Strategic Approaches to the Control and Prosecution of Marihuana Growing and Trafficking Offences

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Background

The legal framework within which current activities to control marihuana production and trafficking are taking place may be shifting somewhat as a result of recent court decisions and proposed legislative amendments. A certain amount of uncertainty understandably exists since the recent releases of the two Parliamentary Committee reports. First, there was the Report of the Senate Special Committee on Illegal Drugs[3] in September 2002 which recommended the creation of a criminal exemption scheme for the production and sale of cannabis under the authority of a license and, in December 2002, the Report of the House of Commons Special Committee on Non-Medical Use of Drugs which recommended decriminalizing the possession and cultivation of not more than 30 grams of marihuana for personal use[4]. The Minister of Justice of Canada has also announced his intention to propose amendments to the dispositions of the *CDSA* relating to marihuana. In that context, the Supreme Court of Canada which was set to consider three appeals which raised the central question of whether the harm to society or

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[3] Special Committee on Illegal Drugs (2002). *Cannabis: Our Position for a Canadian Public Policy*. Ottawa: Senate of Canada, September 2002. Recommendation 6, page 618.

[4] Special Committee on Non-Medical Use of Drugs (2002). *Policy for the New Millennium: Working Together to Redefine Canada's Drug Strategy*, Ottawa: House of Commons Canada, December 2002, Recommendation 41.

to any person, by use of marihuana, is sufficient to permit criminalization decided on December 13, to adjourn these appeals[5] to the Spring term.

At the same time, recent cases in the provinces of Ontario and Quebec, mostly in relation to situations arising out of the tension between the criminal and the medicinal uses of marihuana, further weakened some of the dispositions of the *CDSA* relating to marihuana. For instance, on December 19, 2002, Judge Gilles Cadieux of the Quebec Court stayed proceedings in a case involving possession and trafficking of marihuana on the basis that authorizing those who are ill to use marihuana while depriving them of a legal source violates their right to life and liberty under the Charter[6]. On January 9, 2003, in *The Queen v. J.P.* [7], Justice Douglas W. Phillips held that s. (4) of the *CDSA* was still invalid with respect to marihuana possession pursuant to *Parker*[8] because Parliament had not addressed the problem of ministerial discretion with statutory exemption. On January 9, 2003, in *R. v. Hitzig,* Justice Lederman of the Ontario Superior Court of Justice declared the Marihuana Medical Access Regulations (MMAR) to be unconstitutional in not allowing seriously ill Canadians to use marihuana because there is no legal source or supply of the drug[9]. The next day, Justice John Moore quashed a marihuana possession charge on the basis that the accused "was charged with an offence not known to the law"[10].

Issue

Notwithstanding these recent developments, a major matter of public concern remains the unchecked relationship between the growing illicit marihuana market in parts of the country and the growing influence of dangerous criminal organizations. The fact that some provinces have a greater marihuana production and trafficking problem than others does not mean that

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[5] Supreme Court of Canada, on appeal from the Ontario and British Columbia Courts of Appeal: *R v Malmo-Levine, R. v. Caine, R. v. Clay*

[6] *R. c. St-Maurice*, (2002) C. Q. 500-01-001826-004, 19 décembre 2002.

[7] *The Queen v. J.P.* (2 January 2003), Windsor 02-Y11520. This ruling is currently under appeal.

[8] *R. v. Parker* (2000), 49 O.R. (3rd) 482 [Parker].

[9] The declaration of unconstitutionality is suspended for six months.

[10] Kari, S. (2003). "Possession of small amount of pot okay, court rules", *Vancouver Sun*, Jan. 11, 2003.

the latter should not pay attention to that growing problem. All provinces are vulnerable to the activities of criminal organizations as the profits derived from the illicit marihuana market fuel the activities of these organizations throughout the country. In fact, one of the most troubling aspects of the proliferation of marihuana cultivation and trafficking offences in a province like British Columbia is the growing involvement of criminal organizations in this sector and the magnitude of the profits they can easily generate through these low-risk, low-investment criminal activities.

In spite of the significant amount of resources invested in the control of marihuana production and trafficking, these efforts generally fail to produce the results that the community expect. Current results are insufficient whether they are measured in terms of the system's ability to curtail the production of marihuana, to affect the ease with which it is marketed, acquired and sold within the country, or to limit its availability on the Canadian market or at the very least its availability to children and youth[11]. It is also far from certain that current efforts are yielding substantial results in terms of curtailing or significantly disrupting the activities of criminal organizations involved in marihuana production and trafficking. Nor are the current results significant in terms of preventing other dangerous or violent activities in which these groups become involved in order to avoid detection, protect their share of the market, or attempt to steal from each other.

In this respect, the relative inability of the current criminal justice system to limit the ability of criminal organizations to conduct and benefit from these very lucrative activities is arguably the most powerful argument in favour of devising more effective approaches and strategies to control and prosecute marihuana offences. A strong case can be made for approaches that would more directly target marihuana growing and trafficking operations known to be conducted by or on behalf of criminal organizations. Even if the criminal justice system cannot be expected to neglect other aspects of its marihuana law enforcement in favour of a more targeted approach, it is obvious that targeted, intelligence-based, coordinated initiatives are required in order to produce more convincing outcomes.

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[11] See also: Auditor General of Canada (2001). *Report of the Auditor General of Canada - 2001, Chapter 11, Illicit Drugs, The Federal Government's Role.*

Options for Consideration

A number of options are being explored in British Columbia to increase the efficiency of current criminal justice practices as they relate to the control and prosecution of marihuana growing and trafficking offences. The object of these initiatives is to ensure that the limited resources that can be devoted to the control of marihuana related offences are used more strategically and effectively. It is to ensure that current efforts have the greatest impact possible on debilitating that illicit market and limiting the violence and other harmful consequences that are frequently associated with it. Some of these ideas were formulated as a result of the findings of a province-wide study conducted on the criminal justice response to marihuana growing operations and trafficking offences[12]. Most of these ideas point to changes and improvements that can be brought to current practices in order to improve the overall efficiency and impact of the criminal justice system's response to the problem. They are summarized here to provide a context for reviewing considerations that may strengthen the criminal justice system's response.

Some provinces have a greater marihuana production and trafficking problem than others. British Columbia is clearly one of them. The recent survey conducted in that province for the four-year period between 1997 and 2000 showed that marihuana growing operations had increased in number by an average of 36 percent per year[13]. These operations were becoming not only more frequent, but also significantly larger and more sophisticated. These activities and the market they supplied were clearly dominated by criminal organizations. The amount of marihuana available in that province grows from year to year, as does the whole market. The opportunities for making huge illicit profits from these activities are staggering.

Another problem documented by the recent survey conducted in British Columbia is that of the added burden placed on all aspects of the criminal justice system as a result of the proliferation

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[12] Plecas, D., Dandurand, Y., Chin, V. and T. Segger (2002). *Marihuana Growing Operations in British Columbia. An Empirical Survey (1997-2000).* Abbotsford/Vancouver: Department of Criminology and Criminal Justice, University College of the Fraser Valley, and International Centre for Criminal Law Reform and Criminal Justice.

[13] *Ibidem.*

of marihuana-related offences in that province. The survey produced evidence that the high volume of marihuana cultivation activity in that province had actually hindered police capacity to respond to complaints, let alone its capacity to respond strategically by engaging in its own intelligence gathering, investigation, and proactive enforcement activities. That was particularly true in ten local jurisdictions, mostly in the Lower Mainland region, which alone dealt with 60 percent of all cases of marihuana cultivation that came to the attention of the police in the province during the year 2000. These jurisdictions were clearly overwhelmed by the volume of such activities. Furthermore, because law enforcement activities in such cases are rarely the result of pro-active investigations, they often lack the strategic focus required to effectively counter the sophistication and the inventiveness of many of the criminal groups involved. In addition, the cost of enforcing the law against such offences is growing almost exponentially and there is a very real risk that the resources used to simply respond to the public complaints relating to these marihuana-related activities are being diverted away from more important (and more productive) law enforcement activities. The Federal Prosecution Service also feels the impact of the rapid growth in the number of cases submitted for prosecution. At the current rate of growth in the number of cases, the gap between the demand for services and prosecution services ability to meet that demand can be expected to widen.

The following presents a number of alternatives that could be further explored in order to ensure a more strategic use of current resources and produce a greater impact on the activities of criminal organizations involved in the illicit marihuana market. The paper then concludes by briefly considering whether the decriminalization of possession and cultivation of a small amount of marihuana, such as it was proposed in the recent report of the House of Commons Special Committee on the Non-Medical Use of Drugs[14], could affect the effectiveness of other efforts to control marihuana production and trafficking.

1. Lessening the Current Burden of these Cases on the Criminal Justice System

[14] Special Committee on Non-Medical Use of Drugs (2002). *Policy for the New Millennium: Working Together to Redefine Canada's Drug Strategy*, Ottawa: House of Commons Canada, December 2002, Recommendation 41, p. 131.

Many minor offences could perhaps be dealt with differently in order to allow the system to focus on the more serious cases. There are, to be sure, different views on whether or not the police are actually spending much of their time and resources dealing with minor cases of possession and production. National statistics[15], on the one hand, would seem to indicate that they do[16]. On the other hand, law enforcement officials often argue that interventions and prosecutions in minor marihuana cases tend to result from the fact that other offences are involved. Nevertheless, the fact that the prosecution of relatively minor marihuana related offences takes up too much of the scarce criminal justice resources is quoted in the recent report of the Special Committee of the House of Commons as an argument in favour of decriminalizing possession and cultivation for personal use of small quantities of marihuana[17]. Treating some minor offences as contraventions has been suggested. In other countries, various forms of diversion schemes are being used, including the use of police cautioning in the U.K. where, for instance, it was used in 44 percent of cases of unlawful possession of cannabis, and 22 percent in cases of unlawful production of cannabis (in 2000) [18].

(a) Decriminalizing the possession of small quantities of marihuana. Designating the possession for personal use of small quantities of marihuana as a contravention may reduce the workload of law enforcement and prosecution agencies and allow the reallocation of resources to more significant incidents. Law enforcement agencies may not necessarily be opposed to these changes provided that they retain the possibility of treating the behaviour as a summary conviction offence when the circumstances would justify doing so. Under the *Contraventions Act*[19], it remains possible for an information to be laid. The provisions of the *Criminal Code* relating to summary convictions and

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[15] Savoie, J. (2001), "Crime Statistics in Canada, 2001", *Juristat*, Vol. 22, no. 6, Statistics Canada, Canadian Centre for Justice Statistics, p.11.

[16] A fact that was duly noted by the House of Commons Special Committee on Non-Medical Use of Drugs.

[17] Special Committee on Non-Medical Use of Drugs (2002). *Policy for the New Millennium: Working together to Redefine Canada's Drug Strategy*, Ottawa: House of Commons Canada, December 2002, p. 128

[18] Corkery, J.M. (2002). *, Drug Seizure and Offender Statistics. United Kingdom 2000.* Home Office Statistical Bulletin No. 4/02, London, 17 May 2002, pp. 31-38.

[19] *Contraventions Act*, S.C. 1992, c. 47.

the provisions of the *Youth Criminal Justice Act* apply to proceedings in respect of contraventions. The powers of arrest in respect of an offence that is conferred by an enactment may be exercised even though the offence is designated as a contravention[20].

The quantity of 30 grams suggested by the Committee as a threshold for that designation is in line with *Schedule VII* of the *CDSA*. The Committee suggestions were probably referring to "dried"[21] marihuana. However, the matter of the amount of marihuana that would be established as a threshold for the designation of the offence as a contravention is not as simple as it may first seem. The weight of marihuana varies considerably depending on when it is weighed. The weight of dried marihuana can be as little as 5 percent of what it was when the substance was still "green". 30 grams of marihuana bud is arguably more significant than 30 grams of leaves. Finally, as it currently exists, s. 5(6) of the CDSA stipulates that the word "amount" means "the entire amount of any mixture or substance, or the whole of any plant, that contains a detectable amount of the substance". For example, in the form of a "joint", the calculation of the amount of the substance for the purpose of the law includes the weight of the tobacco that may be mixed with the marihuana. Would one not want the police to be able to issue a ticket on the street and not wait until they get back to the station to weigh the confiscated substance? In addition to the confusion that might be created and the potential unfair discretionary decisions that may result from a lack of clarity about the threshold amount, there is also a small risk that current practices in that illicit market may be affected by inadvertently encouraging small suppliers to deal in more concentrated product (for the same reasons that bootleggers during the American prohibitions were not moving beer, but high-proof liquor). In fact, one may argue that it would be more effective to make the offence of possession ticketable

[20] *Contraventions Act*, S.C. 1992, c. 47, s. 7.

[21] The MMRA deals with the issue of possession of marihuana for medical purposes by referring to "dried marihuana" (s.2) and they define dried marihuana as "harvested marihuana that has been subjected to any drying process" (s. 1). *Marihuana Medical Access Regulations - Controlled Drugs and Substances Act*, Regulations Amending the Narcotics Control Regulations. SOR 2001-227, P.C.1146, June 14, 2001.

generally, without reference to the amount. As long as the option to charge the offender criminally remains available, should the question of the weight really be an issue?

On the question of the use of the proposed new "contravention option" by the police, the idea of having the legislation require the consent of the Attorney General to proceed before laying a marihuana possession charge should perhaps be considered seriously. This may not always represent such a big departure from the existing situation, as it may be the case that individual prosecutors may already need the authorization of their supervisors when they do not propose to divert an offender charged with simple possession.

(b) Decriminalizing production of small quantities of marihuana for personal use. The House of Commons Special Committee also recommended designating the cultivation of small amounts of marihuana for personal use as a contravention. The Committee also suggested the quantity of 30 grams as a threshold, but it is hard to imagine a marihuana plant that would weigh less than 30 grams near harvest time. If such a proposal were retained, it may be more useful to use a threshold defined in terms of a number of plants, as it was done in Australia and in the recent new dispositions of the Swiss law, although such an alternative also creates difficulties. In setting such a threshold, one should keep in mind that some plants are mere two ounces clones, while others are huge and produce a large harvest. In the same manner, one should also guard against setting the number of plants at a level so high that it may inspire sophisticated growers to size their operations so as to avoid prosecution. In many ways, it would be simpler for the law to define a new offence of "cultivation for the possession of trafficking" and to make cultivation for personal use a ticketable offence. The complexity involved in determining what number of plants can be assumed to be cultivated for "personal use" (in that case, medical use) is demonstrated in sections 30 and 31 of the Marihuana Medical Access Regulations (MMAR) which resort to mathematical formulae which vary depending on whether the plants are grown indoor

or outdoor, or partly indoor or outdoor[22]. The MMAR also highlight the need to consider a different set of issues relating to marihuana cultivation near schools or close to areas frequented by children. If a person is really producing marihuana for himself or herself, does the amount produced really matter for the purpose of deciding which system will sanction the behaviour?

(c) Decriminalizing the offence of seeking and obtaining small quantities of marihuana. The House of Commons Committee did not recommend that the offence described in s. 4(2) of the *CDSA* relating to seeking or obtaining marihuana also be designated as a contravention when small quantities are involved.

(d) Differential approaches to small scale offences around schools. Should the fact that relatively small amounts of marihuana are involved affect the way law enforcement operates in relation to the possession of marihuana in or close to a school? The idea that the possession of under an ounce of marihuana, or of say 25-30 joints, would be decriminalized whether the offence occurs in or near a school or not is apparently raising some concerns in the law enforcement community.

It is true that the vast majority of cases involving possession of marihuana or possession for the purpose of trafficking in or around schools and other areas frequented by people under the age of eighteen rarely involve the possession of large amounts. In fact, in the majority (60 %) of all marihuana trafficking offences that came to the attention of the police in British Columbia between 1997 and 2000, the amount of marihuana involved was less than one once (roughly equivalent to 30 grams) [23].

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[22] MMAR *Marihuana Medical Access Regulations* - *Controlled Drugs and Substances Act*, Regulations Amending he Narcotics Control Regulations. SOR 2001-227, P.C.1146, June 14, 2001., s. 30 and s.31.

[23] Dandurand, Y., Plecas, D., Chin, V., and T. Segger (2002). *Marihuana Trafficking Incidents in British Columbia – An Empirical Survey (1997-2000).* Abbotsford/Vancouver: Department of Criminology and Criminal Justice, University College of the Fraser Valley and International Centre for Criminal Law Reform and Criminal Justice Policy.

Small-time dealers usually have limited amounts of the substance in their immediate possession. The evidence gathered by the police in such cases rarely concerns the actual sale or trafficking and is usually limited to establishing the possession of marihuana "for the purpose of trafficking". In the case of possession for the purpose of trafficking, the proximity of a school is already an aggravating factor to be considered at the time of sentencing[24].

Law enforcement officials may be concerned about retaining an ability to intervene effectively with pushers near "school gates" and assume that dealing with these offences as contraventions will not in most cases be a sufficient deterrent. They currently rely on the disposition of the *CDSA* relating to the possession of marihuana for the purpose of trafficking. Collecting additional evidence to prove that a transaction is taking place would demand the investment of far more resources. However, it would seem that these concerns are possibly exaggerated because, under the dispositions of the *Contraventions Act,* the police would apparently still retain the option of laying charges.

The House of Commons Committee reported that it deliberated at considerable length over the question of whether criminal sanctions should be retained for simple possession of cannabis in relation to schools and other places frequented by youth. The report explains that:

> "(...) most of the Committee members were reluctant to propose a scheme more onerous against youths than it does against their adult counterparts. Furthermore, trafficking, or possession for the purpose of trafficking, in or near a school or other place frequented by those under eighteen, are already 'aggravating factors' to be considered at the time of sentencing. Because trafficking-related offences will not be affected by the decriminalization scheme we propose, those provisions will continue to apply. Therefore, the Committee proposes that the possession of a small amount of cannabis for personal use, even on school property, should also be a 'ticketable' offence under the new scheme." (p. 130).

[24] CDSA, s. 10 (2).

(e) Differential approaches in relation to impaired driving. It is frequently suggested that, no matter how current policies evolve with respect to the prosecution of cases involving the possession for personal use of small amounts of marihuana, a far less lenient approach should be adopted when the marihuana possession offence is related to incidents of impaired driving.

The House of Commons Committee report is not very clear on that point. In one place, the Committee suggests that "possession charges in relation to an impaired driving offence should continue to be prosecuted as a criminal offence under the *CDSA*"[25]. The report raises the possibility that redrafting the possession offences in the *CDSA* may be required in order to retain the present penalties for "aggravated possession". The recommendation itself (No. 41) only speaks of the need to develop effective tools to facilitate the enforcement of existing *Criminal Code* prohibitions against driving while impaired by a drug. However, it is not clear how these measures would operate. It is already very difficult to proceed in impaired driving cases involving marihuana, because there is no easy way to measure and prove that the subject is impaired.

However, it is our view that, under the *Contraventions Act*, the police and the Crown would retain the option to charge criminally in possession cases related to impaired driving. We therefore do not quite understand the concerns of the Committee.

(f) Systematic Use of Police Discretion: In many situations, police officers simply seize and destroy the marihuana they find without any further procedure. They usually also seize, deactivate, or otherwise dispose of the equipment involved. These situations are known as "no case" seizures. This type of limited response is based on the exercise of discretion by law enforcement officers. It is used in a number of situations such as when a suspect has not been and is not likely to be identified, the amount of marihuana seized is very small, the case involves a consent search, the investigating officers believe that there may be insufficient grounds for a prosecution, or the search is

[25] Special Committee on Non-Medical Use of Drugs (2002). *Policy for the New Millennium: Working Together to Redefine Canada's Drug Strategy*, Ottawa: House of Commons Canada, December 2002, p. 131.

conducted in such a way or under circumstances such that it would likely render available evidence inadmissible in court[26]. Where warranted by the circumstances of the case, a more systematic and, one would hope, more strategic use of police discretion in marihuana cultivation cases (and also in some cases of possession for the purpose of trafficking) could alleviate the shortage of resources problem faced by law enforcement agencies in their efforts to disrupt the market and control the activities of organized crime. Do the police have to proceed in all marihuana cultivation cases that come to its attention? Can decisions to proceed be made more strategically? Who should make these decisions and on what basis?

The recent British Columbia survey documented the extent of the law enforcement practice of proceeding to so-called "no-case" seizures. During the four year period reviewed (1997-2000) 45 percent of all cases involving a search and in which marihuana was seized were dealt with as "no case" seizures. The proportion of "no case" seizures was considerably lower in cases where one or more suspects had been identified (32%). "No case" seizures were also much less frequent when the search resulted from a complaint received from a landlord, a neighbour, or an anonymous caller and when the police could investigate and obtain a search warrant in advance of the seizure. It was also obvious that one of the determining factors of whether or not a "no case" seizure approach was used involved the size of the marihuana cultivation operation. A "no case" seizure was three times more likely when the seizure involved less than ten plants, than in cases involving ten plants or more.

The subject of "no case" seizures also became somewhat controversial in British Columbia, particularly in relation to the activities on the "Growbusters Initiative" in Vancouver. The issue has received a fair amount of media attention and has been the object of a review by the Office of the Police Complaint Commissioner. As a result, law enforcement practices in that regard have apparently evolved during the last few years[27]. The use of this kind of discretion in marihuana cultivation and trafficking cases

[26] Plecas, D. et al, (2002), op. cit., p. 55-56.
[27] See: Campbell, Larry (2001). *The Growbusters Initiative – A Review of Police Conduct, Policy and Procedures*, Prepared for the Police Complaint Commissioner of British Columbia, July 2001.

varies considerably from one jurisdiction to another. These variations may or may not have produced a crime displacement effect between different parts of the province. Nevertheless, there is room for the articulation of clearer, province wide policies to better structure the use of police discretion in such cases and to ensure that it is applied fairly, strategically, and in a manner that prevents crime displacement and promises an optimum impact on the activities of criminal organizations.

2. **Diversion Schemes and Alternative Measures**

The systematic use of well thought-out diversion schemes in the case of many minor cases of marihuana possession, cultivation and trafficking offences could go a long way to rationalize the use of the limited criminal justice system resources and maximize their impact on the illegal marihuana market.

In British Columbia, the Department of Justice has entered into an agreement with the Ministry of Public Safety & Solicitor General for the diversion of adult offenders alleged to possess cannabis for personal use. An internal document was also prepared by the Federal Prosecution Service to provide counsel with guidance on the application of this policy. The document stipulates that diversion can be considered even if the amount of marihuana involved exceeds the amount stipulated in Schedule 7 of the *CDSA* (currently 30 grams). It also addresses various issues including the importance of aggravating factors in making a decision to divert a case or use alternative measures. These include: the possession of marihuana in or near a school, previous convictions, and the use of the substance while operating a vehicle.

Because numerous offences of marihuana cultivation, possession for the purpose of trafficking, and trafficking involve relatively small quantities of marihuana, the possibility of making a more systematic use of diversion and alternative measures should be seriously considered. In that manner, it is likely that significant amounts of enforcement and prosecutorial resources could be freed and redirected towards the effective prosecution of more serious cases, particularly those involving criminal organizations.

The introduction of clear policies to guide the use of alternative measures in marihuana cases should continue to receive attention. However, the House of Commons Special Committee expressed its concern about the possibility of uneven or inconsistent enforcement of existing laws and it is likely that the concern will be shared by the courts[28]. The Committee quoted that possibility as a reason to support legislative changes "to ensure that some individuals don't end up with a large fine and a criminal conviction for possession or a small amount, while others are simply warned and/or have their cannabis confiscated"[29].

3. A Reclassification of the Offences of Marihuana Cultivation and Trafficking

Under the *CDSA* (4(5)), the possession of 30 grams or less of marihuana is a summary conviction offence. The threshold set in these cases by Schedule VII of the Act could be raised. In addition, the Act also provides for the possibility of electing summary conviction proceedings in marihuana possession cases and seeking or obtaining marihuana. However, for no apparent reason other than historical, the Act does not provide for the possibility of summary proceedings in cases involving the importation, trafficking, possession for the purpose of trafficking, and cultivation of marihuana in small quantities. A re-classification of the offences to allow for summary proceedings at the discretion of the prosecution could simplify proceedings and produce potentially huge savings in law enforcement and prosecution resources.

4. Clearer Focus on Serious Marihuana Trafficking Cases

It appears to be necessary to re-examine current enforcement strategies relating to trafficking of marihuana offences. When one compares BC to other provinces, one notes that BC has a relatively low level of marihuana trafficking offences (e.g. arrests/charges) even though it has

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[28] Although the number of cases reviewed involving youth was too small to warrant final conclusions, the British Columbia survey mentioned earlier noted numerous cases where the consequences of an involvement in relatively minor marihuana related offences seem to be far more serious for youth than for adults.

[29] *Idem,* p. 128.

the highest number of marihuana cultivation offences[30]. Furthermore, the majority of the marihuana trafficking offences known to the police in British Columbia are minor offences involving very small quantities of the substance. For B.C. operators, it seems that once the marihuana has been cultivated and harvested, the risk of detection and conviction goes down significantly. The likelihood of having one's activities disrupted by the police at the trafficking stage is much lower than at the growing stage. It is clear from the survey that the offenders involved in marihuana growing operations are not necessarily the same that get involved in the sale and the trafficking. The "growers" often appear to be part of a network about which they themselves know little. They are poor informers and their links with organized crime are real, but often remote. The criminal element appears to be horizontal rather than vertical, more like a loose and evolving network of associations rather than as a hierarchy. They are not easily disrupted. This presents special challenges for criminal investigations focussing on these organizations. Investigating significant incidents of marihuana trafficking requires expensive and prolonged procedures. A question which deserves serious consideration is that of whether law enforcement efforts can somehow be partially re-focused to pay more attention to the trafficking part of the equation, and in particular the graver trafficking cases.

5. A More Strategic and Intelligence-driven Approach to Law Enforcement. A more strategic and intelligence-driven approach to law enforcement has been adopted by the R.C.M.P. to guide its own efforts against organized crime and drug control. It now sets national priorities based on threat assessments and makes conscious choices to focus resources on the areas of greatest risk to the population. These efforts often target the upper echelons of organized crime[31]. However, one may ask how adequate that particular approach may be in relation to how criminal organizations structure their activities and generally function in

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[30] Dandurand, Y., Plecas, D., Chin, V., and T. Segger (2002). *Marihuana Trafficking Incidents in British Columbia – An Empirical Survey (1997-2000).* Abbotsford/Vancouver: Department of Criminology and Criminal Justice, University College of the Fraser Valley and International Centre for Criminal Law Reform and Criminal Justice Policy.

[31] See: R.C.M.P. (2000). *SLEIPNIR: The Long Matrix for Organized Crime. An Analytic Technique for Determining Relative Levels of Threat Posed by Organized Crime Groups. Ottawa:* Criminal Analysis Branch, Criminal Intelligence Directorate, Royal Canadian Mounted Police.

relation to the illicit marihuana market. These organizations are apparently very fluid and can quickly adapt themselves to new circumstances. They can rapidly adjust their practices in order to defeat new law enforcement tactics and initiatives. They mostly do not appear to be structured along hierarchical lines. As a result, the illusive prospect of getting at the so-called "upper-echelons" of the organizations may not provide the most realistic basis upon which to design more effective enforcement strategies.

6. Proceeds of Crime Prosecutions.

A strategy that is frequently suggested would consist of focussing on the investigation of proceeds of crime and on the seizure of assets. The approach is a major part of the RCMP national drug control and organized crime strategy. In British Columbia, in the context of the Integrated Proceeds of Crime Unit, the Federal Prosecution Service has assigned four lawyers to work with the R.C.M.P. on proceeds of crime cases. However, these cases are usually very complex and extremely difficult to investigate and successfully prosecute. A focus on proceeds of crime may be more fruitful in areas other than the control of marihuana cultivation offences. It is not clear that a focus on seizing criminal proceeds and assets would deliver the expected results in cases of marihuana grow operations. Measures are routinely taken by criminal organizations to prevent the seizure of any valuable assets other than the equipment that it immediately requires to grow the plants. Given the way that large marihuana grow operations are structured and the fact that they are most often conducted in rented property, they rarely involved substantial forfeitable assets or proceeds.

Obviously, the same is not necessarily true of marihuana trafficking offences, yet in the police files reviewed in the four year British Columbia survey, very few cases actually involved sizable assets or proceeds that the police could confiscate.

7. More Effective Case Management and Coordination Between Police and Prosecutors

In British Columbia, representatives of the Federal Prosecution Service now participate in the work of the Operations Council (involving the RCMP, the Vancouver Police Force, the Provincial Crown, and the Organized Crime Agency of British Columbia). In addition to these measures, the possibility of an early assignment of a prosecutor to special law investigation teams to ensure the success of operations targeting particular groups or criminal organizations involved in the illicit marihuana market should probably also be explored. A similar strategy has often paid dividends in other sectors. Several other initiatives can improve coordination between law enforcement and prosecution. In British Columbia, a lawyer from the Department of Justice Canada is stationed at the Organized Crime Agency and can provide pre-charge advice to investigators. The Deputy Director of the Federal Prosecution Service is also responsible for acting as primary contact with the police on major cases to enhance the level of advice and address file management issues. The R.C.M.P. has just appointed two sergeants to work as wiretap liaison officers. They will work with the FPS and affiants to improve on the quality and focus of wiretap materials. In-depth training is being provided to these officers. Finally, a senior Department of Justice Canada lawyer has conducted a review of disclosure and file coordination practices within the R.C.M.P.. He worked on-site with the R.C.M.P. and traveled throughout the province to provide training and assess current needs[32].

8. Improved Quality of Evidence Gathered and Better Case Preparation

In reviewing marihuana cultivation and trafficking cases where an initial decision to prosecute had been made, it became clear during the survey conducted in British Columbia, that proceedings had to be stayed in far too many cases because the evidence presented by the police to the prosecution was weak, insufficient or no longer available. Even in cases where a conviction was obtained, all the evidence that would have been relevant at the time of sentencing was not always made available to the court. The key to any successful prosecution is a timely and comprehensive brief. A recent review of sentencing trends for marihuana growing operations in British Columbia stressed the need for strong evidence, particularly when the police and the Crown wish to invoke the presence of aggravating factors:

[32] A report on this initiative should be ready within the coming few months.

> "Perhaps the most common element that goes through all those cases is the need for evidence. Unless the Crown has evidence to prove the aggravating factors beyond a reasonable doubt, trial Judges will have little choice but to follow the Court of Appeal decisions in which conditional sentences were imposed"[33]

The Director of the Federal Prosecution Service for the BC Region is preparing the release of instructions or guidelines to the police for the preparation of briefs to the Crown.

9. Targeting Particular Groups of Offenders

The targeting of particular groups of offenders offers an immediate basis for strategic action. In British Columbia, for instance, the involvement of suspects from minority ethnic groups increased dramatically during the four-year period, from 6 percent of the total number of suspects in 1997 to 43 percent of the same in 2000. That increase was largely the result of the involvement of suspects of Vietnamese origin. Their number, as a percentage of the total number of suspects identified in relation to founded marihuana cultivation cases, grew from 2 percent in 1997 to 39 percent in 2000, an almost twenty-fold increase. Viewed another way, in 2000, Vietnamese suspects grew to 36% of all founded cases of marihuana cultivation while the percentage of suspects from minority ethnic groups other than Vietnamese has itself remained constant at the 4 percent level. Fourteen percent of all suspects were born in Vietnam. In fact, most suspects of Vietnamese origin were first generation immigrants to Canada, as 97 percent of all suspects of Vietnamese origin had been born in Vietnam[34].

In British Columbia, one of the pressing questions in relation to the control of the proliferation of marihuana grow operations in the province is whether law enforcement and prosecutorial efforts will effectively target Vietnamese operators. The facts that in the ten police jurisdictions with the highest number of growing operations in British Columbia, 56 percent of the suspects

[33] PRIOR, R. (2002). "Sentencing trends for Grow Operations in British Columbia", Vancouver: Department of Justice Canada. (Unpublished, December 2002), p. 12.

[34] PLECAS, D. et al. (2002), p. 47-49.

were of Vietnamese origins (in 2000) and that 47 percent of them had come from another province (mostly Ontario, Alberta and Quebec) cannot be ignored in a strategic enforcement strategy.

It is not clear how many of these offenders are Canadian citizens and/or landed immigrants. Police information concerning this particular group of offenders is particularly weak. Nevertheless, it may still be that an enforcement effort coordinated with immigration officials could pay some dividends.

10. Tightening the Charge Approval Process and the Use of Prosecutorial Discretion.

There is no national data on the outcomes of federal prosecution efforts. It is hard to determine how successful various practices are and to what extent prosecution patterns are successful. Even when data is gathered through a special study, such the one conducted in B.C., it is difficult to analyse the findings in the absence of valid points of comparison.

One of the surprising findings of the British Columbia survey was the fact that up to a fifth of the cases where a charge had initially been approved by the Crown - usually a Crown agent - proceedings on all charges were later stayed. The surveys conducted so far do not provide detailed information on the reasons for the decision to stay proceedings. An analysis of some of the data retained in the Department of Justice Canada database containing reports from Crown agents could perhaps usefully shed some light on current practices in marihuana cases and produce a clearer picture of prosecuting patterns in such cases in British Columbia.

How can one explain the large number of prosecutions in marihuana cultivation cases that are first authorized by the Crown and later stayed or dropped? This state of affairs has cost implications, as well as implications for the public image and credibility of the justice system and the law enforcement agencies involved. Can the process of making these decisions be improved and tightened up? Directives can be issued to agents. Procedures could be set in place for an earlier review of the report to the Crown by counsel. A system could perhaps be implemented, at least on an experimental basis, to have a specialist or a more senior and experienced counsel review cases at the charge approval stage, or to have that charge approval

decision made by counsel who is not part of the firm hired to act as agent in the given case. For instance, Justice Canada has now stationed a senior litigation lawyer in Kelowna to provide supervision and litigation support to agents in the interior and northern parts of the province and to provide training and pre-charge legal advice to the R.C.M.P. The supervisor routinely becomes involved in the decision to prosecute on major cases. He is also available to provide advice and monitor the work of agents. A second supervisor has recently been appointed to monitor the work in the Lower Mainland and on Vancouver Island.

Another area which deserves consideration as part of developing a more strategic approach to the prosecution of marihuana trafficking and cultivation offences is that of the principles that should guide plea bargaining in such cases. Plea bargaining is guided by the general provisions of the *Crown Counsel Policy Manual*[35]. Can the plea bargaining process and the criteria used in marihuana cases be re-examined? Should the directives that guide the work of Crown counsel in such cases be reviewed? What is the wisdom of, as a general practice, proceeding against only one of the offenders when one is manifestly dealing with more than one offender who clearly belongs to the same organized crime network?

11. Targeting Cases Involving Violence, Intimidation, Threats of Violence.

Violence rarely seems to be involved in cases of marihuana cultivation and trafficking themselves. That is perhaps why so few such cases have been prosecuted so far. On the other hand, the criminal elements involved in that illicit market are often very violent ones. The B.C. survey of marihuana growing operations revealed for instance that 58 percent of all the suspects involved in such cases had a prior criminal record and 31 percent of them had a least one prior conviction for a violent offence[36]. They frequently attempt to steal from each other, when they are not trying to intimidate or eliminate each other. The number of home invasions and murders involving individuals involved in the illicit marihuana market is a source of concern for many communities. The prosecution of such offences is clearly a matter of high

[35] http://Canada.justice.gc.ca/en/dept/pub/index.html
[36] PLECAS, D. *et al.* (2002), p. 51-52.

priority for both the criminal justice system and for the communities in which they occur. However, their successful investigation and prosecution is rarely a simple matter.

12. Coordinating Criminal Code and CDSA Prosecutions

Most marihuana growing operations typically involve both *Criminal Code* and *C.D.S.A*. offences. They also sometime include firearm offences (e.g., improper storage). The responsibility for prosecuting these different offences is split between federal and provincial prosecutors. The decision concerning which level of government will prosecute is guided by the 'Major/Minor Offence Agreement" whereby the office that has the most serious offence receives a delegation from the other office and can prosecute all offences in a particular case. In practice, however, there are very few cases where all the offences are prosecuted. It seems that in virtually all cases involving marihuana trafficking and/or cultivation as well other Criminal Code offences, except perhaps where a serious violent offence is involved, it is automatically assumed that the "major" offence is the marihuana-related offence and the federal prosecution service takes charge of the prosecution. Does it make sense to have federal prosecutors prosecute the offence merely because it is drug law, or should the issue be whether the case is more of a "local" concern where traditionally the local Crown Attorney would have conduct? That argument can be particularly compelling in the context of the police saying that there is a lot of non-drug crime related to marihuana growing operations. There are also, as one may be able to assume, some financial considerations behind these decisions. Nevertheless, it would seem that these decisions could be taken far more strategically (in consultation between the two levels of prosecution) to ensure the maximum impact of the action taken. Could a consultation process or some other mechanism be put in place to improve the decisions that are made about who will prosecute for which offence? To what extent would such a tighter coordination be possible when federal drug prosecutions cases are handled by Crown agents?

The province and the federal government should together explore the possibility of devising a joint principled and strategic approach to dividing the work of prosecuting marihuana growing and trafficking cases. Pilot projects could perhaps be designed at first to explore the possibility

of sharing responsibilities on a geographical basis, with one level of prosecution assuming responsibility for both types of prosecutions.

13. Cooperation between Jurisdictions to Address the Inter-Provincial Movement of Offenders Involved in Serious Marihuana Offences

Concerned jurisdictions should consider cooperating with each other to more effectively target some individuals (or groups) involved in marihuana cultivation and trafficking who are operating simultaneously in more than one province or in close cooperation with criminal organizations in other parts of the country. For instance, the recent B.C. survey of marihuana grow operations showed that, in that province, 32 percent of marihuana traffickers and 37 percent of marihuana growers known to the police came from three other provinces. Can provinces cooperate more closely in these cases given the observed movement of suspects? At present, it seems that it is sufficient for a marihuana trafficker or grower to move out of a province to avoid further interventions until he/she gets caught again in another province.

14. Media / Public Communications

The frequent public statements made by law enforcement officials concerning the profits to be made by growing marihuana and the relatively "minor consequences" imposed by the courts on those convicted of marihuana cultivation and trafficking can be said to act almost as advertisement for new recruits to illegally cultivate marihuana. Different media communication strategies could be explored.

15. Sentencing Considerations

There is a lack of data on sentencing patterns and, as a result, no ability to compare sentencing data between jurisdictions. As was pointed out in the Auditor General Report, because Canada does not have national data, it cannot monitor important trends such as sentence lengths,

emergence of new drugs and offence patterns, and regional differences[37]. Collecting sentencing data is a task which is a little more complex than it would first seem because most cases involve multiple charges and multiple offenders and because the records usually do not contain information of the factors that were considered by the court at the time of sentencing.

In British Columbia[38], between 1997 and 2000, the most frequent sentences in cases of marihuana grow operations were conditional imprisonment, probation and fines. During that four-year period, for these cases, a fine was part of the sentence ordered by the court in 42 percent of the cases and, in a little over half of these instances, it was the only penalty. During that same period of time, imprisonment was included in the sentence ordered by the court in only 18 percent of the cases. When ordered, imprisonment was accompanied by another penalty in 64 percent of the cases (e.g. a fine, a probation term, or a restitution order). The number of plants involved in a particular growing operation (as an indicator of the seriousness of the offence) was associated with whether or not offenders were handed a prison term, a conditional prison term, or a fine. The number of plants involved was also significantly correlated with the severity of the penalties imposed. The seriousness of the offenders' criminal history (as measured by the number of previous convictions) was correlated to whether or not offenders were sentenced to a firm prison term, but not to the length of the prison term imposed. Generally speaking, the quantum of the penalty imposed was neither significantly associated with the seriousness of the offenders' history of prior criminal convictions, nor to the number of their past drug trafficking or production offence convictions. The only notable exception was a correlation between the number of prior drug convictions and the length of the prison sentence imposed. The more drug convictions, the lengthier the prison sentence imposed. Although the difference in the length of the prison sentences imposed may not be a large one, the correlation between the two variables is, nonetheless, statistically significant[39].

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[37] Auditor General of Canada (2001). *Report of the Auditor General - 2001, Chapter 11, Illicit Drugs, The Federal Government's Role,* p. 15.

[38] See: PLECAS, D. *et al.* (2002), p. 70.

[39] This is not inconsistent with the dispositions of s.10 of the *CDSA* concerning a consideration of a prior drug conviction as an aggravating factor.

In the trafficking cases surveyed in British Columbia, offenders were sentenced to imprisonment in 27 percent of the time and that sentence was accompanied by another penalty in 47 percent of these instances. Offenders were sentenced to a conditional term of imprisonment in 15 percent of the cases and it was accompanied by another penalty in 58 percent of the cases. When a term of probation or a fine was imposed by the court, each was the most serious penalty imposed in 17 percent and 29 percent of the cases respectively[40].

A review of sentencing trends in British Columbia concluded that the Court of Appeal of that province had struggled with sentencing for marihuana grow operations. It also concluded, however, that the message from the Court of Appeal is reasonably clear that it is prepared to approve of deterrent sentences, provided that there is evidence to justify the sentence. If the police or the Crown wants the courts to consider a linkage to organized crime or some other specific harm that might result from a marihuana growing operation, they most certainly must be prepared to bring forward evidence to support these allegations[41].

Providing judges with information about the potential harm generally associated with marihuana grow operations may be useful, but only up to a point. If it was available, more information could be placed before judges about current patterns of sentencing and their likely impact on the phenomenon of marihuana cultivation and trafficking. At present that kind of information is not available.

Can something be done with respect to the sentencing of multi-recidivists convicted of a cultivation offence? For example, given the huge profits involved, can judges be encouraged to very significantly increase the amount of fines ordered? Should much higher minimum fines be imposed by the legislation? The CDSA s. 10 (2)(b) already imposes an obligation on judges to consider prior drug offence convictions as an aggravating factor. Judges are also directed by CDSA s. 10(3) to explain when they choose not to sentence an offender with previous drug conviction to prison. The British Columbia survey of marihuana growing operations showed that these dispositions do not necessarily translate themselves into much more severe sentences for recidivists.

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[40] DANDURAND, Y. *et al.* (2002), op. cit, p. 22.

It is sometimes alleged that judges often fail to fully consider the relevance of an offender's prior criminal and drug convictions at the time of sentencing him/her in relation to a marihuana cultivation incident. The best way to encourage judges to consider prior convictions and, in particular drug related convictions, as aggravating factors at the time of sentencing is to make sure that that evidence is fully presented to them. Alternatively, Parliament could be encouraged to consider amending the law to provide for minimum sentences in cases of repeat offenders involved in marihuana cultivation and trafficking offences. That possibility should perhaps be considered very seriously in view of the large proportion of offenders who are repeatedly convicted for such offences and who seemingly consider the sentences as part of "the cost of doing business", in fact the cost of being involved in a very lucrative business.

Crown counsel/agents are now being provided with good information on sentencing trends and appeal court decisions in marihuana cultivation cases. They certainly can use that information in preparing their submission to the court. However, in British Columbia, they do not have access and therefore neither do the judges to quantitative data on sentencing trends in the province in marihuana-related offences and on the influence of various aggravating factors on sentencing patterns across the provinces. There is some limited evidence that sentencing patterns in neighbouring jurisdictions involve the imposition of more severe sentences. However, data to allow sound comparisons of British Columbia sentencing patterns in marihuana related offences and patterns observed in other provincial jurisdictions are not available.

Restitution is frequently ordered as part of the sentence in cases of marihuana growing operations in BC. It is usually awarded to BC Hydro, because the utility company produces evidence, as a matter of routine, concerning the damages that it has suffered as a result of the offence. However, restitution is rarely ordered in favour of owners of rental property who have suffered a significant financial loss as a result of the damages caused by the marihuana growers. Evidence concerning that type of damage, although it is usually readily available, is rarely introduced in court and that might explain why judges cannot always fully consider the harmful effects of the illegal marihuana cultivation operations. An opposite and possibly very

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[41] PRIOR, R. (2002), op. cit, p. 11.

counter-productive trend has been observed in several municipalities of British Columbia where by-laws have been adopted to make the owners of the rental property used by the criminals responsible for the cost of the police intervention.

Conditional sentences are frequently ordered by the courts in the case of marihuana related offences and, in particular, in cases involving a marihuana grow operation. The creation of conditional sentences, with no offences being excluded, mandates judges to consider them in all cases where the jail sentence, if imposed, would be less than two years[42]. If there are reasons why a more restrictive sentence should be considered by the court, these must obviously be presented. Otherwise, one must acknowledge that, in the present state of the law, the frequent use of that type of sentence (often in conjunction with other penalties) is a very legitimate use of that sentencing alternative. Some practical measures can be taken to ensure that conditional sentences are ordered with the optional conditions that are appropriate in a given marihuana-related case. For instance, in December 2002, all prosecutors and standing agents acting for the Federal Prosecution Service received some written guidance from the regional Director of the Service on how to ensure that the court has all of the information it requires at the time of setting the terms of a conditional sentence. For these frequently ordered sentences to be effective, it would also be important to ensure that they are adequately policed, using electronic monitoring when necessary, and ensuring that all mandatory and other conditions imposed by the court are enforced.

16. Potential Negative Effects of the Proposed Partial Decriminalization of Marihuana Possession and Cultivation on the Investigation and Prosecution of Other Offences

Our purpose here is not to comment on the merits of the decriminalization proposal put forward by the Special Committee of the House of Commons, but to consider whether the proposed legislative changes could negatively affect the efficient enforcement of the other provisions of the *CDSA* concerning marihuana cultivation and trafficking.

[42] Section 718.2 of the *Criminal Code* also directs judges to not deprive an accused of his/her liberty when less restrictive measures are appropriate.

For the Special Committee, "decriminalization" means the removal of criminal sanctions for certain criminal activity while retaining legal prohibition. The contention of the House of Commons Special Committee is that:

> "By designating as contraventions, those offences relating to the possession or cultivation of small amounts of cannabis for personal use, the proposed decriminalization scheme would leave existing criminal sanctions in place to allow the full force of the law to continue to be brought to bear against anyone who traffic in or cultivates cannabis for profit." [43]

On the other hand, the Senate Special Committee observed that, in the long run, there may be more disadvantages than advantages to the decriminalization of personal use[44]. Some concerns are also being raised by others about the potential negative impact of the proposed partial decriminalization of marihuana possession and cultivation offence. Would it, for instance, eventually affect the ability of law enforcement to show probable cause in order to obtain a search warrant?

Some minor difficulties can certainly be expected to arise with respect to the initial operation of the proposed new scheme. However, on the surface, it would not seem that the designation as contraventions of the offences of marihuana possession and cultivation when small amounts of the substance are involved for personal use would in itself negatively affect the effectiveness of other law enforcement and prosecution efforts in cases involving more serious marihuana-related offences. On the contrary, such a change may serve to promote a more focused targeting of law enforcement efforts on more serious cases involving criminal organizations. On the not so positive side of things, however, it should be noted that, while it is obviously not possible to predict exactly how the courts would respond to the decriminalization of possession and/or cultivation of small amounts of marihuana, there is a distinct possibility that they may take the partial "decriminalization" as a signal that Parliament is not considering the

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[43] Special Committee on Non-Medical Use of Drugs (2002). *Policy for the New Millennium: Working together to Redefine Canada's Drug Strategy*, Ottawa: House of Commons Canada, December 2002,page 130.

[44] Special Committee on Illegal Drugs (2002). *Cannabis: Our position for a Canadian Public Policy.* Ottawa: Senate of Canada, September 2002, p. 600.

recreational use of marihuana very harmful. Such a development could further affect sentencing practices and patterns in relation to all marihuana offences.

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