



HAPPENSTANCE

POLICY BRIEF

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DON'T BOGART THAT EVIDENCE-BASED POLICY: LEGALIZATION OF MARIJUANA IN CANADA WITH PROFESSOR ALANA KLEIN

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HIGHLIGHTS SUMMARY

- Canada spends 5 times as much on police, courts and corrections than it does on the health response to dealing with illegal drugs.
- The 2015 Liberal party election platform called for legalization, regulation and restriction of access to marijuana.
- Decriminalization – unlike full legalization- could have similar marginalizing effects to the criminalization model.
- New legislation is expected in Spring 2017 – a new approach to drug policy grounded in public health, human rights, compassion and evidence-based practice.
- This legislation is expected to legalize marijuana in Canada by July 2018.
- Research and broad public consultation are key both before and after new legislation comes into effect.

QUESTION AND ANSWER: THE LEGALIZATION OF MARIJUANA IN CANADA

In light of the rapidly shifting landscape regarding the legalization of marijuana in Canada, an interview with Professor Alana Klein sheds light on the heated topic. This issue of HappenStance takes a deeper look at the issue of marijuana prohibition in Canada, the legal implications of regulation models, and the cost benefit analysis of this shift in policy.

Q: LEGALIZATION OF MARIJUANA IN CANADA- WHAT ARE THE LATEST DEVELOPMENTS?

Klein: Currently, marijuana possession is criminalized by the Control Drugs and Substances Act sections 4(1) and 5, which prohibits possession and possession for the purposes of trafficking (and various other types of trafficking offenses). Part of the Liberal party platform in the 2015 elections was to legalize, regulate and restrict access to marijuana. In April 2016, Canada's Minister of Health, Jane Philpott, announced at a UN General Assembly Special Session on drugs that new legislation grounded in public health and human rights would be introduced in the Spring of 2017. A federally-appointed task force was assembled soon after to consult with stakeholders and propose a legislative framework, which it did in November 2016. The legislation, which will be announced April 10th 2017, is expected to be in force by July 2018.

Q: WHAT PROMPTED THE CHANGE?

K: The current government's position is that Canada's current system of marijuana prohibition does not work: criminalization is not inhibiting marijuana consumption, many Canadians are having harmful encounters with the criminal justice system for minor, non-violent offenses, arresting and prosecuting is expensive, and the proceeds from the drug trade support organized crime, which are viewed as greater threats to public safety.

Canada spends 5 times as much on police, courts and corrections than it does on the health response to dealing with illegal drugs. Recent statistics show that out of 100,000 drug-related incidents reported by police, 62% involved cannabis, and of these $\frac{3}{4}$ were possession. A 2011 report by the Canadian Drug Policy Coalition showed that in that year, over 4,200 young people aged 12-17 were reported for cannabis possession, but most encounters don't result in conviction. The financial and social costs of prohibition enforcement have been very high.

The plan would legalize marijuana but would maintain laws against providing it to minors and operating a motor vehicle while under the influence. It was a very popular part of the Liberal platform, and it stands in stark contrast to the former Conservative government's approach to marijuana, which was to increase the role of the criminal law in the regulation of marijuana by, for example, introducing mandatory minimum sentences for growing even relatively small amounts.

// Canada's new drug policy, and its marijuana legalization plan specifically, would be informed by solid scientific evidence, grounded in public health and human rights, and based on principles of harm reduction. //

Q: WHEN CAN WE EXPECT TO SEE THE NEW LEGISLATION, AND WHAT WILL IT LOOK LIKE?

K: We should see new legislation in early April 2017, with implementation by July 2018, according to the most recent news reports. In Minister Philpott's 2016 statement to the UN, she said that Canada's new drug policy, and its marijuana legalization plan specifically, would be informed by solid scientific evidence, grounded in public health and human rights, and based on principles of harm reduction. We also expect the legislation to broadly follow the recommendations of the Final Report of the Task Force on Cannabis Legalization and Regulation, which was itself premised on stakeholder consultations. Their recommendations are consistent with many of the ways we minimize harms of tobacco and alcohol now, including a minimum purchase age of 18, prohibitions on impaired driving, limiting commercialization through plain packaging, and labelling that includes levels of active ingredients. The task force also recommended maintaining a separate system for medical and non-medical cannabis provision to ensure that the needs of medical users are prioritized. More controversial features are limits on personal possession and personal plant-growing.

How these recommendations will be implemented remains to be seen, however. Not only is the legislation still under wraps, but the Task Force recommended that while the federal government would remain in charge of production, the provinces regulate wholesale distribution and retail sales, including the power to harmonize minimum age with drinking age. The sharing of responsibility between federal and provincial authorities over tobacco has proved contentious in the past!

Q: WHAT IS THE DIFFERENCE BETWEEN LEGALIZATION AND DECRIMINALIZATION?

K: There are three options for the regulation of marijuana:

- Criminalization, which is our current legal framework.
- Decriminalization, which still permits civil sanctions such as tickets or fines without criminal records for possession. Most decriminalization models retain criminal sanctions for larger scale production and distribution. This model is in place in a number of jurisdictions, including some US States (where it dates back as far as the 1970s), Italy, Spain, and some Australian states to name a few.
- Legalization, which was proposed by the Liberal government, removes all forms of sanction. The substance is still subject to regulation imposing guidelines and restrictions on use, production and distribution, similar to the regulation of alcohol and tobacco. This is the model recently introduced in U.S. states such as Colorado, Washington and Oregon, as well as in Uruguay.

Q: WHY NOT JUST OPT FOR A DECRIMINALIZATION MODEL OVER FULL LEGALIZATION IN CANADA?

K: Decriminalization involves non-criminal sanctions (like ticketing) for possession, while production and distribution remain subject to criminal sanction. As the Liberals have pointed out, decriminalization would maintain the black market in production. From my own research perspective, I worry that ticketing would also maintain the marginalizing effects of the current policy. Recent studies have shown that in places that have moved to a ticketing approach, law enforcement activity has actually increased, perhaps because it is so much simpler for police to issue tickets than to introduce criminal charges. And tickets can often have consequences that are similar to criminalization. For example, there is evidence that homeless people are disproportionately ticketed for all kinds of municipal infractions. When they can't pay tickets, fines may accumulate, and they might be enrolled in compensatory work programs that they may never manage to complete. In some jurisdictions in Canada, they may even be imprisoned for non-payment of fines. Although most people would not face jail time with decriminalization, some segments of the population would benefit far less from the change. That is one reason to favour legalization over decriminalization.

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Q: YOU TALKED ABOUT “MARGINALIZING EFFECTS”, WHAT DO YOU MEAN BY THAT?

K: Drug criminalization has long been linked with discrimination. Our legal framework on drug use – the prohibition and prosecution model – is a product of early 20th century racial prejudice. Legal historians have noted that the Opium Act, which first banned the use of opiates in Canada in 1908, is better understood as a reaction to Anti-Asian sentiments prevalent at the time, than to concerns over the health effects of the substance. Later versions of the law covered other opiates, such as cocaine. Parliamentary records do not show why cannabis was finally added in 1923, though the decision did dovetail with growing moral panic over recreational drug use. In fact, criminalization of drug use has never been driven by evidence-based public health concerns. Furthermore, the effects of criminalization have always been largely discriminatory: marijuana use is consistent across racial groups, and yet poor and racialized drug users were – and continue to be – most likely to be detected, prosecuted, convicted and they receive harsher penalties. They are also most likely to suffer the community consequences of violence associated with the illegal drug trade.

The commission also considered that criminalization was a waste of money and bad for the morale of law enforcement. These arguments are in fact very similar to those we hear today.

Q: HAVE THE COURTS HAD ANY ROLE IN PROMOTING THE LEGALIZATION MODEL?

K: Perhaps indirectly. In a set of cases decided by the Supreme Court of Canada in 2003, three litigants, most famously marijuana activist David Malmo-Levine, argued that the prohibition on possession violated the Canadian Charter of Rights and Freedoms. They claimed that the state was criminalizing an essentially harmless behavior, and that this violated a constitutional norm against arbitrary laws that interfere with life, liberty and security of the person. The challenge failed. A majority of the court found that the legislator didn't act arbitrarily as long as it was criminalizing based on what is called a “reasonable apprehension of harm”. The court pointed to a number of harms associated with marijuana use, including the alteration in mental functioning that could impair driving, flying or other activities; health problems that chronic users may suffer; and dangers for vulnerable groups. In light of these concerns, the court concluded that criminalization was not arbitrary or irrational for the legislator to prohibit marijuana. There have been no other challenges related to the recreational use of marijuana.

But since the Malmo-Levine decision, the constitutional standard for determining when a law might be considered arbitrary or irrational has shifted: courts have begun to look at the effectiveness of legal prohibitions in much greater detail, and have been more willing to consider the collateral harm of criminalization. In one famous 2011 case, the Supreme Court of Canada demanded that the Federal Minister of Health grant an exemption from criminal drug prohibitions for Vancouver's safe injection site on the basis that applying the drug prohibition, to prevent the site from operating, was arbitrary and causes disproportionate harm.



Courts' capacity to scrutinize drug laws to see if they are proportionate has expanded. A future challenge like Malmo-Levine might succeed. In fact, in the UN General Assembly Special Session in April, Canada's Minister of Health justified the current government's legalization plan with reference to the concept of proportionate criminal justice.

It is worth mentioning that access to medical marijuana has been the subject of heavy litigation; this legal wrangling may have fueled the push toward legalization. Over the last fifteen years through numerous waves of litigation, courts, relying on the constitutional norm against arbitrariness, have required the Federal government to craft, and revise its

regulations to ensure access to marijuana for medical use. For instance, last February, four BC patients won the right to grow their own plants. The Supreme Court of Canada also relatively recently ruled that the government could not limit medical access to dried pot, giving patients legal access to extracts and edibles, like oils, teas, creams and cookies. Legalization would largely obviate this kind of litigation.

On the other hand, legalization may be in contravention of international drug treaties committed to the so-called war on drugs, which require criminalization of possession and production of drugs including marijuana. These treaties have come under heavy criticism for standing in the way of evidence-based drug policy, however, and the current government doesn't seem to be giving in to this.

Q: DOES THE LEGALIZATION OF MARIJUANA IN CANADA REPRESENT A BIG SHIFT IN POLICY THINKING?

K: Yes, but the seeds for this policy were sown a long time ago. Between 1969 and 1973, a Commission of Inquiry into the Non Medical Use of Drugs, headed by Gerald Le Dain, who would become a justice of the Supreme Court of Canada, recommended the gradual withdrawal of criminalization for all drugs. Although more circumspect about the application of criminal law for so-called harder drugs like hallucinogens, amphetamines and opiates, the Commission did recommend the immediate decriminalization of marijuana possession.

At the time, the Commission was especially concerned with the effect of criminal convictions for marijuana possession upon the lives of otherwise law abiding, non-violent young people. It noted that given the widespread use of cannabis, there was an "understandable sense of injustice" given the uneven application of sanctions and the episodic enforcement of the law. It noted that criminalization:

- Pushed users to "engage in crime or at least deal with criminal types" to obtain the drug;
- Undermined the credibility of drug education by equating dangers of marijuana with harder drugs which the Commission considered far more dangerous;
- Fostered disrespect for law enforcement among people who viewed the official attitude to cannabis as "perverse and profoundly hostile" given that it is probably not as dangerous as alcohol.

Q: GIVEN THESE FINDINGS, WHY HAS THIS TAKEN SO LONG?

K: The Le Dain Commission report came out when Pierre Elliott Trudeau was prime minister, and it seems he basically ignored it. Cynics said that like most Royal Commissions, it served the purpose of delaying action on controversial issues, long enough for the public to forget them. During 1980s the U.S. war on drugs may have inhibited action on drug decriminalization in Canada.

In 2002, a House of Commons Committee report and a Senate Committee report both recommended decriminalization of possession and cultivation of small amounts of marijuana, citing generally the same reasons as in the Le Dain Commission Report. The Senate Committee went furthest and recommended licensing of production and sale of marijuana, a legalization and regulation approach. Since the 2002 reports, there have been further calls by various drug policy organizations in Canada for decriminalization or legalization of marijuana.

Not surprisingly, these recommendations didn't get much traction under the law-and-order Conservative government. In 2012, the government instead opted to increase mandatory minimums for growing and trafficking marijuana, including adding a minimum sentence of 6 months for the production of as few as six plants for the purposes of trafficking. (Trafficking, by the way, was defined extremely loosely; it includes sharing or even simply offering to share with a friend). At the same time the U.S. Attorney General Eric Holder was criticizing mandatory minimum sentences in the drug context for failing to serve justice or public safety, and for fueling the massive over incarceration, in particular, of people of colour and poor people. Yet Canada appeared to be doubling down on the war on drugs even as the U.S. was retreating from it.



The international landscape is also changing. The Global Commission on Drug Policy, a panel of world leaders, issued a report last month recognizing that the war on drugs has done more harm than good to public health. Public opinion has continued to shift as well. By the time Justin Trudeau made his election promise to legalize marijuana, popular support for the position was high even among conservative voters, with two thirds of Canadians in one widely reported poll supporting legalization and regulation of marijuana.

So it seems legalization is now a foregone conclusion and the public debate has shifted to whether possession laws should still be enforced while the new legislation is being drafted.

Q: WHAT ARE A COUPLE OF KEY POLICY SUGGESTIONS YOU WOULD RECOMMEND FOR THE LEGALIZATION MODEL IN CANADA?

K: One important thing that the Task Force Final Report suggests and that I would really want to emphasize is to ensure research and consultation involving community actors, public health actors, people who use drugs, and experts, both before and after the legislation comes into effect. The Report itself drew on broad public consultations but public awareness, communication and co-ordination between the various levels of government and non-governmental stakeholders should continue in the lead-up to the legislation's release and its implementation thereafter. There must be sufficient resources for effective administration of the regulatory framework, as well as for health promotion, awareness and education to ensure responsible use in the context of decriminalization. All of these are necessary to ensure that decriminalization actually serves its goal of minimizing harm. There is no doubt that regulating this new area will present unexpected challenges, but we have pretty good models of tobacco and alcohol regulation. We should also watch the effects of decriminalization in parallel jurisdictions very carefully. Finally, assessment of marijuana regulation in the context of decriminalization could provide important data and a methodology for evidence-based, harm-reducing public health approaches to all drugs. .



PROFESSOR ALANA KLEIN

Assistant Professor at McGill University's Faculty of Law, Alana Klein teaches and conducts research in health law, criminal law and human rights. Her research focuses on the position of marginalized groups and individuals in decentralized systems, and on evidence in governance and decision-making. Prior to joining the Faculty, she was a senior policy analyst with the Canadian HIV/AIDS Legal Network, where she worked on HIV/AIDS and immigration, legal and other barriers to harm-reduction programs for people who use illegal drugs, and law reform to promote the rights of women and girls in the context of HIV/AIDS.

FOR MORE INFORMATION SEE:

The Task Force report: "A Framework for the Legalization and Regulation of Cannabis in Canada" - <http://healthycanadians.gc.ca/task-force-marijuana-groupe-etude/framework-cadre/index-eng.php>

CBC article: "Liberals to announce marijuana will be legal by July 1, 2018" - <http://www.cbc.ca/news/politics/liberal-legal-marijuana-pot-1.4041902>