

## FOUR DECADES OF CANNABIS CRIMINALS IN CANADA: 1970-2010

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### Introduction

Canada was one of the first nations to criminalise cannabis when it was added to the schedule of prohibited “narcotics” in the Opium and Narcotic Drug Law amendment of 1923. Since cannabis use was hardly known in Canada then, or for decades afterwards, social historians of this period have aptly termed the criminal prohibition of this drug as “a solution without a problem”.<sup>1</sup> A more current characterisation of Canada’s drug policy is ‘to make the problem fit the solution.’ For over four decades, the laws and apparatus of the criminal justice system have sought to shape the image and effects of cannabis use as a serious threat that justified ongoing, harsh and determined punishment of users. The paradox is that Canada has a strong public health tradition and an international reputation as a leader in health promotion.<sup>2</sup> It was also one of the first countries to subject the appropriateness of the modern cannabis prohibition to intense scrutiny (Le Dain Commission, 1969-73) and to consider reform of its drug laws. Nevertheless, no significant reform was forthcoming in the direction of penalty reduction or harm minimisation.<sup>3</sup> Another lost opportunity was the passage of the Controlled Drugs and Substances Act (CDSA) on October 30, 1995 and its proclamation in May of 1997.<sup>4</sup> Canada again reaffirmed its allegiance to criminalisation as the major tool of social policy towards cannabis and its consumers. The first decade of the new millennium was marked by further failures to decriminalise cannabis possession and an ongoing inertia in drug policy reform.<sup>5</sup>

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<sup>1</sup> P.J. Giffen, S. Endicott & S. Lambert, *Panic and Indifference: The Politics of Canada’s Drug Laws*, Ottawa: Canadian Centre on Substance Abuse 1991.

<sup>2</sup> P.G. Erickson, ‘A Persistent Paradox: Drug Law and Policy in Canada’, *Canadian Journal of Criminology and Criminal Justice* (41) 1999, 275-284.

<sup>3</sup> P.G. Erickson, ‘The Harm Minimization Option for Cannabis: History and Prospects in Canadian Drug Policy’, in: J. Inciardi & L. Harrison (eds), *Harm Reduction: National and International Perspectives*, Thousand Oaks: Sage Publications 2000, p. 155-169.

<sup>4</sup> B. Fischer, P.G. Erickson & R.G. Smart, ‘The New Canadian Drug Law: One Step Forward, Two Steps Backward’, *International Journal of Drug Policy* (7) 1996, 172-179.

<sup>5</sup> E. Hyshka, ‘The Saga Continues: Canadian Legislative Attempts to Reform Cannabis Law in the Twenty-first Century’, *Canadian Journal of Criminology and Criminal Justice* (51) 2009, 73-91; E. Hyshka, ‘Turning Failure Into Success: What Does the Case of Western Australia Tell Us About Canadian Cannabis Policy-making?’, *Policy Studies* 30 (5) 2009, 513-531.

After reviewing the major federal law reform initiatives to date, this paper will present an overview of the impact of the public policy of criminalisation on the lives of users with original empirical data from three decades of cannabis criminals.<sup>6</sup> Studies at the Addiction Research Foundation (now part of the Centre for Addiction and Mental Health) were conducted in 1974, 1981 and 1998, all involving contacting and interviewing comparable samples of cannabis possession offenders during their court appearances in Toronto. Their personal, legal and drug use characteristics are summarized in the accompanying Table 1. Detailed presentations of findings are available elsewhere for the first two decades,<sup>7</sup> therefore more attention will be paid to results for the more recent decade of the 1990's. This paper will compare the individual costs and deterrent benefits experienced by these users, their knowledge of the law, the contrasts in administrative procedures, and outcomes in the three decades that were intensively studied. Developments in the 2000's will be reviewed, with particular attention to the cumulative impact of criminal records. Finally we consider policy implications and conclude that reform efforts directed only at penalty modification have been unsuccessful and fail to address the fundamental issue of the appropriateness of using the criminal law to control this drug use behaviour.

## I Federal Initiatives in Law Reform for Possession of Cannabis

Since the first waves of the new cannabis users began to appear in Canadian courtrooms in the mid-1960's, much concern has been expressed about the impact of criminal convictions "on young lives," as the Le Dain Commission phrased it. The ensuing debate at the official level, in the political arena, has focused more on *what* the most appropriate criminal penalties *should be*, rather than on whether there should be *any at all*. No serious consideration of other models of control has been evident up to the present. A series of federal initiatives has been directed at mitigating the individual consequences of criminalisation while maintaining the possession offence. The first change occurred in the late 1960's, when the sentencing choice between either suspended sentence or imprisonment led to nearly half of those convicted being incarcerated.<sup>8</sup> In 1969 a 'fine only' option was added to the Narcotic Control Act (NCA) which allowed fines of up to \$1000 for a first offence, along with a maximum of six months imprisonment. This was widely applied

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<sup>6</sup> P.G. Erickson, 2001. 'Three Decades of Cannabis Criminals', invited presentation to the Senate Special Committee on Illegal Drugs, Canada, May 14, 2001.

<sup>7</sup> P.G. Erickson, *Cannabis Criminals*, Toronto: ARF Books 1980; G.F. Murray & P.G. Erickson, 'Regional Variation in Criminal Justice Practices: Cannabis Possession in Ontario', *Criminal Law Quarterly* (26) 1983, 74-96; P.G. Erickson & G.F. Murray, 'Cannabis Criminals Revisited', *British Journal of Addiction* (81) 1986, 81-85; P.G. Erickson & B. Fischer, 1997. 'Canadian Cannabis Policy: The Impact of Criminalization, the Current Reality and Policy Options', in: L. Boellinger (ed.), *Cannabis Science: From Prohibition to Human Right*. Frankfurt am Main: Peter Lang, p. 227-242.

<sup>8</sup> Erickson 1980, *supra* note 7, p. 22.

and fines became the most common sentence, given to 77% of offenders in 1971.<sup>9</sup>

A second initiative took place in 1972 when absolute and conditional discharges became available in the general Criminal Code. The discharge option imposed a finding of guilt and a criminal record, though not of conviction, and those receiving a discharge were eligible to apply for an official pardon under the Criminal Law Amendment Act. While the absolute discharge has been the most lenient sentence possible under the NCA, its application has varied within urban jurisdictions, within provinces and between provinces.<sup>10</sup> The fine option, which continues to carry the full burden of criminal conviction, was the preferred option by judges in about two thirds of all possession cases nationally up to 1985,<sup>11</sup> when detailed information on sentencing trends ceased to be publicly available, and still predominates.

A third federal initiative aimed at mitigation of individual consequences was the federal diversion policy introduced in October of 1997 and applicable to cannabis possession offenders in certain circumstances.<sup>12</sup> It went a step beyond discharge and allowed those facing a charge of simple possession to admit their guilt to avoid a criminal record. To do so, they must commit themselves to fulfil an alternative requirement such as performing a certain number of community service hours or writing an essay. If this is completed, the accused then reports back to court and the prosecutor stays the original charge. Neither the implementation nor the actual content of the diversion programs was mandated by the federal Department of Justice, leaving each individual jurisdiction to develop its own approach. Diversion did seem to reflect a step towards greater leniency for some offenders who would be able to avoid a criminal record, unlike the over one half million Canadians who already had acquired one for cannabis possession.

A number of attempts were made in the 2000's to liberalise Canada's cannabis laws, and for a time, they seemed likely to succeed. Much effort was directed at finding a way to retain the possession offence in a non-criminal way, that would avoid the imposition of a record. In 2003, the federal government introduced a bill in the House of Commons that proposed removing criminal sanctions for minor cannabis possession. Specifically, the proposed legislation would decriminalise the possession of less than 15 grams of cannabis and less than 1 gram of hashish by making it a non-criminal federal offence under the Contraventions Act and subject to a fine between \$100-\$400. Possession of larger amounts of cannabis would remain

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<sup>9</sup> *Idem*, p. 26.

<sup>10</sup> Murray & Erickson 1983, *supra* note 7, p. 75.

<sup>11</sup> J.A.E. Moreau, *Selected Narcotic, Controlled and Restricted Drug Statistics*, Toronto: Addiction Research Foundation 1995.

<sup>12</sup> P.G. Erickson, A.D. Hathaway & C.D. Urquhart, 2004. 'Backing into Cannabis Reform: The CDSA and Toronto's Diversion Experiment', *Windsor Review of Legal and Social Issues* 17, p. 9-27; T. Landau, (2001). 'An Evaluation of Post-charge Diversion in Old City Hall, Toronto', Ottawa: Department of Justice, Research and Statistics Branch.

illegal and subject to criminal penalties including incarceration. Additionally, the Bill provided for tougher penalties for cannabis cultivation.<sup>13</sup>

The introduction of this bill was in response to an earlier private member's bill tabled by an opposition member and two high profile Parliamentary reports. In 2002, the Canadian Senate released a report calling for the legalisation of cannabis possession, later that year a House of Commons committee studying the issue recommended that Canada consider cannabis decriminalisation. Although the proposed legislation would have removed criminal sanctions from minor cannabis possession, the government's ultimate goal was to increase enforcement against cannabis users with the logic being that police officers would be less hesitant to charge cannabis offenders with a non-criminal offence.<sup>14</sup>

In addition to tabling cannabis decriminalisation legislation, the government sought to address the concerns of critics who suggested that decriminalisation would lead to an increase in drug-impaired driving. After the introduction of the cannabis decriminalisation bill, the government tabled legislation that would create a 'driving while in possession' criminal offence.

Despite multiple attempts over a four-year period, and considerable public support for cannabis decriminalisation, neither bill was ever passed into law and the period of attempted reforms ended with the election of a new more socially conservative government in 2006.<sup>15</sup>

The current cannabis penalty structure in the Controlled Drugs and Substances Act remains strict, with first-time offenders liable to 6 months imprisonment, or a fine not exceeding \$1000, or both. In practice, the majority of offenders receive a fine averaging around \$200, and absolute or conditional discharge (imposing probation) is also possible, and only 13% are imprisoned.<sup>16</sup> The next sections review the nature and type of criminal penalties and their impacts on samples of cannabis users over four decades.

## II The 1970's

This initial study of 95 first offenders was conducted in 1974 when nationally, 27,202 individuals were found guilty of cannabis possession, 10,290 of them in Ontario.<sup>17</sup> In that same year, Toronto police recorded 4,949 offenses of cannabis possession. Some of the questions this study was designed to answer were, what kinds of people go to court for simple possession, what happens to them, what are their offense characteristics, and what kinds of cannabis users are they? As shown in column one of Table 1,

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<sup>13</sup> Hyshka 2009a, *supra* note 5.

<sup>14</sup> *Ibid.*

<sup>15</sup> Hyshka 2009b, *supra* note 5.

<sup>16</sup> Canada, 2003. Bill C-38: an *Act to amend the Contraventions Act and the Controlled Drugs and Substances Act* (legislative summary). Library of Parliament, Parliamentary Research Branch. (LS-456E). Ottawa, Canada: Gerald Lafreniere.

<sup>17</sup> Erickson 1980, *supra* note 7.

cannabis criminals then were nearly all male (90%) and 2/3 fell in the age 16-21 years range. The majority (72%) were employed and almost half (43%) lived with their parents. While most (71%) had been taken to the police station, and held for an average of 2.5 hours, an administrative shift at that time led to only 62% being fingerprinted then or later. The practice of the police giving a “notice to appear” in court and not requiring fingerprinting for most simple possession cases had recently been implemented. The typical legal case profile was of a plea of guilty to a single charge of possessing a small amount of marijuana, resolved within one or two appearances, without benefit of legal representation. The amount of cannabis was no more than 14 grams (1/2 oz) in 74% of the cases, and of these, nearly half involved only three grams or less. The absolute discharge was the most popular sentence, awarded to 42%, followed by 34% given a conditional discharge (usually with 12 months probation) and 24% with a fine (the amount ranging from \$25 to \$300, but averaging \$90). As cannabis users, this group fell at the heavier end of the use spectrum, as 73% reported using cannabis twice a week or more, whereas population surveys find only about 10% use that frequently.

In order to measure the post-conviction impact of criminalisation, the respondents were followed up and 90% (N=85) were re-interviewed one year later. A comparison group of non criminalised cannabis users would have improved our confidence in the results pertaining to costs; however, in the short term, little impact was found in relation to personal and social identity, economic position or difficulties with travel or legal status. Because the large, impersonal nature of the court proceedings enabled most who wished to do so to “keep their secret,” the impact of social stigma was minimized. Some of the adverse effects, difficult to quantify, related more to the emotional stress of going to court in the first place and also to long term anxiety about the impact of a criminal record and others (e.g. potential employers) finding out about it. None of the cost areas examined was related to the sentence received except disrespect for the law: those who did not get an absolute discharge were even more likely, a year later, to feel that their sentence was unfair. Legal knowledge was generally inaccurate, with only 19% able to identify correctly the NCA and the related provision of a maximum \$1000 fine for a first offence of possession; moreover, most of those receiving a discharge felt they “got off” and did not realise that they had a criminal record.

A separate study designed as a field experiment provided a better gauge of the possible adverse effects of a criminal record for cannabis possession on employment prospects.<sup>18</sup> With random assignment of record conditions for simple possession of cannabis (i.e., none, absolute discharge, conviction and fine), researchers responded, by telephone only, to ads for vacant positions. Favourable responses, in the sense of the caller being asked to submit a job application, were adversely affected by both the existence and the seriousness

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<sup>18</sup> P.G. Erickson & M.S. Goodstadt, ‘Legal Stigma for Marijuana Possession’, *Criminology* (17) 1979, 208-216.

of the criminal record revealed. While an absolute discharge was better than a conviction, it was not the same as having no record at all. This suggests that a criminal history has a negative impact on employment in a generaliseable manner, regardless of the minor nature of the offence.

Preventing recidivism, or specific deterrence, is the major presumed benefit of application of the criminal sanction to cannabis users. At the time of court appearance and sentence, 85% expressed the intention to continue to use cannabis, and one year later, 92% reported doing so. Continuing to use was not related to sentence received, and those most committed to use also perceived the greatest likelihood of re-arrest. In the one year interval, 9% had been arrested again for cannabis possession. As well, since many offenders were not aware of the discharge option before they attended court, and nearly half had expected a harsher sentence than they actually received, added weight was lent to the lack of specific as well as general deterrent effects found in a number of studies of drug use.<sup>19</sup> What is likely more significant is that well entrenched and fairly long-term habits of cannabis use are quite resistant to both the threat and actuality of punishment from one arrest and episode of punishment. This study concluded that criminalization is a high cost, low benefit option for control of cannabis use. In the context of penalty reduction, the absolute discharge was deemed to be preferable to probation or fines, because “if a minimal benefit is being obtained through the sanction, then it is more rational to apply the least costly form of it”.<sup>20</sup>

### III The 1980's

In 1981, an all time high of 34,535 convictions (including discharges) for cannabis possession under the NCA was registered for all of Canada.<sup>21</sup> In that year, the previous study was replicated and also extended to four other locales besides Toronto for a total of 120 respondents. The second column of Table 1 refers to the 48 respondents drawn only from the Toronto Court for strict comparative purposes. As is evident, young single males who are frequent users of cannabis continued to dominate those charged and brought to court for simple possession. The personal and legal characteristics were quite similar in the two time periods. The later group of offenders were somewhat more likely to be in school or unemployed and live with their parents than the earlier group. The basis for the charge in about three quarters of the cases was still 14 grams or less of the banned drug.

The most striking differences between the two decades emerged in the administrative profile. Although 71% were still taken to the police station, police processing time had been reduced with 92% not being required to

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<sup>19</sup> Reviewed in Erickson 1980, *supra* note 7; see also R.J. Lundman, ‘One-wave Perceptual Deterrence Research: Some Grounds for the Renewed Examination of Cross-sectional Methods’, *Journal of Research in Crime and Delinquency* (23) 1986, 370-388.

<sup>20</sup> Erickson 1980, *supra* note 7, p. 147.

<sup>21</sup> Erickson & Murray 1986, *supra* note 7, p. 82.

appear for fingerprinting. Similarly, 81% were now dealt with at court on their first appearance. The time between arrest and final court disposition was halved from an average of 2.6 months in 1974 to only 1.3 months in 1981. Leniency in sentencing also grew, with a greater proportion (58%) receiving absolute discharges, and fewer (8%) being fined, while the proportion receiving conditional discharge remained about one third of the total dispositions. Nor were offenders as likely to be represented by counsel as they had been in the earlier period (65% vs. 41%), a finding likely related to the overall more routine treatment of possession cases by 1981. Clearly a more streamlined and efficient process was in place.

This group of respondents was also followed up after a period of six months. The impact of criminalization was similar in most respects: almost none held a criminal self perception or thought their friends would view them that way; no job losses were reported as directly related to going to court or getting a record; perceptions of unfairness among those not receiving an absolute discharge remained high, particularly among those fined. Nevertheless, respondents at both time periods were quite similar in wishing to maintain secrecy about their criminal record with respect to family and current or future employers. Again, the *caveat* is that a brief follow-up cannot provide definitive answers as to how successful they will be in concealing their criminal records, nor what the lifelong repercussions may be. Respondents of the 1980's were also similar to those in the prior decade in that the large majority of more than 80% continued to use cannabis and had a limited understanding of the law or the implications of their sentences. The conclusion of this second study regarding the Toronto data was that while one pressure for reform had been reduced – the pressure on police and court resources – the impact of criminalization was little altered but was now considered by officialdom as an acceptable cost of the dominant policy.

It should also be noted that a comparison of offenders in four other Ontario jurisdictions besides Toronto indicated that the personal characteristics and drug use histories of offenders did not vary substantially between locales.<sup>22</sup> The amounts of cannabis that were the basis for the charge also were small everywhere. The major differences between cities were in the police and court practices, including sentence, and most were statistically significant. For example, the proportion of offenders who were convicted and fined ranged from 8% to 55%. Since similar types of offenders sharing legal offence circumstances receive such variation in criminal justice response, even within one province, the study concluded that this disparity was a major source of unfairness in the application of the criminal law.

#### **IV The 1990's**

As the decade commenced, cannabis offences accounted for 64% of all drug offences recorded in Canada, and by 1996, for 72% of the total; the majority

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<sup>22</sup> Murray & Erickson 1983, *supra* note 7.

of these nearly 47,000 offences were for simple possession.<sup>23</sup> The third sample of cannabis possession offenders (N=74) was recruited in Toronto in June, July and August of 1998, just after the diversion option was implemented on May 28, 1998.<sup>24</sup> As before, these respondents were also approached and interviewed at court from those present facing at least one cannabis possession charge. This group included both those who had just been referred to the new diversion program (43%) and those who had been processed in the conventional manner. This latter group consisted of some who had been denied diversion, or themselves refused it, and others whose cases had begun before diversion was introduced. Unlike the previous two samples, they were not all “first offenders” without a prior drug record, and most were interviewed before the final disposition of their cases. In fact, 22% of the 1998 group admitted having a prior record for cannabis, making them ineligible for the diversion option. Another difference is that the intervening passage of the Young Offenders Act, raising the age of adult criminality to 18 years, meant that this most recent group did not contain any 16 and 17 year olds, as did the other two. However, this sample reflects those charged with cannabis possession in decade of the 1990’s and appearing in the Toronto court, and provides insight into how the characteristics have changed, or not, in this time span. The third column of Table 1 summarizes the features of this group.

Cannabis criminals in 1998 continued to be mostly men, though this was an older group, as expected, with a mean age of 25 years and only 47% under 21. The same proportion lived with their parents as in 1974 (43%), less than in 1981 when 58% did so. Regarding current position, 22% were in school, 59% were working and 19% were unemployed, a similar distribution as in the two earlier periods. The consistency in cannabis use was striking, with 73% reporting use at least twice per week, meaning that about three quarters of cannabis criminals in all three decades were at the more frequent end of the use continuum.

The legal features of their cases present similarities in that a charge of possession of one form of cannabis only (nearly all marijuana) predominated, though slightly lower at 81% for this group. Some of the balance of cases involved additional trafficking (10%) and other charges, though this was also found in previous years. However, in 1998 the amount of cannabis that formed the basis for the charge was 14 grams or less in 86% of cases, considerably higher than the previous proportions of 74% and 75%, respectively. In addition, since half of all the 1998 cases involved one gram or less, these are considerably smaller amounts overall than in previous decades.

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<sup>23</sup> P.G. Erickson, ‘Recent Trends in Canadian Drug Policy: The Decline and Resurgence of “Prohibitionism”’, *Daedalus* (121) 1992, 239-267; E.W. Single, E. Adlaf, M. van Trong & A. Ialomiteanu, *Canadian Profile: Alcohol, Tobacco and Other Drugs*, Ottawa: Canadian Centre on Substance Abuse.

<sup>24</sup> Erickson, Hathaway & Urquhart 2004, *supra* note 12.

Offenders were more likely to have their own lawyer, 47%, than in either previous time studied. Concerns about criminal records were also expressed.

Compared to previous decades, offenders were much less likely to be taken to the police station (39%) but almost half were fingerprinted compared to 8% in 1981 and more similar to the 62% of 1974. Another difference was in the frequency of court appearances. Noticeably fewer had been to court only once or twice, while 57% had been three times or more (and half of the cases were not completed as yet and only four had been sentenced). The average time from arrest to the current court appearance was almost 3 months. This could reflect the greater complexity of some of the cases, more active participation by lawyers, or a greater willingness to contest the charge. After the earlier streamlining of the 1980's, possession cases appear to be taking longer to process in the late 1990's. Whether this alteration of administrative practices is a cause, effect, or unrelated to the diversion initiative is unknown.

Similarity with previous studies was found, however, when looking at intentions to continue use (found to be an excellent proxy for actual use in the previous follow-up studies).<sup>25</sup> A large majority of 75% expressed this intention – somewhat lower than the two previous studies, but likely understandable in the light of the closer monitoring that was implied in the diversion option. Most of the respondents had not heard of the diversion program before being charged, and three quarters had expected to get a discharge or a fine. Moreover, knowledge of the current law was highly limited, in that two thirds said they did not know what the name of the drug law governing cannabis was, 20% incorrectly named the NCA or Food and Drugs Act, and only 13% were able to correctly identify the existing drug statute, the CDSA.

Since there was no follow-up component to this third study, it is not possible to consider more long term costs to offenders nor to provide any evaluation of their actual experience in the diversion program. It can be noted that, as before, almost none considered themselves criminals despite their illegal behaviour and arrest for cannabis use. Their initial impressions of diversion were sought.<sup>26</sup> Of the 32 individuals getting diversion, the majority (59%) said that its main benefit was that they would not gain a criminal record, while 12% identified not coming back to court and not wasting legal resources as its best features; 6% said “it taught them a lesson,” 16% saw no benefit to the program, and a couple of respondents were unsure. When asked what they did not like about getting diversion, just over half said “nothing,” and the main complaints from the remainder were “too many community service hours” and the “waste of time” of the whole process. It is also interesting to note that two respondents who said they refused diversion

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<sup>25</sup> G.F. Murray & P.G. Erickson, ‘Cross-sectional vs. Longitudinal Research: An Empirical Comparison of Projected and Subsequent Criminality’, *Social Science Research* (16) 1987, 107-118.

<sup>26</sup> Erickson, Hathaway & Urquhart 2004, *supra* note 12.

did so in one instance, because of the burden of the community service hours on a fully employed person, and in the other, because he intended to fight the charge. Of those who were not offered diversion, three quarters said they would have preferred it to a conviction.

Thus, while these initial impressions were gained in the very early days of the diversion experiment in Toronto, it appears that in its immediate objective, to enable some cannabis possession offenders to avoid a criminal record, it was successful and was understood by its targets. Unfamiliarity with the existence of the option before coming to court was rectified for most by discussion with duty counsel or others at court. However, there is also some suggestion that another source of disparity has been introduced into the disposition of cannabis possession cases. As those charged become aware that some escape conviction on what may appear to be arbitrary grounds, greater disrespect for the law and courts may be manifested. For instance, some of the legal requirements imposed by the screening agent were that any possession offence by the driver of a car, or in a schoolyard, precluded diversion. This meant that some were turned down when caught in a parked car, or in a school area when it was not in session over the holidays, and this was perceived as unfair. Moreover, if these users do not accept the legitimacy of the prohibition in the first place, any punishment, even diversion, is unlikely to be welcomed.

TABLE 1:  
**Sample Characteristics of Cannabis Offenders at Three Time Periods in Toronto, Canada: 1974, 1981, 1998.**

Characteristic	1974 (N = 95) %	1981 (N = 48) %	1998 (N = 74) %
<i>Personal</i>			
Male	90	88	87
Age 21 or less	65	65	47
Position			
In school	17	29	22
Employed	72	50	59
Unemployed	12	21	19
Live with parents	43	58	43
<i>Cannabis Use</i>			
2+ times per week	73	77	73
<i>Legal</i>			
Charge of possession of one form of cannabis only	84	94	81
Amount of cannabis $\leq$ 14 g	74	75	86
Legal representation			
None	41	65	49

Own lawyer	32	21	47
Duty counsel	27	15	4
<i>Administrative Practices</i>			
Taken to police station	71	71	39
Not fingerprinted	38	92	51
Times to court			
Once only	48	81	23
Twice	32	15	20
Three or more	20	4	57
<i>Outcome</i>			
Absolute discharge	42	58	Other outcome or none yet
Conditional discharge	34	34	
Fine	24	8	
Diversion	N/A	N/A	

## V The 2000's

When cannabis criminalisation was in its early stages in 1970, an estimated 3.5% of the Canadian population reported having ever used cannabis and 1% reported past-year use.<sup>27</sup> These numbers have increased steadily over the past four decades, in spite of ongoing cannabis criminalisation, and are currently at an all time high.<sup>28</sup> In 2004, almost half of all Canadians (44.5% of Canadians 15 years and older) reported having tried cannabis in their lifetime, and 14.1% reported past year use.<sup>29</sup>

Cannabis charges have also increased in terms of the proportion relative to other drug offences. Approximately 77% of all drug offences are cannabis-related and of those 70% were for possession. Unfortunately, there are no available data from this most recent decade outlining the characteristics of this group and detailed sentencing statistics are not publicly available. In many ways, it has seemed that users as well as the government have learned to “live with prohibition”.<sup>30</sup>

Given that the earlier studies were consistent in showing that even those prosecuted for cannabis possession had a very inaccurate understanding of the law<sup>31</sup> it is doubtful that more current offenders are any better informed.

<sup>27</sup> Canada, 2002a. *Report of the Senate Special Committee on Illegal Drugs: Cannabis*. Ottawa, Canada: Senate Special Committee on Illegal Drugs.

<sup>28</sup> G. Thomas, J. Flight, K. Richard, & S. Racine, *Towards a policy relevant typology of cannabis use for Canada: Analysis drawn from the 2004 Canadian Addiction Survey*, Ottawa ON: Canadian Centre on Substance Abuse 2006.

<sup>29</sup> D. Patton & E. Adlaf, ‘Cannabis Use and Problems’, in: E. Adlaf, P. Begin & E. Sawka (eds.) *Canadian Addiction Survey, Detailed Report*. Ottawa: CCSA 2005.

<sup>30</sup> P.G. Erickson, ‘Living with Prohibition: Regular Cannabis Users, Legal Sanctions and Informal Controls’, *International Journal of the Addictions* 24(3)1989, 175-188.

<sup>31</sup> J. Erickson 1980, *supra* note 5; Murray & Erickson 1983 *supra* note 5.

Indeed, in our most recent interview study with long-term adult cannabis users<sup>32</sup> we found that most users did not even appreciate that possession of small amounts of their drug of choice was still illegal. They also felt somewhat “immune” to detection. Many questioned whether they would actually be charged and have to go to court, if caught with cannabis. Since a fundamental precept of deterrence is that would-be law breakers are aware of the risks of punishment, this is further evidence that the prohibition is ineffective in the broader population sense.

In the future, Canadian cannabis criminals are likely to face more serious impacts of criminalisation if the federal government’s proposed changes to legislation governing the pardon system are passed into law. These will be described in the final section with our conclusions and proposals for future directions in drug policy reform.

## Conclusion

While there are obvious gaps in research in terms of long term follow-up studies of the effects of criminalisation, and in current comparative studies of how cannabis criminals are being processed across Canada, some conclusions can be drawn from this unique series of studies in Toronto, Ontario. It should be emphasized that the adverse individual consequences of criminalisation are likely minimized in this location, due to the relatively lenient sentencing and the greater probability of successful secrecy in a large urban area with anonymous courtrooms.

- 1) The criminal justice system continually adapts while those arrested, and the offence behaviour, remain fundamentally unchanged.
- 2) The short term costs post-conviction are predominantly associated with the fact of arrest and criminal justice system response, and not mitigated by non-custodial sentences such as discharges and fines.
- 3) The withholding of a criminal record (diversion) cannot reduce the costs of official criminalisation, in the period from arrest to court.
- 4) The threat and actuality of criminal sanction are not effective deterrents.
- 5) Knowledge of the law is imperfect both before and after court visits and is therefore another source of confusion and ultimate disrespect.
- 6) Considerable disparity exists in police and court response to cannabis offenders over time, and also between different locales.

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<sup>32</sup> A.D. Hathaway, E. Hyshka, P.G. Erickson, M. Asbridge, S. Brochu, M-M. Cousineau, C. Duff & D. Marsh, ‘Whither RDS? An Investigation of Respondent Driven Sampling as a Method of Recruiting Mainstream Marijuana Users’, *Harm Reduction Journal* 7 2010, 15-26.

There are serious limitations to reform efforts directed only at penalty modification.

Moreover, if proposed changes to the pardon system are passed into law, harms associated with criminalisation for minor cannabis possession will likely be augmented. Bill C-23b—currently before Parliament—seeks to amend the Criminal Records Act to require that individuals convicted of a summary criminal offence be ineligible to receive a criminal pardon for five years (rather than the current three years) after their sentence is complete, and individuals convicted of an indictable offence would be ineligible to receive a criminal pardon for ten years (up from the current five years) after sentence completion. Additionally, Bill C-23b would amend the Act to replace the term criminal ‘pardon’ with criminal ‘record suspension’ implying that the state is not necessarily forgiving or reversing the offender’s criminal conduct.<sup>33</sup>

With regards to the typical cannabis possession offender, the proposed legislative changes would mean an increased wait after their sentence (probation, fine, etc.) completion to be eligible to have their offense kept separate from their official criminal record. Any subsequent criminal offences within that 5-year window (cannabis possession included) would continue to preclude the possibility of a record suspension. Thus individuals whose ability to work or travel is determined by the presence and retrievability of a criminal conviction on their permanent record would face at least two additional years of economic and social hardship.

Canada’s proposed changes to its pardon system, its high rates of cannabis use and evidence of individual harm associated with ongoing criminalisation for cannabis possession, call into question the effectiveness of current cannabis laws and imply the urgent need for a measured public policy response to cannabis use that weighs its relative social and individual harms. Canadian legislators seriously interested in lowering the health, social and economic costs of cannabis use in Canada might consider revisiting the idea that criminal sanctions are an ineffective means for achieving this goal, and that their associated harms, rather than effectively deterring cannabis users, may be ineffective and disproportionate to the offence of cannabis possession. However this argument has been debated since the days of the Le Dain Commission (1972) and Canada seems no closer to resolving this public policy paradox.

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<sup>33</sup> Canada (2010). Bill C-23B: *An act to amend the Criminal Records Act and to make consequential amendments to other Acts*. Ottawa: Parliament of Canada.

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