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# CANNABIS USE IN CANADA: POLICY OPTIONS FOR CONTROL

*La politique concernant le cannabis devrait s'efforcer de réduire les risques associés à la consommation et, en même temps, les coûts et conséquences adverses qui découlent des tentatives en vue de la contrôler. Les mesures actuelles se sont avérées incapables de réaliser l'équilibre souhaité : elles ont suscité des coûts sociaux et individuels considérables sans produire d'effet de dissuasion visible ou d'autres effets bénéfiques. Les auteurs esquissent un certain nombre d'autres options possibles. Compte tenu des résultats positifs observés dans d'autres pays où des approches moins punitives ont été mises en place, ils affirment que la possession de cannabis ne devrait pas être passible d'une peine de prison et qu'on devrait prendre des mesures pour en minimiser l'incidence sur le casier judiciaire des délinquants.*

There is little doubt that cannabis use adversely affects the public health and safety of Canadians. Cannabis users are subject to a variety of possible adverse health consequences, and cannabis use is associated with poor work and school performance. Although occasional use often occurs with relatively little or no subjective negative effects for the user, it is a myth to consider cannabis to be a benign drug. In particular, heavy cannabis use is correlated with negative health consequences. These have been shown to occur in the areas of physical coordination, respiratory damages, pregnancy and post-natal development, memory and cognition, psychiatric effects, and are suspected to affect hormone production, immune system and cardio-vascular processes. While there is little evidence that cannabis is a causal factor in crimes of violence or crimes of acquisition, cannabis is implicated in a considerable number of motor vehicle accidents.

However, at present levels of use in Canada, other drugs, including alcohol and tobacco, cause much more health harm than cannabis. Of the costs to the Ontario health care system attributable to drugs in 1992, 0.5 percent were attributable to cannabis, 2.0 percent to other illicit drugs, 28.4 percent to alcohol, and 69.0 percent to tobacco.

Survey data show that a small but stable number of Canadians use cannabis. In the past 10 years, some seven percent of Canadians 15 or older had used cannabis in the past year, and roughly one in four had used it at some point in their lives. Use is considerably higher among student populations, and the prevalence of use there has increased over the past five years after a period of consistent decline (trends seen also in the US and Europe). Student use rates range from 23 percent to 44 percent in different Canadian jurisdictions. However, most use of cannabis in Canada is sporadic or experimental. According to the most recent Ontario surveys, less than two percent of students had used it daily in the previous four weeks, and less than one percent of adults reported daily use. More than four out of five adult users had used cannabis less than 40 times in the past year.

An effective response to the potential problems caused by cannabis use in current contexts is hampered by recent funding cutbacks to prevention programming and difficulties faced by the criminal justice system in enforcing drug laws aimed at deterring use. The *Controlled Drugs and Substances Act* (Bill C-8), proclaimed in 1997, provides maximum sentences of \$1000 fine and/or six months imprisonment for first-time cannabis possession offenders, and double the amounts for repeat offenders under summary conviction proceedings. While the law appears to have had a very limited deterrent effect, it entails high social costs and diverts limited police resources from other pressing needs.

It should be noted from the outset that the existence of health and safety risks *per se* does not dictate the legislative response to cannabis use. The goal of cannabis

policy should be not only to minimize the harm resulting from use, but also to minimize the costs and harm that may result from attempts to control use. Attempts to minimize harms of cannabis use through rigorous enforcement can increase enforcement costs and adverse individual consequences of criminalization. While reduced enforcement and more lenient sanctions against users would address the latter concerns, this could potentially result in increases in cannabis use and the consequent health and safety risks. Thus, the key issue concerns selecting the legislative option that provides the best balance between minimizing cannabis related harm including the adverse individual consequences from law enforcement, while also reducing related criminal justice system costs.

While there is increasing evidence that cannabis has medical uses and policy development is clearly needed in this area, the following paper focuses on issues involved in how to best control recreational cannabis use and prevent problems associated with such efforts.

### Legal control and costs

Canada's drug law enforcement is relatively vigorous by international standards. Under the *Narcotic Control Act* (NCA) or *Food and Drug Act* (FDA), 70 percent (45,286) of the total of drug offenses (63,851) in Canada in 1995 were offenses involving cannabis. Approximately half (49 percent) of all drug offenses were for the simple possession of cannabis (typically small amounts for personal use). The total number of cannabis offenses and the proportion of drug offenses accounted for by cannabis declined in the 1980s, but these figures have increased since 1991.

Cannabis possession enforcement varies considerably between regions in Canada, and particularly with regard to urban and rural areas. For 1995, the cannabis possession offense rate per 100,000 for British Columbia is 246, compared to 92 for Ontario and 52 for Quebec. Cannabis offense rates in the other provinces tend to be close to the Canadian average of 104. The cannabis possession offense rates in Toronto (41) and in Montreal (43) are lower than their respective provincial averages. On the other hand, the rate in Vancouver (260) exceeds the overall rate in British Columbia.

There are only imprecise data on the number of cannabis possession cases that result in custodial sentences. The most recent available data indicates that 14 percent of the Canadian prison population was in jail for drug offenses in 1991, but it is not clear what kind of drugs and what kinds of offenses were involved. Data on offenses, charges and convictions are not maintained and computerized by drug offense or drug category type, so that outcome data are not available for systematic large-scale analysis. When records were formerly kept by drug category, the data indicated that cannabis possession offenders were infrequently sentenced to jail or prison. However, given the large number of possession cases, cannabis offenders constituted a significant number of persons given custodial sen-

tences. In 1981, 5.2 percent of cannabis possession offenders received a custodial sentence, 64.8 percent received a fine and 25.3 percent were discharged. More recent data suggests the same pattern may still exist. Information from the 1993/94 Adult Criminal Court Statistics Survey of nine Canadian jurisdictions (not including BC, Manitoba and New Brunswick) indicates that of 23,160 drug possession charges under the NCA, 15 percent received a prison sentence, 18 percent a probationary sentence, 59 percent a fine, and 8.2 percent another disposition (including discharges) as primary sentences.

It has been estimated that approximately 2,000 Canadians are sent to jail each year for cannabis possession. Data are lacking regarding the nature of these cases. It is likely that many of these cases involve more serious charges which were reduced to simple possession after plea bargaining. Also, a considerable number of these offenders are likely to have been jailed for defaulting on payment of a fine. The potential effects of fine defaulting are thus an important issue to consider with cannabis possession sentences, especially since this offense often involves individuals of lower socio-economic status who are not capable of paying substantial fines. Apart from the adverse consequences to the individual offenders from being jailed, considerable costs are involved for governments — the *per diem* costs of incarceration in Canada are approximately \$150.

It has been conservatively estimated that the dollar costs of illicit drug enforcement to Canadian police, courts and correctional services total more than \$400 million per year. Although the costs of criminal justice proceedings are generally considerably higher for cases involving trafficking or illicit drugs other than cannabis, it is nonetheless clear that cannabis offenses account for a substantial proportion of these costs.

In addition to the costs to the justice system, cannabis possession cases involve other social costs such as the adverse consequences to the individual offenders. These include employment impacts, economic impacts due to payment of fines and lost time from work, and family discord caused by the arrest. Even in cases involving a non-custodial sentence, there are serious and often poorly understood criminal record consequences for the offense. Over the past three decades, there have been more than a million arrests under Canada's drug laws, and there are hundreds of thousands of Canadians who have a criminal record as a result of a conviction for possession of small amounts of cannabis. There are few empirical data on the impact of a criminal record, but the list of potential adverse consequences is extensive. Anyone with a criminal record is at a disadvantage in subsequent criminal proceedings at the arrest, court or probation level. Entry to other countries may be denied to persons with criminal records and a drug conviction may prevent a landed immigrant from obtaining Canadian citizenship. Under federal and provincial statutes, a criminal record may be used to show a lack of good moral character and deny

an offender employment in many different professions.

A number of attempts have been made to mitigate the consequences of a drug offense, including the provision of pardons and discharges for offenders. Unfortunately, the discharge provisions of the *Criminal Code* and the pardon provisions of the Criminal Records Act provide very limited relief. A discharged offender is legally deemed as not having been convicted but he or she would have to answer affirmatively to any of the following questions: "Have you ever been arrested, found guilty of, pled guilty to, or been sentenced for a criminal offense?" In a Toronto study of cannabis offenders, the likelihood of being unemployed or suffering other adverse consequences was unrelated to whether or not the offender received a discharge. Pardons also provide only very limited relief. A pardoned offender cannot truthfully deny having a criminal record — the pardon merely "vacates" a conviction or discharge, meaning it negates legal disabilities which automatically result under federal law.

### Parameters of Canadian cannabis law

Canada is a signatory to the three main international drug treaties which require it to make the use or possession of cannabis a punishable offense by law. There is debate about whether this *de jure* offense has to be of a criminal nature. However, the International Narcotics Control Board (INCB) points out that "[n]one of the conventions requires a party to convict or punish drug abusers who commit such offenses even when they have been established as punishable offenses." Instead, the conventions themselves explicitly provide for the possibility of *de facto* alternatives to legal punishment in that "The Parties may provide, either as an alternative to conviction or punishment, or in addition to conviction or punishment of [a cannabis possession] offense ... measures for treatment, education, aftercare, rehabilitation or social reintegration of the offender."

The extent to which past and current cannabis laws succeed in deterring cannabis use is not clear. With regard to the "general" deterrent effects of the law — *i.e.*, the impact of the law in preventing cannabis use in the general population, it would appear that the enforcement of current law against cannabis possession has a very limited deterrent effect. Cannabis use remains high at a stable level despite a high level of enforcement and there is no clear relationship between changes in enforcement and levels of illicit drug use over the past several decades. The lack of general deterrence is perhaps not surprising, since the actual and perceived likelihoods of apprehension for cannabis users are extremely low. Despite the best efforts of enforcement agencies, less than one percent of cannabis users — and a much lower percentage of drug use incidents — are detected in Canada each year. This does not necessarily mean, however, that the current law has not had any general deterrent effect, because rates of cannabis use might have been even higher under a less punitive policy. Nonetheless, the available

evidence suggests that the general deterrence has not been substantial. In surveys, most non-users cite health concerns as the reason for their abstention rather than concerns about legal sanctions.

Similarly, it appears that the law also does not have a substantial "specific" deterrent impact — *i.e.*, the deterrent effect on subsequent cannabis use by convicted offenders. The Le Dain Commission found no evidence that the law had a significant "specific" deterrent effect on drug taking behaviour following conviction; as well, a study of convicted cannabis offenders in Toronto found little or no impact on subsequent use. One year after being found guilty of cannabis possession, 92 percent of the drug users reported continuing use, typically at levels similar to those reported at the time of conviction.

### Experience with alternatives to criminal prohibition

In light of the apparent lack of effectiveness and high individual and social costs involved in criminalizing cannabis use, a number of jurisdictions have attempted to make cannabis control more rational and cost-effective through schemes of depenalization. In the 1970s, 11 American states reduced penalties for possession of small quantities of marijuana, mostly for first-time offenders only, eliminating jail terms as a sentencing option and imposing fines up to \$250 for offenders. For example, the 1976 *Moscone Act* in California converted the possession of up to an ounce of cannabis from a felony into a misdemeanour. Follow-up evaluations of these measures concluded that they substantially reduced costs to the criminal justice system without leading to significant increases in cannabis use compared to other state jurisdictions maintaining the *status quo* of enforcement.

Over the past few years, prosecution practices in a number of European states — including The Netherlands, Germany, Italy, Spain — have utilized their judicial discretion not to prosecute cannabis possession offenders, mostly in circumstances where the possession of the drug did not indicate immediate harm to others. As an effect of these reform measures, in most of these systems the possession of small amounts of cannabis for personal use is now tolerated in legal practice, while law enforcement focuses on large scale traffickers. There is no evidence of significantly increased cannabis use rates in these European jurisdictions.

In the early 1990s, two Australian jurisdictions — South Australia and the Australian Capital Territory — converted the simple possession of cannabis into a civil offense through the introduction of a "Cannabis Expiation Notice" (CEN) system. The offenses are not criminally prosecuted or penalized, there are no criminal consequences, and the maximum fine is \$150. The consumption of cannabis in public places continues to be a criminal offense. Recent studies show no evidence of a differential change in cannabis use rates in CEN jurisdictions, as compared with rates reported from juris-

dictions where the CEN model was not in effect. It should be noted, however, that the CEN system entailed a considerable “threshold lowering” effect in cannabis enforcement, since it was procedurally easier to issue and sustain than an arrest. Thus the number of cannabis offenses recorded increased disproportionately after the introduction of this system. Furthermore, there have been substantial changes in offender characteristics. Enforcement under the CEN scheme seems to focus disproportionately on males, particularly those of lower socio-economic status and aboriginals. Also, almost half of CEN recipients — approximately 45 percent — fail to expiate (*i.e.*, pay the fine), and thus eventually end up before the courts.

### Options to rationalize cannabis possession control

There are clearly major direct and indirect costs of the current control of cannabis possession through the criminal law in Canada, with little evidence of a substantial benefit in reducing cannabis use. In order to better balance the costs and benefits of cannabis possession control, the following alternative policy options should be given strong consideration:

- The severity of punishment for a cannabis possession charge should be reduced. The current law involves considerable enforcement and other criminal justice costs, as well as adverse consequences to individual drug offenders, with little evidence of a substantial deterrent impact on cannabis use and at best marginal benefits to the public health and safety of Canadians. As a minimal measure, jail should be removed as a sentencing option for cannabis possession. The available evidence indicates that removal of jail as a sentencing option would lead to considerable cost savings without leading to increases in the rates of cannabis use. Punishing cannabis possession with a fine only would be consistent with current practices and prevailing public opinion. The majority of Canadians — 69 percent — no longer favour jail sentences for simple possession of cannabis, with a majority of those advocating a limited fine as a maximum penalty.

- Diversion of cannabis offenders to treatment or community service should be available, particularly for heavy users and those experiencing problems from the use of other illicit drugs, but diversion will not resolve the difficulties involved in cannabis enforcement. The widespread post-trial diversion of cannabis offenders would do little, if anything, to reduce the burden that cannabis cases place on Canadian courts nor would it have any impact on the criminal record consequences for offenders. Diversion is clearly desirable in many cases and should be available, but it is not the solution to the difficulties caused by cannabis cases. Accused persons should only be diverted to mandatory treatment following a complete assessment, and if treatment is deemed appropriate, the treatment modality should be determined by the agency providing the treatment.

- Any change in law should be subject to systematic evaluation of its impact on cannabis use and related

harms, as well impacts on criminal justice practices and costs.

- Any change in law which reduces the consequences for a cannabis offense should be accompanied by a strong message that this does not signal less concern with the potential problems caused by cannabis use.

In this context, the CCSA National Working Group on Addictions Policy proposes the following policy options. The proposed alternatives are limited to practical options involving less dramatic changes to the current law — changes which would retain the offense of cannabis possession (although not necessarily as a criminal one) but reduce the penalties and other negative individual and social consequences.

1) *“Fine only” option under the Controlled Drugs and Substances Act:* The “fine only” option refers to measures which would amend the *Controlled Drugs and Substances Act* to exclude jail as a sentencing option for simple cannabis possession, making a fine the maximum penalty for cases involving simple possession of cannabis. This modification would maintain simple cannabis possession as a criminal offense so the criminal record consequences would remain.

2) *“Civil Offense” option:* The “civil offense” option is another type of “fine only” option. It refers to proposals to exempt the offense of simple possession of cannabis from the criminal law by converting it into a civil offense with a fine under the recently enacted federal *Contraventions Act*. The “civil offense” option differs from the first option in at least two significant ways. First, the inability to pay a fine under the *Contraventions Act* does not lead to imprisonment. Second, a person with a civil violation under the *Contraventions Act* is deemed not to have committed a criminal offense and a conviction for violating this Act is not deemed to constitute a criminal record. This would take the offense out of the criminal system, while ensuring some uniformity in the handling of cannabis possession offenses across Canada, likely producing considerable savings in criminal justice system costs. A difficulty with this option is that some provinces have yet to agree upon a Memorandum of Understanding with the federal government concerning the *Contraventions Act*, and amendments to the *Controlled Drugs and Substances Act* with regards to cannabis possession might be necessary.

3) *“Diversion” option:* This option refers to measures designed to specify and encourage use of diversion mechanisms for simple cannabis possession offenders. In particular, Bill C-41 (the “Alternative Sentencing” law) presents a number of such options, including “conditional sentences.” Under such provisions, the offender’s criminal sentence is suspended while the offender complies with alternative sentencing conditions, *e.g.*, community service or treatment. A variety of concerns, however, arise with such an option. First, the use of such diversion alternatives falls into the discretion of the courts. Therefore, diversion in many instances does not reduce the workload of the court sys-

tem, but rather increases it. Second, the alternative sentencing provisions in many instances are not proportionate to the severity of the offense; many conditional sentences involve a lengthy period of criminal probation. Third, all conditional sentences automatically result in a criminal conviction and record. Fourth, widespread diversion should only be adopted once clear and justifiable guidelines are developed regarding the most appropriate circumstances in which to apply diversion and agreements are reached with treatment agencies regarding treatment protocols that have proven to be workable and effective. If treatment is deemed appropriate, the treatment modality should be determined by the treatment provider. There are severe doubts with regards to the appropriateness and effectiveness of mandatory treatment, especially for cannabis offenders who are not regular users. Concerns have been expressed that the diversion option would combine the worst features of both criminal and non-criminal control, increasing systemic costs and complexity with little or no benefit. While certainly desirable in many cases — particularly for heavy cannabis users and those involved with other illicit drugs — diversion does not appear to be a solution to the problems of the current law.

4) *"Devolution to provinces" option*: This option refers to measures that would devolve the jurisdiction of the control of cannabis possession to the provinces. The federal government could legislatively concede jurisdiction over the control of cannabis possession to the provinces, and put the onus on them to establish suitable control schemes (as for example have been devised for various drinking driving offenses) in their own jurisdictions. Such a devolution could be justified by emphasizing the primary nature of drug use control as a health — and thus a provincial — task, as implied in a Supreme Court decision in the early 1980s. This devolution model might lead to locally more acceptable solutions (e.g., the provinces might allow for municipal control schemes in the form of by-laws, as for tobacco smoking restrictions), but it could potentially undermine the equity and consistency principles of the law in Canada, due to discrepancies between provincial or local regulations. Without knowing the nature of the control systems that would replace the current arrangements, it is not possible to judge the relative merits of this option. Clearly, this option should only be adopted with the full agreement of the provinces and once the provinces have developed a coordinated strategy to take on this responsibility.

### Conclusion

In the view of the CCSA National Working Group on Addictions Policy, cannabis is not a benign drug. However, the goal of cannabis policy should be to find an appropriate balance between minimizing the harms associated with use while, at the same time, minimizing the costs and adverse consequences which result from attempts to control such use. Such balancing

efforts have been advocated on the basis of various examinations of Canadian cannabis policy over the past few decades, including the landmark Le Dain Commission's reports (1972/73). The current policy has failed to achieve the envisaged policy balance — it has entailed considerable social and individual costs with little demonstrable deterrent impact or other benefits. Given the positive experience of other jurisdictions in adopting less punitive approaches to cannabis possession, it is argued that cannabis possession should not be subject to a jail term and that steps should be taken to minimize the criminal record consequences for offenders. In particular, strong consideration should be given to the creation of a civil offense for cannabis possession under the recently enacted federal *Contraventions Act* (Option 2 above).

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