

A persistent paradox: Drug law and policy in Canada

Patricia G. Erickson

Addiction Research Division

Centre for Addiction and Mental Health

Toronto, Ontario

The 1990's were a turbulent time for developments on the drug policy front, but ended on a disappointing note for those expecting significant reform. While the decade began with a fledgling Canadian Drug Strategy that appeared to be distancing itself from the American War on Drugs, by May 1997 the passage and proclamation of the *Controlled Drugs and Substances Act* [CDSA] was complete (Boyd 1991; Erickson 1997; Mitchell 1991). A wealth of drug research dating back to the Le Dain Commission (1969-73) was ignored. There is a paradox here. Canada has a strong public health tradition and has tended to reduce social conflicts through fairly equal access to health care, education, and social services. Canada was one of the first countries to subject the scope and nature of modern criminal drug prohibition to intense scrutiny, and consider major reforms of its laws. Yet, the new drug law ensconced the severe maximum penalties and extensive police powers found in the previous *Narcotic Control Act*, and added resources to aid even more efficient arrest and prosecution of illicit drug users and sellers. Canada's allegiance to criminalization was affirmed (Erickson 1992; Fischer 1997; Giffen, Endicott, and Lambert 1991).

Of course, a tough law on the books does not always translate into actual practice. This overview will examine research relevant to the formation of the new drug law, and present the most recent trend data on drug criminalization during the 90's. As well, several emerging research and policy issues will be identified: methadone expansion, heroin prescribing and safe injection rooms, drug courts and cannabis diversion, medical marijuana and the relationship between drugs and violence. The Canadian context for future drug policy issues is likely to be shaped within

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the competing influences of aggressive prohibition and the more public health oriented harm reduction perspective (Institute for Research on Public Policy 1998). The evidence suggest some modification of the strict criminal justice response may be underway.

In the wake of the Le Dain Commission, a substantial research program in illicit drugs was undertaken at Ontario's Addiction Research Foundation. Investigators there and in other academic centres studied the nature of Canada's illicit drug problem, and the legal response to it, over the next decade and a half, much of the research was collected in Blackwell and Erickson's *Illicit Drugs in Canada* (1988). During this quiescent period of illicit drug policy, drug use persisted in an endemic but not particularly alarming way. For example, past year prevalence rates of student cannabis use in Ontario were halved between 1979 and 1987 (from 32% to 16%) (Erickson and Cheung 1992), rates of current adult cocaine use in national surveys were found to range from 1% to 2%, (Erickson, Adlaf, Smart, and Murray 1994) and notoriously difficult estimates of opiate injectors ranged from 40,000 to 80,000 for the whole country (Fischer, forthcoming). Drug arrests also declined from their peak in 1979. Nevertheless, then Prime Minister Mulroney declared in 1986, two days after President Reagan's declaration of a new crusade against drugs, that "drug abuse has become an epidemic which undermines our economic as well as our social fabric" (Jensen and Gerber 1993). The result was to reactivate drug policy to a prominent place on the political agenda.

Events moved swiftly and, by May, 1987, a new national drug strategy was announced with the "objectives of reducing the harm to individuals, families and communities from the abuse of drugs... the approach balances health and enforcement goals in a way acceptable to Canadians." The influx of resources (\$210 million over 5 years) was, under pressure from community groups and addiction agencies, allocated not only to initiatives for illicit drugs, but also to alcohol, solvents and pharmaceuticals, in a 70%-30% split favouring prevention and treatment over enforcement; funds were also earmarked for a targeted research competition in the substance abuse area. This strategy appeared to be more distinctively Canadian, in distinguishing itself from the US enforcement emphasis and increased sentence severity of this

era (Erickson 1992).

When, in 1992, a draft law (Bill C-85) was prepared as part of Canada's Drug Strategy, the next four years provided an opportunity for research to be presented, to two House Health Committees and to the Senate Standing Committee on Legal and Constitutional Affairs, before its eventual passage. Delegations appeared from the Canadian Foundation on Drug Policy, a group of academics and policy analysts who had written and published widely on drug issues during the 1970's and 1980's. As well, scientists from the Addiction Research Foundation appeared before all three committees. A major issue for the Committees might have been expected to be the effectiveness of the current law in relation to its personal and social costs.

A substantial body of Canadian research has built up questioning the deterrent effectiveness of the law. A study of specific deterrence in Toronto showed that over 90% of convicted first offenders were still using marijuana one year later. Erickson's *Cannabis Criminals* (1980) research also indicated the high costs to individuals and the justice system of relying on the punishment of offenders, and recommended that minimum penalties, if any, be applied. Although much of the debate and testimony about C-85 (and C-7 as it later became) swirled around the cannabis issue, there was no significant change in the eventual penalty structure of the CDSA. The possession offence, and the potential of 6 months imprisonment, remained on the books, though some modification occurred with respect to possession of small amounts (less than 1-g of hash or 30-g of marijuana) being formalized as summary offences.

The appearance of cocaine, both in powder and smokable crack preparations, on the Canadian drug scene has also spawned some highly relevant research on its patterns of use (Erickson *et al.* 1994). The population surveys indicated that cocaine use was never an epidemic in Canada, in contrast to the US experience. Empirical research on community based users, those outside of treatment or correctional settings, revealed controlled, self limiting patterns that challenged the notion of the "instantly addictive" reputation of this drug. Nevertheless, the existence of more harmful forms of use and violent dispute resolution in crack markets in deprived areas also underlined

the importance of social setting and context in determining the outcomes of given drug use behaviours. Health issues around HIV transmission and the high risk environment of both the streets and prisons has been well studied in Canada, and again considerable evidence was made available regarding the worsening situation to the Committees studying C-85/C-7. The selective enforcement involved in drug arrests, targeting the homeless, minorities, and other more vulnerable segments of what is a much more homogeneous drug using population was also documented in the larger cities. The Parliamentary Committees, however, did not seem responsive to the social, racial, and cultural implications of maintaining an aggressive drug policy that relied on this type of enforcement and punishment. Much research evidence was presented about the costs of allowing the criminal justice response to dominate over more harm reducing alternatives for addicted users. Except for a vague clause about rehabilitation and treatment in appropriate circumstances, little changed from the previous law [CDSA, 11(1)].

What has been happening with respect to the criminal justice response to drug law breaking in the 1990's, as the CDSA was being debated? The Canadian Centre for Justice Statistics has been maintaining records, and these have been useful in monitoring trends in legal response. In 1996, there were 65,106 recorded drug offences in Canada, an increase of 5.6% over the previous year, and the highest total since 1989. The large majority, 72%, were for cannabis, while cocaine accounted for 17% and heroin for 2% of the total. The highest rates of adults charged with drug offences are found in the Yukon, the NW Territories, and BC, while the lowest rates occur in the Maritimes and Manitoba. The overall rate of adults charged in Canada with federal drug offences is 171 per 100,000. Preliminary data related to the disposition of drug charges are available for 1997, but data relating specifically to cannabis charges have not been recorded since 1985. All other illicit drugs are included, and 45% of these convictions are for possession, 34% for trafficking, 19% for possession for the purpose of trafficking, and 1% for importing. Over half of all convictions (61%) resulted in prison sentences, the majority of which (71%) were for less than one year. A tiny minority, less than one per cent, receive a sentence of four years or more. It is evident that the harsh maximum

sentences available in the law are not usually imposed, but that considerable criminal justice activity is continuing against drug consumption and sale (Single, Adlaf, Van Trong, and Ialomiteanu 1999).

It is notable that drug offence-related admissions to federal correctional institutions actually declined from 1991 to 1997, from 15% to 3%, while comparable admissions to provincial institutions remained stable at about 6% of the total (Single *et al.* 1999). This is a sharp contrast to the escalation of drug-related admissions to US prisons in the 1990's. It is likely a result in part of the mandatory sentencing policy in the American system, while Canadian judges maintain considerable discretion in both nature and duration of disposition. There has also been a shift in the type of offences detected and prosecuted in Canada. Whereas in 1991 the ratio of cannabis to cocaine offences was 2:1, by 1996 it was more than 4:1. Those charged with cocaine offences are much more likely to receive a term of imprisonment, and for longer periods, than cannabis offenders. Whether this reflects a shift in enforcement resources and/or priorities, or fewer cocaine users and sellers to detect and arrest, is not clear. But it is evident that the far greater number of cannabis users will always make them, and their suppliers, an easier target for enforcement efforts. It will be important to monitor any changes in the legal response from 1997 with the new law in place.

While the punitive direction of Canada's drug law has not changed, but even intensified, there have also been contrasting developments in policy at more local levels of practice. Several emerging issues can be considered which illustrate Canada's tendency to moderate its severe federal laws with its expertise in public health and education in provincial jurisdictions (Mitchell 1991). These include the rising rates of overdose deaths and AIDS cases among the injection drug user population, the availability of treatment or other alternative measures to drug offenders before the courts, the medical use of cannabis, and the consideration of drug related violence as primarily a function of the illicit market.

When the epidemic of HIV among injection drug users was recognized, the response in Canada's largest cities was to institute

more accessible needle and syringe exchange programs, and this has been credited, along with the existing sale of needles in pharmacies, with keeping infection rates quite low until recently. Methadone programs have also been expanded markedly since 1995, when authority over methadone prescribing was devolved to the provinces. In Ontario, the resulting increase in the number of patients {quadrupled} and the number of prescribing physicians {doubled} was most dramatic. By 1997, an estimated 7500 individuals were in methadone programs in Canada overall, compared to only 911 in 1983 (Fischer, forthcoming). Low threshold methadone programs have been introduced; these involve considerable physician discretion to permit "carries" or take home doses, to retain patients whose urinalysis shows other drug use, and to provide additional psychosocial support services. There is also active discussion in the three largest cities about the protocols for a heroin maintenance trial, following similar studies in Switzerland and the Netherlands, and some being considered in Germany and Australia. A Vancouver health board proposal for safe injection rooms, where users are provided with clean equipment and medical backup if needed, but no threat of arrest, generated considerable controversy and appears unlikely at this time. All these initiatives, whether implemented or merely discussed, suggest a willingness to look beyond punitive models and consider more health based responses. Ultimately, the evaluation of new strategies will point the way to change.

The federal diversion policy, released by the Department of Justice in October 1997, paved the way for a drug court pilot project in Toronto, commencing in December 1998. While modelled to some extent on US programs for non-violent, drug addicted offenders, the Canadian version has been couched in a harm reduction/restorative justice perspective. Besides concerns with recidivism and cost effectiveness, the Canadian program emphasizes voluntary participation, concern for the client's welfare, and the mobilization of a broad array of social support services in addition to out-patient treatment. The target group are dependent users of heroin or cocaine. The project has involved a unique collaboration of judges, federal drug prosecutors, the defence bar, addiction agencies, and community groups. The support for rehabilitation rather than incarceration again suggests a step away from the traditionally punitive response. A careful evaluation of its effectiveness on several

dimensions is being conducted in order to guide future best practice.

For cannabis users, there have been further initiatives aimed at mitigating the harmful individual consequences of criminalization while retaining the possession offence. The federal diversion policy has been applied to first time offenders in certain circumstances. Those who accept responsibility may perform some type of community service. Upon successful completion of the specified hours, they report back to court and the charge is stayed, avoiding a criminal record. Neither the implementation nor the actual content of the diversion programs has been mandated by the Department of Justice and, at this time, cannabis diversion has been implemented in various ways in only a few locales. In Toronto, some assessment of the program's impact is being conducted. While this may seem like a modest step, compared to significant legal reform, it does at least reflect a step towards greater leniency. Within the existing CDSA, it is the least costly disposition to the offender. In other countries attempting to extricate the justice system from cannabis criminalization, efforts have taken the form of selective non enforcement (Netherlands, Spain), non prosecution (Germany), and civil penalties (Australia). Canada seems unique in this particular 11th hour diversion option.

Another example is the medical marijuana issue, which has generated a lot of media attention and several court cases. The judiciary have shown themselves to be quite open to the medical-scientific evidence provided by numerous experts to the effect that the harms of marijuana have been generally overstated, while its medical worth should be established in clinical trials. In *Parker*, the judge ruled that to deprive the defendant, an epileptic whose seizures were controlled by marijuana, of a legal source of the drug contravened his primary Charter right to health and the protection of life, and ordered the police to return his plants. The Justice and Health Ministers have appeared willing to consider medical necessity grounds, but as yet there is no legal source of supply to identified medical users, doctors cannot legally prescribe cannabis, and the court decisions are all under appeal. A 1997 poll that showed 83% of Canadians supported legitimizing marijuana for medical purposes may pave the way for a genuine policy change.

Finally, research on the links between drugs and violence has been considered by Canadian criminologists, with a particular interest in understanding the drug market linkages. The role of pharmacological factors in violence are known to be weak or non-existent for opiates, cannabis, and even cocaine. Economic pressure to commit property crimes to obtain money to purchase drugs has not as yet been thoroughly examined in Canada, but is an important aspect of policy at the level of the municipalities. Street violence around drug markets has also been investigated with similar results to that obtained in US research, but with lower levels of lethal and serious injuries. Clearly Canada can continue to develop key criminological findings in this policy relevant area.

Canada has a strong legacy of excellence in drug crime and drug policy research that has thoroughly debunked the myths sustaining the ideology of prohibitionism (Giffen *et al.* 1991). To date, this scholarship has had little obvious effect on federal law makers, but as the late Chet Mitchell (1991) said, "The bad, and false, news travels fast, while the scientific hardly travels at all." The reasons for the lack of direct impact on the CDSA are complex, a combination of the inertia of the criminal justice institutions, the vested interests and resistance to change of those benefiting from the resources available, and the "no win" scenario for politicians, given a public that is still fearful of drug users and the crimes they are believed to commit. Such harsh laws cannot be maintained without public support, and a major function of the US drug war propaganda may be seen as maintaining that moral consensus about the "wrongness" of drugs. This message is becoming tarnished, however, as nations begin to modify their prohibitionist policies in less punitive ways. Instead of looking to the USA, Canada in its more local policies appears to be finding lessons in Australia and some European countries. The tension between criminalization and harm reduction will continue into the next millennium, when it is to be hoped, criminological research on various initiatives will help to pave the way for a more just, humane, and effective response to drug users in Canadian society.

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