Cannabis Control Policy: A Discussion Paper

Health Protection Branch

Department of National Health and Welfare

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Foreword

In the spring of 1978 Dr. Alex B. Morrison, then Assistant Deputy Minister, Health Protection Branch (HPB), was advised that the Government was prepared to make a major shift in cannabis control policy. Before taking that step, however, the responsible Cabinet Ministers, led by the Minister of Health, required a thorough briefing on cannabis and the legal issues and options surrounding its control in Canada. At that time I was a Policy Analyst in HPB's Planning and Evaluation Directorate. I had also served as Special Assistant and Editor to the Le Dain Commission of Inquiry Into the Non-Medical Use of Drugs (1969-1973). Dr. Morrison called me to his office and explained the Government's desire to address cannabis policy. By the end of our meeting I was given *carte blanche* to assemble a team of leading researchers in drug pharmacology, epidemiology, the law and law enforcement and to coordinate the preparation of a briefing document. That I did, and this Cabinet Discussion Paper is the culmination of that team's efforts.

The key members of the research team and the drafters of this Discussion Paper were also former members of the staff of the Le Dain Commission: Ralph D. Miller, Ph.D., was the Commission's Director of Research; Mel Green, L.L.B., a Research Associate; Prof. Judith Blackwell of Brock University, a Senior Research Assistant; and Prof. Robert Soloman of the University of Western Ontario Law School, a Contract Researcher. Dr. Leo E. Hollister of the Veterans Administration Hospital, Palo Alto, California and Patricia Erickson, Senior Scientist, Addiction Research Foundation of Ontario were among other noted specialists who contributed background research for the paper.

For the past thirty years the federal Government has been telling the Canadian public that it has taken steps to prevent imprisonment and the imposition of criminal records for persons tried for possession of small amounts of cannabis. This it has never done — not even with the special cannabis provisions of the *Controlled Drugs and Substances Act* enacted last year. Every person prosecuted for cannabis possession today faces the possibility of imprisonment and will definitely have a criminal record for the offence, regardless of the amount involved or the sentence imposed — a criminal record that will be entered, even if for a limited time, on the RCMP's automated information retrieval system (CPIC) and that will, therefore, be accessible to public and private organizations in Canada and officials of the United States and other allied states.

The cannabis control policy debate in this country remains wide open; and for that reason this Discussion Paper is as relevant today as it was when written 20 years ago. It provides a thorough analysis of the major health and safety issues related to cannabis, one that has not altered substantially in the intervening years. In terms of the breadth and depth of its examination of the legislative options available to the federal and provincial Governments, there is nothing on the Canadian scene to compare to it. It is an excellent starting point for anyone wanting to take a serious look at where we can go from here.

I obtained a copy of this briefing paper through the *Access to Information Act* in January of this year and am pleased to have had a hand in sharing it with you through the good offices of the Canadian Foundation on Drug Policy.

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Part 1 – General Introduction

Cannabis control policy has been a source of contentious debate for more than a decade. In order to resolve some of the outstanding issues, the Health Protection Branch of Health and Welfare Canada has recently undertaken a systematic review of the medical, social-scientific and legal aspects of cannabis use. Based on these data and a comparative examination of control programs in some other jurisdictions, a broad spectrum of control options has been articulated. These legislative alternatives, which range from the current provisions of the *Narcotic Control Act,* through various "decriminalization" proposals, to a regulatory model involving authorized retail distribution of cannabis, are critically surveyed in this paper. The results of these endeavours should provide government policy advisors and decision-makers with sufficient information to evaluate the various options and facilitate their selection of a preferred legislative policy.

Part Two – **The Global Objectives,** briefly outlines those goals which the Department seeks to further in the area of cannabis control. **Part Three** – **The Empirical Bases of Cannabis Control Policy** is founded on the Department-commissioned studies and reviews that are currently being completed or edited. Eventually these background materials will be collated as a source book on cannabis. It is intended that this source book will have five major divisions: (1) cannabis use and its effects; (2) sources and distribution of cannabis; (3) extent and patterns of use; (4) law and law enforcement; and (5) the impact of the present law. **Part Three** reports the major findings and policy implications of these background studies in two chapters: Chapter 1 concerns empirical evidence regarding cannabis use (health and safety-related effects, epidemiological data, and the nature of the market); Chapter 2 details information pertaining to the present legislative response to cannabis (including police powers and problems, the processing of suspects and information, enforcement statistics, and the financial and socio-legal costs of current controls).

Part Four – **Legal Issues and Options,** describes the legislative and jurisprudential considerations pertinent to any informed discussion of cannabis control policy. Our primary focus is on the available options. Prior to this, however, a number of factors which limit the choices and determine the shape of any legal response to cannabis use are outlined. These include certain normative and legislative design concerns (such as clarity, consistency, fairness and proportionality), the international and constitutional constraints on the exercise of federal legislative discretion, and the problem of defining offences to reflect meaningful behavioural categories. Eight legislative options are subsequently described and critically assessed in fight of the broad policy objectives and the aforementioned legal considerations.

The adoption of any reform proposal is unlikely to turn on strictly legal considerations. Legal research may indicate the legitimate scope of our response and suggest varying legislative re-formulations, but the law must ultimately serve rather than dictate the ends of social policy. With regard to cannabis, social policy is primarily the product of a complex mix of broad social objectives, related empirical evidence, and unavoidably

political, or electoral, considerations. This last concern is best left to those who are publicly accountable for their decisions. The second set of issues will be discussed at length below. First, however, it is important to articulate the broad social policy objectives that motivate the search for an appropriate legislative response to cannabis use.

Part 2 – The Global Objectives

Goal definition is a normative exercise which ultimately falls to those who bear political responsibility for social policy. Subject to the possibility of future political refinement, the Department's primary goal is to minimize the harms resulting from cannabis use and a prohibitory response to such use. This is a two-pronged objective that addresses both those public health concerns arising from current usage patterns and those administration of justice concerns that pertain to enforcement practices and the fate of offenders. Two global objectives thus emerge. The first is to minimize the individual risks (chiefly, health hazards to oneself) and social risks (namely, safety risks to others) associated with cannabis use. The second is to minimize the adverse socio-legal consequences which result from the application of the criminal law to cannabis-related conduct. This latter objective reflects several fundamental concerns related to the operation of any criminal justice system, including fairness, proportionality, institutional integrity and administrative efficiency. These matters are examined in some detail in **Part Four – Legal Issues and Options.**

The two primary objectives may, to a large extent, prove contradictory. An attempt to minimize health and safety risks through rigorous law enforcement will exacerbate the current individual and societal costs of enforcement. Conversely, the minimization of enforcement costs (personas, societal and economic) may result in an increase in conduct associated with health and safety concerns. Thus, the maximal attainment of both policy objectives requires a compromise or balancing of interests. The exact point at which an acceptable trade-off is effected will depend on the gravity of the harms and an evaluative assessment of their relative importance. The Le Dain Commission, in its *Final Report*, adopted a similar calculus. In discussing the test to be used in deciding what, if any, measures should be taken in response to drug use, the Commission noted that:

> We must weigh the potential for harm, individual and social, of the conduct in question against the harm, individual and social, which is caused by the application of the criminal law, and ask ourselves whether, on balance, the intervention is justified. (Le Dain, 1973:940)

In short, the legislative response must be designed to avoid a situation where the harms that flow from our cannabis control policy are greater than those attributable to the conduct the policy is intended to curtail.

Part 3 – The Empirical Bases of Cannabis Control Policy

A meaningful discussion of cannabis policy must be founded on reliable information as to the effects of the drug, the epidemiology of its use, and the institutional characteristics and socio-legal consequences of our present control regime. These matters are addressed in the following subsections: Chapter 1 surveys the available evidence regarding the correlates of cannabis use, while Chapter 2 summarizes the data pertaining to our current legislative response.

1. EMPIRICAL EVIDENCE REGARDING CANNABIS USE

Cannabis sativa is an herbaceous annual plant which grows as a weed or is cultivated throughout the tropical and temperate areas of the globe; it is commonly referred to as "Indian Hemp." Marijuana consists of the crushed leaves and often small twigs or flower tops and is usually smoked, either by itself or mixed with tobacco. Hashish, which is generally more potent, is the resin of the plant which has been squeezed or scraped from the leaves or flowering tops. It is sometimes eaten, but usually smoked in a pipe or sprinkled on tobacco and rolled into a cigarette. Hash oil, an extract of the resin, is mixed with tobacco or low-grade marijuana to be smoked, or smeared on cigarette papers to be used in the manufacture of "joints." The pharmacological effects of cannabis are due primarily to 1-Δ^9-tetrahydrocannabinol (THC) and certain related metabolites.

In the following section we canvass the major findings of our background studies and literature reviews of the use of cannabis. This survey includes discussions of: (a) health concerns; (b) safety concerns; (c) the cannabis market; (d) extent of use; and (e) patterns of use.

Health Concerns

One of the major areas of concern surrounding cannabis pertains to its physiological and psychological effects, especially under conditions of heavy or prolonged use. Unfortunately, several important hypotheses have only begun to be explored, the scientific literature is riddled with inconsistent, methodologically questionable and unreplicated research, and North American-based long-term studies have yet to commence. Further, in some areas the proponents and opponents of cannabis law reform are locked in a prolonged and unproductive debate as to the meaning, significance and epidemiological implications of reported effects. As Griffith Edwards (1974:8) has commented: "in this polarized situation, objectivity becomes the casualty."

For the past decade, however, there has been an intensive international effort to determine what, if any, biomedical liabilities result from the use of cannabis. There remains much to be learned, but a considerable body of reliable knowledge of cannabis effects — adverse and otherwise — has accumulated. A review of these materials for

the Health Protection Branch has been prepared by Dr. Leo Hollister, a California pharmacologist and one of a very small number of universally respected researchers in this field. We have also received advice and assistance in this area, especially as it relates to the Canadian context, from Dr. Ralph Miller, former Research Director of the Le Dain Commission of Inquiry into the Non-Medical Use of Drugs.

The evidence to date suggests that cannabis is relatively safe, but we must proceed on the assumption that it is not a unique drug in having no detrimental effects on health. Indeed, there are a number of possible health hazards which must be addressed.

Recent controlled field studies (all of which were conducted outside of North America) have generally failed to detect any major health consequences from long-term heavy cannabis use, but in certain circumstances the research techniques were too limited and the samples too small for accurate epidemiological predictions regarding unusual or statistically rare conditions. If cannabis is at all like alcohol or tobacco in its health hazards, broader-based epidemiological studies will be necessary before any final conclusions can be reached in certain areas.

Since there is little evidence of any significant health problems caused by moderate use of cannabis by normal young adults, attention in this review is placed primarily on possible effects of heavy, chronic use, and on use by particular subgroups of Canadian society who may have specific susceptibilities to any potential health problems. Impairment of psychomotor functioning, and its relationship to the safe operation of motor vehicles, is one issue of major importance to public health, but discussion of this problem will be deferred to a later section on safety-related concerns associated with cannabis use. First, we will focus on physiological effects. Later in this section, we will deal with the psychological and mental health aspects of cannabis use.

It seems to be generally agreed that the most likely health problem associated with cannabis use derives from its most common mode of administration (smoking) and the consequent risk of bronchial or pulmonary damage. It appears that heavy cannabis use may have effects similar to tobacco in this regard. This problem is especially exacerbated by the additional risk that some samples of marijuana may be contaminated by paraquet, an herbicide which may be extremely toxic when inhaled. Consequently, cannabis smoking by persons with impaired pulmonary function appears to be hazardous; frequent, chronic use of the drug in this way should be avoided. However, at present it is much more difficult to find evidence of clinically important pulmonary insufficiency among cannabis smokers than for example, among those who regularly smoke tobacco.

Concern about other probable health hazards is primarily focused on particular subgroups of society. The acute effects of cannabis, including increased heart rate and other ordinarily minor cardiovascular effects may have deleterious consequences for those suffering from arteriosclerosis of the coronary arteries, congestive heart failure or other cardiovascular disorders. Possible effects on the hepatic enzyme system may be problematic for persons with preexisting liver disorders.

There are other areas where the degree of risk involved in cannabis use is less certain than in those discussed above, but nonetheless deserve careful appraisal. Three of these again apply to special population groups: pubescent boys, pregnant women and diabetics.

Concern about cannabis use by young boys initially arose from some contradictory clinical observations of decreased serum testosterone levels in male cannabis smokers. Experimental studies have been similarly suggestive, but inconsistent. Although the evidence is not clear and its potential significance yet to be determined, the limited endocrine changes indicated, although probably of relatively little consequence in adults, could be of major importance in the prepubertal male.

Cannabis, like many other drugs, crosses the placental barrier, and although there is no demonstrated association between its use during pregnancy and fetal abnormalities, such occurrences, if they exist, are likely to be statistically rare and might easily be missed. Use during pregnancy should therefore be discouraged, although, as Dr. Hollister has noted, the "...current admonition against using cannabis during pregnancy is based more on ignorance than on definite proof of harm."

It has been suggested that large doses of THC might aggravate diabetes through deterioration of glucose tolerance. Such a relationship has not been clinically demonstrated, but the paucity of clinical evidence may be due to the relatively low doses commonly consumed by users or to some development of tolerance to this particular pharmacologic effect.

Other hypothesized, but so far unresolved, health hazards apply to the cannabis-using population as a whole. Impairment of cell-mediated immune responses has been suggested by some studies, but the experimental evidence is inconsistent and greater disease susceptibility in cannabis smokers has not been observed. . If such reductions do occur, they may well be transient, or so small that the capacity of the body to resist challenge is not sufficiently depleted to be cause for concern. The issue, nonetheless, warrants further research. The controversy over chromosome damage also remains to be resolved for cannabis, and, for that matter, a variety of commonly used drugs, including aspirin. In the absence of clinical evidence of harm, the significance of any abnormalities which may emerge is doubtful, but current uncertainty will only be assuaged by further experimental work. Similarly, research into the effects of cannabis on cell physiology and metabolism has failed, as yet, to provide us with satisfactory information on the role of the drug as a potential cause of lung cancer. Some findings suggest that the tars in cannabis smoke might be carcinogenic. Other cell studies indicate that THC might be therapeutically useful in the treatment of malignancies.

In the light of recent research findings, some issues which were once considered important do not now seem to warrant particular concern. An early study which reported brain atrophy in cannabis users has not been confirmed by newer and more reliable techniques, and epidemiological surveys have been generally unable to find clear evidence of impaired brain function in heavy cannabis users. It also appears unlikely that the high lipid solubility of THC implies that sequestered quantities of the drug might

be later released in an active form. Many widely used drugs, including diazepam (Valium®) are highly lipid soluble, but this does not necessarily mean that the drug is accumulated in any active form or causes problems as a result of this characteristic *per se.* However, high lipid solubility, in this case, must be seen as grounds for continued, careful observation.

Dr. Hollister has come to the conclusion that "... general toxicity studies of cannabis and its constituents lead to the inescapable conclusion that it is one of the safest drugs ever studied in this way."

Turning now to the area of mental health and psychological functioning, it has been suggested that there might be some risk in the use of cannabis by psychologically troubled persons, whose psychiatric problems might be unmasked or aggravated by the drug. Tolerance to the effects of cannabis and definite, although mild, signs of physical dependence have been experimentally observed. These occur at much higher levels of consumption than those which characterize typical recreational cannabis use, but we cannot ignore the possibility that certain persons may be prone to compulsive use of this drug, as with any drug with attractive psychopharmacological characteristics.

One of the most common concerns is that cannabis use may precipitate basic changes in the personalties of users, whereby they become less motivated to work or strive for success. This so-called "amotivational syndrome," although observed in some young people who have become preoccupied with drug-taking and have radically changed or abandoned traditional life goals, is difficult to attribute directly to cannabis, especially when multiple drug use is present. In contrast to pharmacological hypotheses regarding such occurrences, other researchers have suggested that lack of motivation is really a manifestation of concurrent depression for which cannabis may be a self-prescribed treatment. No clear evidence exists for either mechanism, however. It has also been found that family background and relationships, as well as social values, are much. stronger predictors of dropping out of college than is drug use. Participation in the illicit drug subculture and "amotivation" may both be symptomatic of the same underlying problem. It is clearly impossible to ascertain if these lifestyle changes, when they do occur, are caused by the pharmacological properties of cannabis.

Whether or not cannabis has the ability to evoke sociopathic, depressive or schizophrenic states is highly uncertain, but there is little empirical evidence that this is a significant risk. There is no doubt that, in certain situations, it can produce acute anxiety or panic reactions. Although such transient reactions occur infrequently, if at all, in regular users, they are probably the most common adverse psychological effects of the drug. Fortunately, these reactions are rapidly reversible as the effects of the drug wane. Toxic delirium and acute paranoid states, more serious and more rare, are similarly self-limiting. "Flashback" reactions tend to be mild and require no specific treatment. At the present time, it would appear that psychopathology may predispose certain people to problematic cannabis use, rather than being caused by it. As mentioned above, it is reasonable to assume that it might unmask latent psychiatric

disorders in those who are particularly vulnerable, but it does not appear that this is a significant occurrence in the general population.

Evidence from the available health statistics suggests the limited scope of cannabis-related psychological problems. For example, roughly one hundred cases involving cannabis are reported each year to the National Poison Control Program, representing 0.1%-0.2% of all reported poisonings. Even then, the figure is probably inflated, since patient reports are accepted without independent chemical verification. A 1975 study in a Toronto emergency ward indicated that adverse cannabis reactions (chiefly acute panic reactions) were concentrated among young, and probably naive, users; less than 3% of the alcohol and other drug-related emergencies requiring institutional intervention involved cannabis. Similarly, cases involving cannabis constituted less than 4% of all 1976 “crisis contacts” at the Calgary Information and Crisis Centre. This represented less than one-tenth of the number of cannabis cases reported there in 1972, despite a steady increase in the prevalence of cannabis use during the intervening period. While 19% of all psychiatric admissions in Canada are classified as due to “drug dependence” by the Mental Health Division of Statistics Canada, all but 2% were attributable to alcohol, the cannabis-related admissions constituting 0.03% of the country's psychiatric case load. (About 30 cases per year over the past six years). Further, most cannabis-related admissions result in very brief hospital stays, usually measured in days or weeks, and some admissions may be attributed to cannabis in lieu of other more appropriate diagnostic assignments. Despite considerable increases in the using population, the proportion of psychiatric admissions attributed to cannabis has not risen accordingly. These more recent data seem to reinforce the Le Dain Commission's 1972 conclusion that:

> ...cannabis does appear as a secondary or complicating factor in psychiatric admissions in Canada, although such cases do not represent a significant proportion of either cannabis users in general or of the psychiatric hospital patient population in particular. (Le Dain, 1972:90)

There is no currently accepted medical use of cannabis in Canada, outside of the experimental context, although it appears that therapeutic prescription by physicians is not prohibited by law. Production of the last cannabis-containing pharmaceuticals was discontinued in 1954 and no new supplies have been made available through traditional channels. While cannabinoids, over the centuries, have been reported to produce an incredible array of possibly useful medicinal effects, the majority of the alleged effects are either complicated by undesirable side effects or can be duplicated by other more readily available and convenient drugs. Recent advances in the synthesis of natural cannabinoids and related compounds has led to a new generation of clinical testing. Some potentially important therapeutic uses have been discovered and a few interesting leads from the earlier literature have yet to be adequately followed up using modern techniques.

Of primary interest is the ability of THC to lower intraocular pressure in glaucoma, a major cause of blindness, and its capacity to suppress the often debilitating nausea and vomiting associated with cancer chemotherapy. Areas where cannabinoids are currently

being investigated for possible, but less likely, clinically useful effects include its use as a bronchodilator in the treatment of asthma, as a tumour growth inhibitor in cancer treatment, and as an appetite stimulant in anorexia disorders. Other more tenuous uses include possible anticonvulsant and analgesic applications.

Major health hazards of cannabis have not readily appeared in either field studies or clinical practice, but we cannot rule out the possibility of statistically rare or as yet unforeseen occurrences. Like tobacco cannabis smoke contains tars which can be damaging to the lungs, and paraquat-contaminated materials are likely to be quite toxic. Until definitive research results are obtained concern will continue over the use of cannabis by people with heart, lung, or liver problems, diabetics, pregnant women, and young boys. Although our mental health and toxic reaction statistics would indicate that cannabis is of relatively little importance in precipitating problems in these areas, use by certain emotionally unstable people may be unwise. Overall, the risks to health connected with cannabis use appear, at present, to be less significant than those related to the use of the more common recreational drugs, but until further research has been conducted, caution and vigilance would be recommended.

Safety Concerns

Safety is of major importance warranting independent consideration for a number of reasons. Although the impaired driver may be putting himself at risk, he may potentially harm others as well, so our concern here is now focused on risk of harm to others which may arise from cannabis use. Secondly, direct "harm to others" describes a moral category of behaviour that all schools of legal philosophy agree justifies the use of the criminal law power. Finally concern about safety raises a host of self-contained legal problems that deserve special attention.

The cannabis and safety issue primarily involves the operation of motor vehicles on the roads. The use of heavy machinery and flying are further illustrations of situations where cannabis use may compromise performance and thus put the safety of others at risk. Driving, however, remains the archetypal, most commonly occurring, and best-researched example of an activity which can endanger public safety. In addition, its apparent resemblance to the alcohol-and-driving situation has prompted considerable public discussion and a concomitant search for a "Breathalyzer" type of testing device, on the assumption that the problems anticipated will indeed occur.

A thorough review of the relevant research findings in this very complex field has recently been completed by R.A. Warren, a Research Associate at the Ottawa-based Traffic Injury Research Foundation. In general, his findings confirm the research and literature review presented by the Le Dain Commission in its 1972 *Cannabis* report.

In order to investigate possible traffic safety hazards associated with cannabis use, two major methodological strategies, experimental and epidemiological, have been adopted,

each with its special strengths and weaknesses. Experimental studies are designed to investigate, under carefully controlled conditions, the potential cannabis effects on certain psychomotor skills thought to be important in safe driving. Epidemiological studies, on the other hand, search for evidence of already-existing “real world” involvement of cannabis in problematic driving, by examining users' attitudes or experiences, studying driving records, and systematically investigating accidents.

Epidemiological studies are frequently very difficult to control properly and can generally yield reliable predictive information only if the incidence of drug use in the driver population is already fairly substantial. To date, no comprehensive studies of cannabis involvement in traffic accidents have been undertaken, although a number of limited efforts have been made. There is some evidence of an association between cannabis and driving mishaps, but the data are inconsistent. Other studies have not found evidence of such a relationship.

Care must be taken in interpreting limited or inadequately controlled epidemiological studies. For example, an apparent relationship between accidents and persons who have chosen to drive after consuming an illegal drug may derive from other preexisting characteristics, such as risk-taking tendencies, rather than resulting from the use of the drug. Age, sex and region are also essential factors which must be controlled.

Studies where active drug levels in the bodies of persons involved in accidents are compared with drug levels in control subjects who have not been associated with driving mishaps have been of primary importance in clarifying the traffic hazards of alcohol. However, there are chemical and pharmacological differences inherent in the cannabis situation which limit the feasibility of such an approach.

Considerable attention has been given to the possible development of a quantitative chemical test analogous to the Breathalyzer, which could provide a reasonable estimate of the intensity of current cannabis effects. Such a device would be invaluable for basic experimental and epidemiological research, as well as for traffic law enforcement. Although qualitative methods exist that can provide some evidence of fairly recent use (e.g., employing ether finger swabs, mouthwashes, dental scrapings and urine samples), these sampling techniques are often not appropriate and, in any event, cannot provide quantitative information regarding current effect levels. In fact, they cannot generally discriminate use immediately before testing from use several days prior to taking the sample.

Available evidence, based primarily on the relatively simple case of isolated THC administration, suggest that blood sample analysis is the most practical approach to estimating the intensity of effects from levels of cannabinoids in the body. However, current methods have little applicability outside the laboratory. Even if simplified and efficient blood sample techniques were developed, significant practical and legal problems surrounding the acquisition of appropriate samples would likely preclude their use for general traffic control purposes.

In the review noted above, Warren (1978) concluded that a causal relationship between cannabis use and driving impairment has not been demonstrated and that at present no epidemiological evidence that cannabis contributes to driving collisions has been found.

Since completing this review, Warren has submitted a confidential interim report on a project investigating the level of drugs in fluid and tissue specimens from persons killed in traffic accidents in Ontario over the past year. Evidence of cannabis use was found in a significant number of the victims. It is difficult to interpret this aspect of the study, due to the small numbers involved and the preliminary nature of the report. Disclosure of more complete results is anticipated later in the year.

There are different problems involved in the evaluation of experimental studies deriving from the fact that little is known about the actual causes of traffic accidents, and small changes in one or more of the complex of driving-related skills might not be significantly related to accidents or injuries under natural conditions. It appears that such factors as driver attitudes, risk-taking traits, aggression, judgement, attention and susceptibility to distraction, and a variety of other psychological variables which are difficult to measure may be more significant in contributing to automobile accidents than are elementary psychomotor skills. Therefore, although certain basic driving parameters can be established experimentally and important issues raised, such studies can provide only a limited basis for predicting the likely “real-world” effects.

Laboratory research indicates that cannabis can produce dose-dependent short-term deficits in certain perceptual, attentional, cognitive and psychomotor abilities which are of possible significance to driving. Similarly, a few studies have revealed that experienced airplane pilots undergo deterioration in performance on flight simulators after smoking high doses of marijuana. Several experiments have demonstrated analogous detrimental effects of cannabis on certain automobile driving tasks, on test tracks and on the road. Further, it appears that alcohol and cannabis have additive deleterious effects on driving skills when used together. On the other hand, several reports suggest that cannabis reduces aggression and risk-taking in a variety of situations. Taken as a whole, these experimental findings are certainly cause for concerned attention, although, as noted above, they cannot be used to directly predict traffic hazards under natural conditions.

Surveys suggest that among regular cannabis users driving while high is not uncommon and that the combined use of alcohol and cannabis in a variety of situations is becoming increasingly frequent. In spite of the inconclusiveness of current findings, research suggests a cautious, rather than optimistic, approach to the issue of cannabis and driving.

The Cannabis Market

Despite intensive efforts to eradicate the cannabis trade, marijuana, hashish and hash oil are probably more readily available now than at any other time in Canadian history. Large international networks, capable of smuggling literally tons of cannabis into the

country in a single venture, have evolved over the post decade, and substantial seizures and severe penalties appear to have had little or no effect on national availability.

Prices have tended to stabilize recently, domestic cultivation has expanded, and marijuana, the most common cannabis product, has tended to increase in potency as once-rare strains and more discriminating tastes have come to characterize the retail market.

The source countries for the Canadian market have remained the same over the decade, although there has been some reordering in terms of the amounts contributed by each country. Hashish still comes from the Middle East, North Africa and parts of Asia; Mexico, Colombia and Jamaica are the major sources of marijuana. In recent years, however, the Mexican marijuana trade has become disrupted because of intensified enforcement efforts, including the herbicide-spraying programme and increased border and coastal patrols. Consequently, many smuggling organizations simply shifted to countries such as Colombia, now Canada's largest contributor of marijuana, where the crops are less physically vulnerable or regimes more hospitable.

This reordering of source countries has had a number of effects. The size and sophistication of smuggling operations has increased. In addition, there has been a marked increase in the potency of the marijuana available in Canada, since the more equatorial locales generally produce plants superior in THC content to most Mexican cannabis. The available data suggest a three- to fivefold increase in average marijuana potency over the past seven years. In this same relatively brief period, the strength of the hashish typically available in this country appears to have declined to the point where it is more or less equivalent to that of marijuana, suggesting the difficulties of chemically or legally distinguishing between these two cannabis products on the basis of potency alone.

Initially, domestic cultivation of cannabis operated on a relatively small scale, but by 1976, commercial production had become a significant factor. Although domestic cannabis is not particularly popular among consumers at present, it will become increasingly marketable as growers develop the experience and technology necessary to produce more potent varieties, or in the unlikely event of a sustained shortage of foreign supplies.

Even if the present sources of supply were eliminated, there is no shortage of possible countries in which cannabis could be grown. In many regions, cannabis cultivation provides a higher return per unit of land and per unit of labour than even poppy cultivation. The possibility of finding a viable crop substitute or developing an income replacement programme for cannabis cultivation is extremely bleak in the foreseeable future. The likelihood of greatly improving cannabis enforcement in the potential source countries is also discouraging.

The young entrepreneurs of the 1960s, who imported relatively small quantities of cannabis, are being increasingly replaced by older and more experienced smugglers involved in large-scale operations. However, cannabis importers tend to be less

sophisticated than their counterparts in the heroin trade, and the market does not appear to be linked to organized crime syndicates, such as the Mafia. It is assumed that the lion's share of the domestic market is met by these large-scale importing operations; smaller importers continue to operate, and become particularly important when the market is disrupted.

Some violence does erupt in the cannabis market from time to time, but these episodes seem to be chiefly related to cheating or theft, rather than territorial rivalry. Upper level distributors tend to deal only in cannabis; however, some retail dealers also handle other illicit drugs, including amphetamines and LSD. There appears to be little overlap between the cannabis and opiate narcotics distribution systems.

Within Canada, the marketing systems for hashish and marijuana are similar, although on the upper levels of distribution they are largely discrete entities. The larger the initial quantity that arrives in Canada, the more numerous are the levels of distribution between importer and consumer. Each level of distribution involves different financial risks and chances of detection and arrest, as well as different profit margins. At the lower levels, financial returns are so small that only those committed to using cannabis would bother to become involved. The return for some dealers is solely realized in cheap or free supplies for personal use; indeed, many so called “dealers” operate only or primarily to ensure themselves and their immediate friends a continuous supply of cannabis at bulk-purchase prices.

Any effort to reduce cannabis consumption must include measures directed at the reduction of both supply and demand. Supply, however, does not appear to be significantly influenced by either expensive interdiction methods or repressive sanctions.

During the last ten years, Canadian law enforcement resources devoted to cannabis have probably increased twentyfold. While this upsurge in resources has increased cannabis arrests by more than 1000 percent, there has been no significant increase in the price of cannabis products in relation to disposable income, no sustained shortages of marijuana, and only temporary regional shortages of hashish.
These disappointing results are attributable to a number of factors. There are almost no serious barriers to entering the cannabis importing business or participating in the distribution system. The profit margins in the illicit traffic are powerful inducements, even in the face of severely punitive sanctions. The underground romance of dealing cannot be discounted as a motivating factor.

In summary, our experience since the late 1960s strongly suggests that the Canadian cannabis market is largely immune to increasing arrests, raids, and other law enforcement efforts. The resilience of the international and national cannabis markets in the face of sophisticated enforcement endeavours suggests that Canadian demand is unlikely to exceed supply, in the foreseeable future.

Extent of Use

In the previous section, we addressed the problems surrounding the control of the supply of cannabis in Canada. Here, and in the section which follows, we consider the nature of the demand: how many Canadians consume cannabis and how the size and composition of this population has changed in recent years.

Widespread use of cannabis did not occur in Canada until the mid-1960s, but since that time the number of users has grown dramatically. Uniform trend data is, unfortunately, not available, but there have been two national household surveys and a number of regional studies, most commonly of school populations, from which to draw broad conclusions.

The first nationwide survey, in 1970, was sponsored by the Le Dain Commission. It gathered a certain amount of retrospective data for the years 1966 to 1970 which indicated that the proportion of adult Canadians who had tried the drug, or had "ever" used it, had risen from 0.6% to 3.4% during that period. A Gallup survey, commissioned by the Non-Medical Use of Drugs Directorate and conducted in January of 1978, revealed that this "ever used" category had risen to just over 17%, indicating that just over 2,750,000 adult Canadians had consumed cannabis at least once.

Of more relevance, however, are measures of the number of people who are *"current"* users, that is, those who have taken cannabis within a specified time period (usually six months or a year) prior to being surveyed. Indeed, at the time of the 1970 survey, about 2.4% of adults claimed to have stopped, leaving only 1% currently using, little more than 125,000 people. These figures had changed considerably by early 1978, with over l½ million Canadians aged eighteen and over (9.7%) having used within the past year, and almost as many (1.33 million or 8.3%) having done so within the month prior to interview.

The population bases of these two national surveys are not strictly comparable, but the percentage increase suggested is large enough to indicate substantial growth in the cannabis-using population.
In addition, there is reason to believe that these are *minimal* estimates, for the sampling methodologies employed by household surveys tend to identify people who spend much of their time in the home and underrepresent younger and more socially active people. On the basis of what we know about the characteristics of cannabis users, it is not unreasonable to hypothesize that many would fall into these two categories. The very nature of the household survey also excludes those who live in college dormitories; this is likely to be a significant omission, as the 1970 household data were supplemented with a survey of university students which yielded the highest use rates in Canada. In addition, the national surveys leave out people who live in hospitals, prisons and other institutions, as well as the more geographically mobile, or hostel-dwelling, citizens.

Nonetheless, these findings indicate that a large and growing number of persons use or have used cannabis. In addition, a significant proportion of current users smoke fairly regularly. The 1978 data suggest that close to 600,000 adults had smoked cannabis in the week prior to interview; somewhat less than half of this group, representing about

1.4% of adults, had used every day in the preceding month. The results of two surveys of Ontario adults, sponsored by the Addiction Research Foundation, suggest that adult cannabis use may be increasing at a *faster* rate today than was the case in the late 1960s and early 1970s. The incidence of current users rose from 5.8% in 1976 to 8.6% in 1977. The 1978 Gallup data for Ontario would indicate a further rise to 11.5% last year, implying that 3% of the adult population was recruited into use each year and that, in just two years, the proportion of adult Ontarians who had used cannabis sometime in the past twelve months had doubled. It is clear that cannabis use is not just a phenomenon of the 1960s, and is not confined to students and other young people.

Turning to adolescent Canadians, the surveys sponsored by the Le Dain Commission found that 11%, just under 300,000 teenagers, were cannabis users in the spring of 1970. (Le Dain, 1972: 204) There has not been a national survey of secondary school students since, but there are sufficiently comparable regional surveys to roughly piece together countrywide estimates. With some regional variations, these local and provincial polls show a steady growth in the incidence of cannabis use among high school students.

Research involving students usually identifies percentages of students who have used within six months or one year of the survey. "Ever used" data are only available for Vancouver secondary school students; in 1978, roughly 47% said they had ever tried cannabis, up 8% from the 1970 figure.

"Current use" figures vary considerably, depending on the year the research was conducted and the city or region covered. One consistent observation, nevertheless, is that the proportion of students using cannabis seems to increase yearly. In the early years of the decade, users generally represented 10-20% of secondary school students. In the past three years, studies have been obtaining figures of 20-30% for the most part, with a low figure of 15% for Prince Edward Island, and a recent high of 37% from Vancouver. Our only national data on high school students were obtained in 1970 (Le Dain, 1972: 203) and indicated that about 2% were using at the end of 1968. It is clear that this decade has, indeed, seen a dramatic increase in cannabis use by teenagers.

Although student surveys consistently reveal that cannabis use increases with age or grade, it is by no means confined to the older students: up to 13% of some samples of those in grade 7 (or aged 12) have been found to be using, with most surveys suggesting about 5% for this age group. The range for 17-year-olds (or those in grade 12) tends to be 35-45% using at least once in the six months prior to the research. Less than 10% of all students use once per week or more often. Although this implies that over one-third of current student users smoke with some degree of regularity, "once per week," certainly, could not be characterized as very "heavy" use.

The data do not permit accurate estimates of the number of young people using cannabis. However, it is probably safe to assume that 25% of high school students used marijuana or hashish sometime in 1978. This would place one million or more teenagers in the present using population.

Combining the teenagers with the adult population figures, one could conservatively estimate that 2,750,000 Canadians have used cannabis in the past year, 1,750,000 adults and one million teenagers. Considering some of the sampling problems involved in household surveys, that there is no indication that recent increases in incidence have reached a plateau, and that the student use estimates are necessarily lacking in precision, it is well within the realm of possibility that the current using population numbers 3½ million or more. It would certainly not seem unreasonable to suggest that there are 3 million current users, representing one in seven (15%) Canadians aged ten or over. As the adolescent using population continues to grow and as older adult non-users are demographically replaced by maturing users, it appears that cannabis users will constitute an increasingly large proportion of the Canadian population.

Patterns of Use

It is necessary to identify the various patterns of cannabis use, if we wish to meaningfully understand the phenomenon in Canada. Most classification systems are based on the frequency with which the drug is used, the persistence or duration of use, and often some suggestion as to the role and meaning of cannabis in the user's social and personal life.

In the foregoing section, we distinguished between people who had “ever” used cannabis, to indicate how widespread was personal contact and experience with the drug, and “current” users, who had consumed cannabis within a year or six months of being surveyed. Within this latter category are people who may be called *experimental* users, who may have smoked cannabis once, or several times, but have not yet established the role it will play in their lives, if any. There may also be found those casual (or episodic) users, who enjoy the use of cannabis in certain situations, probably at the invitation of more regular smokers, but do not maintain their own source of supply. *Occasional* users may purchase cannabis from time to time, or even quite regularly, but tend to be selective about the contexts in which they use (special social occasions, on weekends, with certain friends, etc.) and tend to use less frequently than *regular* users. Those in the latter category have more thoroughly integrated the use of cannabis into their lives, usually keep a quantity of it on hand, and tend to smoke in a variety of social and personal situations, some, but not all, smoking every day.

It is worth noting here that many cannabis users switch from one category to another or stop using altogether; occasional users become episodic and vice versa, regular users become occasional, and so on. One of the encouraging aspects of cannabis use patterns is the apparent ease with which people move out of the cannabis-using population. Some, often after extensive use of the drug, discover that they are no longer enjoying it sufficiently to continue or that unpleasant reactions tend to predominate. In most cannabis-using circles, certainly amongst mature users, it is quite acceptable to pass along the cigarette or pipe without partaking, and such occurrences usually go by unremarked. Some people stop as a result of other life style changes, often drifting away without having made a definite decision to refrain from use.

The survey data do not inquire deeply into the role of cannabis in users' lives, but there is some anecdotal and observational information available, and it is probable that frequency-of-use is a fairly good indicator of seriousness of involvement. The 1978 Gallup national household study found that a large proportion (over 85%) of the adults who had used any cannabis in the year prior to interview had also used within the previous month. It indicated, however, that less than one-half of the current adult cannabis users were smoking as often as once per week. As mentioned above, most student surveys reveal that somewhat more than one-third of adolescent users smoke once per week or more frequently. Less than 15% of adult users claim to use on a daily basis, but it would appear that most of these confine their cannabis smoking to weekends and evenings. Only a very small proportion of users (1-2%, by one estimate) would seem to use frequently enough to be under the influence of cannabis for most of their waking hours.

Indeed, most cannabis use seems to be recreational and social, engaged in by persons of like interests, as a complement to other shared activities. Most use occurs in private settings, but some events and social occasions are associated with public consumption: certain concerts, films or youth-oriented bars, for example. Use in public is rarely indiscriminate, however, and usually occurs where cannabis users constitute a large proportion of those present and where they believe themselves to be substantially immune to arrest.

Although public consumption is less common than private, it is more likely to be followed by driving while under the influence of cannabis. It is thought that a substantial proportion of cannabis users prefer to avoid driving in this condition (Kahn, 1978:8), yet it has been estimated that between 50% and 80% have done so at some time. As indicated earlier, the highway accident implications of this have yet to be determined, but are a source of some concern, especially when alcohol has also been imbibed before taking to the roads.

The full implications of patterns of cannabis use in Canada await further research and the passage of several more years. There is no indication that recent increases in the using population have begun to level off. One might postulate, however, that we have already passed through the period in which the worst, at least short-term, consequences of cannabis use could have been expected to reveal themselves. In its beginnings, cannabis found favour among the young, the rebellious, and those on the margins of Canadian society. That it has now moved into the households of “ordinary” citizens raises concerns about road safety, increases in conviction rates for cannabis and the unhappy consequences that may result, and perhaps, some long-range health hazard which has not yet become apparent. However, remarkably few “victims” of cannabis use have emerged over the past fifteen years, when a large proportion of users were among the least mature, responsible and socially integrated of our citizens. Despite the widespread availability of cannabis, at prices which are low in relation to disposable incomes, the majority of users maintain casual or occasional patterns of use. Bearing these considerations in mind, perhaps we can anticipate future dissemination of cannabis use in Canada with cautious reserve, but with minimal trepidation.

2. Empirical Evidence Relating To The Current Legislative Response To Cannabis

We propose to examine here the preliminary findings of the background papers on law and law enforcement and the sociolegal impact of our present response to cannabis use. The discussion includes: (a) the powers of arrest, search and seizure; (b) the processing of a cannabis suspect through the criminal justice system; (c) the processing of information concerning a cannabis case; (d) problems inherent in drug enforcement; (e) a statistical review of current arrest, conviction, and sentencing patterns; (f) the financial cost of cannabis enforcement; (g) the sociolegal consequences of enforcement; and (h) public and professional attitudes to cannabis control policy.

Special Powers of Arrest, Search and Seizure in Drug Enforcement

The *Narcotic Control Act (N.C.A.)* 1960-61, c.35 and *Food and Drugs Act (F.D.A.)* 1952-53, c.38 grant police who work in drug enforcement virtually unequaled powers of arrest, search and seizure. The Canadian courts have broadly construed these statutory powers and the police officer's common law defences to civil suits. Despite police complaints that their hands have been increasingly tied by the expansion of civil liberties, the exact opposite is true. During the past seventy years federal drug legislation has greatly expanded police powers of arrest, search, and seizure at the expense of individual freedom, privacy and physical integrity. It is important to emphasize that these special police powers in drug enforcement are in addition to the already broad general powers of arrest, search and seizure contained in the *Criminal Code* R.S.C. 1970, c.34 and other federal criminal statutes. Provincial legislation such as *The Highway Traffic Act* R.S.O. 1970, c.202 and *The Liquor Control Act* R.S.O. 1970, c.249 provide still further police powers. Thus, even in the absence of the extraordinary powers of the *N.C.A*. and *F.D.A.*, officers engaged in drug enforcement still have broad powers of arrest, search and seizure.

Two examples illustrate the breadth of the special police powers and the extent to which they represent a fundamental departure from traditional legal principles. A large percentage of cannabis arrests are made by uniformed police officers during routine traffic patrol. In these situations, the officer can use his powers under the provincial highway traffic and liquor control acts to undertake *ad hoc* drug investigations. For example, the Ontario *Highway Traffic Act* authorizes the police to stop any vehicle, to require the driver to identify himself and produce his licence, and to "submit the vehicle to such physical examination...as the constable...may consider expedient." While this Act does not give the officer the right to search the driver or the car's occupants, suspicious circumstances observed during this licence and safety inspection can be used to invoke the broad search powers of the *N.C.A.,* s.l0, and *F.D.A.,* 5.37. Both permit the police, without warrant, to enter and search any place other than a dwelling house in which they reasonably believe there is a prohibited drug. The police are also empowered by these acts to search any occupant found therein, using as much force as is reasonably necessary, whether or not they have reasonable grounds, or for that matter any grounds, to believe that the occupant was committing an offence. If the occupant refuses to submit to the search, he may be charged with obstructing a peace

officer in the exercise of his duty, and if he physically resists, he may be charged with assaulting him and sued civilly. The police may require the occupant to submit to oral, rectal or vaginal examinations, and are not obliged to use medically-trained personnel for that purpose.

Perhaps the most noteworthy aspect of this power is that an individual may be forced to submit to a physical search in the absence of any evidence, belief, or even suspicion of wrongdoing of any kind on his part. This is a major departure from established principles; as a general rule, the police may only search a person after they have lawfully arrested him, and the arrest to be lawful must be based on a reasonable belief that the person had committed or was about to commit or was apparently committing a criminal offence. A possible rationale for this exception in drug cases arises in situations in which the occupants of a private car might realistically know of, or be participating in, a drug offence being committed by another occupant. However, this power to search occupants of premises in which the police have reason to believe a drug offence is being committed applies to all places other than dwelling-houses, not only cars. The police have used this power to enter taverns and strip-search their occupants, many of whom had no possible relationship with the suspected offenders and who probably had no idea that any offence was occurring. (See, for example, The Royal Commission on the conduct of Police Forces at Fort Erie on the 11th of May, 1974.)

The second example concerns the special police powers to search dwelling-houses in drug cases. The common law has traditionally distinguished between police powers to search dwelling-houses and other places. Generally speaking, the police could only enter the former if they had obtained a valid search warrant duly issued by a judge. Judicial scrutiny of the police evidence and control over issuance of the search warrant were designed to protect the sanctity of the home and the privacy of the individual. Both the *N.C.A.,* s.l0(3), and *F.D.A.,* s.37(3), provide far the issuance of *writs of assistance* to members of the RCMP, which empower them to enter and search any dwelling-house, day or night, in which they reasonably believe there is a prohibited drug. In order to prevent the possible destruction of evidence, the courts have permitted the police to enter without a prior announcement, using whatever force is reasonably necessary. The police may search the occupants of the dwelling- house and may “break open any door, window, lock...or any other thing.”

Although the government has proposed modest changes (Globe and Mail, March 14, 1978:9; Globe and Mail, April 7, 1978:1), there is still no judicial control over the issuance or use of the *writ of assistance.* A judge of the Federal Court must issue it on the Attorney-General’s request. It is not limited as to time or place and is valid for the entire career of the officer to whom it is issued. Consequently, the judge has no control over when, where, how often, or in what circumstances the writ is invoked, regardless of whatever abuses arise. It should be pointed out that RCMP regulations require officers holding writs to file internal reports when they use them. (Le Dain, 1972:240) However, even if this departmental review were scrupulously carried out, which is questionable in

light of earlier reports (Solomon, 1972), it is a far cry from the common law requirement that the judiciary approve and control each police entry into a dwelling-house.

This brief review of the special powers of arrest, search and seizure raises numerous issues regarding cannabis control policy. The most important of these is whether the risks posed by cannabis — particularly those posed by consumption-related activities — justify the wholesale sacrifice of our traditional safeguards of individual liberty. Even if one decides that cannabis use presents a sufficient threat to justify investing police with special powers of arrest, search, and seizure, a balance should be struck between the measure of freedom we give up and the enforcement benefits we receive. To date, a large measure of our freedom has been surrendered on the assumption that it has been offset by effective enforcement. Unfortunately the assumption appears unwarranted: the Canadian cannabis market has flourished, demand has risen steadily, supplies are abundant, and prices have remained relatively stable during the past ten years. The vitality of the Canadian cannabis market is even more remarkable given the tremendous increases in resources devoted to cannabis enforcement and more than a tenfold increase in cannabis arrests during the last ten years.

The Processing of a Cannabis Suspect Through the Criminal Justice System

The processing of a cannabis suspect involves two parallel but interrelated series of transactions: the first and most visible relates to the handling of the suspect; the second concerns the management of the data generated by a case. Although the data flow will be discussed in the next subsection, it should be noted here that the existence of such data may represent the most serious adverse consequence of the suspect's arrest or conviction.

As in most areas of the administration of criminal justice, police, prosecutors and judges have a broad range of options in handling a cannabis case. Their discretion is only partially limited by statute, regulations, court decisions and departmental policy. The broad range of legal options, the confidentiality and inaccessibility of, and variations in, departmental policies, and the large measure of unfettered discretion, make it impossible to describe all the ways in which a cannabis suspect might be processed. Depending on one's view, these variations may be considered essential for ensuring a flexible, individualized enforcement response, or as unequal treatment contrary to fundamental tenets of fairness. The former characterization would be appropriate only if discretion were consistently exercised in accordance with some express or implicit cannabis policy goal, rather than in furtherance of administrative expediency or personal whim. Although the existing evidence is sketchy, the variations in the processing of cannabis suspects do not appear to be based on a rational attempt to further any recognizable policy. It is not that the individual police officer, crown prosecutor or judge acts without due consideration or in bad faith, but rather that the results of their decisions cannot be rationalized. To the suspect who is arrested rather than warned, or held in custody rather than released on bail, or charged with importing a drug rather than possession, or fined rather than given an absolute discharge, the system must appear arbitrary and capricious. It should be of little solace to those responsible for cannabis

policy that each decision is thoughtfully and conscientiously made if, as it appears, the decisions reflect the conflicting goals of thousands of independent decision-makers.

Police. Until the late 1960s, the RCMP drug squads made almost all drug arrests. With the increase in hallucinogenic drug use, the municipal and provincial police introduced special drug training programs and established their own drug squads. It became common practice, nonetheless, to establish mixed drug squads of municipal, provincial and RCMP officers. This arrangement has ensured closer cooperation between the agencies and has permitted the entire unit to take advantage of the broad search powers of the RCMP officers' writs of assistance. In the early l970s, the RCMP and other drug squads began to concentrate on cannabis trafficking and “hard” drugs, leaving enforcement of simple possession of cannabis to police engaged in general enforcement duties.

Despite this division of labour, the vast majority of drug squad arrests involved cannabis users and minor street-level traffickers. In 1977, about 90% of all cannabis convictions were for simple possession, and the quantities involved in trafficking and possession for the purpose of trafficking cases were, on average, surprisingly small. Relatively few cannabis arrests seem to result from the investigation of individuals who have been identified as major importers or distributors.

We will now briefly examine the factors which appear to influence the police officer's discretion in processing cannabis cases. A study of Ontario Provincial Police practices, written by a former officer with six years' experience, identified numerous factors which might affect the officer's discretion. (Bailey, 1978) Curiously, the first factor was a provision of *The Police Act* R.S.O. 1970, c.351 which makes it a disciplinary offence for an officer to fail either to report anything he knows about an offence or to make due efforts to bring a suspect to justice. Consequently, police discretion not to proceed is only exercised in low visibility situations, during the initial confrontation. Similarly, officers will only engage in illegal searches, physical aggression or other irregular tactics if it is unlikely to result in a complaint. Thus, these techniques tend to be used against young, poor and legally-naive suspects who are unaware of their rights and unlikely to take remedial action. Once the officer decides to lay a charge, the case will be processed according to the policy of his particular police department.

Given that cannabis is used primarily by young people, it is relatively easy to make arrests. By pulling over youthful drivers or by confronting young people on the street and aggressively exercising his rights to search, an officer can produce a steady stream of cannabis arrests. Since cannabis is not generally consumed in public, an officer is unlikely to be confronted by a situation where he is obliged to make a cannabis arrest. Whether he pursues opportunities to make arrests or is indifferent to them depends on a variety of factors, including his attitude towards cannabis use, his career ambitions, competing demands on his time, the performance expectations of his supervisors, his attitude towards overtime and clerical work, the circumstances of the case, the suspect's attitude towards the officer, and the likelihood and nature of future interaction with the suspect.

While all the factors cannot be discussed here, two points warrant special consideration. Of particular institutional importance are the pressures placed on officers by the monthly statistical monitoring of their performance. The officer's shift is divided into various categories, such as criminal enforcement, traffic enforcement and administrative duties, and the number of offences per hour of enforcement time is calculated and posted each month. An officer whose performance quotient is 20% below the detachment average is singled out in the monthly ratings. Because cannabis arrests are easy to generate and consume relatively little enforcement time, they are an excellent means of improving the performance quotient. The method of computing these performance statistics does not distinguish between an arrest for one marijuana cigarette and an arrest for non-drug offences such as “break and enter,” which involve much more effort. The officers are concerned about their ratings and may keep a running tally so that they can calculate how well they are doing at any time.

Their concerns are justified in that low performance quotients adversely affect the supervisor's evaluation, chances for promotion, and opportunities for transfer to specialty squads. Thus, an officer's decision to pursue cannabis users or to lay a cannabis charge may well be based more on its statistical value than its social utility. It is not known if other police forces employ such rigid evaluation systems, but it appears that departmental expectations universally influence an officer's conduct in investigating and processing cannabis cases.

A second significant matter is the heavy administrative workload that accompanies cannabis cases. An officer involved in ongoing investigations, or one who dislikes paperwork or who is not interested in overtime is unlikely to pursue opportunities to make cannabis arrests or may warn rather than process the cannabis offenders he finds. Figure 1 illustrates the administrative duties involved in an uncomplicated case of cannabis possession in a motor vehicle. It is assumed that the driver and other occupants cooperate with the officer, that one of them admits sole ownership of the cannabis, and that the accused pleads guilty at his first court appearance. It has been estimated that even in these ideal circumstances it would take an officer almost eight hours to process the case from initial contact until the final disposition.

Figure 1

Police Duties Relating to Processing a Routine Cannabis Case

Description of Duty	Average Time (in hours & minutes)	Cumulative Time
Observe vehicle	:01	:01
Check licence plate in Canadian Police Information Centre (CPIC)	:01	:02
	:02	:04
Stop and approach vehicle	:02	:06
Talk with occupants of car and obtain names	:05	:11
Check names on CPIC	:10	:21
Search car and occupants	—	:21

Discover marijuana	:05	:26
Occupant confesses to sole ownership	:02	:28
Record suspect's name and address in notebook	:05	:33
Issue suspect an appearance notice and release him	:10	:43
Record details of incident in notebook	:03	:46
Return to office, enter occurrence in file control register	:05	:51
Make entry in occurrence book	:45	1:36
Fill out initial narcotics 109 report and type it out		
Store exhibit, attach property tag, enter seizure in drug	:15	1:51
exhibit register	:02	1:53
Fill out criminal contact card	:10	2:03
Fill out prosecution report	:05	2:08
Fill out form for entering suspect's name on CPIC	:01	2:09
Complete affidavit of service of appearance notice		
Type legal information (charge) and swear the information before justice of the peace	:45	2:54
Obtain sample of drug seizure and register and mail sample to analyst	:30	3:24
Fingerprint and photograph suspect and complete forms,	1:30	4:54
mail fingerprints to RCMP	2:00	6:54
Prepare crown prosecutor's brief and type it		
Record disposition of case on Narcotics 109 Form,	:30	7:24
fingerprint forms, and prosecution report	:30	7:54
Send drugs for disposal, complete related forms and letters		

Crown prosecutors. Although the administration of justice and thus prosecution of provincial offences and federal crimes is generally entrusted to the provinces by section 92(14) of the *British North America Act,* all drug cases are prosecuted by federally-appointed prosecutors, operating under instructions from the Attorney-General of Canada. Until 1977, the provinces tacitly agreed to this arrangement, presumably because the drug prosecutors were paid by the federal government, and it reduced the work of the provincial Crowns who already had onerous caseloads. Recently, however, the federal government's constitutional authority to prosecute drug cases without the written consent of the provincial Attorney-General has been judicially challenged. (*Re Hauser v. The Queen* (1977), 80 D.L.R. (3d) 161 (Alta. C.A.)) The issue is presently before the Supreme Court of Canada, but regardless of its decision the prosecution of drug cases is likely to remain in federal hands subject only to the necessity of obtaining the written consent of the provincial Attorney-General. It does not appear that the provinces wish to assume the financial costs and administrative responsibilities of prosecuting these cases.

The federal Department of Justice hires full-time prosecutors in cities which have a sufficiently large drug caseload. In smaller centres, lawyers are appointed part-time and are paid on a fee-for-service basis according to a fixed tariff. These positions are financially attractive, and the applicants are generally well qualified. The applicant's political affiliations also appear to be a significant factor in the selection process. Once appointed, the lawyer and members of his firm cannot act as defence counsel in drug cases.

During the early 1970s, the Department of Justice issued detailed instructions to its drug prosecutors and required them to check with the Department's Regional Offices in stipulated situations. This close supervision was intended to ensure a measure of uniformity. These instructions have since been replaced by more general guidelines, and there is now little contact between the drug prosecutor and the regional office, except for appeals.

The prosecution of drug cases likely varies considerably from jurisdiction to jurisdiction and thus the following discussion of practices in the city of London, Ontario, are not necessarily applicable to the rest of the country. While London may provide a model for the smaller cities, the heavier caseloads in larger cities may place greater administrative pressures on the process. The federal Crowns in London have a good working relationship with the police, provincial Crowns, and other members of the legal community. Most drug cases are straightforward and the police rarely consult with the prosecutor before laying a charge. The RCMP have established confidential guidelines for its officers which are referred to by other forces. These guidelines probably reduce the potential for laying inappropriate charges or producing highly disparate dispositions. If an inappropriate charge is laid, the prosecutor will not hesitate to withdraw or correct it.

Defence counsel usually initiate discussions regarding plea-bargaining with either the arresting officer or the federal prosecutor. The prosecutors consider the sufficiency of the evidence as the major factor in deciding whether to reduce a charge to a lesser offence in return for a guilty plea. The prosecutor seeks background information on the suspect from the arresting officer before making this decision. Defence counsel may also approach the federal prosecutor for a favourable submission as to sentence in exchange for a guilty plea. Occasionally, the arresting officer requests that the prosecutor reduce the charge because the suspect was “cooperative” or because subsequent investigation revealed the limited nature of the accused's involvement. In these situations, and others involving young first offenders, the prosecutors may reduce the charge despite evidence establishing a more serious offence.

The federal prosecutors regard their function in speaking to sentence as bringing all the relevant facts to the Court's attention. They rarely propose a specific sentence, unless they feel that the sentence sought by defence counsel is inappropriate. In speaking to sentence they generally introduce the defendant's prior drug-related criminal record, if any.

It appears that the individual prosecutor's sense of fairness is the single most important factor shaping his exercise of discretion. This does result in irreconcilable discrepancies in the prosecution of cannabis cases, but unlike the situation with the police, the drug prosecutor’s exercise of discretion is acknowledged and is a matter of record.

Judges. The Le Dain Commission's 1970 study of sentencing in drug cases revealed wide disparities in sentencing policy and practices. During the last ten years, the number of sentencing options has been greatly expanded by the introduction of absolute and conditional discharges, intermittent sentences, the option to proceed by

summary conviction for possession, and greater freedom in the use of suspended sentences and probation. Although there has been a marked trend towards more lenient sentences in cannabis cases, there is considerable variation in the use of these new options. As in the case of the drug prosecutor, the judge's exercise of discretion appears to be based on his sense of fairness, and it is a matter of public record. Generally speaking, both the Crown and accused may appeal against sentence if the judge erred in applying a principle of sentencing.

The Processing of Information Regarding A Cannabis Suspect

As previously indicated, the most adverse consequence of being convicted of a cannabis offence may be the existence of a written and computer record of the incident, rather than the sentence itself. If this result were intended, then further discussion would be unnecessary. However, various Royal Commissions, academics, commentators and the Law Reform Commission of Canada have strongly urged that the collateral punitive consequences of a criminal record be mitigated, especially in less serious criminal cases. The discharge provisions of the *Criminal Code,* s.662, the *Criminal Records Act* R.S.C. 1970 (1st Supp.), c.12 and Bill S-19 all address this problem. In this section of the paper, we will examine the massive flow of data generated by a cannabis case and explain why federal attempts to mitigate the consequences of a “criminal record” have had an extremely limited impact.

It is necessary at this point to briefly describe the information systems available to a police officer engaged in general enforcement duties. In addition to the files kept by his own department, almost all police officers in Canada have virtually immediate access to the data contained in the Canadian Police Information Centre (CPIC). CPIC, which is run by the RCMP, receives information from individual member police forces across Canada and organizes it into two basic categories of operational data. One includes information regarding wanted, missing and charged persons and stolen or missing vehicles and property. This data is kept for relatively short periods of time during ongoing investigations. For example, once a charged person's case has been disposed of, his name is removed from this system.
The other category of information, the Criminal Records Index, is a permanent record of all persons who have been charged by member police forces and whose fingerprints have been forwarded to the RCMP. All entries on this Index must be accompanied by fingerprints. Since all cannabis offences may be proceeded against by indictment, even those persons charged with simple possession of cannabis are liable to be fingerprinted and photographed. *(Identification of Criminals Act* R.S.C. 1970, c.I-l) Based on the information submitted, the RCMP prepare what is known as a “criminal record synopsis” which summarizes the persons “criminal history.” Once an individual has been charged and his fingerprints have been sent to the RCMP, that data will permanently remain on file, even if the case is dropped or the accused is acquitted or discharged. Thus, an officer, by simply requesting a CPIC “criminal record synopsis” over the police radio, can obtain the police record for any individual who had ever been fingerprinted pursuant to an arrest.

There appears to be only two ways to limit access to, and dissemination of, information in the Criminal Records Index. A person may ask the police force that forwarded his prints to the RCMP to seek their return. While the RCMP will return the fingerprints to the contributing force and close its file, the local police force is not obliged to either make such a request or, even if it does, to close its own file. The second way in which to prevent dissemination of the record is to obtain a pardon under the *Criminal Records Act.* The limitations of this Act are detailed below.

Traditionally the term “criminal record” has been used to refer to an official account of an offender's conviction and disposition. This narrow definition ignores the massive trail of potentially damning information that is collected and disseminated prior to the disposition of the case. With the exception of the RCMP and drug prosecutors’ files, the federal government may have no constitutional power to limit these pre-disposition records. By the time the discharge and *Criminal Records Act* provisions take effect, the harm to the suspect's reputation, or education and employment prospects may be complete.

Potentially damaging information begins to accumulate during the first contact between police and the suspect. It is standard police policy to query through CPIC the licence plate of a car prior to approaching it. At that point the officer, the driver and his passengers, the CPIC operator, and anyone listening to police calls on shortwave radio or the widely advertised police and fire department receivers would be aware of the contact. The officer routinely checks the driver's and even the occupants' names on CPIC. Thus the company you keep, your whereabouts and perhaps even the officer's reason for stopping you may be accessible to a wide audience. CPIC checks are routine — more than 250,000 inquiries are made each week.

If the officer eventually finds cannabis and decides to lay a charge, reams of forms are filled out and filed. (See Figure 1 on page 20.) The suspect's fingerprints and photograph are filed at the local police station and a copy of the fingerprints are sent to the RCMP. The suspect's name and address and the charge are entered on CPIC. As indicated, even if the charge is dropped or the accused is acquitted, the police station's record and the RCMP Criminal Records Index are maintained; only the short-term CPIC entry under charged persons is expunged. Generally, any police agency in Canada can gain access to the local police records and the RCMP Criminal Records Index. Customs, immigration, prison, parole and similar agencies have been granted access to this information. Reciprocal information sharing arrangements have also been instituted with Interpol and American police agencies. Despite rigorous precautions in the design of these systems and the training and monitoring of operators, some of this information will inevitably leak into unauthorized hands.

Once the suspect appears in court, the charge becomes a matter of public record and may be reported by the local newspaper or other media. In addition, the arrest might be recorded in the local legal aid office, federal prosecutor's office, the local court records, local detention centre files, and the Federal Department of Health and Welfare's record of known and suspected drug users. These sources of information are accumulated

prior to the disposition of a case and, with few exceptions, are permanently maintained regardless of its outcome.

The disposition of a case is entered in the records of the local police, the RCMP, the court, the prosecutor's office and the Department of Health and Welfare. It might also be reported in the local newspapers, radio and television.

Discharges. In very general terms, the discharge provisions provide that an individual who has been found guilty or pleads guilty and who is granted a discharge is deemed not to have been convicted. A discharged offender can honestly answer "no" to the question, "Have you been convicted of a criminal offence?", but he would, however, have to answer "yes" if asked any of the following questions: "Have you ever been arrested for, been found guilty of, pleaded guilty to, been sentenced for, or ever committed a criminal offence?" The discharge has no impact on the police or other records that accumulated prior to disposition, nor does it limit the subsequent dissemination of this information. A discharged offender is not treated as a first offender, because the court is free to consider his discharge in sentencing him in a subsequent case. For all intents and purposes, a discharged offender has a "criminal record."

At best, the discharge provisions provide a very limited benefit in very narrow circumstances. It is questionable if the legal community fully understands the discharge provisions, and it is likely that the public and the offender himself do not realize their limited effect. Unfortunately there are probably many young people who have plead guilty to cannabis possession on the assumption that they would be given a discharge and thus suffer no "criminal record" or any disabilities with respect to future employment, citizenship, travel, credit rating, bonding, and similar matters. Regrettably, this is simply not true: the pre-disposition record and the discharge itself are widely disseminated, and a discharge is likely to have almost the identical impact on the offender's future as a conviction.

Pardons. The *Criminal Records Act* provides for the granting of a pardon upon an application by a discharged or convicted offender, following specified waiting periods. In most cases the RCMP will investigate the applicant, his family and acquaintances, and forward their findings to the Clemency Division of the Parole Board, which in turn makes a recommendation to the Parole Board. The pardon "vacates the conviction" (the term "conviction" has with respect to pardons been statutorily defined to include a discharge), which means that it deprives the conviction of any legal disabilities or disqualifications imposed by federal legislation. For example, a person who has been pardoned may not be challenged or disqualified as a juror solely on the ground that he had been convicted or discharged. Similarly, a person who has been pardoned regains his right to hold public office or contract with the Crown. A grant of a pardon, however, does not create the legal fiction that the crime never occurred. Consequently, a pardoned offender must answer "yes" to the questions, "Have you ever been convicted or discharged for a criminal offence?" and "Do you have a criminal record?" The offender, for what it is worth, may attempt to qualify his response by pointing out that he has been pardoned.

The *Criminal Records Act's* most tangible benefit is that it precludes federal departments, Crown corporations or other agencies under Parliament's legislative authority from asking a question on an employment form that would require the applicant to disclose a conviction or discharge for which he had been pardoned. The *Canadian Human Rights Act* S.C. 1977, c.33 extends some of these employment benefits beyond the application stage.

Records of a pardoned offence in the custody of federal authorities must be separately stored and cannot be revealed without the prior approval of the Solicitor General. The *Criminal Records Act* does not expunge the pardoned offender's criminal record but rather dictates how it is to be stored and the circumstances in which it may be released. These provisions are limited to "judicial records" which, according to the Clemency and Criminal Records Division, includes only the records of federal agencies and departments. All other records are considered non-judicial. These would include local and provincial police files, the court reporter's transcripts, court files, the court clerk's calendar, warrants of committal, and news media data. In any event, both judicial and non-judicial records will have been widely disseminated before a pardon was even applied for. The problems of limiting this information, years after it was collected and distributed, are insurmountable. The concern with limiting disclosure of a pardoned offender's record is somewhat misplaced. Unless the pardoned offender is willing to lie, an employer can obtain this critical information by simply asking him if he has ever been convicted or discharged for a criminal offence.

In summary, the benefits of a pardon are extremely limited. The Act is complex and probably misunderstood by the public, the offender, and even members of the legal community. The RCMP investigation may cause the applicant more trouble than the pardon is worth, and the Act is expensive to administer. Any attempts to broaden the Act's prohibition against disclosure to local and provincial police and court records may be unconstitutional.

By creating a criminal offence, the federal government sets in motion a process which generates a massive trail of data, both prior to and after the disposition of the case. Much of this elaborate record-keeping is essential to maintain the factual integrity of the process, to provide police with intelligence data, to evaluate the system's productivity, to assist in the efficient allocation of manpower and resources, and to ensure some measure of public access. These record-keeping systems cannot be dismantled, and the police and courts cannot operate in secrecy beyond the scrutiny of the public and media. A necessary result of these features of our criminal justice system is that any federal attempts to limit the collateral punitive consequences of pre-disposition and post-disposition records will benefit few cannabis offenders.

Problems Inherent in Drug Enforcement: Irregular Methods of Enforcement

In addition to extremely broad powers of arrest, search and seizure, the police have employed irregular or unorthodox methods of enforcement, including the use of wiretaps, paid informants, undercover agents, entrapment, trained dogs, strip-searches and massive surprise raids. Although these tactics are legal, in that they have not been successfully challenged, the resort to such methods has been criticized as bringing the administration of criminal justice and the police into disrepute.

Various forms of illegal police conduct are another cost of using the criminal justice system as a means of controlling cannabis-related behaviour. Unlike the situation in the United States and many other countries, drug enforcement in Canada has been relatively unblemished by corruption. However, illegal searches and the use of excessive force appear commonplace. Given the tolerant attitudes of our courts to narcotics enforcement officials, and the fact that illegally obtained evidence is admissible in court, there are few, if any, significant disincentives to illegal searches or physical aggression. The chances that an officer will be sued civilly or disciplined internally are remote, especially if these practices are confined, as they largely appear to be, to young, legally-naive suspects. The use of informants, undercover agents, surprise raids, and physical force have all contributed to the tension and violence that is inherent in narcotics enforcement.

A Statistical Review of Arrest, Conviction and Sentencing Patterns

Statistics related to the enforcement of cannabis offences have been compiled by both the Bureau of Dangerous Drugs and the Justice Division of Statistics Canada. The trend from the mid-1960s until 1974 was one of dramatic annual increases in the number of persons charged with and convicted of cannabis offences. More recently there has been some stabilization of reported possession offences, but the annual number of distributional offences continues to grow.

Arrest statistics. In 1969, 4,756 adults and juveniles were charged by police with cannabis of fences. By 1977, this figure had risen to 52,233. The total number charged with cannabis offences during this nine-year period exceeds one-quarter million (267,300) and will likely have exceeded 300,000 by the end of 1978. For the past four years, cannabis offences have represented about 90% of all Canadian drug charges under the *Narcotic Control Act* and *Food and Drugs Act.* More significantly, cannabis offences have constituted approximately one in eight adult, non-driving charges in Canada every year since 1973. If federal highway traffic of fences are included, the proportion drops to about one in eleven. Viewed in another light, cannabis possession offences alone account for roughly 25% of the increase in the official “crime rate” between 1969 and 1976. (See Justice Division, Statistics Canada, Catalogue 85-205.)

Conviction statistics. Convictions have also risen dramatically. In 1968, there were 1,453 convictions for cannabis offences, 1,097 of which were for simple possession. In 1977, convictions for all cannabis offences had risen to 40,020 with simple possession accounting for 90% of the total. During the 1968-1977 decade, 180,987 Canadians were convicted of cannabis possession, and an additional 18,499 persons were

convicted of trafficking, importing, and cultivation offences. Over 70% of these convictions occurred in just three provinces, Ontario (36.6%), British Columbia (20.1%) and Alberta (14.8%).

Whereas true opiate narcotics accounted for 98.3% of all convictions under the *N.C.A.* in 1961, by 1977 the opiates' share of convictions under this Act had dropped to 1.3%. Given that cannabis now accounts for over 96% of all *N.C.A.* convictions, and that virtually 90% of all cannabis offences are for simple possession, police assertions that they are concentrating on “hard drugs” and major cannabis distribution cases appear suspect.

Simple possession convictions have risen by a factor of thirty between 1968 and 1977 while, in the same decade, trafficking convictions have only increased tenfold. There has, however, been an interesting shift within the distributional offences. In 1969, for example, 72% of the distributional convictions were for trafficking, while only 28% were for possession for the purpose of trafficking. These proportions soon began to reverse: in 1974 and 1975, 75% of the distributional convictions were for possession far the purpose, and according to the 1977 data this offence still accounts for 65% of the trafficking convictions. Both trafficking and possession for the purpose of trafficking carry the same penal sanctions.

The tremendous increase in simple possession convictions is probably due more to the efforts of uniformed police engaged in general enforcement duties than to the expansion of the RCMP, municipal and provincial police drug squads. It was only in the late 1960s that uniformed officers began to make substantial numbers of cannabis arrests, and this might also partially explain the subsequent shift in the distributional offences. While uniformed police could make large numbers of arrests for possession and possession for the purpose of trafficking, they would almost never make trafficking arrests. The shift in trafficking offences might also reflect enforcement difficulties in making undercover purchases from medium- and large-scale trafficking groups. Petty trafficking arrests are easily effected at concerts, bars and on street corners, but making larger purchases from more sophisticated and cautious traffickers is far more difficult. Consequently the drug squads may be content to raid a known dealer in the hope of finding sufficient evidence to secure a conviction for possession for the purpose, rather than attempting to engineer a trafficking purchase.

Use of these alternative strategies is supported by a recent study of the actual quantity of cannabis involved in the various cannabis offences as recorded in the 1975 conviction data of the Bureau of Dangerous Drugs (Bryan, et al., 1978.) Half of those convicted of trafficking in marijuana sold one ounce (30 grams) or less of the drug; 70% sold under four ounces. Of those convicted of possessing marijuana for the purpose of trafficking, only 16% possessed less than four ounces, while 48% possessed more than a pound. Similarly with respect to hashish: 78% of the trafficking convictions involved one ounce or less as compared to only 32% of the possession for the purpose convictions. By way of comparison, 84% of the marijuana possession and 97% of the hashish possession convictions involved one ounce or less.

Sentencing statistics. Sentences have become less severe during the past decade, especially in simple possession cases. A change in judicial attitudes is partly responsible. The most influential factor, however, has probably been the introduction of discharge provisions in July 1972. At the same time, federal drug prosecutors were instructed to seek discharges in all first offence cannabis possession cases where the offender had no previous criminal record or concurrent conviction. The judiciary refused to automatically grant discharges in these cases in the absence of specific legislation to that effect. There has been, however, a steady rise in the use of discharges since 1972. (See Leon, 1977: esp. 51-53) Sentences for distributional offences have also become less severe, but the change is far less dramatic than in possession cases.

In 1968, 43.4% of those convicted of simple possession were awarded custodial sentences; the rest were fined or granted probation or suspended sentences. Fines soon became the preferred disposition, rising to 77.3% of the possessory sentences awarded in 1971. Despite the introduction of discharges, fines still accounted for 65.7% of the possession sentences in 1977. It is surprising that discharges, which were specifically designed to reduce the stigma of a cannabis possession conviction, have never accounted for more than 25% of simple possession dispositions.

About 4%, or 1,317 of those convicted for simple possession in 1977 were sentenced to incarceration, including 10 persons who received more than a year, and 18 who received indefinite periods. About 40% of those imprisoned were 20 years of age or under. In total, imprisonment has been imposed in over 10,000 convictions for cannabis possession during the past decade. However, these figures are misleading, as it appears that more people are incarcerated for default in payment of fines than are sentenced to incarceration. A recent study (Hartman, May 15, 1978) indicated that 587 persons convicted of possession in British Columbia between 1974 and May of 1978 were imprisoned for up to six months for default. This total exceeds the number of persons actually awarded custodial sentences during the same period. If this pattern applies nationally, as is indicated by recent Ontario data (Patterson, June 21, 1978: Labelle, July 14,1978), then close to 3,100 persons were incarcerated during 1977 as a direct consequence of simple possession convictions.

Sentences for trafficking and possession for the purpose of trafficking have become slightly less punitive since 1969. Custodial sentences for possession for the purpose of trafficking accounted for more than 75% of the cases in 1969, 1970 and 1971, but only 66% in 1975, 1976 and 1977. Over 80% of those incarcerated received less than one year, and over 90% received less than 2 years. Sentencing practices in trafficking cases have been relatively consistent: between 75% to 82% of traffickers were incarcerated each year from 1970 to 1977. There has been a trend toward shorter custodial sentences with less than 5% of those incarcerated for trafficking sentenced to more than two years. The courts have not consistently distinguished between levels of trafficking, and undoubtedly some marginal or insignificant traffickers are still being severely punished.

Persons convicted of importation are subject to a mandatory minimum of seven years' incarceration, regardless of the quantity involved. Almost all importing dispositions

since 1973 have been for this mandatory minimum period. Occasionally, however, importers have received fines, probation, discharges, and one-, two- and three-year sentences. These unauthorized sentences probably reflect the individual judges' concern for the disproportionality of the statutory minimum sentence.

Cultivation convictions increased from 6 in 1968 to 145 in 1977. As in the past, about a third of those convicted in 1977 received custodial sentences. Of those incarcerated, only one received more than six months.

In summary, one out of every eight Canadian adult criminal charges, excluding highway traffic crimes, is for a cannabis offence. Approximately 38,000 persons are annually convicted of cannabis violations. Ninety percent of these convictions are for simple possession of marijuana or hashish. Despite a general reduction in the severity of sentences in cannabis cases, over 1,300 persons were sentenced to prison for simple possession in 1977. At least this number were subsequently imprisoned for defaulting on fines imposed for simple possession. These default incarcerations are likely borne by the young and the poor — those same classes most exposed to the risk of arrest and conviction in the first place.

The Financial Cost of Cannabis Enforcement

The Health Protection Branch has recently begun collecting data on the dollar cost of cannabis enforcement. Research in this area is always difficult as much of the information is confidential, enforcement agencies are sensitive about external appraisals of their operations, and, even when accessible, the data rarely refer to purely cannabis-related costs. Information on enforcement costs, particularly for the offence of simple possession, is critical to any comprehensive assessment of the present control regime. Obviously some public hazards warrant almost any expenditure. However, where one is skeptical of the impact of current measures and faced with limited resources, it is reasonable to strive for a more efficient and effective administration of justice. And this requires estimates, at least, of present costs.

California has provided the most comprehensive study of the fiscal costs of cannabis enforcement. The Final Report of the California Legislature Senate Select Committee on Control of Marijuana conservatively estimated the cost of state cannabis law enforcement for 1972 at $100 million. As the Report noted, this figure “is considered a minimum calculation: the actual costs to the taxpayer were probably much higher” as various processing, committal, juvenile justice, diversion, rehabilitation and peripheral welfare costs were not included in the calculation. (California, May, 1974:113) The cost of an adult cannabis arrest and prosecution in 1972 was conservatively estimated at between $1,200 (a figure that excluded state, as opposed to local, law enforcement agency expenditures) and $2,800. Approximately 80% of those arrested were charged with possession. These California data exclude substantial cost items and are somewhat dated, but if we were to apply them to Canada, the police and judicial costs of processing the 41,000 adults charged with cannabis possession in 1977 would be

conservatively estimated at between $49 and $115 million. The 2,214 juveniles similarly charged in 1977, would, of course, represent an additional expense.

A second, and the only indigenously Canadian calculation, appears in a recent paper by Hogarth and Robertson. (June 7, 1978, rev. Sept. 1, 1978:44) Stripped to its essentials, their argument is as follows: A task force on the administration of justice estimated that the total annual cost of administering the Canadian criminal justice system is about $2 billion. Cannabis possession of fences constitute about one-eighth (or 13%, in 1976) of all criminal offences, and one can "assume" that these cases require, on average, one-half the resources of "ordinary" crimes. Thus, taking 13% of $2 billion and dividing by 2, they arrive at an annual simple possession enforcement cost of $130,000,000.

Unfortunately their analysis suffers from several fatal methodological flaws. The "one-out-of-eight" statistic, for example, refers to all cannabis-related offences, not just simple possession as the authors assume. As well, their calculations exclude consideration of federal highway traffic charges such as impaired driving and failure to provide a breath sample, which, if included, would increase the total number of criminal offences by a third. More importantly, moreover, the $2 billion figure included not only all federal offences but, as well, *all provincial and municipal offences* except parking violations. In fact, cannabis offences represent only about 1%, rather than 13%, of the total Canadian offences recorded in 1975. (National Task Force on the Administration of Justice, June 7, 1977: 18-19, 24). Of equal difficulty is Hogarth and Robertson's assumption that cannabis cases involved one-half the resources of "ordinary" crimes. Once it is realized that the $2 billion figure refers to violations of provincial statutes and municipal by-laws as well as federal enactments, then it is likely that the average cost of a cannabis possession offence is considerably greater than the approximately $350 average cost of an "ordinary" offence. This is because the formal proceedings in criminal cases are far more costly than the "ticketing" procedures commonly employed in the provincial and municipal violations that account for the bulk of Canadian offences.

Although any estimate must be speculative at this stage, it appears reasonable to suggest that the enforcement cost for the offence of simple possession of cannabis is between $60 and $100 million per year. It should be emphasized that even if this offence were repealed, there would likely be no direct monetary savings. More realistically, the funds now spent on enforcing the prohibition of possession would be reallocated to other police operations. In California, for example, a July 1975 enactment (SB 95) reduced the offence of simple possession of marijuana from a possible felony carrying a penalty of up to ten years' imprisonment to a citable misdemeanor with a maximum penalty of a $100 fine. A legislatively mandated study of the impact of this "decriminalization" measure found that the law enforcement and judicial system costs for marijuana possession were 75% lower during the first six months of 1976 than during the comparable period immediately prior to the new law's enactment. Comparing the same two periods, marijuana possession arrests and citations were reduced by nearly 50% while "arrests of heroin addicts and other drug offenders increased

significantly...reflecting greater police concentration on hard drug offenders." (California, State Office of Narcotics and Drug Abuse, January, 1977:1,8)

The Sociolegal Consequences of Enforcement

The negative consequences of criminalizing cannabis are easy to recite but extremely difficult to quantitatively assess. The Le Dain Commission enumerated ten such "social costs" in its *Cannabis* report. (Le Dain, 1972: 292-298) The first and "most serious" was the effect of a criminal conviction, particularly on young offenders. It is well established that the formal application of criminal sanctions has a stigmatizing effect on those exposed to the process, although, according to a Canadian study, this experience has almost no deterrent influence on cannabis users. (Erikson, 1978)

Other social costs of criminally prohibiting cannabis mentioned by the Le Dain Commission include: encouraging the development of an illicit market; obliging persons to engage in criminal activities or with criminal types to supply themselves with cannabis; exposing people to more hazardous drugs by forcing them to have contact with traffickers dealing in a variety of psychotropic products; promoting the development of a deviant subculture; undermining the credibility of drug education programs; the use of extraordinary and disreputable methods of enforcement; creating disrespect for law and law enforcement generally; diverting law enforcement resources from more important tasks; and adversely affecting the morale of law enforcement authorities. Additional social costs include the provision of an economic base for organized crime, health risks flowing from the consumption of unregulated, herbicide-contaminated products, the inhibition of research into therapeutic uses of cannabis, the erosion of civil liberties, and the criminal socialization of young persons through custodial sentences.

The Commission also noted that occupational and professional disqualifications and numerous automatic and discretionary legal liabilities result from a cannabis conviction. Two studies sponsored by the Health Protection Branch detail these specific negative consequences. (Leon, 1978; McKee, 1978)

A convicted cannabis offender is at a distinct disadvantage in any subsequent criminal proceedings: his past criminal record may be used to establish grounds for keeping him in custody prior to trial; it may influence the Crown to proceed by way of indictment rather than summary conviction; it may be raised to impeach his credibility if he takes the stand; it may automatically result in a more severe sentence as dictated by various criminal statutes; it may be introduced by the prosecutor in speaking to sentence and appears to be an extremely important factor in shaping judicial sentencing discretion; and it will likely influence the classification process in prison, and the granting and terms of parole.

An individual convicted of a cannabis offence may be denied entry into Canada as a visitor, or as an immigrant. Once in the country, a visitor, immigrant or even permanent resident may be deported if convicted of a cannabis offence, even simple possession. Discussions with immigration officials in the London area indicated that these harsh

provisions may be tempered by various saving sections in the *Immigration Act* S.C. 1976-77, c.52 and by the immigration officers' exercise of formal and informal discretionary powers. It was suggested that an otherwise law-abiding permanent resident would not be deported if convicted of a minor cannabis offence. The *Citizenship Act* S.C. 1974-75-76, c.108 provides that citizenship cannot be granted to a person who has been convicted of an indictable offence three years prior to the date of application or during the period between the application date and the date he otherwise would have been granted citizenship.

Entry into the United States and the United Kingdom may be denied to an individual who has been convicted of a cannabis offence. Officials of both countries indicated that the decision to permit or deny entry would be based on various factors including the reason entry was sought, the date of the conviction, other convictions, and humanitarian considerations. It appears that a Canadian citizen visiting either country on a holiday would not be denied entry merely because he had been convicted of cannabis possession in the distant past.

Many federal acts contain broad employment criteria which could be used to deny a job to an individual with a record for a cannabis offence. The *Criminal Records Act* and *Human Rights Act* together reduce the possibility that a pardoned offender's record would even become known to a federal department or agency. With the possible exception of jobs requiring a security clearance, these Acts should prevent discrimination against pardoned offenders in hiring by federal departments and agencies.

An informal survey of federal and Ontario government personnel and security officers was conducted in the Health Protection Branch in the summer of 1978. It would seem that, unless their cannabis possession offences were detected at the place of work or resulted in a gaol sentence, government employees would be unlikely to be suspended. Any disciplinary action taken against an employee for the sole reason that he or she had been convicted of possession would warrant lodging a grievance with the Anti-Discrimination Branch of the Public Service Commission. In cases of trafficking-related offences, the picture is less clear. Cannabis offences, however, even simple possession, can result in the suspension or cancellation of security clearances or can be considered grounds for refusal to issue one to a prospective employee. This could be a major stumbling-block to obtaining a job or promotion in the public service.

Employment opportunities in the regulated professions and licensed occupations may be adversely affected by a conviction for a cannabis offence. The provincial legislation governing admission and disciplining of professions usually contains general criteria requiring an applicant or member to be of “good character” and refrain from “unprofessional”, “dishonorable” or “improper” conduct. Such broad criteria apply to lawyers, architects, engineers, surveyors, accountants, health care professionals, dental technicians, psychologists, veterinarians and funeral directors. The licensed occupations are governed by similar legislation and include an even broader range of careers such as ambulance drivers, auctioneers, real estate agents, police officers, and

operators of nursing homes, taverns, private hospitals, and private vocational schools. Primary and secondary school teachers are particularly vulnerable because of the sensitivity of their positions to public scrutiny. In some recent cases (Vancouver Province, Dec. 1, 1977; Globe & Mail, June 30,1978), school boards have taken disciplinary action against teachers convicted of cannabis offences, despite the fact that the court granted them discharges. They were removed from contact with students and given administrative duties to perform or otherwise demoted.

Given the generality of the "good moral character" criterion and the discretionary nature of the admitting, licensing and disciplining powers, it is impossible to predict the consequences of a cannabis conviction. In fact, this element of uncertainty itself is one of the most significant negative consequences of a cannabis conviction.

Some of these social and legal costs are inherent in the criminal law process. Others are a product of our current approach to non-medical drug use in general and cannabis in particular. Although impossible to quantify, these are all real costs which must be balanced against the benefits of maintaining the criminal prohibition in reaching any reform decision.

Public and Professional Attitudes

Demographic surveys have been used to canvass public attitudes toward cannabis and appropriate cannabis control measures. These polls are exclusively conducted among adult populations and are difficult to compare because of the array of legal alternatives presented to respondents. However, the results show uniform dissatisfaction with the current control regime.

An April 1977 Gallup poll found that about 37% of the responding national sample thought "possession of small amounts of marijuana should be a criminal offence." A slightly higher proportion, 38%, thought simple possession should "be an offence subject only to a fine — similar to a traffic violation", and 24% thought simple possession should "not be an offence at all". (Ottawa Citizen, May 14, 1977:7) A second national survey, conducted in the fall of 1977 for *Weekend Magazine* (1977:3), asked only if marijuana should be "'legalized" in Canada. There was no explanation of "legalization," a term that ordinarily connotes licit distribution as well as use, but approximately 37% of those who answered the question thought this approach a "good thing." The remainder thought legalization a "bad thing."

The most recent attitudinal survey was deliberately designed to reflect a full range of realistic legislative options in a clearly comprehensible manner. This survey was sponsored by the Addiction Research Foundation of Ontario and was conducted by the Gallup organization as part of their September 1978 national poll. (The Journal, Nov. 1978:1; Gallup Omnibus Study, Sept. 1978) Of those who responded, approximately 90% of those surveyed, about 35% favoured retention of the status quo, 15% thought simple possession should be a crime subject to fines only, 24% thought simple

possession should not be a criminal offence, although trafficking activities should remain so, and 26% opted for commercial cannabis distribution, like alcohol, in government-licensed stores.

In both Gallup polls, one in the spring of 1977 and the other in the fall of 1978, about two-thirds of those who responded were opposed to maintaining the present legislative regime. The latest poll indicates that half the Canadian adult population, including about 60% of those between 18 and 30, is prepared to remove all criminal sanctions, including fines, for simple possession of cannabis. Further, over half of these persons favour a legal distribution system akin to that presently employed for alcohol. Since some liberalization is apparent between the 1977 and 1978 polls, and since young adults more frequently choose the reform options than older Canadians, the likely direction of public attitudes will increasingly be away from criminal measures and towards more tolerant or even approbative control regimes.

Most of the relevant Canadian professional associations have expressed similar sentiments. As long ago as 1972, the Pharmacological Society of Canada endorsed the Le Dain Commission's recommendation that simple possession no longer be an offence. (The Journal, Aug. 1, 1972:1) The Canadian Medical Association publically opted for “decriminalization” during the 1975 Senate hearings regarding Bill S-19. More recently, the Canadian Bar Association adopted a resolution recommending the removal of all criminal penalties for the possession, cultivation and non-profit transfer of small amounts of cannabis intended for personal adult use. (National, Sept.-Oct. 1978:19)

Part 4 – Legal Issues and Options

3. INTRODUCTION

Thus far, we have surveyed the empirical bases of cannabis control policy. The health and safety correlates, the epidemiology of cannabis use and the nature of the cannabis market have been examined. We have also detailed our legal response to cannabis use, including such matters as police powers, the processing of suspects and information, enforcement statistics, and the financial and sociolegal costs of the present controls. These background data permit an informed analysis of the cannabis control options and their relative capacity to attain our policy goals.

The preferred cannabis control alternative is that regime which best achieves our social policy objectives. As outlined earlier, the major objectives are the minimization of those public health concerns associated with contemporary usage patterns and those individual and social costs ascribable to legal controls and enforcement practice. These twin objectives are somewhat contradictory, and their maximal realization thus requires a balancing of interests. To date, however, official policy has been exclusively directed toward minimizing the health and safety harms, chiefly through a strategy of general discouragement of use. The instrument of social control traditionally employed to effect this policy of discouragement has been the criminal law. While education and information programs have been used as ancillary measures, historically primary reliance has been placed on the criminal sanction. Although it is impossible to estimate what the prevalence of cannabis use would be in the absence of legal penalties,[1] it is clear that millions of Canadians have not been deterred by the criminal law. More importantly, reliance on the criminal law engenders adverse consequences which may outweigh the harms incidental to that very conduct it was designed to discourage.

The criminal sanction represents the extreme end of the social control continuum. In the words of the respected legal theorist Herbert Packer (1968:250), it is the "ultimate threat . . . that should be reserved for what really matters." Certain aspects of cannabis use or commerce may generate risks that warrant application of the criminal law. But it is a question of degree, proportionality and appropriateness: of how to achieve the desired health and safety objectives at the lowest possible social, personal and financial costs. Our current approach is overly-comprehensive. By maintaining a blanket prohibition we have criminalized some relatively inoffensive conduct and tens of thousands of otherwise law-abiding persons; yet we have failed to effectively address those public health matters of genuine concern.

It should be re-emphasized that cannabis use, *per se*, is a relatively innocuous activity. The major risks posed by cannabis consumption are limited to clearly delineated populations, certain types of conduct (behaviour) requiring skilled functioning, and smoking, the most prevalent mode of administration. Since the significant health and safety concerns can be readily identified, our response should be specifically designed to minimize these potential harms. Driving while cannabis-intoxicated, for example, is

one kind of hazardous conduct that entails risks more amenable to risk-tailored measures than any general possessory prohibitions. This type of risk-focused approach serves several important functions: government's concerns, better achieves the desired balance of objectives than general prohibitions, and avoids the needless collateral costs of blanket criminalization. Such risk-specific criminal measures should be but one part of a comprehensive, integrated governmental response that also includes educational, informational and interventionist measures. This multi-modal response is essential to effectively reduce the incidence of cannabis-related public health concerns.

Before reviewing the cannabis control alternatives, we will examine several legal factors that mark the outer boundaries of any legislative response to cannabis use in Chapter 4. These include certain normative concerns such as clarity, efficiency and fairness, constitutional and international restraints on federal legislative discretion, and the problem of meaningfully defining offences. Eight legislative options are then conceptually delineated, described and critically analyzed with respect to the global objectives and normative and legal constraints in Chapter 5.

4. Factors To Be Considered in Framing a Legislative Response

A number of legal factors which fix the outer parameters of federal legislative discretion must be surveyed prior to examining the cannabis control options themselves. Some of these considerations are a product of international agreements or the Canadian constitution. Other concerns are of a more normative nature, pertaining to goals or ideals applicable to the design of any criminal legislation.

Normative and Design Concerns

Among the jurisprudential concerns that ought to be addressed in framing any legislative response are clarity, efficiency and fairness. Of initial importance, then, is that legislation provide the public with a clear and unambiguous statement of federal government concerns and policy. This is particularly important with respect to cannabis legislation because it affects a broad and largely young segment of the general population. The need for a clear message is heightened by the controversy and misinformation surrounding both the drug's effects and the present law. The public need not understand the technicalities or legal nuances of complex penal legislation, but it must be able to appreciate the central thrust of government policy and the consequences of violations.

One problem with the present control regime is that it no longer reflects current knowledge about the drug or, for that matter, current government concerns. The legislation conveys the message that cannabis use *per se* is a hazardous activity, a characterization that is belied by the personal experience of over three million Canadians. This contradiction between official legislative policy and individual experience has undercut the legitimate health and safety concerns posed by cannabis.

Of equal importance, it is likely to have undermined the credibility of the criminal justice system, especially among the young.

Similar problems have arisen from the public's misunderstanding of both the present law enforcement approach to cannabis and the significance of a cannabis conviction. The impression has been created that arrests for simple possession of cannabis are decreasing and that the police are concentrating almost exclusively on traffickers. Many believe that if convicted of simple possession they will avoid a criminal record, while others believe an offender can have his criminal record for cannabis possession completely expunged. As indicated in **Part 3** – **The Empirical Bases of Cannabis Control Policy,** these views are unfounded.

The present legislation no longer reflects current policy, confuses rather than emphasizes the real health and safety concerns posed by cannabis, has generated a misleading impression of the law, and may seriously threaten the integrity of the criminal justice system.

A second normative concern, the efficient allocation of criminal justice resources, has become increasingly important given competing demands on an already over-burdened criminal justice system. The earlier reported finding that “decriminalization” of cannabis in California resulted in decreased arrests for marijuana possession, but increased arrests for heroin and other drugs, is particularly germane. Any legislative option that reduces the $60-l00 million yearly cost of cannabis enforcement in Canada will likely result in increased enforcement of other, and hopefully more serious, offences. Thus, the first issue is whether the present allocation constitutes the most efficient and effectual use of a limited resource. No matter how this issue is resolved, efforts must be made to ensure the wisest allocation of those enforcement resources ultimately assigned to cannabis control.

Because responsibility for police activities falls on all three levels of government, federal, provincial and municipal, the federal government's ability to influence the allocation of resources among all criminal offences and within a specific criminal area is extremely limited. Changes in R.C.M.P. drug enforcement policy, federal drug prosecutors’ directives, and federal-provincial discussions may be of some limited assistance. However, it should be noted that attempts to focus aggregate police resources on the hard drugs and major cannabis trafficking cases have not been successful. Simple possession of cannabis now accounts for over 85% of all cannabis charges and about 80% of all adult charges under the *Narcotic Control Act.* The federal government cannot substantially alter this heavy concentration of resources on enforcement of consumption-related offences so long as it maintains a general prohibition against cannabis possession. The options discussed below vary both in terms of their likely enforcement costs and the extent to which they facilitate concentration of police attention on specific high-risk behaviours. If a blanket prohibition against all consumption -related behaviour is maintained, significant savings are not likely to be realized, nor is the public's protection from legitimate health and safety concerns likely to be enhanced.

A final, general normative concern relates to two matters traditionally subsumed within the term “fairness.” The first, proportionality, deals with whether the legislative response to cannabis-related behaviour is appropriate *relative* to the response to other potentially harmful behaviours. In this regard, any legislative response must be considered in terms of the severity of its sanctions, the risks posed by the proscribed conduct, the allocation of enforcement resources, and the breadth of the relevant police powers. Proportionality, like the efficient allocation of limited enforcement resources, involves the comparison of cannabis use with other risk-producing conduct *and* the subsequent comparison of cannabis-related behaviours relative to one another. The seven year mandatory minimum sentence for cannabis importation is perhaps the most commonly cited example of disproportionality, and one that has provoked at least some judges to ignore the law and impose lesser, unauthorized sentences. Public opinion data indicate that there is broad support for remedying many such inequities.

A second aspect of fairness is equality of treatment. This fundamental principle of our legal system requires that like cases be treated alike. In the context of federal cannabis policy, this principle would require that the legal definitions of offences correspond to meaningful categories and distinctions. The present definitions of trafficking and constructive trafficking have been widely criticized for including within the distributional offences conduct that is functionally equivalent to simple possession. For example, persons who engage in conduct virtually identical to simple possession, such as the communal sharing of a marijuana cigarette, are liable to the same penalties as large-scale commercial traffickers.

The principle of equality of treatment must be tempered by a capacity to respond to individual cases. Traditionally, this has been accomplished by granting a broad measure of discretion to police, prosecutors and judges. But, there are legitimate concerns that this discretion be uniformly exercised in accordance with explicit or implicit cannabis policy goals. Even if the federal government provided a clearer statement of its policies and concerns, it could only indirectly influence this exercise of discretion. To directly address the issue, the present general prohibitions and high maximum penalties would have to be replaced with more specifically defined offences and sanctions.

International Considerations

Canada is a party to the *Single Convention on Narcotic Drugs, 1961*, as amended by the 1972 Protocol. This treaty determines Canada's international obligations regarding the domestic control of cannabis products. It subjects “cannabis,” “cannabis resin” (hashish) and “extracts and tinctures of cannabis” to stringent general control measures governing, among other things, import, export, manufacture and domestic distribution. “Cannabis” is defined as “the flowering or fruiting tops of the cannabis plant...from which the resin has not been extracted.” It is generally conceded that this definition permits the legalization of the leaves of the cannabis plant, provided they are not accompanied by the flowering or fruiting tops. THC and its isomers are governed by the

Convention on Psychotropic Substances, a distinct treaty to which Canada has not yet acceded.[2]

The primary object of the *Single Convention* is to restrict the trade in and use of controlled drugs, including cannabis products, to exclusively medical and scientific purposes. To this end, a number of elaborate reporting and licensing measures have been developed. As well, the sole penal provision of the *Single Convention* (article 36) requires that,

> ...each Party shall adopt such measures as will ensure that cultivation, production, manufacture, extraction, preparation, possession, offering, offering for sale, distribution, purchase, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation and exportation of drugs contrary to the provisions of this Convention, and any other action which in the opinion of such Party may be contrary to the provisions of this Convention, shall be punishable offences when committed intentionally....

Consequently, Canada is bound to treat these activities, with respect to cannabis, cannabis resin, and extracts and tinctures of cannabis, as punishable offences. However, the prevailing view is that article 36 is directed towards illicit traffickers rather than drug users. As a result, it is generally accepted that the word "possession" in article 36 refers to possession for unauthorized distribution and not simple possession for personal consumption. Other consumption-related conduct described in article 36 may be similarly excluded from the treaty-prescribed obligation to impose penal sanctions. Thus, "cultivation" for personal use and even non-commercial "distribution" such as sharing, would, like possession for personal consumption, fall outside the mandatory penal provisions of article 36.

Certain "general obligations" in the *Single Convention* prevent Canada from affirmatively authorizing cannabis possession except for medical or scientific purposes. While these general obligations (articles 4 and 33) do not oblige treaty parties to impose penal sanctions on possession for personal use, they do require that non-penal measures be taken to discourage such possession. This, essentially, is Canada's present policy with respect to the "controlled drugs", such as amphetamines and barbiturates: these drugs may only be obtained upon prescription but their unauthorized possession is not a criminal offence. One such non-penal measure that may be employed is confiscation. Parties are expressly bound to seize and confiscate drugs involved in the commission of article 36 offences, but there is no *explicit* parallel confiscatory requirement for consumption-related conduct that, as indicated, falls outside of this penal provision. At least one country, the Netherlands, has found an implicit treaty obligation to confiscate drugs possessed for personal use. However, such a confiscatory obligation does not appear to necessarily flow from *Single Convention* requirements.

In summary, the *Single Convention* provision which obliges Canada to render certain cannabis-related conduct punishable offences allows considerable constructive latitude.

The obligation to criminalize the specified behaviours apparently depends on the purpose of the behaviour. A party is required to impose criminal sanctions on conduct in furtherance of commercial trafficking, but not on conduct — be it possession, cultivation or distribution — that relates solely to personal consumption. Consequently, Canada is not required to criminalize consumption-related activities, although it may continue doing so. Further, even If continues to criminalize persons engaged in consumption-oriented conduct, the 1972 Protocol no longer requires a party to convict or punish such offenders. Finally, the general obligation to limit the possession of cannabis products exclusively to legally authorized medical and scientific purposes refers to administrative and distribution controls. Although this provision may require confiscation of cannabis possessed without authorization, it does not bind Canada to criminally penalize such possession.

A more detailed analysis of Canada's international obligations, including a discussion of the amending and withdrawal provisions, appears as **Appendix A: The Single Convention and Its Implications for Canadian Cannabis Policy.**

Constitutional Considerations

The Canadian constitution severely limits both federal and provincial legislative responses to cannabis. The innovative cannabis control regimes adopted in some Western European and several American states are incompatible with the unique division of legislative powers that characterizes our constitution. It is necessary, then, to briefly examine Parliament's and the
provinces' constitutional jurisdiction to enact cannabis legislation. The problem of whether Parliament can create a non-criminal (or “civil”) offence and control provincial police and court records will also be explored.

Jurisdiction. Both federal and provincial governments have the constitutional authority to enact valid cannabis legislation. Parliament's authority can be founded on its criminal law power, s. 91(27) of the *British North America Act,* 1867 (*B.N.A. Act*), and its trade and commerce power, s. 91(13) of the *B.N.A. Act*. Under its criminal law power, Parliament can enact legislation for the promotion of public order, safety, morals, and health, provided the legislation contains penal sanctions. If Parliament repealed the present cannabis prohibitions, it could still invoke its criminal law power to enforce standards of quality and purity for the drug. However, Parliament could not, in the name of criminal law, establish a regulatory scheme for the retail licensing and distribution of cannabis. Such a statute would be struck down as “colourable” criminal legislation, i.e., as legislation which bears the trappings of the criminal law, but which in fact, deals with matters assigned exclusively to the provinces. Federal legislation regarding the retail distribution of cannabis would almost certainly be held to invade the provincial power to control intraprovincial trade — a subject reserved for the provinces by virtue of their authority over property and civil rights (s. 92(13) of the *B.N.A. Act)*.

Parliament has some constitutional jurisdiction over trade and commerce, but this head of power has been judicially defined to include only interprovincial and international

trade. While Parliament could use this power to regulate, tax and even prohibit importation of cannabis into Canada, it could not, without use of the criminal law power, control cultivation within a province or intraprovincial cannabis sales. If Parliament relied exclusively on its trade and commerce power, each province could enact their own cannabis regulatory schemes.

The provinces have three constitutional bases for cannabis legislation: the provincial health power, s. 92(7), the provincial trade and commerce power, s. 92(13), and the provincial power over matters of merely a local or private nature in the province, s. 92(16). Just as Parliament cannot usurp provincial control over intraprovincial trade by enacting colourable criminal legislation, the provinces cannot, in the guise of health or intraprovincial trade, enact what is in essence criminal law. The provinces can Impose penalties for violation of provincial statutes, but these statutes must serve purposes constitutionally assigned to the provinces. The penalties for such violations may be as severe as those prescribed by federal statutes, but these provincial violations are defined as "offences," not "crimes," and such offenders do not have "criminal records."

Since Parliament and the provinces both have constitutional power to enact valid cannabis legislation, whether any provincial legislation is operative depends on the extent and nature of any federal cannabis legislation and the constitutional doctrines of *paramountcy* and *concurrency.* The doctrine of paramountcy provides that where valid federal and provincial legislation on the same subject conflict, the federal statute prevails, rendering the provincial legislation "dormant" or "inoperative" to the extent of the conflict. Where there is no inconsistency or repugnancy between the federal or provincial laws, both operate concurrently. The problem, then, is to determine what constitutes inconsistency or repugnancy.

Although the issue is contentious, it appears that the Supreme Court of Canada has adopted a test of "operating incompatibility" which requires that there be an express contradiction between the federal and provincial statutes. The test of such incompatibility is usually expressed as the impossibility of obeying one statute without violating the other. Thus, if Parliament were to pass legislation stating that it is an offence to possess more than a specified amount of cannabis, the provinces would be likely to enact legislation prohibiting possession of less than the specified amount as there would be no operating inconsistency between these two acts. Should Parliament wish to prevent provincial possessory legislation, it would have to *expressly* state that it is not an offence to possess less than the stipulated amount.

If Parliament, by modifying its cannabis legislation, vacated part of the cannabis control field, each province could enact its own complementary cannabis statutes. In the case of a complete federal withdrawal, one province could establish a government retail distribution system akin to a Liquor Control Board. Another province, however, could prohibit cannabis possession, cultivation and distribution under its health power. Once having vacated the field, Parliament could not prevent these variations in provincial responses. It is possible, however, that Parliament could negotiate with the ten

provinces, offering to withdraw in return for provincial legislation which met its policy objectives.

Non-criminal, or "civil," offences. A number of American states have "decriminalized" cannabis possession by transferring the offence from their criminal codes to their civil codes. Cannabis possession is not, as a result, legalized; it remains an offence subject to punishment like a violation of highway traffic legislation, but it is not a "criminal" offence and the offender does not have a "criminal record." This transfer is possible because state governments have both criminal and civil jurisdiction. As appealing as this model might be, it appears to be constitutionally unavailable to Parliament. Since Parliament's jurisdiction over cannabis is based on its criminal law power, it is difficult to see how it could create a civil offence, when the courts have defined a crime as an act prohibited with penal consequences. In any event, the *Interpretation Act* R.S.C. 1970, c. I-23, s. 27(2), deems the violation of any federal statute — no matter what head of power it is enacted under — to be a criminal offence. Thus, unauthorized parking on federal property, in violation of the *Government Property Traffic Act* R.S.C. 1970, c. G-10, constitutes a criminal offence. The fact that this legislation provides for the ticketing of the vehicle and the entering of a conviction upon payment of a set fine does not negate the criminal nature of the offence, but merely relates to the procedures used to enforce the law.

Criminal records. Parliament has jurisdiction over criminal law and procedure by virtue of s. 91(27) of the *B.N.A. Act.* However, under s. 92(14) the provinces are responsible for the administration of justice, including the constitution, maintenance and organization of the criminal courts. Provincial enforcement agencies generate enormous amounts of data, and the issue arises as to whether it is Parliament or the provinces which can control the collation and dissemination of this information. These police and court records are created in the normal course of the administration of criminal justice and are essential for system management. Consequently, the provinces would argue that these data rest within their sole constitutional power. The federal Government would claim that control over such records is necessarily incidental to its powers over criminal law and procedure, and that therefore it is competent to enact legislation concerning the data. If the federal government is right, then it might, through the doctrine of paramountcy, be able to control these data despite contraveiling provincial legislation.

Although this specific matter has not yet been litigated, the Supreme Court of Canada is presently deciding a somewhat analogous issue involving a conflict between the provincial power over the administration of criminal justice and Parliament's power over the criminal law. (See, *Re Hauser and The Queen* (1976), 80 D.L.R. (3d) 161 (Alta. C.A.))[2] Based on appellate court decisions and available authorities, it would appear that the provinces may well have exclusive control over the collection and dissemination of these records. This issue is of crucial importance as several of the cannabis control options discussed below, as well as proposed changes in the *Criminal Records Act* purport to prohibit the dissemination of *any* police, court or related record in the hands of *any* administration of criminal justice agency of *any* government. While the purpose of these federal proposals is commendable — namely, to reduce the collateral punitive

consequences of a criminal record — they may nonetheless be unconstitutional. In analyzing the legislative options it is important to keep in mind that Parliament may *not* have the constitutional power to limit the collection and dissemination of local and provincial police and court records which it is responsible for creating.

In summary, Parliament's range of options is limited. It cannot create a civil offence. Once Parliament has made a certain cannabis-related criminal, the entire spectrum of collateral consequences of a criminal record automatically apply. While some of these consequences can be retroactively "deemed" away through elaborate legislative mechanisms, the criminal offender will inevitably suffer some residual disadvantages. If Parliament is intent on eliminating these consequences for possession of small quantities of cannabis, it must explicitly remove the criminal offence in such a fashion as to prevent the provinces from enacting parallel provincial offences.

Defining Offences

Central to the formulation of rational legislative policy is the problem of defining offences to reflect meaningful behavioural categories. This is an implementational problem, an issue that arises independent of the selection of a preferred control option. However, it is of such importance, particularly with regard to the innovative reform models, that it should be addressed at this preliminary juncture.

> Our concerns, then, are several. First, cannabis-related offences should be referable to common-sense understandings of the proscribed conduct. The offences, in other words, should derive from "real" behaviour rather than abstract legal theory. Second, if statutory behavioural distinctions carrying differential penalties are drawn, they should accord with popular moral as well as behavioural conceptions. Third, while offences should be defined so as to forward policy goals and facilitate enforcement, they must also be sufficiently precise and narrow to ensure that the public can identify the boundaries of legal conduct and thus avoid the risk of unintended criminalization.

Canadian drug control legislation has always distinguished between consumption-related conduct and commercial conduct, between those who merely use drugs and those who sell them. The present statutory response to cannabis consumption is found in the *Narcotic Control Act* offence of possession. All other cannabis-related offences — trafficking, import, export and cultivation — appear to be directed at distributors. The different treatment accorded consumption and distributional conduct is reflected in the statute's procedural and penal provisions. Further, this fundamental distinction is not unique to Canada, but appears in the drug legislation of every western nation and is internationally acknowledged in the *Single Convention on Narcotic Drugs.*

This distinction mirrors an important difference in the public moral characterization of these two classes of conduct. Personal use may not be countenanced, but it is thought a private indulgence that interferes little, if at all, with the rights or interests of others.

Commercial activities, on the other hand, imply the active distribution of cannabis products for monetary gain. The relationship between cannabis use and commercial distribution is clearly symbiotic, but it is rational to distinguish between those who engage in consumption and those who profit from it, between those who assume personal risks and those responsible for generating such risks for monetary gain. Further, it makes strategic and policy sense to draw this distinction if it better concentrates enforcement resources on distributive conduct. The vigorous application of the criminal law is likely to have a greater impact on interdictions of supply than on the reduction of demand.

Considerations of both fairness and efficiency dictate that cannabis legislation accurately distinguish between consumption-related and commercial activities. The *Narcotic Control Act,* however, suffers from at least three problems in this regard which result in an over-comprehensive use of the criminal sanction. The first problem relates to the statutory definition of importation; the second concerns constructive trafficking (i.e., possession for the purpose of trafficking); and the third pertains to behaviour that is functionally equivalent to possession. *Any* new cannabis control regime should avoid unintended adverse consequences by carefully crafting offence formulations so as to address each of these problems.

Importation. The unauthorized import and export of cannabis are subject to a minimum sentence of seven years and a maximum sentence of life imprisonment (*N.C.A.,* s. 5). Although export convictions are rare, importation convictions are a fairly common occurrence. Unfortunately, the *Narcotic Control Act* fails to distinguish between importation for personal consumption and importation for purposes of trafficking. Consequently, all those convicted of importing — no matter how minuscule the quantity involved — are subject to the mandatory minimum sentence.

Because there is understandable concern about imposing lengthy prison sentences on persons who have imported small quantities of cannabis, federal prosecutors often exercise their discretion to lay reduced charges which carry no mandatory minimum, such as possession for the purpose of trafficking. Their exercise of such discretion is apparently governed by confidential guidelines developed by the Department of Justice. However, the very confidentiality of these guidelines, when coupled with the fact that a prosecutor's exercise of discretion is effectively immune from judicial challenge, raises serious concerns about the right to equal protection before the law. Furthermore, the failure to statutorily distinguish between consumption-related and commercial importation has virtually precluded judicial sentencing discretion, with the result that almost every recent importation sentence has been for the minimum mandatory term of seven years.

In view of these considerations, it is procedurally fairer and more consistent with our current knowledge of cannabis to statutorily redefine the offence of importation so as to provide a more flexible and less punitive response. A judge could then consider the offender's purpose (personal consumption or commercial re-sale) and the quantity of cannabis involved, along with other salient factors, in fixing an appropriate sentence.

This reformulation could be most easily achieved through a collapsing of “import” and “export” into the definition of trafficking. This is the statutory approach already taken with “controlled drugs” (such as amphetamines and barbiturates) and “restricted drugs” (such as LSD and psilocybin). (See, *Food and Drugs Act,* ss.33 and 40).

Constructive Trafficking. A second problem derives from the present definition of constructive trafficking. Drug enforcement would be severely hampered if proof of an actual sale were required to establish a trafficking conviction. Indeed, such a requirement would render it almost impossible to prosecute major traffickers, since they rarely sell to anyone but trusted acquaintances. These difficulties led to the introduction of the offence of “possession for the purpose of trafficking” (*N.C.A.,* s. 4(2)) in 1954. Its effect was to make anyone who possessed any amount of a “narcotic” (including cannabis) for the purpose of trafficking liable to the same maximum penalty as a person convicted of actual trafficking: life imprisonment.

Possession for the purpose, or constructive trafficking, is further statutory acknowledgment of the distinction between consumption-related and commercial conduct. Theoretically, possession of *any* amount of cannabis could constitute either simple possession or constructive trafficking, depending solely on the suspect's intention. Obviously the amount possessed serves as evidence of intention, but it is not determinative. As a result, police resources are occasionally needlessly expended on trifling constructive trafficking prosecutions, since there is no conclusive way to distinguish one offence from the other; some traffickers defeat possession for the purpose charges because there are no statutory quantitative guidelines; and, invariably, some persons who possessed cannabis merely for personal consumption are convicted of and sentenced for the far more serious offence of constructive trafficking. The absence of quantitative demarcations also prevents a cannabis *user* from confidently adjusting his conduct to avoid a constructive trafficking charge or conviction.

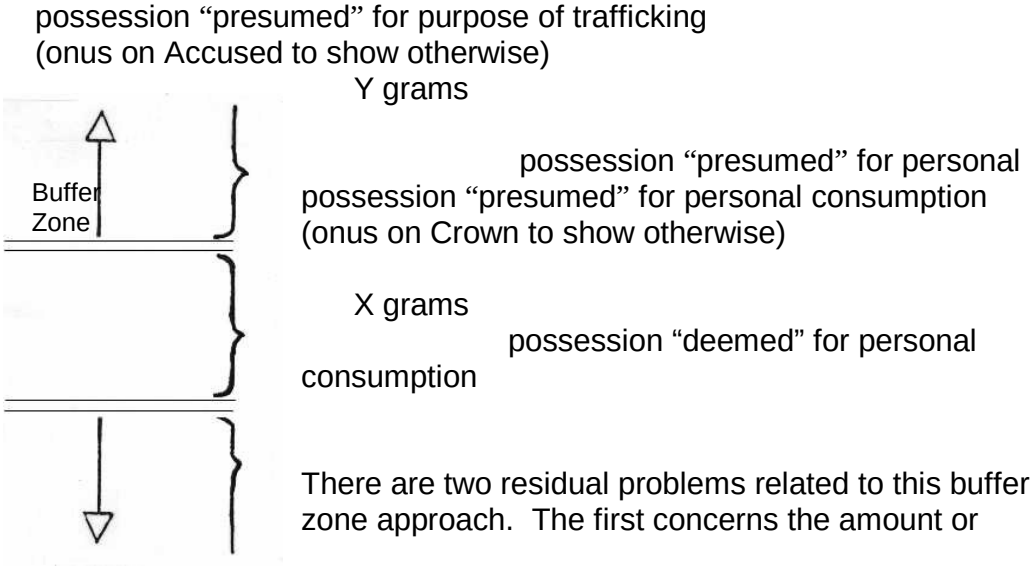
The risk that a person possessing cannabis for personal consumption may be found guilty of constructive trafficking is further enhanced by special procedural provisions. Section 8 *(N.C.A.)* prescribes a two stage trial process in possession for the purpose cases. If the accused does not plead guilty, the trial proceeds as though the offence charged was one of simple possession. If such possession is not proved, the accused is acquitted. If, however, possession is proved, the burden of proof shifts to the accused to establish that he was not in possession for the purpose of trafficking. Should the accused so establish, he is acquitted of the possession for the purpose charge but convicted of and sentenced for the offence of simple possession. If, however, the accused fails to discharge the burden on him, he is convicted of and sentenced for possession for the purpose.
This procedure is relatively rare in Anglo-Canadian criminal jurisprudence in that it involves an express transfer of the burden of proof from the Crown to the accused. In effect, where a person is charged with constructive trafficking, section 8 allows proof of unauthorized possession of any amount of cannabis to raise a statutory presumption of an intention to traffic. This presumption is rebuttable, but only by proof which carries on the balance of probabilities. If the evidence adduced by the accused merely raises a

reasonable doubt as to his intent, he is not entitled to the benefit of that doubt. This onus-shifting procedure has been challenged as a violation of the presumption of Innocence guaranteed by the *Canadian Bill of Rights* R.S.C. 1970, Appendix III. While its constitutionality has been upheld, it nonetheless must be viewed as such a marked departure from fundamental principles of our judicial system that it is only warranted where there is a *prima facie* case of an intention to traffic.

Neither fairness nor efficiency is advanced by the current substantive and procedural provisions with respect to constructive trafficking. A statutory mechanism is required for distinguishing between consumption-related and commercially-related possession that would permit cannabis *consumers* to purposively and confidently avoid the risk of more serious prosecutions while allowing enforcement resources to be concentrated on *traffickers.* Ideally, such a system would provide a middle-ground, or "buffer-zone," for dubious cases, thereby allowing a consumer who inadvertently possessed slightly more than a prescribed amount the opportunity to exculpate himself where there was clearly no commercial purpose.

A regime that appears to effect these aims involves the combination of intent *and* quantitative criteria. (The *N.C.A.,* in contrast, can be thought of as a "pure intent" model.) The relevant legislative provision would stipulate two amounts of cannabis, X and Y. Possession of less than X would be "deemed", incontestably, possession for personal consumption. Possession of more than Y would be "presumed" possession for the purpose of trafficking and, upon proof of possession, the onus would shift to the accused to show otherwise. Possession of more than X but less than Y would be "presumed" possession for personal consumption, but the Crown could attempt to rebut this presumption as in any ordinary criminal prosecution. This "buffer zone" model is graphically delineated in Figure 2.

Figure 2 – "Buffer Zone" Model



There are two residual problems related to this buffer zone approach. The first concerns the amount or

quantities by which the zones are to be differentiated. In other words, exactly what number of grams should X and Y designate in the above illustration? The second problem relates to whether, and if so, which distinctions should be drawn between various cannabis products.

Since the proposed regime's purpose is to more fairly and efficiently distinguish between possession for personal consumption and possession for commercial distribution, the stipulated quantities should accurately reflect actual cannabis-related behaviour. A recent survey of Bureau of Dangerous Drugs (B.D.D.) 1975 conviction data has provided a first glimpse of the actual quantities involved in the enforcement of cannabis offences. (Bryan, 1978) From this study it appears that X, the line differentiating conclusive consumption conduct from "presumed" consumption conduct, could be confidently set at 30 grams (roughly, a metric ounce). Eighty-four percent of those convicted of marijuana possession, 97% of the hashish possession convictions, and 100% of the hash oil possession convictions involved 30 grams or less. The data regarding Y, the line separating "presumed" consumption behaviour from "presumed" commercial behaviour, is less consistent. The concern, here, is to avoid defining the amount in such a way that it is either over inclusive (i.e., so low that true "consumers" are statutorily presumed to be constructive traffickers) or under inclusive (i.e., so high that "traffickers" can escape the presumption of commercial intent). Given these considerations, and given that marijuana cases constitute about 80% of the cannabis possession for the purpose convictions, it appears reasonable to use the marijuana data for purposes of these calculations. According to the B.D.D. data, 63% of those persons convicted of constructive trafficking in marijuana in 1975 possessed more than 120 grams (approximately 4 metric ounces). It would make empirical sense, then, to stipulate that the upper line, Y, be 120 grams, particularly since the Crown, where warranted, may still establish an intention to traffic for any amounts down to 30 grams.

Applying the buffer zone model, persons who possessed under 30 grams of cannabis would be deemed to do so for their own personal consumption. Persons possessing more than 120 grams would be "presumed" to possess the drug for commercial purposes, unless they proved otherwise. Those who possessed between 30 and 120 grams of cannabis would be "presumed" to be in possession for purposes of personal consumption, subject to contrary proof by the Crown.

> A remaining problem concerns the issue of whether or not to distinguish between cannabis forms. The argument for drawing any such distinctions has traditionally been founded on potency — and consequent health and safety risk — differentials thought to exist among various cannabis products. However, recent Departmental data suggest that the average potency of the marijuana currently available in Canada is approximately the same as that of hashish. Consequently, there is little rationale for legislatively distinguishing between the two products, especially since there may be no forensically convincing way to differentiate one from the other.

Most hash oil has a higher THC value than marijuana or hashish and is more readily distinguished from those two products. However, it constitutes such a minuscule proportion of the total Canadian cannabis market that it hardly justifies a distinct statutory response, given the inevitable problems of chemical identification and legal definition. If these difficulties are surmounted and special treatment is thought warranted, hash oil could simply be transferred to Schedule H of the *Food and Drugs Act.* It would then be subject to the Part IV ("Restricted Drugs") provisions, along with drugs such as LSD and psilocybin. Depending on which cannabis reform model is ultimately adopted, this schedule H approach may have the advantage of persuading hash oil users to transfer to arguably safer forms, such as marijuana or hashish, because of the reduced risk of penal consequences.

Functional equivalence. However inexactly, the *Narcotic Control Act* does acknowledge the difference between consumption and commercial behaviour by distinguishing between simple possession and possession for the purpose of trafficking. Nowhere, however, is this fundamental distinction extended to functionally equivalent conduct, to behaviour that is currently statutorily defined as commercial although its purpose may be solely related to personal consumption. As a result, some cannabis consumers are liable to commercial sanctions. For example, a person who gratuitously passes a cannabis cigarette to a friend is, at present, subject to a trafficking conviction. Similarly, an individual who grows one marijuana plant for his personal use is currently in violation of the offence of cultivation.

Sociologically, it is well recognized that casual, noncommercial transfers of small amounts of cannabis are commonplace occurrences. Use of the drug is often a communal experience with all participants sharing the cannabis that may have been purchased by one of them. It is also fairly common for one individual to make a single purchase for himself and his friends, and to be reimbursed upon sub-distribution. These types of activities are not commercial ventures; they are not characterized by mercenary intent. Accordingly, non-commercial distributive conduct which is functionally equivalent to possession for personal use should be legally distinguished from palpably commercial activities. The statutory realization of this distinction depends on consideration of two criteria: the nature of the transaction (i.e., whether the transfer Is gratuitous, non-profit or commercial) and the quantity transferred. Although complex combinations of these criteria may be developed, problems of proof of intention and the desire to discourage commercial trafficking recommend a strict approach. The most convenient solution, and the one that is least likely to benefit commercial dealers, is to consider only gratuitous transfer of under 30 grams the functional equivalent of possession for personal consumption. Any transfer involving more than 30 grams and/or for which consideration was furnished would be treated as trafficking.

> Similar line-drawing problems arise with respect to cultivation, but they can be more easily resolved. In fact, cultivation for personal use has several social advantages over illicit commercial sources of supply which may warrant its covert encouragement. For

example, home-grown marijuana is almost invariably less potent than imported cannabis products; contact with criminal traffickers would no longer be necessary; and the health risks associated with smoking herbicide-contaminated marijuana would be eliminated. Since only the leaves and flowering tops of the marijuana plant are consumed, and since even these are only effective at a certain stage of maturation, the number of mature plants rather than the total weight of the cannabis is the more appropriate criterion for distinguishing between consumption-related and commercial cultivation. Although the useable yield of a domestically grown marijuana plant is not known, it would appear reasonable to consider the cultivation of up to six mature plants the functional equivalent of possession for personal use.

These three areas of definitional concern — importation, constructive trafficking, and functional equivalence — re relevant to all five "decriminalization" options discussed below. The reformulations recommended here are only explicitly incorporated into the "semi-prohibition" model, but the underlying principle — the fundamental distinction between consumption-related and commercial conduct — should be considered in any attempt to reform cannabis legislation.

5. THE LEGISLATIVE OPTIONS

An Ordering of Terms and Concepts

The subject of cannabis control policy is complicated by an inconsistent use of terms that has confused appreciation of the various options. Therefore, it is necessary to define those concepts fundamental to our purpose. Three broad, abstract control alternatives may be posited: "prohibition" (as currently exemplified by the *Narcotic Control Act*), "legalization" (licit commercial distribution of cannabis), and "decriminalization." *Prohibition* and *legalization* are the polar types. The former enjoys only minority support and the latter has no more likelihood of prevailing, if for no other reason than that it is politically untenable. The third alternative, and the middle ground from which any new control regime will almost certainly arise, is *decriminalization.*

This latter rubric is responsible for most of the confusion, for decriminalization is a term of neither art nor science. It is, rather, a legally dubious but rhetorically elastic concept employed idiosyncratically by all parties to the debate. As such, its meaning depends less on its context than on who brandishes the term. The result has been that "decriminalization", as commonly employed, has served to obscure rather than illuminate the issue of cannabis reform. The term, however, has entered the popular vocabulary and has significant descriptive utility. It is worthwhile, then, to operationally define it in such a way that it can be readily located along a continuum of control alternatives while, at the same time, reflecting popular understanding of the notion.

> It is helpful to adopt a threshold concept which uses decriminalization to refer to any statutory scheme short of legalization under which the least serious cannabis-related behaviour is not punishable by incarceration. Under present Canadian law, the least serious cannabis-related behaviour is first offence simple possession. There appears to be a broad consensus, on the pert of the courts, the public, concerned professional associations, leading newspapers, the leaders of Canada's major political parties and the Senate, that imprisonment is inappropriate for first offence simple possession. There is far less agreement, however, as to what cannabis-related conduct should be subject to custodial sentencing, whether repeat offenders or those who default on payment of fines should be liable to imprisonment, and as to what, if any, sanctions should be maintained for cannabis possession. Most Canadians now favour decriminalization, by which they mean something less than imprisonment for persons who possess cannabis. It is the varied content of this "something less" that constitutes the categories of cannabis reform.

Decriminalization, in this threshold sense, is an umbrella concept covering a broad range of policy choices that primarily focus on possessory, or functionally equivalent, conduct. It is possible, however, to enunciate three generic subtypes. That subtype closest to *prohibition* can be designated *mitigation.* It involves the reduction of penalties for possessory behaviour. Simple possession remains a criminal offence, but violators are liable only to fines or mandatory participation in community service programmes. Offenders are subject to ordinary criminal procedures and suffer a criminal record of the event.

A decriminalization subtype that attempts to minimize the criminal trappings of cannabis possession may be referred to as *dispensation*. Simple possession remains an offence but, to the degree possible, the "criminal" attributes and consequences of a prosecution are negatived, or "dispensed' with. Ideally, ticketing or citation procedures are substituted for traditional arrest provisions, court appearances are not required if one admits guilt, fines are nominal, no convictions are registered, and no official criminal records are maintained. This, essentially, is the approach adopted by those American states that have decriminalized marijuana possession by transferring it from their criminal codes to their civil codes, thereby rendering it a "civil offence" subject to "civil" rather than "criminal" penalties. This transfer from criminal to civil jurisdictions avoids the formal procedural requirements and derivative consequences of a criminal prosecution, even though the prescribed penalties may not differ from one regime to the other.

As previously indicated in ***Constitutional Considerations*****,** our constitutional arrangement is such that this American approach cannot be readily imported into Canada. Parliament cannot enact a non-criminal offence and, consequently, all federal

offences — no matter how insignificant — may give rise to those statutory disabilities that attach to "real crimes." While Parliamentary emulation of American decriminalization is constitutionally stymied, it is possible to realize many of the advantages of a civil offence design through the use of "deeming provisions." It is these particular legal fictions that characterize the dispensation alternative. Thus dispensation, as in law, refers to exemptions from or relaxations of ordinary legal requirements — in this case, those *Criminal Code* and related statutory provisions that presently give cannabis possession its criminal colouration.

The third decriminalization subtype is *depenalization.* Here, the behaviour formerly sanctioned is no longer rendered an offence, criminal or otherwise. The once offensive conduct is literally depenalized, stripped of its unlawful character and *all* penal consequences. Cannabis, itself, may be subject to forfeiture as contraband, or its use in specified high risk situations (such as driving) may provoke a penal response, but its private possession for personal consumption does not constitute an offence.

These three decriminalization options are ideal typifications. Few "real-world" alternatives completely adhere to these conceptualizations. There will be occasion, however, to refer to these typifications as standards by which to locate more concrete options along a control policy continuum.

The Cannabis Control Options: A Description

There are eight operational models of cannabis control. Each permits subvariants, elaborations and hybrids, but these eight basic models represent the compass of realistic options in light of current cannabis ideology, informed discussion, and legal and constitutional constraints. Each model has been subject to or is capable of legislative drafting, and each is directly related to one of the conceptual typifications, although the "fit" is often less than exact. As noted earlier, the extreme control options are *prohibition* and *legalization.* Prohibition defines a concrete model *per se,* the *Narcotic Control Act* and all related federal enactments, whereas legalization encompasses a number of diverse regimes, ranging from the complete absence of controls to tightly regulated and potency-controlled sales of cannabis to government-licensed consumers. For comparative purposes, legalization will be concretely exemplified by a regulation model akin to that which presently applies to alcohol.

Between these polarities rest five *decriminalization* options which, for reference purposes, may be designated as Bill S-19, 83-77RD, Full Deeming Provisions, Semi-Prohibition, and Transfer to Schedule G (of the *Food and Drugs Act*). The first, *Bill S-19,* typifies the *mitigation* alternative. *83-77RD* and *Full "Deeming Provisions"* are operational variants of *dispensation. Semi-Prohibition* and *Transfer to Schedule G* are conceptually proximate to *depenalization.* An eighth model, *Federal Withdrawal,* refers to the federal abandonment of cannabis control to the provinces. Given the unpredictability and probable inconsistency of provincial measures, this final option cannot be situated along the same continuum as the other control alternatives.

The basic elements of the eight control regimes are briefly outlined in the following section. The eight models are then comparatively analyzed in light of both our legal concerns and our policy objectives. The prohibitions and maximum penalties pursuant to each option are summarized in **Appendix E.**

Prior to considering the control alternatives, it is worth reiterating that any reform of cannabis legislation entails complex legal, social and possibly political problems. However, the fundamental issue that must be resolved in selecting a preferred option pertains to the proper scope of the criminal law. The question that must be realistically confronted is whether our desire to discourage the use of cannabis — or, more exactly, to discourage those adverse consequences that may result from certain situations of use and populations of users — requires and warrants use of the criminal sanction. And, more particularly, whether such sanctions should be applied to *users,* i.e., to persons engaged solely in consumption-related activities. In formulating a legislative reply, several matters should be borne in mind. First, the criminal law, as presently constituted, does not appear to significantly discourage the incidence or frequency of cannabis use. Second, the current use of the criminal law is counterproductive and results in accumulated collateral consequences that are likely to outweigh the "harms" incidental to use itself. And finally, there is good reason to believe that the identifiable public health concerns can be more effectively and less expensively addressed through public education, special risk-focused programs and sanctions, and the continued criminalization of commercial cannabis activities.

(1) Prohibition. The *Narcotic Control Act* prohibits possession, trafficking (including possession for the purpose of trafficking), import, export and cultivation of cannabis. These acts are criminal offences and, consequently, all relevant aspects of the *Criminal Code,* such as the procedural and penal provisions, obtain. With respect to simple possession, the Crown may proceed by way of summary conviction (in which case offenders are liable to six months imprisonment and/or fines of one thousand dollars for a first offence and one year imprisonment and/or fines of two thousand dollars for a subsequent offence) or indictment (for which offenders are liable to a maximum of seven years' imprisonment). All other offences may be proceeded against only by way of indictment. Persons who cultivate marijuana are liable to up to seven years' imprisonment. Trafficking, including possession for the purpose of trafficking, carries a maximum sentence of life imprisonment, as do import and export. These two latter offences are subject to a *mandatory minimum* penalty of seven years' imprisonment. The court's sentencing discretion is expanded by the penal provisions (Part XX) of the *Criminal Code.* Since 1972, persons who plead or are found guilty of simple possession or cultivation may be "discharged," absolutely or conditionally, in lieu of being convicted. As previously indicated, a discharge does not immunize the offender from a criminal record nor, for example, does it allow him to deny having been prosecuted or sentenced for, or having been found guilty of, a criminal offence.

The *Narcotic Control Act* defines trafficking so as to include the nonprofit giving of cannabis from one person to another. The Act does not differentiate between cannabis and other "narcotics" such as heroin and cocaine. Nor are statutory distinctions drawn

between the quantities of cannabis involved in various incidents or transactions. It has been left to the courts, when sentencing, to distinguish between more and less serious trafficking, importing and cultivation offences. Similarly, any person in possession of *any* amount of cannabis may at the federal prosecutor's discretion, be charged with possession for the purpose of trafficking. In such cases, upon proof of possession the onus of proof is statutorily shifted from the Crown to the accused to establish that he was not in possession for the alleged purpose.

A more detailed description of the *Narcotic Control Act* appears in **Appendix C.**

(2) Bill S-19. In November, 1974, the government introduced cannabis reform legislation, Bill S-19, in the Senate. With some modifications, the Senate passed the Bill in June, 1975. The Bill would have transferred control of cannabis from the *Narcotic Control Act* to a new Part V of the *Food and Drugs Act,* reduced the maximum penalties far all offences (except cultivation), and removed the Crown's discretion to proceed by indictment in the case of possession while extending the discretion to proceed by summary conviction in lieu of indictment to all other offences.

The maximum penalties for simple possession were to be fines of $500 for a first offence and $1,000 for any subsequent offences. In default of payment of these fines first offenders were to be imprisoned for up to three months and subsequent offenders for up to six months. First “possession” offenders who were discharged rather than convicted would have been “deemed” to have been granted a pardon under the *Criminal Records Act.* The sanctions for commercial conduct would also have been substantially modified. Traffickers, including those convicted of possession for the purpose of trafficking, would have been liable to a $1,000 fine and/or imprisonment for 18 months on summary conviction, or imprisonment for up to 14 years less a day if the Crown proceeded by indictment. Importing and exporting would have carried maximum penalties of 2 years and 14 years less a day, on summary conviction and indictment, respectively. The maximum penalty for cultivation would have been increased to 10 years (on indictment), but a summary conviction would have carried a maximum $1,000 fine and/or imprisonment for 18 months.

Bill S-19 was later introduced in the House of Commons, but died on the order paper in October, 1976.

While moving well beyond the current provisions of the *Narcotic Control Act,* Bill S-19 remains an example of the *mitigation* alternative. Apart from the dubious value of a deemed pardon in the case of first offenders, S-19 does not alter the criminal character of a possession prosecution apart from reducing the severity of the maximum penalties that presently obtain.

(3) 83-77RD. In August, 1977, Cabinet approved the drafting of amendments to Bill S-19. This unpublicized decision (83-77RD) apparently represents current Cabinet cannabis policy. If enacted, 83-77RD, like its predecessor, would have transferred control of cannabis to a new Part V of the *Food and Drugs Act* and removed the Crown's

discretion to proceed by indictment in the case of possession while extending the discretion to proceed by summary conviction to all other offences.

The offence of simple possession would have been made punishable by a maximum fine of $500 and, in default, a three month term of imprisonment. There would have been no special provisions for subsequent possessory offences. Persons who pleaded or were found guilty of cannabis possession would have been automatically "deemed" not to have been charged, convicted, sentenced or prosecuted. These "deeming provisions" were to have occurred immediately upon the grant of an absolute discharge and, with some exceptions, after six months in the case of a conditional discharge or conviction. The deeming provisions were to have had retroactive effect and, upon their coming into force, no information regarding the offence contained in any record of a court, police force or any government department or agency could have been disclosed to any enquirer.

The maximum penalties for all other offences were to be substantially reduced from the present sanctions, but the deeming provisions were to apply only to simple possession. Significantly, "import" and "export" were to be collapsed into a new definition of "trafficking," and thus eliminated as separate offences. Trafficking, including constructive trafficking, was to have carried a maximum penalty of a $1,000 fine and/or imprisonment for 18 months on summary conviction, and a maximum sentence of 10 years' imprisonment upon indictment. The "mandatory minimum" problem associated with current importation enforcement would thereby have been obviated. No method was proposed to quantitatively discriminate simple possession from possession for the purpose of trafficking. Nor were distributive activities statutorily distinguished on the bases of the amounts involved or the commercial nature of the transaction. Cabinet did decide, however, to reduce the maximum sentence for cultivation from the ten years' imprisonment on indictment provided in Bill S-19 to 5 years. A summary conviction for cultivation would have remained subject to the same $1,000 fine and/or 18 months' imprisonment prescribed in Bill S-19.

83-77RD is illustrative of a *partial-dispensation* approach to decriminalization. Simple possession remains a criminal offence subject to penal sanctions, but the gravity of the penalty is reduced and elaborate provisions are proposed in an *attempt* to "deem away" all records and most other collateral consequences of the event. The procedural formalities described in the *Criminal Code* and other relevant statutes would not be disturbed by this legislative proposal.

(4) Full "deeming provisions." Both Bill S-19 and 83-77RD constitute serious efforts to reduce the direct end collateral effects of a criminal prosecution. The sanctions in 83-77RD are somewhat less severe than those in Bill S-19, but the significant difference between the two proposals rests in their approaches to the collateral consequences of a finding of guilt in possession cases. While Bill S-19 grants automatic "pardons" to persons "discharged" for a first offence of simple possession, 83-77RD proposes complex "deeming provisions" which automatically apply to all persons discharged from or convicted of simple possession of cannabis. In addition, 83-77RD directly addresses

the issue of criminal records through provisions designed to restrict the disclosure of any information regarding a possessory offender.

These two legislative proposals thus manifest executive concern to mitigate the disproportionately adverse consequences of a prosecution for consumption-related behaviour. And 83-77RD, through its elaborate deeming and criminal record provisions, reflects Cabinet awareness of the negligible ameliorative benefit of a Bill S-19 pardon and the need for more effective measures to reduce the collateral results of a criminal prosecution. However even 83-77RD may not accomplish the government's purpose since it fails to adequately protect possession offenders from the full range of consequences that flow automatically from arrest, trial, and a finding of criminal liability.

It is possible, however, to more clearly approximate the advantages of the American civil offence approach by following the central thrust of 83-77RD through to a “full dispensation” regime. For example, the federal government has exclusive jurisdiction over criminal procedure. As a result, Parliament could replace the formalities of current simple possession arrest, booking, bail and trial procedures with a less formal ticketing system akin to that used by the provinces for minor highway traffic or parking offences. The sole sanction for cannabis possession, as with many provincial and some federal offences, could be a nominal fine, sufficient to indicate society's disapproval but in no way intended to incapacitate or stigmatize the offender. Civil creditor remedies and community work could be substituted for imprisonment in default of payment of these fines. The deeming provisions proposed in 83-77RD could be extended to better ensure that the simple possession offender bear no liabilities beyond his immediate sentence. Upon activation of these deeming provisions, any record of the defendant's prosecution would be automatically sealed or destroyed: no reference could be made to it in any subsequent proceedings and it could be filed in special “no-name” data storage systems that permitted statistical analysis but not personal identification.

A full deeming provisions model can be seen as the natural culmination of a reform initiative begun with Bill S-19 and extended by 83-77RD. Like these two alternatives, a full deeming provisions model continues to apply the criminal law to cannabis users, but attempts to more comprehensively deal with both the procedural and collateral consequences of a criminal prosecution. However, a basic problem common to all three options is that no matter how imaginative or elaborate the deeming provisions, there in no way to completely “undo” the effects of applying the criminal law once the process has been initiated.

(5) Semi-Prohibition. A semi-prohibition model is founded on the fundamental distinction between consumption-related and commercial conduct. Consumption-related conduct refers not only to simple possession but to all functionally equivalent behaviour, such as gratuitous transfers of small amounts of cannabis for personal use and the cultivation of a few plants for one's own consumption. The semi-prohibition model seeks to discourage the use of cannabis, but acknowledges that the personal and social costs of criminalizing users outweigh any benefits that may flow from such criminalization. An American civil offence regime is not constitutionally possible in

Canada, and deeming provisions, for all their ingenuity, can never fully protect an offender from the risk of collateral criminal consequences. As a result, this control option proposes the elimination of the offence of simple possession (thus *depenalization*), while retaining general confiscatory provisions and strict sanctions for commercial activities. Thus, semi-prohibition.

The value of this option rests in its capacity to fairly and efficiently distinguish between consumption and commercial activities. A practical method for legally differentiating one type of conduct from the other has already been elaborated (see, ***Defining Offences***), and the following legislative guidelines are derived from that discussion. The quantitative values, although rationalized earlier, have been inserted primarily to provide a more concrete example. A brief commentary succeeds the statutory model.

(1) Possession of cannabis is not an offence if the amount possessed is 30 grams or less; but where cannabis is found by a peace officer pursuant to an otherwise authorized search, it is to be summarily seized and forfeited.

(2) Possession of more than 30 but less than 120 grams of cannabis is not an offence unless, subsequent to proof of possession, the accused is shown to have possessed the cannabis for the purpose of trafficking; but where cannabis is found by a peace officer pursuant to an otherwise authorized search, it is to be summarily seized and forfeited.

(3) Where the amount of cannabis possessed is 120 grams or more, upon proof of possession the accused shall be given an opportunity to establish that he was not in possession of the cannabis for the purpose of trafficking.

(4) Every person who possesses cannabis for the purpose of trafficking is liable to the same penalties as obtain for the offence of trafficking.

These provisions are not intended as draft legislation, but are designed to illustrate the basic semi-prohibition principles, particularly with respect to the key problem of differentiating between possession for personal use and possession for commercial purposes. The model embodies a buffer zone concept: possession of 30 grams (one ounce) or less is not an offence; possession of 120 grams (four ounces) or more is constructive trafficking *unless* the *accused* proves otherwise; possession of more than 30 but less than 120 grams — i.e., possession within the buffer zone — is not an offence unless the *Crown* proves that the accused had an intention to traffic. As previously indicated, care must be taken in drawing the quantitative lines so as to avoid branding consumers as traffickers or allowing true traffickers to exploit the possessory exception. The buffer zone and the shifting burden of proof should protect consumers from over-zealous enforcement while ensuring that traffickers are liable to prosecution for any amount down to, in our example, 30 grams. Actual trafficking, of course, would remain a serious offence.

The deliberate articulation of a non-offence below 30 grams is designed to prevent the provinces from entering what might otherwise be a vacated legislative field. The confiscatory provisions are intended to convey the federal government's continued disapproval of cannabis use through its refusal to ignore, and thereby sanction, the drug should it come to its agents' attention. The possession of cannabis, where not an offence, does not justify the exercise of police search and seizure powers. But where a police officer comes across marijuana or hashish pursuant to an otherwise lawful search, and a constructive trafficking charge is not warranted, he is to summarily seize the cannabis. Otherwise lawful searches would include those authorized by provincial highway traffic statutes and search warrants for stolen property or other drugs. The person from whom the cannabis is taken may challenge the seizure on the grounds that the substance seized is not cannabis. In this case, the police officer would issue a "receipt" and, upon payment of a nominal analysis fee (intended to discourage frivolous complaints), a qualitative chemical analysis would be conducted to determine the issue. If It were cannabis, it would be permanently forfeited. If, however, it were not cannabis, the substance would be returned and the analysis fee would be refunded. This confiscatory provision *may,* as well, be implicitly required by the *Single Convention* since there is, here, no offence of simple possession.

The remaining provisions of the semi-prohibition model demand little elaboration. Import and export, as in 83-77RD and transfer to Schedule G, would be collapsed into a new definition of trafficking. Both the offences of trafficking and cultivation would distinguish between truly commercial activities and behaviour functionally equivalent to possession. As suggested earlier (see, ***Defining Offences***), only gratuitous transfers of under 30 grams should be assimilated to possessory conduct. Similarly, the cultivation of up to six mature plants would be reasonably considered consumption-related behaviour.

Semi-prohibition is a uniquely Canadian realization of the decriminalization alternative. Simple possession and like conduct would no longer be offences, but cannabis would remain subject to police seizure. Commercial activities, on which the police could concentrate all their enforcement efforts, would still be liable to severe sanctions. The predominant message would remain one of discouragement of use, but the victims of such a policy would no longer be chiefly those whose only significant involvement was that of personal consumption.

(6) Transfer to Schedule G. The Canadian Bar Association, the National Organization for the Reform of Marijuana Laws (Canada) and at least one popular Quebec magazine (Menard, 1977:76) have recommended that control of cannabis be transferred from the *Narcotic Control Act* to Schedule G of the *Food and Drugs Act.* This would represent a convenient, if somewhat inappropriate, method of depenalizing cannabis possession.

The drugs listed on Schedule G, including amphetamines and barbiturates, are defined as "controlled drugs" and are subject to Part III of the *Food and Drugs Act.* Part III does not include an offence of simple possession. However, possession of any quantity of any controlled drug for the purpose of trafficking is subject to the same maximum

penalties as trafficking proper: imprisonment for 18 months upon summary conviction or ten years upon indictment. "Traffic" is defined to mean import, export, manufacture, sell, transport and deliver, but it does not include giving, administering, or distributing, as does the *N.C.A.* definition. The procedure in prosecutions for constructive trafficking is essentially the same as that prescribed under the *Narcotic Control Act.* However, if the accused establishes that he was not in possession for the purpose of trafficking he is acquitted rather than convicted of simple possession.

Cultivation is not expressly dealt with in Part III. Consequently, the offence would disappear unless Part III were amended, most simply through the inclusion of cultivation in the definition of trafficking. However, any amendment would detract from one of the major benefits of the Schedule G option: the facility with which it could be realized. Further, a single amendment for cultivation would likely invite additional and more fundamental amendments. Alternatively, control of cultivation could remain within the *Narcotic Control Act.* "Marihuana" is independently defined in the *N.C.A.* (s. 2) and the offence of cultivation (s. 6) refers to "marihuana" but not cannabis. By simply transferring "cannabis sativa" from the *N.C.A.* schedule to Schedule G of the *F.D.A.*, a comprehensive, if divided, control regime would be effected, with commercial activities subject to the provisions of Part III of the *Food and Drugs Act* and cultivation governed by the *Narcotic Control Act.*

Transfer to Schedule G is an uncomplicated and expedient mechanism for dealing with the problem of cannabis law reform. Although Part III does not systematically distinguish between consumption-related and commercial conduct, it does recognize that unauthorized possession — at least with respect to the drugs it presently governs — does not warrant criminal prohibition or penal sanctions. To this degree it constitutes a *depenalization* option, eliminating possessory controls while retaining stringent trafficking provisions. In this latter regard, it is worth noting that Part III furnishes peace officers with the same extraordinary powers of search and seizure as are prescribed in the *Narcotic Control Act.* (See, **Special Powers of Arrest, Search and Seizure,** above.)

(7) Legalization (regulation). The legally sanctioned distribution of cannabis products could take many forms. The government could virtually abandon all concern for quality control or health and safety considerations, leaving market forces and general consumer protection and anti-combines legislation to determine the shape of the industry that is eventually established. Alternatively, a highly restrictive distribution regime could be introduced, incorporating such measures as consumer licenses, carefully rationed sales, potency controls, government-operated outlets, and narrowly limited retail sales hours. These are, in a sense, polar legalization models. The first, a laissez-faire approach, would undoubtedly precipitate a greater incidence of cannabis use, a consequent increase in health and safety risks, and the likely oligopolization of the market by a few industrial giants. The alternate model would lead, inevitably, to the black market distribution of high potency cannabis products to persons who, for reasons of time, license, age, rationing procedure or personal preference, were unable or unwilling to obtain their supplies through government channels.

The most practical legalization model undoubtedly lies somewhere between these two extremes. Although its precise contours would vary from province to province, it would, in effect, be a *regulation* regime akin to that which presently applies to alcohol. The federal government would retain customs and excise controls, but would withdraw all restrictions on the possession, cultivation and sale of cannabis products. Retail distribution arrangements would fall to the provinces which, as in the case of alcohol, would determine such issues as price, quality, hours, outlets, advertising, and minimum consumer age.

Should the federal government wish to introduce a regulated distribution regime, it would have to carefully negotiate the matter with the provinces to ensure that its broad policy objectives were realized with some degree of consistency. In addition, the federal government may wish to retain consumption and commercial offences for those provinces that refuse to enact regulation legislation. In this way a recalcitrant province could be effectively prevented from punitively proscribing the use of cannabis while its neighbour province aggressively marketed the drug. As well, the federal government would either have to renegotiate or withdraw from the *Single Convention on Narcotic Drugs*.

(8) Federal withdrawal. The federal government could resolve to completely abandon cannabis control rather than attempt to pursue its policy objectives through criminal sanctions or by negotiating uniform legalization arrangements with the provinces. The federal authorities could simply decide that the legal complexities and political liabilities of the issue were such that its most prudent course would be to surrender legislative jurisdiction to the provinces by withdrawing all federal cannabis controls. Parliament might generate revenue from the application of its customs and excise legislation, and it would co-operate, where possible, with provincial governments in expediting or frustrating, as the particular province so directed, the importation of cannabis products; but it would take no leadership or even active role in the development or execution of cannabis policy. Cannabis control would become, in the words of the *British North America Act,* a "matter of a merely local or private nature in the province."

Each province, then, would be free to determine its own cannabis policy. In time, some would probably institute carefully regulated legalization schemes, allowing for the commercial distribution of cannabis products by licensed retailers or government-operated outlets. Others would introduce proscriptive statutes modeled after the current *Narcotic Control Act.* Still others would demand that the federal government reassert its authority through new criminal legislation. It is impossible to predict the direction of provincial enactments, but one can confidently speculate that there would be a wide divergence of approaches, a generally increased use of cannabis, and a level of criminal adventurism reminiscent of the heyday of alcohol prohibition.

The Cannabis Control Options: An Analysis

Only the four central cannabis control options warrant serious consideration as legislative mechanisms for achieving our public policy goals. Prohibition enjoys little public support. Its disproportionately punitive approach to cannabis use has generated contempt for the law and provoked the search for reform alternatives. Bill S-19 is also untenable. Its only significant contribution to legislative reform is its automatic pardons provision, and even this fails to effectively address the problem of the collateral consequences of a finding of guilt. In any case, the issue has been rendered somewhat academic by Cabinet's having replaced Bill S-19 with a more comprehensive proposal, 83-77RD. The most extreme options, *legalization* and *federal withdrawal,* are also very unlikely to survive any critical discussion of cannabis control alternatives. Both schemes involve a surrender of federal authority over cannabis to the provinces, and both would probably necessitate a withdrawal from or renegotiation of our *Single Convention* commitments. Any regime that provided for licit distribution would lead to increased consumption and a parallel rise in the health and safety risks that motivate our current concern to discourage use. Black markets would flourish, even within a regulation model, if the government price was too high, the potency too low, or if all the provinces failed to adopt uniform measures. Both options are likely to prove politically unpopular, at least in the near future. However, a regulation model would generate considerable tax revenue for both federal and provincial treasuries.

Those options most likely to accomplish the goal of minimizing health and safety risks at the lowest possible personal, social and financial costs are the *dispensation* models (83-77RD and full deeming provisions) and the *depenalization* models (semi-prohibition and transfer to Schedule G). The critical distinction between these pairs of options is that the former retains a criminal sanction for consumption-related behaviour while the latter pair do not. As the previous analysis has endeavoured to show there are inevitable costs to using the criminal law to achieve social policy objectives: costs related to the best use of limited enforcement resources; the human costs of criminal arrests, processing and record-keeping; and the costs of increasing disrespect for a criminal justice system at variance with public morality and scientific fact. The most important question, then, is whether our legitimate public health concerns warrant the continued application of the criminal law to cannabis users. Once this has been decided, the choice of a preferred option within each pair of alternatives is not difficult.

It is important to note that the dispensation options are responses to the well-recognized liabilities that flow from using the criminal sanction. Both *83-77RD* and *full deeming provisions* define cannabis possession as a crime, and then propose complex, and unavoidably confusing, provisions for removing the collateral consequences of such a criminal definition. These “deeming provisions,” no matter how elaborate, can never totally undo the personal effects of a criminal prosecution, nor can they guarantee the closure of all related records. Despite the broad sweep of *83-77RD's* record-sealing measures, any attempt to control provincial or municipal offence documentation would probably precipitate a constitutional challenge from the provinces. These deeming and record-keeping provisions would increase, rather than reduce, the costs of administering

federal cannabis control. Further, both options would likely encourage prosecutions, as occurred when the "discharge" provisions were first introduced. The ironic result could well be even more persons channeled through the criminal justice system with even less likelihood of discouraging their cannabis use.

Of the two dispensation alternatives, full deeming provisions is to be preferred. It reduces the enforcement costs and personal degradation associated with conventional arrests and prosecutions by substituting simplified ticketing procedures for the present formalities. It also proposes to extend the scope of *83-77RD's* deeming and record-keeping provisions, and renders imprisonment a last resort for default of payment of fines. Like *83-77RD,* however, it cannot fully eliminate the collateral consequences that result from criminalizing possessory conduct.
Neither *semi-prohibition* nor *transfer to Schedule G* create an offence of simple possession. *Semi-prohibition,* however, does make cannabis liable to summary confiscation and, to that degree at least, conveys Parliament's disapproval of even consumption-related conduct. The absence of a possessory offence serves to concentrate enforcement resources on commercial activities, and both models continue to apply strong penalties to such conduct.

The Schedule G option could be achieved by passage of a bill or by order-in-council. However, use of the latter method is likely to attract political criticism. More fundamental concerns include the absence of an offence of cultivation for Schedule G drugs and the constitutional possibility that the provinces would pass complementary legislation related to cannabis possession once Parliament withdrew its controls. In addition, the failure to specify the quantity necessary to constitute constructive trafficking would virtually invite zealous police and federal prosecutors to pursue otherwise groundless possession for the purpose cases.

In contrast, the *semi-prohibition* model draws firm quantitative distinctions between consumption-related and commercial behaviour, with regard to both possessory and functionally equivalent conduct. By expressly depenalizing certain behaviours, it avoids the possibility of inconsistent provincial incursions and permits users to adjust their conduct so as to avoid the risk of unintended criminalization. Of the two depenalization options, *semi-prohibition* is preferred since it meets our earlier definitional concerns, better advances the interests of fairness and efficiency, is easy to comprehend, and effectively communicates a message of discouragement of use.

Our primary concern is to minimize the health and safety risks associated with the use of cannabis. The pursuit of this objective has required careful consideration of the gravity of the harms attributed to cannabis and the countervailing costs of any control measures. Given our empirical understanding of both the effects of cannabis and the adverse consequences that flow from applying a counterproductive possessory sanction, it appears, on balance, that essentially the same measure of public health protection can be attained through a less comprehensive and injurious use of the

criminal law. Although a broad range of variations is possible, a legislative reform which best achieves this balancing of interests would probably bear a close resemblance to the *semi-prohibition* model.

Notes

1. Various American surveys have found that a very small proportion, usually less than 10% of those “who do not use cannabis, attribute such non-use to the risk of legal prosecution. (See, National Drug Abuse Council, Feb. 16, 1978; State of Maine, Jan. 5, 1979.)

2. This case is also significant in that it indicates the willingness of some provinces to constitutionally challenge what they perceive to be federal incursions on their power over the administration of criminal justice. Any federal attempts to control provincial records would probably provoke a similar constitutional challenge.

Appendix A

The Single Convention and Its Implications for Canadian Cannabis Policy

A series of multilateral treaties, or "conventions," has evolved during this century as part of an international co-operative response to the widespread use of certain drugs which are believed to be harmful. The most recent treaties, the *Single Convention on Narcotic Drugs, 1961* and the *Convention on Psychotropic Substances,* 1971, require, among other things, that party states severely restrict the production, distribution and use of various narcotics and other psychotropes, including certain forms of cannabis. The deliberate vagueness of some critical treaty provisions and the discretion permitted each party allow for a considerable variety of cannabis control regimes. As one official of the United Nations Division of Narcotic Drugs has recently written: "the treaties are much more subtle and flexible than sometimes interpreted." (Noll, 1977:44)

Some *Single Convention* obligations are thought to limit the scope of domestic legislative options, but it is generally recognized that where international law cannot be reconciled to Canadian law, the domestic legislation prevails. A recent example concerning the International Declaration of Human Rights occurred in the 1971 case of *Gagnon and Vallières v. The Queen* (14 C.R.N.S. 321). The Quebec Court of Appeal said that "any alleged violation by Canada of this Declaration may influence Canada's international relations with other signatories to the Declaration, but such violation cannot, by sanctions, or otherwise, affect the sovereign legislative power of Parliament over matters falling within its jurisdiction." Canada, then, is free to derogate from its treaty obligations, although it may risk international censure if it does.

Canada's international obligations with respect to the domestic control of cannabis products are chiefly determined by the provisions of the *Single Convention on Narcotic Drugs, 1961,* as amended by the 1972 Protocol. Substances governed by the *Single Convention* are listed in four schedules. Only those in Schedules I and II are defined as "drugs" for purposes of the Convention. Drugs listed in Schedule I, including "cannabis," "cannabis resin" (hashish), and "extracts and tinctures of cannabis," are subject to the most stringent general control measures. These measures include import, export, manufacture and domestic distribution, licensing, annual reporting of estimated and actual medical or scientific requirements, as well as penal provisions related to certain unsanctioned drug-related conduct. Schedule II drugs are similarly controlled, except that medical prescriptions need not be required for their dispensing. The "preparations" listed in Schedule III are subject to still fewer controls, as annual estimates and certain international trade provisions do not apply.

Schedule IV is intended to include those Schedule I drugs that the World Health Organization determines to be particularly liable to abuse and productive of ill effects that are not offset by substantial and unique therapeutic advantages. (See, Art 3, para. 5) Only six of the over ninety drugs in Schedule I are also included in Schedule IV. Each party to the Convention is invited to apply any additional "special measures of control "which in its opinion are necessary having regard to the particularly dangerous properties" of these Schedule IV drugs. (Art. 2, s-para. 5(a)) Such "special measures" may extend to prohibition even for medical purposes. Cannabis and cannabis resin are included in Schedule IV. Heroin is also included, but such Schedule I drugs as cocaine, opium and thebaine are not.

The *Single Convention* defines "cannabis" as "the flowering or fruiting tops of the cannabis plant (excluding the seeds and leaves when not accompanied by the tops) from which the resin has not been extracted." (Art. 1, s-para. 1(b)) It is generally accepted that this definition permits the legalization of the leaves of the cannabis plant, provided that they are not accompanied by the flowering or fruiting tops. However, uncertainty arises by virtue of paragraph 3 of Article 28 which requires parties to the Convention to "adopt such measures as may be necessary to prevent the misuse of, and illicit traffic in, the leaves of the cannabis plant." In summary, it appears that parties are not obliged to prohibit the production, distribution and use of the leaves (since they are not "drugs," as defined the Convention), although they must take "necessary," although unspecified, measures to prevent their misuse and diversion to the illicit trade.

THC and its isomers are not governed by the *Single Convention*; instead they are included, along with hallucinogens such as LSD, in Schedule I of the *Convention on Psychotropic Substances,* 1971 *(COPS).* The control obligations for THC stipulated in *COPS* are comparable to those for cannabis, cannabis resin, and extracts and tinctures of cannabis in the *Single Convention.* Canada is not yet a party to the *COPS,* but accession to it is under consideration.

The penal obligations: Article 36 and the meaning of "possession." The primary object of the *Single Convention* is to restrict, to the extent possible, the trade in and use of controlled drugs to exclusively medical and scientific purposes. (See, Art. 4, para. c.) It is to this end that elaborate reporting, licensing and penal measures have been developed. The most important of these latter provisions is subparagraph 1(a) of Article 36, which requires that:

> Subject to its constitutional limitations, each Party shall adopt such measures as will ensure that cultivation, production, manufacture, extraction, preparation, possession, offering, offering for sale, distribution, purchase, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation and exportation of drugs contrary to the provisions of this Convention, and any other action which in the opinion of such Party may be contrary to the provisions of this Convention, shall be punishable offences when committed intentionally, and that serious offences

> shall be liable to adequate punishment particularly by imprisonment or other penalties of deprivation of liberty.

As a party to the *Single Convention,* Canada is bound to treat these types of conduct, with respect to cannabis, cannabis resin, and extracts and tinctures of cannabis, as punishable offences. Yet, there remains some doubt as to whether "possession," in the context of Article 36, subparagraph 1(a), refers to possession for personal consumption as well as possession for purposes of distribution. The Le Dain Commission's discussion of this problem (1972:210) concludes that "the prevailing view...is that the word 'possession' in Article 36 includes simple possession for use." It is difficult to find other authoritative support for this interpretation.

The American Shafer Commission, following a comprehensive review of the *Single Convention,* concluded "that the word 'possession' in Article 36 refers not to possession for personal use but to Possession as a link in illicit trafficking." (1972:165) Adolf Lande, who served for many years as secretary of the Permanent Central Narcotics Board and the Drug Supervisory Body (two international drug organs) and who was the primary drafter of the Convention (see Bruun, *et al.,* 1975:65 and 199), has written that:

> The term "possession" and "purchase" used in the penal provisions of the Single Convention art. 36, s-para. 1(a) mean only possession and purchase for the purpose of illicit traffic. Consequently unauthorized possession and acquisition (purchase) of narcotic drugs including cannabis products for personal consumption need not be treated under the Single Convention as punishable offences or as serious offences. (Lande, 1973:128)

The substantive argument in support of simple possession falling outside the scope of Article 36 is founded on the assumption that it is intended to insure a penal response to the problem of illicit trafficking rather than to punish drug users who do not participate in the traffic. (See United Nations, 1973:112; Noll, 1977:44-45) The Third Draft of the *Single Convention,* which served as the working document for the 1961 Plenipotentiary Conference, contained a paragraph identical to that which now appears as article 36, subparagraph 1(a). This paragraph was included in a chapter entitled "Measures Against Illicit Traffickers," but the format by which the Third Draft was divided into chapters was not transferred to the *Single Convention,* and this, apparently, is the sole reason why this chapter heading, along with all others, was deleted. (See United Nations, 1973:112) Article 36 is still located in that part of the Convention concerned with the illicit trade, sandwiched between Article 35 ("Action Against the Illicit Traffic") and Article 37 ("Seizure and Confiscation"). In addition, it should be noted that the word "use," suggesting personal consumption rather than trafficking, appears in conjunction with "possession" in Article 4 (which pertains to non-penal "general obligations"), but not in the penal provisions of Article 36.

The official *Commentary on the Single Convention on Narcotic Drugs 1961,* as prepared by the office of the U.N. Secretary-General, adopts a permissive interpretation

of “possession” in Article 36. It notes that whether, or not the possession of drugs (including prohibited forms of cannabis) for personal use requires the imposition of penal sanctions “is a question which may be answered differently in different countries.” (1973:112) Further, the Commentary (1973:112) notes that parties which interpret Article 36 as requiring a punitive legal response to simple possession,

> may undoubtedly choose not to provide for imprisonment of persons found in such possession, but to impose only minor penalties such as fines or even censure (since possession of a small quantity of drugs for personal consumption may be held not to be a “serious” offence under article *36...* and only a “serious” offence is liable to “adequate punishment particularly by imprisonment or other penalties of deprivation of liberty.”

In summary, Canada, as a party to the *Single Convention,* is not required to treat possession of cannabis products for personal use as an offence, or to impose criminal sanctions on such conduct even if it does choose to maintain a criminal prohibition.

“Possession” and other consumption-related conduct. The same reasoning which has been advanced to exclude simple possession for personal use from the penal obligations of Article 36 will also sustain the exclusion of other forms of drug-related conduct described therein, *so long as they too are not incidental to illicit distribution*. In this regard Noll (1977:44-45), a senior legal officer of the United Nations Division of Narcotic Drugs, has recently noted that “the whole international drug control system envisages in its *penal provisions* the *illicit traffic* in drugs; this also holds true for the 1972 Protocol.” (Emphasis in the original.)

Since the penal provisions of Article 36 are applicable only to the arena of illicit trafficking, there is no obligation on parties to the *Single Convention* to create criminal offences for those aspects of the described conduct that are exclusively related to personal consumption. As a result, “cultivation” for personal use and even non-commercial “distribution” (sharing, for example) would, like possession for personal consumption, fall outside the mandatory penal provisions of Article 36. The obligation to criminalize a behaviour specified in Article 36 depends, then, on the purpose of that behaviour. If it is in furtherance of commercial trafficking, a party is required to impose criminal sanctions; if, on the other hand, the behaviour — be it possession, cultivation or distribution — is related solely to personal consumption, no such requirement arises. Consequently, Canada is not required to render criminal those activities solely related to consumption, although it may elect to do so.

Article 36 and the 1972 Protocol. The 1972 Protocol added a second subparagraph to Article 36, paragraph 1. This provision (Art. 36, s-para. 1(b)) reads:

> Notwithstanding the preceding subparagraph, when abusers of drugs have committed such offences, the Parties may provide, either as an alternative to conviction or punishment or in addition to conviction or punishment, that such abusers shall undergo measures of treatment, education, after-care, rehabilitation and social reintegration....

So, even where a party considers consumption-related conduct, including simple possession, to be subject to the penal provisions of Article 36, subparagraph 1(a), it is no longer obliged to punish the perpetrators of that behaviour so long as they are drug "abusers." As the official United Nations *Commentary on the 1972 Protocol Amending the Single Convention on Narcotic Drugs 1961* (1976:76-77) indicates:

> Parties may substitute measures of treatment (in the broad sense including also "education," "aftercare," "rehabilitation" and "social reintegration") for conviction or punishment of all abusers of narcotic drugs who have intentionally committed an offence covered by subparagraph (a), *no matter how serious that offence may be.* (Emphasis added.)

The emphasized words make clear that even those drug abusers who are demonstrably engaged in illicit trafficking need not be convicted of or punished for their offences.

"Possession" and the confiscatory obligation. Apart from those behaviours specifically delineated in article 36, parties to the *Single Convention* are not obliged to impose penal sanctions for any drug-related activities. There are, however, certain non-penal provisions which pertain to possessory conduct. The Convention's "general obligations" include the requirement that all parties limit the "use and possession" of drugs "exclusively to medical and scientific purposes." (Art. 4, para.(c)) Elsewhere, parties are mandated to "not permit the possession of drugs except under legal authority." (Art. 33) It is generally acknowledged that "possession" in these two articles includes possession for personal consumption. It is also recognized that these provisions are to be read together. (See United Nations, 1973:402). Their combined effect is to prohibit parties from permitting the possession of drugs for other than medical or scientific purposes. In short, Canada cannot, at present, affirmatively authorize the possession of cannabis for personal consumption without contravening its treaty obligations.

While Articles 4 and 33 do not oblige parties to the *Single Convention* to impose penal sanctions on possession for personal use, they do require the utilization of non-penal measures to discourage it.[2] Some of these are referred to in the Commentary (1973:402) which notes that parties which,

> choose not to impose penalties on the unauthorized possession for personal use...still must use their best endeavours to prevent this possession by all those administrative controls of production, manufacture, trade and distribution which are required by the Single Convention....

Further, the obligation to restrict possession of drugs, including cannabis products, to authorized medical and scientific purposes suggests the use of confiscatory measures. Article 37 of the Convention reads, in part: "Any drugs...used in or intended for the commission of any of the offences, referred to in Article 36, shall be liable to seizure

and confiscation." The issue is less clear, however, where a party does not conceive of simple possession, as contrasted with possession for the purpose of trafficking, as an offence within Article 36. The United Nations Commentary (1973:402-403) argues, somewhat unconvincingly, that:

> Parties which do not consider such possession (for personal use) to be an offence under article 36, and therefore are not required to apply article 37 regarding the seizure and confiscation of drugs, are nevertheless bound to confiscate the drugs found in the unauthorized possession of persons for personal consumption. This obligation appears to be implied in the provision of article 33.

While a confiscatory obligation may impliedly flow from Article 33, it does not necessarily follow from this provision. Nonetheless, the American Shafer Commission adopted the construction proposed by the Official Commentary, recommending that cannabis possession no longer be an offence, but that it be classified as contraband subject to summary seizure and forfeiture. (1972:165-6, 152) The Le Dain Commission majority proposed a similar policy but, unlike its American counterpart, the Canadian Commission did not rationalize confiscation on the grounds of international treaty obligations.

Amendment and withdrawal. Canada's international narcotics obligations may be amended, or withdrawn from completely. Amendments may be proposed by any party. The Economic and Social Council then decides whether the proposed amendment is to be considered at a special conference or circulated to the parties for their acceptance and comments. If the latter route is chosen, the amendment comes into force eighteen months after its circulation, so long as no party has rejected it. If it is rejected by any party, the Council, in light of comments received from the parties, may still decide to call a conference to consider the proposed amendment. (See, Art. 47)

Any party may withdraw from the *Single Convention* (a procedure described as "denunciation") by depositing a written instrument with the Secretary-General. If this denunciation is received by July 1st of any year, it becomes effective on January 1st of the succeeding year. If received after July 1st, the denunciation does not take effect until January 1st of the second succeeding year. (See, Art. 46.)

The *Convention on Psychotropic Substances,* 1971, which creates international obligations with respect to THC and its isomers, contains parallel provisions to those in the *Single Convention* with regard to the general control regime and the processes of amendment and denunciation. Unlike Article 36 of the Convention, which requires that specified types of drug-related conduct be made punishable offences, the equivalent *COPS* provision does not detail specific kinds of behaviour but, instead, refers generally to each party's obligation to penalize "any action contrary to a law or regulation adopted in pursuance of its obligations under this Convention." (Art. 22, s-para. 1(a)) This approach appears to offer even more interpretative flexibility as to the

range of conduct which parties are bound to render punishable offences than is the case with Article 36 of the *Single Convention.*

Summary. In summary, there is considerable constructive latitude in those provisions of the international drug conventions which obligate Canada to make certain forms of cannabis-related conduct punishable offences. It is submitted that these obligations relate only to behaviours associated with illicit trafficking, and that even if Canada should elect to continue criminalizing consumption-oriented conduct, it is not required to convict or punish persons who have committed these offences. The obligation to limit the possession of cannabis products exclusively to legally authorized medical and scientific purposes refers to administrative and distribution controls, and although it may require the confiscation of cannabis possessed without authorization, it does not bind Canada to criminally penalize such possession.

Appendix B

Constitutional Bases of Cannabis Policy

1. Introduction

The Canadian constitution limits the federal and provincial governments' legislative response to cannabis. In this paper we will examine the impact of these constitutional restrictions on the federal and provincial government's possible legal options. The following analysis is concerned exclusively with the constitutionality of various alternatives and not with their substantive merit or political appeal. We are examining what each level of government could do assuming its legislation was challenged. While this approach defines the possible alternatives, it suggests that such matters are usually litigated. However, many contentious constitutional issues are resolved through federal-provincial negotiations and cooperative legislation. The courts' tendency to uphold the constitutionality of legislation has provided further impetus to settle differences through discussion.

Before beginning the analysis of the various legislative alternatives, it is necessary to provide a summary of some basic principles of Canadian constitutional law. The rest of the paper is divided into two sections. In the first, we examine the federal and provincial governments' constitutional bases for cannabis legislation and the feasibility of cooperative federal-provincial control. The second section deals with specific aspects of federal legislative authority including Parliament's power to create non-criminal offences, to control the dissemination of criminal records in the hands of provincial officials, and to confiscate cannabis in the absence of a criminal offence of possession.

2. A Brief Introduction to Basic Principles of Canadian Constitutional Law

The primary document of the Canadian constitution is the *British North America Act* 1867, 30 & 31 Victoria, c. 3 *(B.N.A. Act).* That act together with its amendments, was and still is, an enactment of the Imperial Parliament of the United Kingdom. Among other things, the *B.N.A. Act* provides for a division of legislative powers between the federal and provincial governments — section 91 lists the exclusive heads of federal legislative power and section 92 lists the exclusive heads of provincial power. To determine a statute's constitutional validity, a court must establish whether or not the legislation is within the power of the enacting government. If the legislation is within the enacting body's constitutional competence, it is valid or *intra vires* and if it is beyond the enacting body's authority it is invalid or *ultra vires.*

In interpreting the *B.N.A. Act,* the court attempts to prevent either level of government from encroaching on the power of the other. There is in practice, if not in strict legal theory, however, a presumption of constitutional validity. In effect the court begins its inquiry by presuming the statute in question to be valid. The burden of proving otherwise is, therefore, on the party alleging invalidity. Where proper and possible the court will interpret an enactment in such a way as to make it valid. For example, if there are two alternative interpretations of an enactment, the court will adopt the one that brings it within the constitutional competence of the enacting body.[1]

Basically the courts have adopted a three-step procedure for determining the validity of a statute. First the court identifies the statute's dominant feature or "matter" based primarily on its wording, purpose, effect, context, and legislative history. Merely reading a statute may not provide a true understanding of its matter. The term "colourability" is used to describe a situation in which the statute's language disguises its real nature. While the legislation appears valid, careful analysis indicates that its true matter falls within a head of power reserved for the other level of government. In such cases the doctrine of colourability is invoked and the legislation is held to be *ultra vires.*[2]

Once the court has determined the subject matter of the legislation, it must then define the scope of the relevant heads of power in sections 91 and 92. Since the sections are intended to provide an exclusive set of legislative powers and also overlap, they must be read contemporaneously. The scope of any head of power is limited by the scope of the others. This approach to interpreting sections 91 and 92 is referred to as the principle of "mutual modification."

The heads of power are not defined, but rather are briefly described in broad, general terms. The ambit of a particular power must be pieced together from the judgments in various cases. Unfortunately, few cases raising constitutional issues concerning cannabis have been litigated. Even in areas where there is some relevant caselaw, the courts have tended to base their decisions on narrow technical grounds which do not permit the extraction of fundamental principles.

The final step in the process is to determine which head of power the subject matter of a statute comes within. An enactment may incidentally effect a particular power without coming within it. This "ancillary" doctrine applies where the encroachment on the jurisdiction of the other level of government is necessarily incidental to the effective operation of the legislation in question. For example, a provincial statute may incidentally affect the federal power of banking s. 91(l5) but its matter may be within "property and civil rights" s. 92(l3).[3] If the encroachment is not merely incidental, the legislation is said to be "trenching" on the power of other level of government and is *ultra vires.*

The power to legislate on a complex phenomenon such as non-medical drug use is unlikely to be exclusively federal or provincial. While some drug laws may fall

exclusively within either federal or provincial jurisdiction, others may be within the legislative competence of both levels of government. There is concurrent responsibility for such legislation, and both levels of government could enact it. As we shall later discuss cannabis prohibition legislation may well be an example — the provinces could claim that a provincial prohibition was within their power over public health s. 92(16) and the federal government could justify their prohibition as a matter of criminal law s. 9(27). In such situations the law is said to have a "double aspect." In a classic statement of this doctrine, the court explained, "subjects which in one aspect and for one purpose fall within sect. 92, may in another aspect and for another purpose fall within sect. 9l."[4] If Parliament and the provinces enacted cannabis prohibitions that were incompatible, the resulting conflicts would be resolved by the doctrines of "paramountcy" and "concurrency" — these principles will be examined later in the text.

Constitutional analysis is a speculative undertaking. Since legislation is given legal effect until it has been successfully challenged,[5] constitutionally-suspect enactments may remain operative simply because other governments and private litigants have no interest in questioning them. Even if the legislation is challenged, predicting the outcome of constitutional litigation is difficult. While some boundaries of the federal and provincial legislative domain can be readily identified, many constitutional issues central to cannabis control are, and will likely remain, contentious.

3. Federal and Provincial Bases For Cannabis Control

Federal Jurisdiction

There are four heads of power which might be invoked in support of federal cannabis legislation: the criminal law power s. 91(27); the trade and commerce power s. 91(2); the general power in the preamble to section 91; and the treaty-implementing power s. 132.

The courts have broadly defined and applied Parliament's criminal law power. It encompasses legislation prohibiting conduct with penal consequences, provided the legislation serves a typically criminal public purpose. In *In The Matter Of A Reference As To The Validity Of Section 5(A) Of The Dairy Industry Act, R.S.C. 1926, Chapter 45,* [1949] S.C.R. 1, at 50, Rand J. stated that "public peace, order, security, health, [and] morality" were "the ordinary though not exclusive ends" of the criminal law.[6] The protection of health from injurious substances and the prevention of adulteration have been specifically upheld as valid criminal law goals.[7]

Parliament's constitutional authority to enact narcotics legislation under its criminal law power was established more than fifty years ago in *Ex p. Wakabayashi. Ex p. Lore Yip,* [1928] 3 D.L.R. 226 (B.C.S.C.). The present federal cannabis legislation is also based on the criminal law power and is constitutionally unassailable. Clearly, Parliament

could substantially modify its present cannabis control regime. For example, Parliament could repeal its general cannabis possession prohibition and enact valid criminal legislation prohibiting possession and/or consumption in public, possession by minors, possession of stipulated cannabis products such as hash oil, or possession in the passenger section of an automobile.

Rather than repealing the present possession laws, the federal government could create limited exceptions to the existing control regime. These types of exceptions are not an uncommon feature of federal criminal legislation.[8] In *Morgentaler v. The Queen* [1975], 53 D.L.R. (3d) 161, at 169 (S.C.C.), Laskin C.J.C. stated that "Parliament may determine what is not criminal as well as what is, and may hence introduce dispensations or exemptions in its criminal legislation." Although this statement was perhaps too broad and was not central to the decision, Parliament's power to create limited exceptions to general criminal prohibitions appears well established.[9] Provided the exception is an integral part of a bona fide criminal law package, and not merely a colourable attempt to encroach on provincial power, it should be upheld as valid. For example, Parliament could maintain the present general cannabis prohibition but exempt from liability those in possession of less than 30 grams, or those in possession in a private place.

It has also been held that Parliament may regulate aspects of a trade or behaviour under its criminal law power, if such regulation is necessarily incidental to a criminal legislation which serves *bona fide* criminal law purposes. In *Ex p. Wakabayashi. Ex p. Lore Yip,* [l928] 3 D.L.R. 226 (B.C.S.C.), provisions of the *Opium and Narcotic Drug Act,* 1923 (Can.) c. 22 as am., which affirmatively authorized the licensed sale and distribution of restricted drugs, were upheld as valid. It is important to emphasize that these sections empowered individuals to engage in an activity, rather than merely exempting them from criminal liability. The judge distinguished several cases which had held that similar regulatory provisions in other federal criminal acts were invalid. Instead, he stressed that the provisions in this case were necessarily incidental to the operation of the federal criminal drug law. The fact that this criminal legislation created a federal right to trade in drugs did not trouble him. Similar regulatory authority is contained in current federal criminal enactments including the *Food and Drugs Act,* R.S.C. 1970, c. F-27 and the *Narcotic Control Act,* R.S.C. 1970, c. N-l.[10]

The courts have restricted Parliament's regulatory authority under its criminal law power to *bona fide* criminal law purposes in order to prevent federal encroachment on provincial jurisdiction over property and civil rights in the provinces s. 92(13). Federal attempts to establish broad regulatory control of retail markets and various trades in the provinces have generally failed.[11] The more elaborate and extensive the federal criminal regulatory scheme is, the more likely it is that it will be declared invalid.[12] Federal criminal legislation providing comprehensive control over the production, distribution, and consumption of cannabis would probably be viewed as colourable criminal law — that is invalid legislation which bears the trappings of criminal law, but

which in fact deals with intraprovincial trade, a matter within the exclusive competence of the provinces by virtue of section 92(13).[13] The fate of a more modest federal regulatory scheme governing limited aspects of cannabis possession would be difficult to predict. If such provisions were enacted as an exception to a broad criminal cannabis prohibition, it might well be viewed as necessarily incidental to the federal criminal drug law. The issue is contentious and would likely turn on the exact scope and wording of the regulating sections.

The second constitutional basis for federal cannabis legislation is Parliament's trade and commerce power, s. 91(2). Under this power Parliament may tax, regulate and even prohibit the importation of any commodity.[14] The courts have narrowly construed s. 91(2), confining federal jurisdiction to international and interprovincial trade.[15] Federal legislation affecting intraprovincial trade has only been upheld when such control was necessarily incidental to the regulation of international or interprovincial trade.[16] The courts would likely not accept that federal regulation of the retail cannabis trade is necessarily incidental to control of the international or interprovincial aspects of the trade.[17]
Federal liquor licensing legislation provides an appropriate example of the limits of Parliament's trade and commerce power. In 1883, Parliament enacted the *Liquor License Act, 1883,* 46 Victoria, c. 30 as am. by 47 Victoria, c. 32, establishing a complex regulatory system and a prohibition against the sale of liquor by unlicenced vendors. The Supreme Court of Canada held the act to be invalid to the extent that it controlled retail licensing and distribution in the provinces.[18] The principle established in this case has usually been followed.

The preamble to section 91 of the *B.N.A. Act* authorizes Parliament to enact laws for the peace, order, and good government of Canada. The “P.O.G.G.” clause, as it has been called, has been subject to varying judicial interpretations during the last hundred years. The “gap test” provides that the P.O.G.G. clause is a residual power enabling Parliament to legislate on areas that do not come within the heads of section 92.[19] Since cannabis control legislation clearly falls within several heads of section 92, the “gap test” is inappropriate.[20]

The courts have held that a subject matter originally within provincial jurisdiction might become of such national concern as to bring it within Parliament's P.O.G.G power.[21] There have been several competing tests of what constitutes a matter of national concern.[22] Regardless of which test or tests are adopted, it would be difficult to argue that cannabis use is a matter of national concern, particularly since recent legislative initiatives are predicated on the view that cannabis is not as serious a problem as previously thought.[23]

The fourth possible basis for federal cannabis control is Parliament's treaty-implementing power in section 132 of the *B.N.A. Act.* Since Canada, as a colony could not enter into treaties in its own right, section 132 granted Parliament power to

implement treaties between the British Empire and foreign states. Canada became an autonomous dominion in the 1920s, and began entering into treaties on its own behalf. Nevertheless, it was held that section 132 did not authorize Parliament to implement Canadian treaties.[24] Consequently, Parliament could not likely base cannabis legislation on Canada's status as a signatory to the *Single Convention on Narcotic Drugs 1961.* [Recent judicial discussion suggests that Parliament may have the power to implement Canadian treaties by virtue of the P.O.G.G. clause.[25]] The power to enact legislation implementing a Canadian treaty resides in that level of government which has constitutional jurisdiction over the class of subjects within which the treaty falls.[26]

A related issue is the effect of Canada's treaty obligations on Parliament's legislative authority. It has been established that Parliament may enact any legislation within its constitutional competence. The fact that such legislation violates Canada's treaty obligations may attract international criticism and even sanction, but it has no effect on the law's constitutional validity.[27]

In summary, Parliament may use its criminal law power to enact a broad range of cannabis laws provided such legislation serves a traditional criminal law purpose. Parliament's trade and commerce power provides a much narrower basis for cannabis legislation, and its P.O.G.G. and treaty powers could not be invoked for this purpose.

Provincial Jurisdiction

Three heads of legislative power could arguably be used to support provincial cannabis legislation: the power over property and civil rights in the provinces s. 92(13); the public health power s. 92(7); and the power to make laws in relation to matters of a merely local or private nature in the provinces s. 92(16). Before examining provincial jurisdiction, several preliminary issues must be discussed.

Unlike Parliament, the provincial legislatures do not have an independent power to enact penal provisions. Rather, section 92(15) allows the provinces to create offences in order to enforce valid legislation enacted pursuant to one of their other enumerated heads of power. Thus, provincial penal enactments must serve bona fide provincial legislative purposes. It is often difficult to distinguish between valid provincial statutes containing ancillary penal provisions and colourable provincial legislation which is invalid because it is in essence criminal law. In recent years, the courts have tended to take a liberal view of provincial penal legislation.[28]

Another major difference between federal and provincial penal powers is the legal significance of a conviction. Unless otherwise provided, the *Criminal Code,* R.S.C. 1970, c. C-34 applies to a violation of any penal provision of a federal act.[29] In effect, all such violations are crimes and result in the creation of a “criminal record.” Since a violation of a provincial penal statute is an offence and not a crime, provincial offenders do not, in a strict legal sense, have a criminal record — despite the fact that official records are maintained and the sanctions imposed may be severe. The most important

difference between a conviction for a federal crime and a provincial offence stems from the collateral punitive consequences that often result from the former.[30]

Finally, it should be noted that valid provincial legislation will not be given legal effect if it is inconsistent with a valid federal enactment on the same subject. The federal law is paramount and the provincial law is rendered inoperative to the extent of the inconsistency.[31] Unfortunately, this distinction between validity and paramountcy was blurred in the three most relevant cases dealing with provincial drug laws.[32] As a result, the caselaw provides little guidance in determining the bounds of valid provincial drug legislation.

As indicated earlier, the provincial power to enact legislation in relation to property and civil rights in the province includes the power to control intraprovincial trade. The provincial regulatory and licensing schemes governing alcohol production, pricing, distribution and consumption are based on this head of power.[33] Therefore provincial regulatory control over cannabis would likely be valid on the same basis. As in the case of alcohol, the provinces' regulatory responses to cannabis would vary.

The provinces probably could not rely solely on their jurisdiction over intraprovincial trade to prohibit cannabis outright. Such a statute might be viewed as colourable provincial legislation which is in essence criminal law, and thus invalid.[34] In any event, a province could severely restrict, and perhaps, all but prohibit the cannabis trade by carefully drafting stringent production, distribution, pricing and consumption provisions. Section 92(7), which empowers the provinces to enact legislation regarding health institutions, has been interpreted to include all public health matters not specifically assigned to Parliament.[35] The caselaw and existing provincial statutes suggest that the provincial health power encompasses a broad range of health-related legislation, such as confiscation of property which threatens public health, control of contagious diseases, food inspection, environmental health, mental illness and health insurance.[36]

The regulation and even prohibition of non-medical drug use appears to fall within the provincial health authority. Yet, there is little caselaw on point. Despite their complexity, the provincial liquor prohibition cases are the most analogous. Initially, the courts held that the provinces could prohibit alcohol as a “local evil,”[37] under section 92(16), but the Supreme Court later rejected this interpretation of the section.[38] Therefore the Le Dain Commission stated that the provincial alcohol cases must be viewed as based on the provincial jurisdiction over public health. The Commission concluded that the provinces have a similar jurisdiction over non-medical drug use:

> Liquor prohibition must necessarily involve the right to prohibit any and all conduct involved in the distribution and use of liquor, and it is impossible to distinguish between provincial control of liquor and provincial control of other drugs as legislative concerns. They are both concerned with the effect of consumption on the individual and the community generally. Unless the courts are to say that a mistake was made in the liquor prohibition cases there seems to be no way of making a distinction between the

> two. The "local evil" spoken of in the liquor cases may be thought of as a matter of public morality but it may equally be thought of as a matter of injury to health. We have come to the conclusion that if provincial legislation is so framed as to clearly indicate a concern with the effect of non-medical drug use on the health of the individual it would have a valid provincial aspect notwithstanding that it might incidentally serve other purposes such as the prevention of social harm or the deleterious effects of drug use upon society generally.[39]

The court in *Regina v. Synder and Fletcher* [1967], 61 W.W.R. 112 (Alta. S.C.), adopting a line of reasoning similar to that of the Le Dain Commission, held that a prohibition against the manufacture, distribution, and possession of LSD in Alberta's *Public Health Act* S.A. 1967, c. 63, s. 42, was valid. Despite some confusion in the case between the issues of validity and paramountcy, the judge clearly stated that the non-medical use of LSD was a health problem which might legitimately be addressed by the provinces.

The following year, a similar prohibition against LSD possession in British Columbia's *Health Act*, R.S.B.C. 1960, c. 170 as am. by 1967, c. 21, s. 4, was found to be invalid.[40] This LSD prohibition was part of a legislative package which included a cannabis prohibition. The British Columbia Court of Appeal felt the latter was invalid, as it was a clear invasion of the criminal law field. The LSD prohibition was held to be invalid because it was linked to the invalid cannabis legislation. Again the issues of validity and paramountcy appear to have been blurred. If the LSD prohibition had been carefully drafted in terms of health concerns, the result might have been different.

Although the caselaw is confusing, the general conclusion reached by the Le Dain Commission appears to be correct. A carefully drafted provincial cannabis prohibition, which clearly reflects concern for public health, ought to be upheld.

Section 92(16) empowers the provinces to make laws in relation to matters of a merely local or private nature in the province. As indicated, this section has been subject to varying judicial interpretations. The more recent cases suggest that section 92(16) will not sustain provincial penal legislation designed to suppress a local evil or enforce morality.[41] In light of these cases, and the Le Dain Commission's interpretation of the early provincial alcohol prohibition cases, section 92(16) does not appear to be an appropriate basis for provincial regulation or prohibition of non-medical drug use.

In summary, the provinces could regulate the cannabis trade by virtue of their jurisdiction over either property and civil rights in the provinces, or their public health power. It appears, however, that they could only prohibit cannabis by enacting carefully drafted legislation under their public health authority.

The Doctrine of Paramountcy and Concurrency

Since both the federal and provincial governments have the power to enact valid cannabis legislation, it is necessary to determine how conflicts between their enactments would be resolved. As indicated, the doctrine of paramountcy provides that if valid federal legislation and valid provincial legislation on the same subject are inconsistent, the federal law will prevail. The provincial statute, while not invalid or repealed, is rendered inoperative to the extent of the inconsistency. Where there is no inconsistency both laws operate concurrently.[42]

Two alternative tests of inconsistency have been articulated by the courts: the "negative implication test" and the "express contradiction" test.[43] Mr. Justice Cartwright provides a clear example of the negative implication test in his dissenting judgment in *O'Grady v. Sparling,* [1960] S.C..R. 804, at 820-821:

> ...when Parliament has expressed in an act its decision that a certain kind or degree of negligence in the operation of a motor vehicle shall be punishable as a crime against the state it follows that it has decided that no less culpable kind or degree of negligence in such operation shall be so punishable. By necessary implication the Act says not only what kind or degree of negligence shall be punishable but also what kinds or degrees shall not.

The test permits the court to infer from the statute its purpose and to render inoperative provincial legislation which would conflict with these implicit federal goals. The use of this test would increase the number of inconsistencies and result in more provincial legislation being rendered inoperative.

In recent years the majority of the Supreme Court has rejected the negative implication test in favour of the much narrower express contradiction test.[44] Under the latter, an inconsistency arises if the provincial legislation expressly contradicts the federal, rendering it impossible for a person to obey both laws.[45] Thus, a provincial statute which is virtually identical to a federal law raises no paramountcy issue because there is no inconsistency,[46] even though theoretically an individual may be convicted twice for one act.[47] The fact that a provincial law imposes a stricter standard of conduct than a federal enactment does not violate the express contradiction test. The courts have reasoned that in such situations a person may obey both laws by complying with the stricter of the two.

The express contradiction test was examined in *Ross v. Registrar of Motor Vehicles,* [1975] S.C.R. 5.[48] Following a conviction for impaired driving under the *Criminal Code* R.S.C. 1970, c. C-34 as am. 1972, c. 13, s. l8, Ross was prohibited from driving except during working hours. Subsequently, his license was unconditionally suspended under the provincial highway traffic act — clearly defeating the goals of the federal law. The Supreme Court held that there was no express contradiction between the two statutes. The provincial act did not take away a federally-created right, but merely augmented the federal sanction. Ross could satisfy the sentences imposed under both laws by complying with the more onerous provincial sanction. It appears that the decision might

have been different if the federal legislation expressly empowered the sentencing judge to authorize driving under certain circumstances notwithstanding a general driving prohibition in the federal law.[49] In this case it could be argued that the provincial provision would negate a federally-created right. Ross would be expressly authorized to drive by federal law, but expressly prohibited by the provincial statute.[50]

The application of the paramountcy doctrine to the field of cannabis legislation is contentious. The judicial analysis of the express contradiction test has left several issues unresolved. Because of the narrow definition of inconsistency, there have been few cases in which the courts have found an express contradiction, and therefore few examples of its application.

The drug cases in which the paramountcy doctrine has arisen provide little guidance. *In Dufresne et al. v. The King,* [1912], 19 C.C.C. 414 (Que. K.B.) the judge concluded that a provincial drug law was rendered inoperative because it imposed liability in broader circumstances than the federal act. His reasoning appears to be based on the negative implication test. In *Regina v. Snider and Fletcher,* [1967], 61 W.W.R. 112 (Alta. S.C.) the validity of a provincial LSD prohibition was upheld, and the paramountcy doctrine only arose in relation to a subsidiary point. In his brief discussion of the matter, the judge apparently confused the questions of validity and paramountcy. The following year, a similar British Columbia LSD provision was held to be invalid. It was part of a legislative package containing a cannabis prohibition. Without explaining why, the court stated that the cannabis prohibition was a clear invasion of Parliament's criminal law power, and held the LSD prohibition to be similarly tainted. It is possible to infer that the provincial cannabis prohibition was struck down merely because it duplicated the federal law.

While the three drug cases are confusing, they appear to support the negative implication test of inconsistency. Since the majority of the Supreme Court specifically rejected this test, the three drug cases are not reliable precedents. The following analysis is based on the assumption that future conflicts between provincial and federal cannabis legislation will be resolved according to the express contradiction test. Whether provincial legislation expressly contradicts a federal enactment depends on the exact wording of the statutes and the courts' interpretation of the *Ross* case.[51] The following examples are intended to provide an outline of how such issues might be resolved.

The provinces could probably enact valid cannabis legislation with onerous sanctions pursuant to its public health power, notwithstanding the present federal prohibition. Since mere duplication does not amount to inconsistency and the provincial penalties would augment the federal sanctions, there would be no express contradiction. Both laws would operate concurrently. The provinces would have little reason to pursue this course of action, unless Parliament drastically reduced the present sanctions for possession of cannabis.

The paramountcy issue will likely arise if Parliament partially or totally repeals its present cannabis possession prohibition and the provinces respond by enacting provincial cannabis legislation. If Parliament replaced the current possession prohibition with a provision stipulating that possession of 30 or more grams of cannabis is an offence, the provinces might seek to prohibit possession of less than 30 grams. Since a person could obey both laws by complying with the stricter provincial enactment, there would be no express contradiction and both laws would operate concurrently.

Even if Parliament were to enact legislation stating that possession of 30 grams or more of cannabis was an offence and that possession of less than 30 grams was not an offence, the provinces could still prohibit possession of less than 30 grams. This situation is parallel to that in the *Ross* case. Parliament's failure to prohibit an act does not create a federally-guaranteed right to engage in that activity. As in the *Ross* case, the provincial cannabis statute would likely be viewed as merely augmenting the federal legislation. Since compliance with one act does not involve breach of the other there would be no express contradiction and both laws could operate concurrently.

The result would be less clear if Parliament specifically authorized possession of less than 30 grams of cannabis as an express exception to a general cannabis possession prohibition.[52] As indicated earlier, Parliament's power to authorize conduct under its criminal law power is limited. A federal criminal statute empowering someone to possess cannabis might be struck down as invalid, unless it was narrow in scope and carefully drafted. Assuming the federal legislation was valid then a provincial cannabis prohibition would clearly extinguish a federally-created right to possess under 30 grams. Nonetheless, a person could comply with both laws by obeying the stricter of the two. The *Ross* case did not address this situation. The strong dissents and the wording of the majority judgment suggest that a provincial prohibition and a federal authorization would expressly contradict one another.[53] If they did not, it would be difficult to imagine how an express contradiction could ever arise between substantive penal provisions. Therefore, it would appear that the provincial prohibition would expressly contradict the federal authorization. The federal legislation would be paramount, and the provincial cannabis prohibition would be rendered inoperative.

An express contradiction might also arise if the enforcement of the federal cannabis legislation conflicted with the enforcement of the provincial cannabis law. If Parliament was intent on preventing the provinces from entering the field, it could probably draft procedural provisions which would almost certainly conflict with the enforcement of a provincial cannabis offence. For example, the federal cannabis legislation could direct that a peace officer shall not arrest or detain any person for possession of cannabis unless the quantity involved is 30 grams or more. It could also provide for the confiscation of lesser quantities, but expressly prohibit the officer from recording the individual's name, or other personal information except as provided for by regulation.

The exact wording of such procedural provisions would depend on the nature of the substantive criminal law.

Joint Federal-Provincial Control of Cannabis

Assuming that the political problems associated with the negotiations could be overcome, Parliament and the provinces could agree to adopt a single legislative policy regarding cannabis. The provinces could agree not to enact cannabis legislation pursuant to their health power, if Parliament's criminal cannabis legislation contained certain provisions. Similarly Parliament could partially or totally repeal its cannabis prohibitions on condition that the provincial cannabis law met stipulated criteria. The only limit on these kinds of arrangements is that the body enacting the legislation have the constitutional power to do so.

Parliament has often used its spending power to encourage the provinces to enact legislation which is consistent with federal policy.[54] The federal government could offer financial inducements to encourage the provinces to adopt consistent legislative policies on cannabis. Although the issue was not central to the decision, the court in *Mercer v. Attorney-General of Canada,* [1971] 3 W.W.R. 375, at 384-385 (Alta. S.C.) suggested that such arrangements are not constitutionally assailable.

4. Specific Constitutional Issues Related to Federal Cannabis Legislation

Parliament's Power to Create Non-Criminal Of fences

Several American states have "decriminalized" cannabis possession by transferring the relevant provisions from their criminal codes to their regulatory offence codes. Cannabis possession is not legalized, but rather becomes a non-criminal offence subject to punishment like a violation of a provincial highway traffic act. While a record of the incident may be officially recorded, the offender would not have a criminal record. This approach is available to the state governments because they have the constitutional power to create both criminal and non-criminal offences. As appealing as this model might be, Parliament appears to lack the constitutional authority to implement it.

Federal authority to enact cannabis legislation is, and will likely remain, based on its criminal law power. It is difficult to see how Parliament could create a non-criminal offence under its criminal law power given that the courts have defined a crime as an act prohibited with penal consequences. If it is to be upheld as a valid criminal enactment, the cannabis legislation must serve traditional criminal public purposes, and its breach must be subject to penal consequences. It may be argued that by definition alone, Parliament could not validly create a non-criminal cannabis offence.

In any event, the *Interpretation Act* R.S.C. 1970, c. I-23, s. 27 in effect renders a violation of any federal statute a criminal offence subject to all of the provisions of the *Criminal Code* R.S.C. 1970, c. C-34. Thus, parking on federal property in violation of the *Government Property Traffic Act* R.S. 1970, c. G-l0 constitutes a criminal offence. The fact that the legislation provides for ticketing the vehicle and entering a conviction upon payment of a set fine, does not negate the criminal nature of the offence, but merely relates to the criminal procedures and sanctions.

There is no reliable caselaw directly on point. In *Toronto Railway Company v. The King,* [1917], 29 C.C.C. 29 (P.C.) the court suggested, in the course of a very complex judgment, that Parliament could create a non-criminal offence. However, the decision appears to be based on a fundamental error. The court failed to recognize that Canada, unlike Great Britain, is a federation with a clear division of legislative authority between Parliament and the provinces. This error was detailed *in Rex v. City of Victoria,* [1920], 33 C.C.C. l08 (B.C.C.A.) and the *Toronto Railway Company* case has not been followed on this issue.

Although Parliament cannot create a non-criminal offence, the provinces can clearly do so. If the federal government is intent on cannabis possession being made a non-criminal offence, it could agree to repeal its current criminal prohibition on condition that the provinces enact a possessional offence. As indicated a violation of a provincial penal provision may be made punishable by a fine or imprisonment, but it is not a crime and such offenders do not, in a strict legal sense, have a criminal record.

Parliament's Power to Control Criminal Records In the Possession of Provincial Enforcement Agencies

Recent federal proposals concerning cannabis and the *Criminal Records Act* R.S.C. 1970, (1st Supp.), c. 12 call for limits on the dissemination of criminal records in order to reduce the collateral punitive consequences of a criminal conviction. Since the bulk of criminal records are generated and maintained by provincial enforcement agencies, the issue arises whether Parliament can control dissemination of this data.

Section 91(27) authorizes Parliament to legislate in relation to criminal law and procedure, and this power carries with it some responsibility for the enforcement and prosecution of the criminal law. The management of the criminal records generated by federal agencies is necessarily incidental to Parliament's enforcement power and is within the federal sphere of legislative competence. The provinces' power over the administration of justice s. 92(14) provides them with concurrent authority to enforce and prosecute the criminal law. The record-keeping practices of provincial enforcement agencies are clearly within this provincial mandate. It should be noted that the provinces have assumed primary responsibility for enforcing and prosecuting the criminal law, and that the federal government's activities are limited to a relatively small number of specialized criminal offences. Even if the federal government expanded its

role, it is doubtful that control of provincial record-keeping would be considered necessarily incidental to federal enforcement.

If all record-keeping in criminal cases is a matter of criminal procedure or is necessarily incidental to criminal procedure, it would fall within Parliament's jurisdiction under section 91(27). In response, the provinces could argue that the criminal records of provincial enforcement agencies are a matter relating to the administration of justice and that consequently, they alone have legislative competence in this field. The provincial argument for exclusive control appears to be more compelling. Provincial enforcement agencies collect, maintain and disseminate criminal records in the ordinary course of enforcing and prosecuting the criminal law, and record-keeping is essential to the efficient and orderly administration of criminal justice. It is difficult to predict how the courts would resolve this issue. There are no cases directly on point and the boundaries between Parliament's criminal law and procedure power, and the province's administration of justice power have not been clearly defined.[55]

In *Re Hauser And The Queen,* [1977], 80 D.L.R. (3d) 161 (Alta. C.A.) the court examined these two heads of power in relation to the prosecutorial function. Three of the five judges favoured a broad view of the province's power over the administration of justice — a view that would support the province's exclusive control of provincial record-keeping practices. However, the *Hauser* case is not an authoritative precedent. The case deals with the prosecutorial function not criminal records, contains a strong dissent, conflicts with the reasoning in other Court of Appeal decisions,[56] and is under appeal to the Supreme Court of Canada.

On balance, Parliament probably does not have the constitutional power to control the dissemination of criminal records in the possession of provincial enforcement agencies. This conclusion may have to be reconsidered after the Supreme Court of Canada decision in *Hauser.* In any event, the *Hauser* case indicates that some provinces would likely challenge federal attempts to control provincial record-keeping.

Parliament's Power to Authorize Confiscation of Cannabis in the Absence of a Possessional Offence

The confiscation of cannabis or any other property is, in essence, a matter of property law which falls within the provincial power over property and civil rights 92(13). This provincial power is clearly limited by several heads of federal power, the most significant of which for our purposes are Parliament's jurisdiction over criminal law and procedure s. 91(27) and trade and commerce s. 91(2). For example, peace officers have been granted broad powers to seize and confiscate property as evidence of criminal conduct.[57] Upon termination of the case, the property may be forfeited to the Crown, returned to the suspect or, in the case of stolen property, given back to the rightful owner. Federal control of such property rights is necessarily incidental to Parliament's exercise of its criminal law and procedure power. Similarly the provisions

of the *Customs Act* R.S.C. 1970, c. C-40 granting federal officials extensive powers of search, seizure and confiscation are necessarily incidental to Parliament's trade and commerce power.

These precedents do not directly address the issue of whether Parliament could authorize the routine confiscation of cannabis, if there was no possessional offence. It would be difficult to justify seizing cannabis from one individual, on the basis that it may provide evidence of trafficking on the part of some unidentified third party. Few of these seizures would be made as part of an ongoing trafficking case or would ever be seriously followed up. Since domestically cultivated cannabis cannot be readily distinguished from foreign supplies, such seizures could not likely be based on enforcement of the federal customs legislation.

Parliament could argue that confiscation of cannabis is necessarily incidental to the goals of its narcotics legislation, even if possession of cannabis is not itself a criminal offence. Confiscation could be seen as a mechanism for discouraging possession, and thus as an essential adjunct to Parliament’s general criminal prohibition against all commercially-related cannabis transactions. Unfortunately, there are no cases or articles on the federal government's powers of confiscation. However, a number of federal statutes contain confiscatory provisions, which can be invoked in the absence of criminal conduct. In the statutes we examined, the power to confiscate property was used primarily as a means of attaining the legislation's goals, and not as a sanction. Most of the confiscatory sections are designed to protect specific individuals or the general public from harm that may result from the use of the goods in question.

The following statutory analysis illustrates the breadth of the federal confiscatory provisions. The *Meat and Canned Foods Act* R.S.C. 1970, c. M-6 s. 22(2) provides that unsound fish found during processing and any unsound canned fish may be seized and confiscated. Section 7 of the *Animal Disease and Protection Act* R.S.C. 1970, c. A-13 as am. S.C. 1974-76, s. 86 empowers the Minister of Agriculture to have destroyed any animal suspected of carrying an infectious disease. Cabinet may make regulations respecting the seizure, detention, forfeiture or disposition of hazardous products by virtue of section 7(b) of the *Hazardous Products Act* R.S.C. 1970, c. H-13. The *Navigable Waters Protection Act* R.S.C. 1970, c. N-19 ss. 13-16, provide that the Minister of Transport may order the removal or destruction of any vessel or thing which in his opinion renders difficult or dangerous navigation in any navigable waters. The vessel and its cargo may be sold to cover the expenses incurred; any surplus is returned to the owner; and any deficit becomes a debt due to, and recoverable by the crown. The confiscatory provisions of these acts apply whether or not the owner of the goods was involved in criminal conduct.

The *Criminal Code* R.S.C. 1970, c. C-34 also authorizes the confiscation of property in the absence of criminal conduct. Section 403(2) permits a peace officer to seize fighting cocks under certain circumstances, even though the owner of the fighting cock

cannot be charged with an offence. Section 101(2) provides that a peace officer may seize any offensive weapon or firearm in stipulated situations, even though the person in possession had lawful custody of the weapon and was not suspected of any criminal conduct. Several sections of the *Criminal Code* R.S.C. 1970, c. C-34 authorize a judge to issue a seizure warrant, even though the property is not needed as evidence and its owner is not engaged in criminal conduct.

The examples discussed above do not provide an exact parallel to the confiscatory provisions that would likely be enacted for cannabis. They do, however, indicate that Parliament may authorize confiscation of private property as a means of accomplishing the goals of *bona fide* federal legislation. Consequently, it would appear that Parliament could authorize the confiscation of cannabis in the absence of a possessional offence, provided the confiscatory measures were an integral part of the criminal cannabis legislation.

Appendix B

NOTES

1. Severn v. The Queen, [1878], 2 S.C.R. 70, 113; *In The Matter Of A Reference Respecting The Farm Products Marketing Act, R.S.O. 1950, Chapter 131, As Amended,* [1957] S.C.R. 198, 226. See also Peter Hogg, *Constitutional Law of Canada,* (Toronto: The Carswell Company Ltd., 1977), at 88-92.

2. See, for example, *Attorney-General For Alberta v. Attorney-General for Canada And Others,* [1939] A.C. 117 (P.C.); *Texada Mines Limited v. The Attorney-General Of British Columbia,* [1960] S.C.R. 713.

3. See *Bank of Toronto v. Lambe,* [1887], 12 App. Cas. 575 (P.C.); *Gold Seal Limited v. Dominion Express Company and The Attorney-General For The Province of Alberta* [1921], 62 S.C.R. 424.

4. *Hodge v. The Queen,* [1883], 9 App. Cas. 117, 130 (P.C.).

5. *Toronto Electrical Commissioners v. Snider and Attorneys-General For Canada and Ontario,* [1925] A.C. 396, 400 (P.C.); *Ex p. Wakabayashi. Ex p. Lore Yip,* [1928] 3 D.L.R. 226, 228 (B.C.S.C.).

6. The definition of the federal criminal law power may be traced through a series of cases. See *In Re The Board Of Commerce Act, 1919, And The Combines And Fair Prices Act, 1919,* [1922] 1 A.C. 191 (P.C.); *Proprietary Articles Trade Association v. Attorney-General For Canada,* [1931] A.C. 310 (P.C.); *Attorney-General for British Columbia v. Attorney-General For Canada,* [1937] A.C. 368 (P.C.); *In The Matter Of A Reference As To The Validity Of Section 5(A) Of The Dairy Industry Act, R.S.C. 1927, Chapter 45,* [1949] S.C.R. 1, approved on appeal in *Canadian Federation Of Agriculture v. Attorney-General For Quebec,* [1951] A.C. 179 (P.C.).

7. See, for example, *Standard Sausage Company Limited v. Lee,* [1934] 1 W.W.R. 81 (B.C.C.A.); and *Rex v. Perfection Creameries Limited,* [1939] 2 W.W.R. 139 (Man. C.A.).

8. See, for example, the *Criminal Code* R.S.C. 1970, c. C-34, as am. to March, 1976: s. 81 (prize fights); ss. 185-190 (gaming, betting, lotteries); s. 251 (abortion). See also the *Lord's Day Act* R.S.C. 1970, c. L-13 containing various exemptions.

9 Hogg, *Constitutional Law of Canada,* at 290 suggests that this statement by Laskin C.J.C. may be "too sweeping." Although Laskin C.J.C. was in dissent, the court was unanimous on this point in upholding s. 251 as valid criminal law.

10. See also, the *Electricity Inspection Act* R.S.C. 1970, c. E-4; *Hazardous Products Act* R.S.C. 1970, c. H-3; *Textile Labelling Act* R.S.C. 1970, c. 46 (1st supp.). The constitutionality of the regulatory features of the *Narcotic Control Act* and the *Food and Drugs Act* are discussed in the Commission of Inquiry into the Non-Medical Use of Drugs's *Final Report,* (Ottawa: Information Canada 1970, Appendix F-1, at 916-922. Hereafter cited as the Le Dain *Final Report.*

11. See, for example, *In Re The Board of Commerce Act, 1919, And The Combines And Fair Prices Act, 1919,* [1922] 1 A.C. 191 (P.C.); *In The Matter Of A Reference As To Whether The Parliament Of Canada Had Legislative Jurisdiction To Enact The Dominion Trade and Industry Commission Act, 1935, Being 25-26 Geo. V, C. 59,* [1936] S.C.R. 379; *Attorney-General For Ontario v. Reciprocal Insurers,* [1924] A.C. 328 (P.C.).

12. Hogg, *Constitutional Law of Canada,* at 291.

13. The *Citizens Insurance Company Of Canada v. Parsons,* [1881], 7 App. Cas. 96 (P.C.); *Attorney-General For The Dominion of Canada v. Attorney-General For The Province Of Alberta,* [1916] 1 A.C. 588 (P.C.); *Hodge v. The Queen,* [1883], 9 App. Cas. 117 (P.C.). See also the Le Dain *Final Report,* at 916-922.

14. *Gold Seal Limited v. Dominion Express Company and The Attorney-General For The Province Of Alberta*, [1921], 62 S.C.R. 424; *Caloil Inc. v. The Attorney-General Of Canada,* [1971] S.C.R. 543; *Attorney-General Of British Columbia v. Attorney-General Of Canada,* [1924] A.C. 222 (P.C.).

15. *The Citizens Insurance Company Of Canada v. Parsons,* [1881], 7 App. Cas. 96 (P.C.). The history of the judicial interpretation of the federal trade and commerce power s. 91(2) is outlined in Hogg, *Constitutional Law of Canada,* at 267-275.

16. *Caloil Inc. v. The Attorney-General of Canada,* [1971] S.C.R. 543, affirming *The Queen v. Klassen,* [1959], 20 D.L.R. (2d) 406 (Man. C.A.).

17. See the Le Dain *Final Report,* at 916-917.

18. Unreported decision. See the *McCarthy Act* decision reported in the Schedule to 48-49 Victoria, c. 74.

19. See Hogg, *Constitutional Law of Canada,* at 245-246 for a fuller explanation.

20. These heads of power, sections 92(7), 92(13), and 92(16), are discussed *infra.* **[N.B.]**

21. See generally the Le Dain *Final Report,* at 917-918.

22. See, for example, *Fort Frances Pulp and Paper Company Limited v. Manitoba Free Press Company Limited,* [1923] A.C. 695; *Reference Re Validity of Wartime Leasehold Regulations,* [1950] S.C.R. 124; *Reference Re Anti-Inflation Act,* [1976] 2 S.C.R. 373.

23. This is also the conclusion reached in the Le Dain *Final Report* at 921-922. The *Final Report* also notes that the controversial early liquor cases allowing for federal prohibition which are seemingly justified by the general power, may be better explained on the basis of the criminal law power.

24. *Attorney-General For Canada v. Attorney-General For Ontario,* [1937] A.C. 326 (P.C.).

25. *MacDonald et al. v. Vapour Canada Ltd. et al.,* [1976], 66 D.L.R. (3d) 1, 27-29 (S.C.C.).

26. Attorney-General For Canada v. Attorney-General For Ontario, [1937] A.C. 326 (P.C.). See Hogg, *Constitutional Law of Canada,* at 181-195 and 189-190.

27. See, for example, *Gagnon and Vallières v. The Queen,* [1971], 14 C.R.N.S. 321, 355 (Que. C.A.); and Hogg, *Constitutional Law of Canada,* at 184-186.

28. See, for example, *The Provincial Secretary Of The Province Of Prince Edward Island v. Egan,* [1941] S.C.R. 396; *Smith v. The Queen,* [1960] S.C.R. 776; *O'Grady v. Sparling,* [1960] S.C.R. 804; *Mann v. The Queen,* [1966], S.C.R. 238.

29. *Interpretation Act* R.S.C. 1970, c. I-23, s. 27.

30. These are discussed more fully in **The Sociolegal Consequences of Enforcement** in Part 3.

31. The issue of paramountcy is fully discussed in **Constitutional Considerations** in Part 3.

32. *Dufresne et al. v. The King,* [1912], 19 C.C.C. 414 (Que. K.B.); *Regina v. Snyder and Fletcher,* 1967], 61 W.W.R. 112 (Alta. S.C.); *Regina v. Simpson, Mack and Lewis*, [1968], 1 D.L.R. (3d) 597 (B.C.C.A.).

33. See, for example, *Hodge v. The Queen,* [1883], 9 App. Cas. 117 (P.C.); *Attorney-General For Ontario v. Attorney-General For the Dominion, and The Distillers and Brewers Association of Ontario,* [1896] A.C. 348 (P.C.).

34. In *Dufresne et al. v. The King,* [1912], 19 C.C.C. 414 (Que. K.B.) the court appeared to adopt this line of reasoning in finding that a provincial statute which limited the sale of cocaine to wholesale dealers and medical professionals was invalid. The court stated, at p. 419:

> The object of the present Provincial Act is to prohibit, under penalty, the use of cocaine...otherwise than as a medicine, an exception being made, however, in favour of wholesale dealers and certain professions. By its nature, the statute must be considered more a punishment that a regulation. Its object is to provide against possible violations of its provisions, in the interest of public morals, rather than to control the sale of cocaine, in the interest of those trading in that drug. The end which it proposes is the suppression, in the province of Quebec, of the dangerous use of cocaine, and not the securing of the free enjoyment of the rights of ownership in the drug.

35. *Rinfret v. Pope,* [1886], 12 Q.L.R. 303 (Que. C.A.); *Re Bowack,* [1892], 2 B.C.R. 216 (B.C.S.C.); *Re Shelly,* [1913], 10 D.L.R. 666 (Alta. S.C.). See also the Le Dain *Final Report,* at 922.

36. See Hal Joffee and J. Oakley, "The Constitutionality Of The British Columbia *Heroin Treatment Act,*" unpublished research report prepared for the Non-Medical Use of Drugs Directorate, Health and Welfare Canada, 1978, at 26-27.

37. *Attorney-General For Ontario v. Attorney-General For The Dominion, And The Distillers And Brewers Association Of Ontario,* [1896] A.C. 348 (P.C.); *Attorney-General Of Manitoba v. Manitoba Licence Holders' Association,* [1902] A.C. 73 (P.C.).

38. See the Le Dain *Final Report,* at 931-932; and Hogg, *Constitutional Law of Canada,* at 241-265.

39. Le Dain *Final Report,* at 932.

40. *Regina v. Simpson, Mack And Lewis,* [1968], 1 D.L.R. (3d) 597 (B.C.C.A.).

41. See, however, *Re Nova Scotia Board of Censors v. McNeil,* [1978], 84 D.L.R. (3d) 1, 28 (S.C.C.). Although it is not clear from his judgment, Mr. Justice Ritchie appears to suggest that section 92(16) may support provincial legislation establishing moral standards.

42. See generally Hogg, *Constitutional Law of Canada,* at 101-114.

43. A variety of labels have been applied to the two tests. For the sake of consistency and to avoid confusion, we have adopted the terminology used by Hogg.

44. See, for example, *The Provincial Secretary Of The Province Of Prince Edward Island v. Egan,* [1941] S.C.R. 396; *Reference Re S. 92(4) Of The Vehicles Act 1957 (Sask.),* [1958] S.C.R. 608; *O'Grady v. Sparling,* [1960] S.C.R. 804; *Stephens v. The Queen,* [1960] S.C.R. 823; *Mann v. The Queen,* [1966] S.C.R. 238; *Ross v. The Registrar of Motor Vehicles and the Attorney-General For Ontario,* [1975] 1 S.C.R. 5. See also Hogg, *Constitutional Law of Canada,* at 103-109.

45. In *Smith v. The Queen,* [1960] S.C.R. 776, 800, Martland J. stated there is an express contradiction when "compliance with one law involves breach of the other."

46. See *Smith v. The Queen,* [1960] S.C.R. 776; *Mann v. The Queen,* [1966] S.C.R. 238.

47. Hogg, *Constitutional Law of Canada,* at 112-113.

48. See also *O'Grady v. Sparling,* [1960] S.C.R. 804. For a criticism of the *Ross* case see Peter Barton, "Comments" 53 *Canadian Bar Review,* (1975), 80.

49. The relevant section of the *Criminal Code* states that where an accused has been convicted, the judge may "...make an order prohibiting him from driving...at such times and places as may be specified...." Thus this section does not expressly give a judge the power to authorize driving under certain circumstances. Pigeon, J., at p. 16, noted that "Parliament did not purport to state exhaustively the law respecting motor driving licences, or the suspension or cancellation for driving offences. Therefore, the question whether this could validly be done by Parliament does not arise.

50. The issue of whether Parliament could validly authorize driving under its criminal law power was not confronted by the court. It also specifically left open the issue of whether such an authorization, if valid, would conflict with the provincial highway traffic act.

51. Ross v. The Registrar of Motor Vehicles and the Attorney-General For Ontario, [1975] 1 S.C.R.

52. It should be noted that federal legislation authorizing cannabis possession would likely violate Canada's treaty obligations under the *Single Convention on Narcotic Drugs 1961.*

53. Hogg reaches a similar conclusion: "If the field had been occupied by express words, as opposed to implication, presumably then there would be an express contradiction which would suffice to trigger the paramountcy doctrine." *Constitutional Law of Canada,* at 110, note 47. See also 388-389 where Hogg discusses section 88 of the *Indian Act* R.S.C. 1970, c I-6.

54. *Ibid.,* at 68-74.

55. *Ibid.,* 277-278.

56. See for example, *R. v. Pelletier,* [1974], 18 C.C.C. (2d) 516 (Ont. C.A.); *R.v. Dunn et al.,* [1977], 36 C.C.C. (2d) 495 (Sask. C.A.).

57. See for example, *Industrial Acceptance Corp. v. The Queen,* [1953], 107 C.C.C. 1 (S.C.C.).

Appendix C

The *Narcotic Control Act* — An Elaboration

The possession, distribution ("trafficking"), import, export and cultivation of any "narcotic" are currently prohibited by provisions of the federal *Narcotic Control Act (N.C.A.).* The term "narcotic" refers to any substance included in the Schedule to the Act, including natural and synthetic opiate narcotics (such as opium and heroin), cocaine, phencyclidine (PCP), and cannabis (including marijuana, hashish, hashish oil, and THC). Under one designation or another, cannabis has been listed on this Schedule since 1923, although it is universally recognized that cannabis is not, in any scientific sense, a narcotic. Commission of any act prohibited by the *Narcotic Control Act* constitutes a criminal offence. Consequently, all relevant provisions of the *Criminal Code* apply (*Interpretation Act,* s. 27(2)), and any convicted offender is subject to those derivative consequences (such as a criminal record) which necessarily attach to persons convicted of any crime.

All offences involving cannabis are indictable offences. In the case of simple possession, however, the Crown has the option of proceeding by way of summary conviction. Persons found guilty of unauthorized, or simple, *possession* (*N.C.A.,* s. 3) are liable, upon indictment, to a maximum of seven years' imprisonment, and upon summary conviction, to a maximum of six months' imprisonment and/or a fine of one thousand dollars for a first offence and one year's imprisonment and/or a fine of two thousand dollars for a subsequent of fence. Persons convicted of unauthorized *cultivation* (*N.C.A.,* s. 6) are subject to a maximum of seven years' imprisonment. The offences of *trafficking* (*N.C.A.,* s-s. 4(1)) and *possession for the purpose of trafficking,* (*N.C.A.,* s-s. 4(2)) render offenders liable to a maximum penalty of life imprisonment. The unauthorized *import* or *export* (*N.C.A.,* s. 5) of cannabis are subject to a *minimum* of seven years' and a maximum of life imprisonment.

Possession, for purposes of the *Narcotic Control Act,* is defined in subsection 3(4) of the *Criminal Code:*

> (a) a person has anything in possession when he has it in his personal possession or knowingly
>
> (i) has it in the actual possession or custody of another person, or
>
> (ii) has it in any place, whether or not that place belongs to or is occupied by him, for the use or benefit of himself or of another person; and
>
> (b) where one of two or more persons, with the knowledge and consent of the rest, has anything in his custody or possession, it shall be deemed to be in the custody and possession of each and all of them.

Cultivation refers to the intentional growing of cannabis plants, not the mere possession of such plants. The statutory law does not distinguish between cultivation for personal consumption and cultivation for purposes of trafficking.

Trafficking is set out very broadly in the *Narcotic Control Act.* Section 2 defines "traffic" as "to manufacture, sell, give, administer, transport, send, deliver or distribute," or "to offer to do" any of these things, without authority. Section 4 prohibits not only trafficking in narcotics but, as well, in "any substance represented or held out...to be a narcotic." Possession need not be demonstrated to determine the offence of trafficking. Purchasers of narcotics are not guilty of trafficking. There is no statutory distinction drawn between levels of trafficking; sharing a quantity of cannabis or selling it at cost to a friend is not differentiated from commercial profit-making transactions involving large quantities of the drug. It has been left to the courts, when sentencing, to distinguish between more and less serious trafficking activities.

Possession for the purpose of trafficking charges involve a unique two-stage trial process. If the accused does not plead guilty, section 8 *(N.C.A.)* provides that the trial initially proceeds as though the offence charged was one of simple possession. If such possession is not proved, the accused is acquitted. If, however, possession is proved, the burden of proof shifts to the accused to establish, on the balance of probabilities, that he was not in possession for the purpose of trafficking. Should the accused so establish, he is acquitted of the possession for the purpose charge, but convicted of the offence of simple possession and sentenced accordingly. If the accused fails to discharge the burden on him, he is convicted of and sentenced for possession for the purpose. As there are no quantitative distinctions outlined in the *Narcotic Control Act,* whether an accused is charged with simple possession or possession for the purpose depends solely on the discretion of the prosecuting attorney.

The *importation* of cannabis raises difficulties for the police, prosecutors and the courts in light of the seven year mandatory minimum sentence, irrespective of the quantity involved. Because there is understandable concern about sentencing young persons to lengthy terms of imprisonment, Crown attorneys often exercise their prosecutorial discretion in deciding to lay reduced charges. The decision as to when to exercise such discretion and which charge to lay with respect to any particular importing incident is determined by confidential guidelines developed by the Department of Justice.

Although the *Narcotic Control Act* fixes the maximum (and, in the case of import and export, minimum) sanctions that may be awarded offenders, the general penal provisions of the *Criminal Code* (Part XX) allow the courts a much broader sentencing discretion than is first apparent. By way of illustration, the alternative penalties available in the case of simple possession of cannabis range *from* an absolute discharge *to* a fine in any amount and imprisonment for seven years. The final disposition depends on, first, whether the Crown elects to proceed by summary

conviction or indictment and, subsequently, on how the presiding judge chooses to exercise his sentencing discretion.

A new sentencing option became available in 1972 with the introduction of absolute and conditional discharges. Although applicable to all federal offences within the limits specified by section 662.3 of the *Criminal Code,* these provisions were originally publicized as a dispositional alternative with respect to simple possession of cannabis. In essence, a person granted a discharge is "deemed not to have been convicted of the offence" to which he pleaded or was found guilty. The conditions for granting a discharge are such that the only *Narcotic Control Act* offences to which it is applicable are simple possession and cultivation. The discharged offender — despite the absence of a "conviction" — still suffers a criminal record of the event. He may deny having been convicted, but he cannot honestly deny, for example, having been arrested, charged, tried or prosecuted for a criminal offence, having pleaded guilty to (or have been found guilty of) a criminal offence, having been discharged or sentenced for a criminal offence, or, perhaps, having a criminal record. Further, in order to restrict disclosure of his criminal record, a discharged offender, like a convicted offender, must still make an application for a pardon under the *Criminal Records Act.* This application may entail exposure of the applicant, his family, friends, professional acquaintances and employer to police investigation and interrogation.

Appendix D

The Extent and Patterns of Cannabis Use Among Adult Canadians, 1970-1978

TABLE D-1

ADULT CANADIANS – INCIDENCE OF USE
(Percent & Estimated Number in Population)

Ever Used:	Marijuana	Hashish	Cannabis
Canada, 1970 (Le Dain)	3.3% 422,000	2.5% 320,000	3.6% 451,000
Canada, 1978 (Gallup)[1]	16.4% 2,624,000	11.2% 1,792,000	17.2% 2,752,000
Annual Use (past 12 months):	**Marijuana**	**Hashish**	**Cannabis**
Canada, 1970 (Le Dain)	* *	* *	1.9% 238,000
Ontario, 1976 (ARF)	* *	* *	5.8% 337,850[2]
Ontario, 1977 (ARF)	* *	* *	8.6% 500,950[2]
Canada, 1978 (Gallup)[1]	9.4% 1,504,000	6.1% 976,000	9.75% 1,560,000

[1] Conducted in January, 1978. Population estimates based on estimate of 16 million Canadians aged 18 and over in 1977.
[2] Estimated number in Ontario only, based on estimate of 5,825,000 Ontarians aged 18 and over in 1977.
* Data not available.

Table D-2

ADULT CANADIANS – CURRENT CANNABIS USE PATTERNS, (GALLUP, 1978)[1]
(Percent & Estimated Number in Population)

	Marijuana		Hashish		Cannabis
Use within 12 months of interview	9.4%	1,504,000	6.1%	976,000	9.75% 1,560,000
Use within 30 days of interview	8.0%	1,280,000	5.1%	816,000	8.3% 1,328,000
Used within week prior to interview	3.2%	512,000	1.1%	176,000	3.6% 576,000
Used daily in past 30 days	1.4%	224,000	0.3%	48,000	1.4% 224,000

[1] See note on Table D-1.

TABLE D-3

ADULT CANADIANS – FREQUENCY OF CANNABIS USE
(Percent & Estimated Number in Population)

	1970 (Le Dain) "Past 12 months"	1976 (Ontario)[2] "Past 12 months"	1977 (Ontario)[2] "Past 12 months"	1978 (Gallup)[1] "Past 30 days"
Once weekly or less	1.8% 225,000	4.6% 273,650	7.4% 430,800	4.7% 752,000
More than once weekly	0.1% 12,500	1.1% 64,200	1.2% 70,150	3.6% 576,000
Total	1.9% 238,000	5.8% 337,850	8.6% 500,950	8.3% 1,328,000

[1 & 2] See notes on Table D-1.

TABLE D-4

ADULT CANADIANS – CANNABIS USE BY REGION (GALLUP, 1978)[1]

	Ever used		Use within past 12 months		Use within past 30 days		Use in past week	
	% of in sample Region	Est. no.	% of in sample	Est. no. Region	% of in sample Region	Est. no.	% of in sample Region	Est. no.
Atlantic	10.8	173,000	7.6	122,000	6.7	107,000	3.8	61,000
Quebec	12.5	550,000	6.5	281,000	5.5	238,000	1.0	43,000
Ontario	22.4	1,326,000	11.5	681,000	9.7	574,000	4.0	237,000
Prairies	12.5	300,000	8.4	202,000	5.8	139,000	2.6	62,000
B.C.	22.6	400,000	15.2	270,000	15.2	270,000	9.8	173,000
Canada	17.2	2,752,000	9.75	1,560,000	8.3	1,328,000	3.6	576,000

[1] See note on Table D-1.

Appendix E

Offences, Procedures and Maximum Penalties Under Eight Alternative Models for the Control of Cannabis

Offence		1. *Narcotic Control Act*	2. Bill S-19	3. 83-77 RD
Simple Possession	**Summary Conviction** **----------** **Indictment**	1st Offence: $1,000 fine and/or imprisonment for 6 months. Subs. Offence: $2,000 fine and/or imprison-ment for one year. ---------- 7 years' imprisonment	1st Offence: $500 fine or, in default, imprisonment for 3 months. ("Discharged offenders are automatically "pardoned.") Subs. Offence: $1,000 fine or, in default, imprisonment for 6 months. ---------- N/A	$500 fine or, in default of payment, imprisonment for 3 months. (Offenders are "deemed" not to have been "charged, convicted, sentenced or prosecuted"; all CJS records subsequently closed to enquirers.) ---------- N/A
Possession for the Purpose of Trafficking	**Summary Conviction** **----------** **Indictment**	N/A ---------- Life imprisonment	$1,000 fine and/or imprisonment for 18 months ---------- 14 years' imprisonment, less one day	$1,000 fine and/or imprison- ment for 18 months ---------- 10 years' imprisonment
Trafficking	**Summary Conviction** **----------** **Indictment**	N/A ---------- Life imprisonment	$1,000 fine and/or imprisonment for 18 months ---------- 14 years' imprisonment, less one day	$1,000 fine and/or imprison- ment for 18 months ---------- 10 years' imprisonment
Import/ Export	**Summary Conviction** **----------** **Indictment**	N/A ---------- Life imprisonment (7 years' minimum)	2 years' imprisonment ---------- 10 years' imprisonment	(No separate offence: included in the definition of "trafficking.")
Cultivation	**Summary Conviction** **----------** **Indictment**	N/A ---------- 7 years' imprisonment	$1,000 fine and/or imprisonment for 18 months ---------- 10 years' imprisonment	$1,000 fine and/or imprisonment for 18 months ---------- 5 years' imprisonment

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Offences, Procedures and Maximum Penalties
Under Eight Alternative Models for the Control of Cannabis

Offence		4. Full "Deeming Provisions"	5. Semi-Prohibition
Simple Possession	**Summary Conviction** **----------** **Indictment**	Nominal fine or, in default of payment, community work orders or use of civil creditor remedies. ("Ticketing" procedures; offenders are "deemed" not to have suffered any incidents of a criminal arrest or prose-cution; all CJS records subsequently sealed or destroyed.) ---------- N/A	(Summary confiscation, but no offence)
Possession for the Purpose of Trafficking	**Summary Conviction** **----------** **Indictment**	1st Offence: $500 fine and/or imprisonment for 6 months Subs. Offence: $2,000 fine and/or imprisonment for 18 months ---------- 1st Offence: 5 years' imprisonment, less one day Subs. Offence: 10 years' imprisonment	1st Offence: $500 fine and/or imprisonment for 6 months Subs. Offence: $2,000 fine and/or imprisonment for 18 months ---------- 1st Offence: 5 years' imprisonment less one day Subs. Offence: 10 years' imprisonment
Trafficking	**Summary Conviction** **----------** **Indictment**	1st Offence: $500 fine and/or imprisonment for 6 months Subs. Offence: $2,000 fine and/or imprisonment for 18 months ---------- 1st Offence: 5 years' imprisonment, less one day Subs. Offence: 10 years' imprisonment	1st Offence: $500 fine and/or imprisonment for 6 months Subs. Offence: $2,000 fine and/or imprisonment for 18 months ---------- 1st Offence: 5 years' imprisonment less one day Subs. Offence: 10 years' imprisonment
Import/ Export	**Summary Conviction** **----------** **Indictment**	(No separate offence: included in the definition of "trafficking.")	(No separate offence: included in the definition of "trafficking.")
Cultivation	**Summary Conviction** **----------** **Indictment**	$1,000 fine and/or imprisonment for 12 months ---------- 5 years' imprisonment, less one day	$1,000 fine and/or imprisonment for 12 months ---------- 5 years' imprisonment, less one day

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Offences, Procedures and Maximum Penalties
Under Eight Alternative Models for the Control of Cannabis

Offence		6. Transfer to Schedule G	7. Regulation	8. Federal Withdrawal
Simple Possession	**Summary Conviction** **----------** **Indictment**	(No Offence)	(No Offence)	(Depends on each province)
Possession for the Purpose of Trafficking	**Summary Conviction** **----------** **Indictment**	18 months' imprisonment ---------- 10 years' imprisonment	(Depends on each province)	(Depends on each province)
Trafficking	**Summary Conviction** **----------** **Indictment**	18 months' imprisonment ---------- 10 years' imprisonment	(Depends on each province)	(Depends on each province)
Import/ Export	**Summary Conviction** **----------** **Indictment**	(No separate offence: included in the definition of "trafficking.")	(Customs and Excise Controls)	(Depends on each province)
Cultivation	**Summary Conviction** **----------** **Indictment**	(No Offence)	(Depends on each province)	(Depends on each province)

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