C.J. in *Miller and Cockriell*, *supra.* After observing that the words could not be limited to the savage punishments of the past, he said at p. 688:

That is because there are social and moral considerations that enter into the scope and application of s. 2(*b*). Harshness of punishment and its severity in consequences are relative to the offence involved but, that being said, there may still be a question (to which history too may be called in aid of its resolution) whether the punishment prescribed is so excessive as to outrage standards of decency. This is not a precise formula for s. 2(*b*), but I doubt whether a more precise one can be found.

I would adopt these words as well and say, in short, that to be "cruel and unusual treatment or punishment" which would infringe s. 12 of the *Charter*, the punishment or treatment must be "so excessive as to outrage standards of decency". While not a precise formula for cruel and unusual treatment or punishment, this definition does capture the purpose and intent of s. 12 of the *Charter* and is consistent with the views expressed in Canadian jurisprudence on this subject. To place stress on the words "to outrage standards of decency" is not, in my view, to erect too high a threshold for infringement of s. 12.

As noted above, while the prohibition against cruel and unusual treatment or punishment was originally aimed at punishments which by their nature and character were inherently cruel, it has since been extended to punishments which, though not inherently cruel, are so disproportionate to the offence committed that they become cruel and unusual: see *Miller and Cockriell*, *supra*; *R. v. Shand* (1976), 30 C.C.C. (2d) 23 (Ont. C.A.); *Re Mitchell and The Queen*, *supra*; *Re Moore and The Queen*, *supra*; *Re Konechny* (1983), 10 C.C.C. (3d) 233 (B.C.C.A.); *R. v. Langevin* (1984), 11 C.C.C. (3d) 336 (Ont. C.A.), and the American cases; *Coker v. Georgia*, 433 U.S. 584 (1977) (plurality opinion); *People v. Broadie*, 371 N.Y.S.2d 471 (1975); *Carmona v. Ward*, 576 F.2d 405 (2nd Cir. 1978); and *Solem v. Helm*, 463 U.S. 277 (1983). However, when considerations of proportionality arise in an inquiry under s. 12 of the *Charter*, great care must be exercised in applying the standard of cruel and unusual treatment or punishment. Punishment not *per se* cruel and unusual, may become cruel and unusual due to excess or lack of proportionality only where it is so excessive that it is an outrage to standards of decency. Not every departure by a court or legislature from what might be called the truly appropriate degree of punishment will constitute cruel and unusual punishment. Sentencing, at the best of times, is an imprecise and imperfect procedure and there will always be a substantial range of appropriate sentences. Further, there will be a range of sentences which may be considered excessive, but not so excessive or so disproportionate as to "outrage standards of decency" and thereby justify judicial interference under s. 12 of the *Charter*. In other words, there is a vast gray area between the truly appropriate sentence and a cruel and unusual sentence under the *Charter*. Entry into that gray area will not alone justify the application of the absolute constitutional prohibition voiced in s. 12 of the *Charter*.

There is a further point which should be made regarding proportionality. The test of proportionality must be applied generally and not on an individual basis. The question is not whether the sentence is too severe, having regard to the particular circumstances of offender "A", but whether it is cruel and unusual, an outrage to standards of decency, having regard to the nature and quality of the offence committed, and therefore too severe for any person committing the same offence. This approach is necessary, in my view, if we are to recognize and give effect to the very special nature of the prohibition contained in s. 12 of the *Charter*. Constitutional effect to the prohibition in s. 12 cannot be given if its application is to vary from case to case and person to person. What is unconstitutional for one must be unconstitutional for all when charged with the same offence. The constitutional question posed in this case, in the absence of a uniform application of the prohibition, could only be answered: "sometimes yes, and sometimes no". This would not provide an acceptable basis for constitutional determination. Section 12 establishes an outer limit to the range of permissible sentences in our society; it was not intended‑‑and should not be used‑‑as a device by which every sentence will be screened and reviewed on appeal and fitted to the peculiar circumstances of individual offenders. This desirable purpose may be served in the actual sentencing process by the exercise of judicial discretion within the wide range of sentencing options not coming within the s. 12 prohibition. As I have tried to show, s. 12 was not designed or intended to fit the individual sentencing requirement for each individual; it was intended as an absolute right to all to be protected from that degree of excessive punishment and treatment which would outrage standards of decency.

What factors must be considered in deciding whether a given sentence may be categorized as cruel and unusual? Various tests have been suggested in the cases referred to and in the academic commentaries on this subject but not all will be relevant in every case. Some of the tests are clearly aimed at the nature or quality of the punishment, others concern themselves more with the duration of punishment under the heading of proportion‑ ality. American jurisprudence upon the question of cruel and unusual punishment is more extensive than Canadian and it provides many statements of general principle which merit consideration in Canada. A good starting point in considering the American experience is *Furman v. Georgia*, 408 U.S. 238 (1972). Each of the nine members of the United States Supreme Court wrote separate reasons, the majority holding that the imposition of the death penalty under a variety of state statutes constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments to the United States Constitution. The judgments of the majority, particularly those of Brennan J. and Marshall J., sought to define a series of principles upon which the constitutional validity of punishments could rest. Brennan J. expressed the view that: "The primary principle is that a punishment must not be so severe as to be degrading to the dignity of human beings" (p. 271). "The State, even as it punishes", he said, "must treat its members with respect for their intrinsic worth as human beings." Accordingly, a punishment which "does not comport with human dignity" would be cruel and unusual (p. 270). As a second principle, he was of the view, at p. 274, that:

...the State must not arbitrarily inflict a severe punishment. This principle derives from the notion that the State does not respect human dignity when, without reason, it inflicts on some people a severe punishment that it does not inflict upon others.

In this, he found support from Douglas J. and Stewart J. His third principle was: ". . . a severe punishment must not be unacceptable to contemporary society" (p. 277). The final principle proposed, at p. 279:

...is that severe punishment must not be excessive. A punishment is excessive under this principle if it is unnecessary: The infliction of a severe punishment by the State cannot comport with human dignity when it is nothing more than the pointless infliction of suffering. If there is a significantly less severe punishment adequate to achieve the purposes for which the punishment is inflicted ... the punishment inflicted is unnecessary and therefore excessive.

In this, he was supported by White J.

Marshall J. also advanced four reasons for concluding a punishment to be cruel and unusual. He said:

First, there are certain punishments that inherently involve so much physical pain and suffering that civilized people cannot tolerate them‑‑*e.g*., use of the rack, the thumbscrew, or other modes of torture [p. 330]. Second, there are punishments that are unusual, signifying that they were previously unknown as penalties for a given offence [p. 331]. Third, a penalty may be cruel and unusual because it is excessive and serves no valid legislative purpose [p. 331] . . . . Fourth, where a punishment is not excessive and serves a valid legislative purpose, it still may be invalid if popular sentiment abhors it [p. 332].

In the later case of *Gregg v. Georgia,* 428 U.S. 153 (1976), the court considered a Georgia statute which had been specifically amended to conform with the majority opinions in *Furman*. The new statute provided certain safeguards with respect to the imposition of the death penalty. The majority of the court applied a proportionality test in holding the death penalty not cruel and unusual in all circumstances.

Subsequently, the court heard *Coker v. Georgia*, 433 U.S. 584 (1977), which raised the question whether the death penalty for rape was cruel and unusual. The majority held that a sentence of death for rape would be grossly disproportionate and excessive and therefore cruel and unusual. White J., speaking for the plurality (Stewart, Blackmun, and Stevens JJ.), said, at p. 592:

Under *Gregg*, a punishment is "excessive" and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime. A punishment might fail the test on either ground. Furthermore, these Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices; judgment should be informed by objective factors to the maximum possible extent. To this end, attention must be given to the public attitudes concerning a particular sentence ‑‑ history and precedent, legislative attitudes, and the response of juries reflected in their sentencing decisions are to be consulted.

Later, in *Solem v. Helm*, *supra*, any question of whether the concept of cruel and unusual punishment could be extended to include excessive sentences, as well as barbaric ones, was set at rest. Powell J., speaking for the majority, held that the Eighth Amendment "prohibits not only barbaric punishments but also sentences that are disproportionate to the crime committed" (p. 284).

The principles developed in the United States under the Eighth Amendment, while of course not binding on this Court, are helpful in understanding and applying the prohibition against cruel and unusual punishment contained in s. 12 of the *Charter*. Many of these principles have already found their way into Canadian jurisprudence, particularly the early decisions interpreting the cruel and unusual punishment clause of the *Canadian Bill of Rights.* In my dissent in *Miller and Cockriell*, *supra*, at p. 71, I proposed the following standards in assessing the validity of a punishment:

It is essential, in my opinion, to settle upon certain standards by which the punishment of death may be judged. It would not be permissible to impose a punishment which has no value in the sense that it does not protect society by deterring criminal behaviour or serve some other social purpose. A punishment failing to have these attributes would surely be cruel and unusual. Capital punishment makes no pretence at reformation or rehabilitation and its only purposes must then be deterrent and retributive. While there can be no doubt of its effect on the person who suffers the punishment, to have a social purpose in the broader sense it would have to have a deterrent effect on people generally and thus tend to reduce the incidence of violent crime. In my view, capital punishment would amount to cruel and unusual punishment if it cannot be shown that its deterrent value outweighs the objections which can be brought against it. Furthermore, even assuming some deterrent value, I am of the opinion that it would be cruel and unusual if it is not in accord with public standards of decency and propriety, if it is unnecessary because of the existence of adequate alternatives, if it cannot be applied upon a rational basis in accordance with ascertained or ascertainable standards, and if it is excessive and out of proportion to the crimes it seeks to restrain.

These same standards were expressly adopted by Heald J. in *McCann v. The Queen*, *supra*, at p. 601; by Borins J. in *R. v. Shand* (1976), 29 C.C.C. (2d) 199 (Ont. Co. Ct.), at p. 209; and by the Ontario Court of Appeal in *Shand*, *supra*, where Arnup J.A., writing for the court, stated at pp. 37‑38:

We recognize that there could be a punishment imposed by Parliament that is so obviously excessive, as going beyond all rational bounds of punishment in the eyes of reasonable and right‑thinking Canadians, that it must be characterized as "cruel and unusual". Therefore, we are prepared to accept that the so‑called "disproportionality principle", in this sense, has relevance to what is cruel and unusual punishment, but it is a principle that needs to be developed in the Canadian context of our constitution, customs and jurisprudence. In this development great assistance can be obtained from the American precedents, across their rather broad spectrum, and to a lesser extent, from some of the articles in the American periodicals.

Many of these standards were also either implicitly or explicitly adopted by Laskin C.J. in his concurring, minority judgment in *Miller and Cockriell*. At pages 693‑94 of his judgment, he states:

...Justice Brennan propounded a cumulative test, which represented the arguments addressed to this Court by the appellants and the intervenor, and it was in these words:

If a punishment is unusually severe, if there is a strong probability that it is inflicted arbitrarily, if it is substantially rejected by contemporary society, and if there is no reason to believe that it serves any penal purpose more effectively than some less severe punishment, then the continued infliction of that punishment violates the command of the Clause that the State may not inflict inhuman and uncivilized punishments upon those convicted of crimes.

The appellants did not advance their submissions as being necessarily cumulative, but I take from their contentions that if severity and excessiveness (as they conceived them) were established, that should be enough to sustain their attack on the death penalty in the present case. I am prepared to accept this premise, but I am unable to agree that the conclusion that they urge is well‑founded.

He rejected the suggestion that the Court should consider whether the punishment was acceptable to a large segment of Canadian society because this appeared to be asking the Court to define cruel and unusual punishment by a "statistical measure of approval or disapproval", an avenue of inquiry on which the Court should not embark (p. 692). On the question of arbitrary application, he held, at p. 690:

Since we are concerned here with a situation where the death penalty is mandatory, I need not embark on any consideration of questions of uneven application of authorized punishments or questions of discretionary, arbitrary or capricious application of the death penalty. It cannot be argued that arbitrariness or capriciousness resides in the limitation of the death penalty to the murder of policemen and prison guards, persons who are specially entrusted with the enforcement of the criminal law and with the custody and supervision of convicted persons. The progressive restriction of the situations in which the death penalty could be imposed in this country (prior to its recent abolition for civil as opposed to military offences, with which we are not here concerned), does not point to an erratic imposition when it was mandatory in the narrow classes of cases for which it was authorized.

Applying the remaining tests, he found that, while all punishment is degrading, the death penalty was not particularly degrading when it was considered in relation to the offences for which it was imposed. Further, after considering the justifications of deterrence and retribution, he concluded at pp. 696‑97 that he could not find "that there was no social purpose served by the mandatory death penalty so as to make it offensive to" the cruel and unusual punishment clause of the *Canadian Bill of Rights*. These comments clearly demonstrate that Laskin C.J. largely adopted the tests enunciated in the American cases and the earlier Canadian case considered above. I should add that because of the view taken by the majority in *Miller and Cockriell* of the status of the *Canadian Bill of Rights*, they did not find it necessary to consider what standards should be developed in applying the clause prohibiting cruel and unusual punishment.

The various tests suggested in the cases are conveniently summarized by Tarnopolsky in his article, "Just Deserts or Cruel and Unusual Treatment or Punishment? Where do we Look for Guidance?" *supra,* at pp. 32‑33:

(1)  Is the punishment such that it goes beyond what is necessary to achieve a legitimate penal aim?

(2)  Is it unnecessary because there are adequate alternatives?

(3)  Is it unacceptable to a large segment of the population?

(4)  Is it such that it cannot be applied upon a rational basis in accordance with ascertained or ascertainable standards?

(5)  Is it arbitrarily imposed?

(6)  Is it such that it has no value in the sense of some social purpose such as reformation, rehabilitation, deterrence or retribution?

(7)  Is it in accord with public standards of decency or propriety?

(8)  Is the punishment of such a character as to shock general conscience or as to be intolerable in fundamental fairness?

(9)  Is it unusually severe and hence degrading to human dignity and worth?

As Lamer J. has indicated at p. 1069 of his judgment, these are the tests which have been generally applied in the cases heard so far under s. 12 of the *Charter*. In my view, these tests do provide a sound basis for assessing the validity of a punishment under s. 12 of the *Charter*. I believe, however, they can be collected and stated more succinctly, as follows:

A punishment will be cruel and unusual and violate s. 12 of the *Charter* if it has any one or more of the following characteristics:

(1) The punishment is of such character or duration as to outrage the public conscience or be degrading to human dignity;

(2) The punishment goes beyond what is necessary for the achievement of a valid social aim, having regard to the legitimate purposes of punishment and the adequacy of possible alternatives; or

(3) The punishment is arbitrarily imposed in the sense that it is not applied on a rational basis in accordance with ascertained or ascertainable standards.

Dealing with the first test, is the punishment of such character or duration as to outrage the public conscience or be degrading to human dignity? It was not asserted before us‑‑nor could it be‑‑that imprisonment, as regulated by Canadian law, is of such character that it would outrage the public conscience or be degrading to human dignity. Instead, the appellant argued that, in certain cases, the minimum sentence of seven years' imprisonment, solely because of its length, could be so excessive and disproportionate to the offence committed that it would amount to cruel and unusual punishment. Under the first branch of the test I propose, the appellant would have to show that the length of the sentence would outrage the public conscience or be degrading to human dignity. In my view, the appellant cannot succeed on this first branch. Sentences far in excess of seven years are imposed daily in our courts for a variety of offences under the *Criminal Code*, R.S.C. 1970, c. C‑34, and other penal statutes. To take but a few examples, theft of property over $1,000 may be punished by imprisonment for l0 years (s. 294); robbery may be punished by life imprisonment (s. 303); breaking and entering a dwelling‑house with intent to commit an offence may be punished by life imprisonment (s. 306); forgery may be punished by 14 years' imprisonment (s. 325); fraudulent personation may be punished by 14 years' imprisonment (s. 361); manslaughter may be punished by life imprisonment (s. 219); and, finally, trafficking in narcotics may be punished by life imprisonment (s. 4 of the *Narcotic Control Act*).

Since the complaint is solely as to the duration of the minimum sentence provided in s. 5(2), it becomes relevant to consider the length of the sentence as it will be served. A person convicted of importing a narcotic under s. 5 of the *Narcotic Control Act* and sentenced to the minimum sentence of seven years will, in the absence of additional sentences imposed for other offences or a loss of earned remission of sentence, be eligible for release on day parole after serving fourteen months in prison (*Parole Regulations*, SOR/78‑428, s. 9, as amended). He will be eligible for a full parole after serving one‑third of his sentence (28 months), and will be entitled to release on mandatory supervision after serving two‑thirds of his sentence (56 months), unless there are reasonable grounds for believing that he is likely to commit an offence causing the death of, or serious harm to, another person upon his release (*Parole Regulations*, SOR/78‑428, s. 5 as amended; *Parole Act*, R.S.C. 1970, c. P‑2, s. 15, as amended; and the *Penitentiary Act*, R.S.C. 1970, c. P‑6, s. 24, as amended). Viewed in the light of the other sentences which are currently provided for in Canadian law and considering the length of the sentence which will actually be served and the severity of the offence, I am unable to say that the minimum sentence in s. 5(2) of the *Narcotic Control Act* is such as to outrage the public conscience or be degrading to human dignity. It may well be excessive, but more than excess is required to meet the test of Laskin C.J.: it must "outrage standards of decency". Parliament has determined that a minimum sentence of seven years' imprisonment is necessary to fight the traffic in narcotics. One might question the wisdom or desirability of this legislative decision but, in my view, given the possibility of early parole, it cannot be said that the minimum sentence is so severe that it outrages the public conscience or is degrading to human dignity.

I turn then to the second test which, of course, overlaps the first in some respects. Does the punishment go beyond what is necessary for the achievement of a valid social aim, having regard to the legitimate purposes of punishment and the adequacy of possible alternatives? There can be no doubt that Parliament, in enacting the *Narcotic Control Act*, was aiming at the suppression of an illicit drug traffic, a truly valid social aim. The deterrence of pernicious activities, such as the drug trade, is clearly one of the legitimate purposes of punishment. Our society has always recognized that it is necessary to suppress social evils by enacting laws and that to secure compliance with the law, punishment must be imposed on those who violate the law. In view of the seriousness of the offence of importing narcotics, the legislative provision of a prison sentence cannot by itself be attacked as going beyond what is necessary to achieve the valid social aim. What falls for consideration is not the fact of imprisonment, but whether the length of imprisonment is too excessive, considering the adequacy of possible alternatives. It is apparent, and here no evidence is needed for we "should not be ignorant as judges of what we know as men" (Frankfurter J. in *Watts v. Indiana*, 338 U.S. 49 (1949), at p. 52), that the minimum sentence provided in s. 5(2) of the *Narcotic Control Act* has not reduced the illicit importation of narcotics to the extent desired by Parliament and probably no punishment, however severe, would entirely stem the flow into this country. In considering the adequacy of possible alternatives, the question is whether they would satisfy the social aims of the legislation and the purposes of punishment as effectively as the punishment conceived by Parliament. The assessment of alternative punishments cannot, of course, be carried out with precision, since our knowledge of the efficacy of any punishment is at best rudimentary. A large degree of latitude must, therefore, be permitted to Parliament in determining the appropriate punishment, particularly where the question is not the nature of the punishment but only its extent. In the words of Professor Tarnopolsky, as he then was, *supra*, at p. 33:

...it is very rare indeed that a court could second‑guess Parliament as to whether the penal aim to be achieved is a legitimate one or whether there are adequate alternatives.

The formation of public policy is a function of Parliament. It must decide what the aims and objectives of social policy are to be, and it must specify the means by which they will be accomplished. It is true that the enactments of Parliament must now be measured against the *Charter* and, where they do not come within the provisions of the *Charter*, they may be struck down. This step, however, must not be taken by the courts merely because a court or a judge may disagree with a Parliamentary decision but only where the *Charter* has been violated. Parliament has the necessary resources and facilities to make a detailed inquiry into relevant considerations in forming policy. It has the capacity to make a much more extensive inquiry into matters concerning social policy than has the Court. It may test public opinion, review and debate the adequacy of its programs, and make decisions based upon wider considerations, and infinitely more evidence, than can ever be available to a court. An example of the Parliamentary approach may be found in the steps taken in enacting s. 5(2) of the *Narcotic Control Act*, as detailed in the judgment of Arnup J.A. in *R. v. Shand*, *supra*. In that case, the validity of the very section under review in the case at bar was tested under the *Canadian Bill of Rights*' prohibition in s. 2(*b*) against cruel and unusual treatment or punishment. Arnup J.A. wrote the judgment of the court (Brooke, Arnup, Dubin, Martin and Blair JJ.A.) and concluded that the section did not impose cruel and unusual punishment. He reviewed the background of s. 5(2) of the *Narcotic Control Act*, at pp. 29‑30. Though the passage from his judgment is lengthy, I reproduce it hereunder in full:

*Background of the penalty provision*

"An Act to prohibit the importation, manufacture and sale of Opium for other than medicinal purposes", 1908 (Can.), c. 50 (the first Canadian enactment on the subject), prescribed no minimum prison sentences. The offence of importing opium was indictable, rendering the offender liable to imprisonment for three years or to a fine not exceeding $1,000 and not less than $50, or both fine and imprisonment.

That Act was replaced by the *Opium and Drug Act*, 1911 (Can.), c. 17. Cocaine, morphine and eucaine (and salts of any of them) were added to opium. One group of offences was to import, manufacture, sell, have in possession or take from place to place in Canada any drug; the penalty was a fine not exceeding $500 or imprisonment for not more than one year, or both. A separate section created an offence of "dealing in" drugs with unauthorized persons, with lesser penalties.

In 1920 came the *Opium and Narcotic Drug Act*, c. 31; a series of amendments preceded a new consolidated Act (1923, c. 22) which remained substantially unaltered until 1954. The first minimum sentence of imprisonment had been enacted in 1922 (c. 36, s. 2(2)); it was six months. This minimum sentence continued through R.S.C. 1927, c. 144, s. 4, and R.S.C. 1952, c. 201, s. 4.

In 1954, towards the close of the Session of Parliament, the Act, 1953‑54, c. 38, was passed. "Trafficking" was defined as meaning importation, manufacture, sale, etc. The maximum penalty was increased to 14 years, plus whipping at the discretion of the Judge. There was no minimum, although the six‑month minimum was retained for possession of drugs and for cultivation of the opium poppy or *cannabis sativa*.

In 1955 the drug problem in Canada was studied by a Special Committee of the Senate which reported on June 23, 1955. It recommended substantially more severe penalties for trafficking, with a "compulsory lengthy minimum sentence, increasing for second or subsequent offences". The object was to reduce drug addiction by making it hazardous and costly to deal in drugs. Importers were mentioned, and a recommendation made for a special offence "with a penalty of the utmost severity for the illicit importation of drugs into Canada".

A bill was introduced in 1957, but "died on the Order Paper" when a federal election was called. The new *Narcotic Control Act*, 1960‑61 (Can.), c. 35, was introduced and passed. In the meantime the *Bill of Rights* had been enacted. (The respective dates of the two Acts are immaterial, in view of s. 5(2) of the *Bill of Rights*.) Section 5(2) of the new *Narcotic Control Act* contained a minimum penalty of seven years for the offence of importing, and it still does. Maximum penalties for trafficking, possession for the purpose of trafficking, and importation were all increased to life imprisonment.

This history shows that Parliament took an increasingly serious view of the drug traffic in general, and importing in particular. Clearly, the minimum penalty for importing, enacted after recommendations to that end, was the result of deliberate legislative policy, with specific evils and specific remedies in mind.

In view of the careful and extensive consideration given this matter by Parliament and the lack of evidence before this Court suggesting that an adequate alternative to the minimum sentence exists which would realize the valid social aim of deterring the importation of drugs, I cannot find that the minimum sentence of seven years goes beyond what is necessary for the achievement of a valid social aim, having regard to the legitimate purposes of punishment and the adequacy of possible alternatives.

This brings me to the final test for consideration: is the punishment arbitrarily imposed, in the sense that it is not applied on a rational basis in accordance with ascertained or ascertainable standards? A punishment may be proportionate to the offence, in the sense that it does not outrage the public conscience or go beyond what is necessary for the achievement of a valid social aim, and yet still be cruel and unusual because it is imposed arbitrarily. This point was made by Stewart J. in *Gregg*, *supra*, at p. 188, where he stated that if the death penalty were arbitrarily and capriciously imposed, it would be cruel and unusual "in the same way that being struck by lightning is cruel and unusual", even though it is proportionate to the offence of murder. In other words, a punishment, though proportionate to the offence, will be cruel and unusual if it is imposed arbitrarily, unevenly and without reason upon some people and not others.

The word "arbitrary" has been defined in a variety of ways, including "capricious", "frivolous", "unreasonable", "unjustified", and "not governed by rules or principles", (see, for example, *Roncarelli v. Duplessis*, [1959] S.C.R. 121, *per* Rand J., at pp. 139‑40; *R. v. Simon (No. 1)* (1982), 68 C.C.C. (2d) 86, (N.W.T.S.C.), pp. 90‑92; *Levitz v. Ryan*, [1972] 3 O.R. 783 (C.A.), p. 790; and *Mitchell*, *supra*). While these expressions provide some assistance in defining the concept of arbitrariness, in my view the most important consideration is whether the punishment is authorized by law and imposed in accordance with standards or principles which are rationally connected to the purposes of the legislation. This ensures that a punishment will not be imposed without reason or standards.

There are at least three ways in which the imposition of a punishment may be said to be arbitrary: the legislative decision to enact the law which provides for punishment could be arbitrary; the legislation on its face could impose punishment in an arbitrary manner; and finally, a body empowered to impose punishment could, in practice, impose the punishment arbitrarily. With respect to the first, I agree with Lambert J. in the Court of Appeal that this is not a matter which can properly be considered by the courts. As he stated, "it is not for the courts to consider whether political decisions are wise or rational, or to sit in judgment on the wisdom of legislation or the rationality of the process by which it is enacted. That is for Parliament and the Legislatures....The courts are confined to deciding whether the legislation enacted by the parliamentary process is constitutional." The remaining two sources of arbitrariness, however, can and should be considered by the courts.

Legislation is arbitrary on its face if it imposes punishment for reasons or in accordance with criteria which are not rationally connected with the objects of the legislation. For example, legislation which provided an essentially random process for determining punishment divorced from any consideration of the relationship between the punishment and the social objective to be achieved would be cruel and unusual, even if the punishment actually imposed were proportionate to the offence. If two offenders have identical histories and characteristics and have committed the same offence in the same circumstances, legislation could not mandate that they be given different punishments. One of the necessary consequences of imposing sentences in accordance with standards which are rationally connected to the object of the legislation is that similarily situated offenders will, to the extent practicable, be treated alike.

In the present case, the appellant submits that the minimum sentence of seven years' imprisonment, under s. 5(2) of the *Narcotic Control Act*, is arbitrary, because it "must be imposed by the trial judge without regard to the type or amount of narcotic imported or exported, nor its intended use, nor to the criminal history or background of the accused". In other words, the appellant is arguing that legislation which restrains the discretion of the trial judge to weigh and consider the circumstances of the offender and the circumstances of the offence in determining the length of sentence is arbitrary and, therefore, cruel and unusual. In my view, this proposition cannot be accepted. It would, under the guise of protecting individuals from cruel and unusual punishment, unduly limit the power of Parliament to determine the general policy regarding the imposition of punishment for criminal activity. It would, in effect, constitutionally entrench the power of judges to determine the appropriate sentence in their absolute discretion. It is true, in general, that when a judge imposes a sentence, he considers the nature and gravity of the offence, the circumstances in which it was committed, and the character and criminal history of the offender, all with an eye to the primary purposes of punishment: rehabilitation, deterrence, incapacitation, and retribution. But, as I noted earlier, sentencing is an imprecise procedure and there will always be a wide range of appropriate sentences. For some offences, the protection of the public will be paramount and little weight will be given to the possibility of rehabilitating the offender. On other occasions, the gravity of the offence alone may dictate that a severe punishment be imposed as, for example, in the case of first degree murder. There will still be other offences and circumstances where the punishment will be based primarily upon the possi‑ bility of rehabilitation. In setting the minimum sentence at seven years for importing narcotics, Parliament has determined that the gravity of the offence, the protection of the public, and the suppression of the drug trade are of paramount importance and that, consequently, the circumstances of the particular accused should be given relatively less weight. This legislative determination does not transform the sentencing procedure into an arbitrary process. Under s. 5(2) of the Act, punishment continues to be imposed for reasons which are rationally connected with the objects of the legislation, that is, the suppression of the illicit traffic in drugs. Moreover, a wide discretion remains with the trial judge to consider the particular circumstances of the accused in determining whether a lesser sentence than the maximum sentence of life imprisonment should be imposed. All that Parliament has done is to conclude that the gravity of the offence alone warrants a sentence of at least seven years' imprisonment. While, again, one may question the wisdom of this conclusion, I cannot agree that this makes the sentencing process arbitrary and, therefore, cruel and unusual in violation of s. 12 of the *Charter*.

Finally, as far as arbitrariness may arise in the actual sentencing process, judicial error will not affect constitutionality and would, ordinarily, be correctable on appeal. No issue arises on this point in this case. I am therefore of the opinion that s. 5(2) of the *Narcotic Control Act* does not offend s. 12 of the *Charter*.

In addition to the submissions based on s. 12 of the *Charter*, the appellant has also submitted that s. 5(2) violates ss. 9 and 7 of the *Charter*. Section 9 provides, as follows: "Everyone has the right not to be arbitrarily detained or imprisoned." In my view, this section does not, in this case, add anything to the submissions already considered under s. 12 of the *Charter*. I have already stated, in respect of s. 12, that it is my view that s. 5(2) of the *Narcotic Control Act* does not impose punishment arbitrarily.

I am also of the view that the appellant cannot succeed under s. 7 of the *Charter*. While section 7 sets out broad and general rights which often extend over the same ground as other rights set out in the *Charter*, it cannot be read so broadly as to render other rights nugatory. If section 7 were found to impose greater restrictions on punishment than s. 12‑‑for example by prohibiting punishments which were merely excessive‑‑it would entirely subsume s. 12 and render it otiose. For this reason, I cannot find that s. 7 raises any rights or issues not already considered under s. 12.

By way of summary, I express the view that s. 12 of the *Charter* is a special constitutional provision which is not concerned with general principles of sentencing nor with related social problems. Its function is to provide the constitutional outer limit beyond which Parliament, or those acting under parliamentary authority, may not go in imposing punishment or treatment respecting crime or penal detention. Parliament retains, while acting within the limits so prescribed, a full discretion to enact laws and regulations concerning sentencing and penal detention. The courts, on the other hand, in the actual sentencing process have a duty to prevent an incursion into the field of cruel and unusual treatment or punishment and, where there has been no such incursion, to impose appropriate sentences within the permissible limits established by Parliament. In so doing, the courts will apply the general principles of sentencing accepted in the courts in an effort to make the punishment fit the crime and the individual criminal.

The *Charter* provision in s. 12 is the device by which the parliamentary discretion as to punishment was to be constitutionally limited. It cannot be said that the *Charter* sought to effect that purpose by giving an absolute discretion in the matter to the courts. If section 12 were to be construed to permit a trial judge to ameliorate a sentence mandated by Parliament simply because he considered it to be too severe, then the whole parliamentary role with regard to punishment for criminal conduct would become subject to discretionary judicial review. The role of Parliament in the determination and definition of this aspect of public policy would be eliminated. The concept of cruel and unusual treatment or punishment would be deprived of its special character and would become, in effect, a mere caution against severe punishment. It must be remembered that s. 12 voices an absolute prohibition. If that prohibition is not confined within definite limits, if it may be invoked by the courts on an individual case‑by‑case basis according to judicial discretion, then what is cruel and unusual in respect of "A", on one occasion, may become acceptable in respect of "B" on another occasion. Such a result reduces the significance of the absolute prohibition in s. 12 of the *Charter* and does not afford, in my view, an acceptable approach to a constitutional question.

For all of the foregoing reasons then, I am unable to find that the minimum sentence of seven years' imprisonment, mandated by s. 5(2) of the *Narcotic Control Act*, is degrading to human dignity, unnecessary for the achievement of a valid social aim, or arbitrary. The punishment is not so grossly disproportionate to the offence of importing narcotics that it is an outrage to standards of decency. The section does not violate ss. 7, 9 and 12 of the *Canadian Charter of Rights and Freedoms*. I would, accordingly, dismiss the appeal and answer the constitutional question in the negative.

The following are the reasons delivered by

Wilson J.‑‑I have had the benefit of the reasons of my colleague, Justice Lamer, and wish to address briefly what I understand to be the right protected by s. 12 of the *Charter*. In so doing, I will touch also on s. 9.

Section 12 on its face appears to me to be concerned primarily with the nature or type of a treatment or punishment. Indeed, its historical origins would appear to support this view. The rack and the thumbscrew, the stocks, torture of any kind, unsanitary prison conditions, prolonged periods of solitary confinement were progressively recognized as inhuman and degrading and completely inimical to the rehabilitation of the prisoner who sooner or later was going to have to be released back into the community. I agree, however, with my colleague that s. 12 is not confined to punishments which are in their nature cruel. It also extends to punishments which are, to use his words, "grossly disproportionate". And by that I mean that they are cruel and unusual in their disproportionality in that no one, not the offender and not the public, could possibly have thought that that particular accused's offence would attract such a penalty. It was unexpected and unanticipated in its severity either by him or by them. It shocked the communal conscience. It was "unusual" because of its extreme nature. Adopting Laskin C.J.'s concept of "interacting expressions colouring each other" (see *Miller and Cockriell v. The Queen*, [1977] 2 S.C.R. 680, at pp. 689‑90) it was so unusual as to be cruel and so cruel as to be unusual.

Yet, as Lamer J. points out, s. 5(2) of the *Narcotic Control Act* precludes the imposition of a sentence less than seven years for the importation of even a minimal quantity of marihuana, a solitary cigarette. I agree with my colleague that this would be a cruel and unusual sentence to impose on a youthful offender with no previous record; indeed, it would be a sentence "so excessive as to outrage standards of decency": see *Miller and Cockriell v. The Queen*, *supra*, at p. 688. Yet the judge has no alternative under the section.

I disagree, however, with Lamer J. that the arbitrary nature of the minimum sentence under s. 5(2) of the Act is irrelevant to its designation as "cruel and unusual" under s. 12. On the contrary, I believe it is quite fundamental. A seven‑year sentence for drug importation is not *per se* cruel and unusual. It may be very well deserved and completely appropriate. It is the fact that the seven‑year sentence must be imposed regardless of the circumstances of the offence or the circumstances of the offender that results in its being grossly disproportionate in some cases and therefore cruel and unusual in those particular cases. The concept of "the fit sentence" to which I made reference in my concurring reasons in *Re B.C. Motor Vehicle Act*, [1985] 2 S.C.R. 486 as basic to modern day theories of punishment is effectively precluded by the mandatory minimum in s. 5(2). Judicial discretion to impose a shorter sentence if circumstances warrant is foreclosed and the inevitable result is a legislatively ordained grossly disproportionate sentence in some cases.

Punishments may undoubtedly be cruel and unusual within the meaning of s. 12 without being arbitrarily imposed. Punishments may be arbitrary within the meaning of s. 9 without also being cruel and unusual. But I do not share my colleague's anxiety to keep the two sections mutually exclusive. I believe this is a case where the arbitrary nature of the legislatively prescribed minimum sentence must inevitably in some cases result in the imposition of a cruel and unusual punishment. This might not be so if the legislatively prescribed minimum was, for example, six months or a year because, although this might be arbitrary, it arguably would not be "so excessive as to outrage standards of decency". Seven years, on the other hand, is that excessive and this, in my view, is why it cannot survive the constitutional challenge under s. 12.

I agree with Lamer J. that the mandatory minimum sentence feature of s. 5(2) is not saved by s. 1 because the means employed to achieve the legitimate government objective of controlling the importation of drugs impairs the right protected by s. 12 of the *Charter* to a greater degree than is necessary.

I would answer the constitutional question as follows:

Question Whether the mandatory minimum sentence of seven years prescribed by s. 5(2) of *Narcotic Control Act*, R.S.C. 1970, c. N‑1, is contrary to, infringes, or denies the rights and guarantees contained in the *Canadian Charter of Rights and Freedoms*, and in particular the rights contained in ss. 7, 9 and 12 thereof?

Answer The mandatory minimum sentence of seven years prescribed by s. 5(2) of the *Narcotic Control Act*, R.S.C. 1970, c. N‑1 denies the right contained in s. 12 of the *Canadian Charter of Rights and Freedoms*.

I do not find it necessary in light of my answer on s. 12 to decide whether s. 5(2) also infringes on or denies the rights contained in s. 7 or s. 9 of the *Charter* and, if so, whether an infringement or denial of rights under either of these sections could be saved under s. 1.

I agree with my colleague's proposed disposition of the appeal.

The following are the reasons delivered by

Le Dain J.‑‑I have had the advantage of reading the reasons for judgment of my colleagues Justices Lamer and Wilson. I am in general agreement with McIntyre J.'s statement of the test for cruel and unusual punishment under s. 12 of the *Charter*, including his approach to the application of disproportionality and arbitrariness. I also agree with him that a punishment which is found to be cruel and unusual could not be justified under s. 1 of the *Charter*. I am unable, however, with great respect, to agree with his conclusion that the mandatory minimum sentence of seven years' imprisonment in s. 5(2) of the *Narcotic Control Act* does not infringe the right guaranteed by s. 12 of the *Charter*.

The issue, as I perceive it, and which I confess has given me considerable difficulty, is whether the mandatory minimum sentence of seven years' imprisonment in s. 5(2) of the *Narcotic Control Act* is to be tested, in the light of s. 12 of the *Charter*, against the general seriousness of the offence created by s. 5(1) or against the relative seriousness of the whole range of the conduct to which the offence could conceivably apply. I have considerable misgivings about determining the issue of the constitutional validity, on its face, of the mandatory minimum sentence in s. 5(2) on the basis of hypothesis. It is conceded that seven years' imprisonment would not be cruel and unusual punishment for many, if not most, conceivable cases of unauthorized importing or exporting of a narcotic. I have considered whether that should not be sufficient to sustain the validity, on its face, of the mandatory minimum sentence of seven years' imprisonment, subject to the power of a court in a particular case to find that the mandatory minimum sentence is constitutionally inapplicable because it would in all the circumstances of the case be cruel and unusual punishment. Although I have found the flexibility of this approach attractive I have come to the conclusion that it would not be a sound approach to the validity and application of a mandatory minimum sentence provision which applies to a wide range of conduct, if only because of the uncertainty it would create and the prejudicial effects which the assumed validity or application of the provision might have in particular cases. In coming to this conclusion, however, I make no assumption as to whether the mandatory minimum sentence provision in s. 5(2) might be restructured in such a manner, with distinctions as to nature of narcotic, quantities, purpose and possibly prior conviction, as to survive further challenge and still be a feasible and workable legislative alternative with respect to the suppression of a complex and multi‑faceted phenomenon.

In conclusion, I agree with Lamer J. that imprisonment for seven years for the unauthorized importation or exportation of a small quantity of cannabis for personal use would be cruel and unusual punishment within the meaning of s. 12 of the *Charter* and for this reason the words "but not less than seven years" in s. 5(2) of the *Narcotic Control Act* must be held to be of no force or effect. I would answer the constitutional question and dispose of the appeal as proposed by him.

I would add, in so far as the question of interest or standing discussed by McIntyre J. is concerned, that I am of the opinion that an accused should be recognized as having standing to challenge the constitutional validity of a mandatory minimum sentence, whether or not, as applied to his case, it would result in cruel and unusual punishment. In such a case the accused has an interest in having the sentence considered without regard to a constitutionally invalid mandatory minimum sentence provision.

The following are the reasons delivered by

La Forest J.‑‑I am substantially in agreement with my colleague, Lamer J. However, I prefer not to say anything about the role of arbitrariness in determining whether there has been cruel and unusual treatment or punishment.

*Appeal allowed,* McIntyre J. *dissenting*.

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*Solicitor for the respondent: Frank Iacobucci, Ottawa.*

*Solicitor for the intervener: Attorney General for Ontario, Toronto*.