

## Where are We Going with Drug Policy and What Should We Do About It?

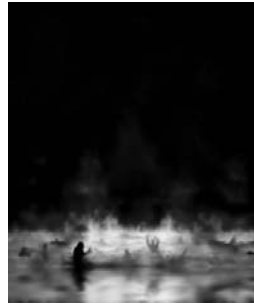
---

Notes for an address to the  
John Howard Society of Canada

Ottawa, November 22, 2007

Eugene Oscapella B.A., LL.B., LL.M.  
Barrister and Solicitor  
Canadian Foundation for Drug Policy  
Department of Criminology, University of Ottawa  
eugene@oscapella.ca

1



2

## Bill C-26 – November 20, 2007

---

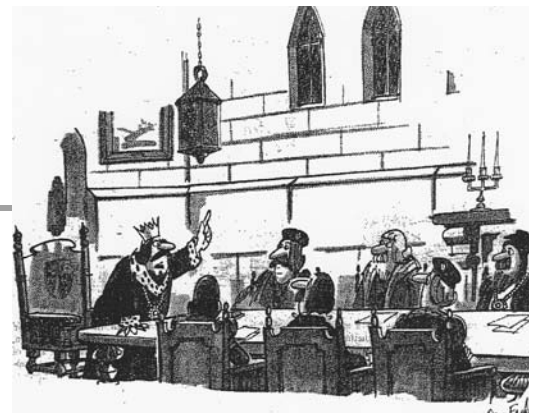
An Act to amend the *Controlled Drugs and Substances Act* and to make consequential amendments to other Acts

“This enactment amends the *Controlled Drugs and Substances Act* to provide for minimum penalties for serious drug offences, to increase the maximum penalty for cannabis (marihuana) production, to reschedule certain substances from Schedule III to that Act to Schedule I, and to make consequential amendments to other Acts.”

3

## Bill C-26: The Humpty Dumpty Approach to Drugs

---



“Gentlemen, the fact that all my horses and all my men couldn't put Humpty together again simply proves to me that I must have more horses and more men.”

Figure 1. Drawing by Dana Fradon; © 1978 The New Yorker Magazine, Inc. Reprinted by permission.

4

## Vacuous Rhetoric

---

“Vacuous” – not intelligent, meaningless

*Oxford Dictionary of Canadian English*

“We've made it very clear that those individuals who are in the business of exploiting other people through organized crime and other aggravating factors -- through this bill, we want to get serious with those individuals and send the right message to them . . . you will be doing jail time,” he said. “We want to put organized crime out of business in this country.”

Hon. Rob Nicholson, Minister of Justice and Attorney General of Canada, November 20, 2007

5

## Bill C-26

---

Major features

- one-year mandatory prison sentence for dealing drugs such as marijuana when carried out for organized crime purposes, or when a weapon or violence is involved;
- two-year mandatory prison sentence for dealing drugs such as cocaine, heroin or methamphetamines to youth, or for dealing those drugs near a school or an area normally frequented by youth;
- two-year mandatory prison sentence will be imposed for the offence of running a large marijuana grow operation of at least 500 plants;
- maximum penalty for cannabis production increases from 7 to 14 years
- Tougher penalties for trafficking GHB and flunitrazepam (most commonly known as date-rape drugs).

6

## Bill C-26

### Some cannabis amendments

- Production of 1 to 200 plants for the purpose of trafficking – minimum six months
- Production of oil or resin for the purpose of trafficking – minimum 1 year
- Importing cannabis for the purpose of trafficking
- *(Likelihood of overcharging with “for the purpose of” to scare individuals into pleading to lesser offences)*

7

## “Aggravating Factors”

- In some cases, aggravating factors will result in mandatory minimums where there would otherwise be no minimum (possession of cannabis for purpose of trafficking (3 kg. or more)
- In cases where there already is a minimum penalty, the minimum will be increased (production of methamphetamine (minimum 2 years) increases to minimum 3 years if “health and safety factors”

8

## Bill C-26

### Aggravating Factors

- Aggravating Factors List A
- include offences committed:
  - ▶ for the benefit of organized crime;
  - ▶ involving use or threat of violence;
  - ▶ involved use or threat of use of weapons;
  - ▶ by someone who was previously convicted (in the past 10 years) of a serious drug offence involving a Schedule I or II substance.

9

## Bill C-26

### Aggravating Factors

- Aggravating Factors List B
- include offences committed:
  - ▶ in a prison;
  - ▶ in or near a school, in or near an area normally frequented by youth or in the presence of youth;
  - ▶ in concert with a youth
  - ▶ in relation to a youth (e.g. selling to a youth)

10

## Bill C-26

### Aggravating Factors

- Health and Safety Factors
  - ▶ the accused used real property that belongs to a third party to commit the offence;
  - ▶ the production constituted a potential security, health or safety hazard to children who were in the location where the offence was committed or in the immediate area;
  - ▶ the production constituted a potential public safety hazard in a residential area;
  - ▶ the accused placed or set a trap.

11

## Bill C-26 – Drug Treatment Court

(4) With the consent of the prosecutor, a court sentencing a person found guilty of an offence . . . may delay sentencing to enable the offender to participate in a drug treatment court program . . . if none of the factors described in clauses 5(3)(a)(i)(A) to (C) or in subparagraph 5(3)(a)(ii) [essentially, many of the “aggravating factors”] have been proven in relation to the offence. . . .

(5) If the offender successfully completes the drug treatment court program, the court is not required to impose the minimum punishment for the offence for which the person was convicted.

12

## Mandatory minimums

---

- Give enormous power to police and prosecutors
- Clog prisons
- Tie the hands of the judges hearing the cases and who are in the best position to understand the circumstances of the case
- Are likely to increase incarceration rates of low-level dealers (often dependent users)
  - ▶ Waste of resources
  - ▶ Inhuman prison conditions, including spread of disease
  - ▶ Failure to address underlying causes of harmful use

13

## Are mandatory minimums constitutional?

---

- *R. v. Smith* (Supreme Court of Canada) 1987
  - ▶ Mandatory minimum of seven years for importing narcotics was inconsistent with section 12 of the *Charter*
    - Section 12 – right not to be subjected to any cruel and unusual treatment or punishment

14

## But . . .

---

- “The test for review under section 12 of the *Charter* is one of gross disproportionality because section 12 is aimed at punishments more than merely excessive.”
  - ▶ Dickson C.J.C. and Lamer J.
- Will the mandatory minimums in Bill C-26 be considered disproportionate

15

## Who will this law catch?

---

- The stupid
- The dependent drug users who are selling to feed the expensive (because of Prohibition) habits
- The young (who sell to the young)
- Those in urban areas, near schools and places frequented by youth
- The “unintended”

16

## The Unintended??

---

- Production of one plant of cannabis for the purpose of trafficking
  - ▶ “Trafficking”
    - (a) to sell, administer, **give**, transfer, transport, send or **deliver** the substance,
    - (b) to sell an authorization to obtain the substance, or
    - (c) to **offer** to do anything mentioned in paragraph (a) or (b),

17

## Why are we doing this?

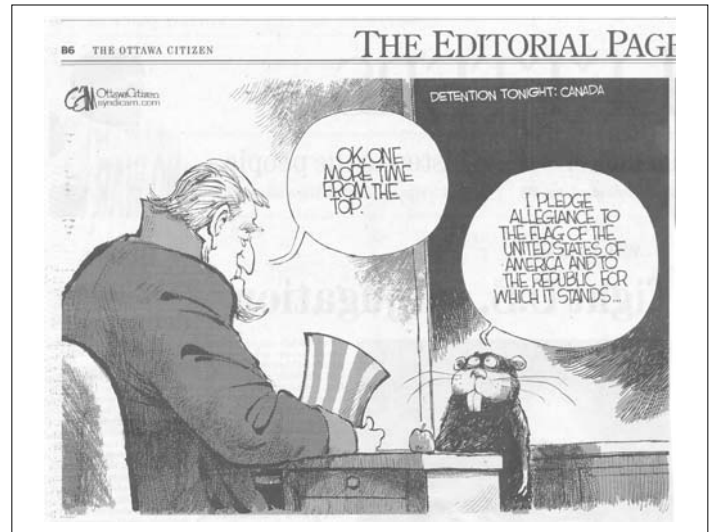
---

- Misplaced sense of morality?
- Religion?
- Authoritarian instincts
- Profit, financial and political
- To make our neighbours happy

18



19



20

### Who will Benefit?

- Criminal organizations
  - ▶ Fear of tougher sentences may drive small, non-violent, producers out of the market, handing the market to larger organizations
  - ▶ Even if law enforcement could create a shortage of a drug, this drives up the value of the remaining supplies (the "OPEC" effect)
- Others who traditionally benefit from Prohibition
  - ▶ Police, criminal justice system workers, defence and prosecution lawyers, the media, politicians, insurgents and terrorists globally

21

### Health of Inmates

- Inmates have high rates of injection drug use prior to and during incarceration. They are:
  - ▶ more than twenty times more likely to have been infected with Hepatitis C;
  - ▶ more than ten times more likely to have been infected with HIV; and
  - ▶ much more likely to be infected with Tuberculosis.

– CSC press release, April 7, 2004: [http://www.csc-scc.gc.ca/text/releases/04-04-07\\_e.shtml](http://www.csc-scc.gc.ca/text/releases/04-04-07_e.shtml)

22

### Prisons (cont'd)

- (iv) prison authorities have restricted attempts to educate prisoners about safe drug use for fear of being seen as condoning an illegal activity.
- 
- (v) drug testing programs instituted in Canadian prisons may persuade prisoners to switch from drugs that can be detected long after use (like marijuana) to drugs that can be detected only up to a few days after use (like heroin and cocaine). This likely means that drug users will shift from smoking to injecting. With little or no access to clean syringes, this greatly increases the risk of HIV infection.

23

### Relationships of deterrence and law enforcement to drug-related harms among drug injectors in U.S.A. metropolitan areas

Legal repressiveness measures (based on US data):

1. arrests for possession or sale of heroin or cocaine (1994-97),
2. police employees per capita,
3. "corrections" expenditures per capita (1997).

Friedman, S.R. et al, "Relationships of deterrence and law enforcement to drug-related harms among drug injectors in U.S.A. metropolitan areas," (1995) (publication forthcoming)

24

The main finding of this paper is that higher rates of three measures of legal repressiveness are associated with higher HIV prevalence among injectors. This may be because fear of arrest and/or punishment leads drug injectors to avoid using syringe exchanges, or to inject hurriedly or to inject in shooting galleries or other multiperson injection settings to escape detection. Numerous studies have found that hurried injection and injection in shooting galleries and similar locations, as well as injecting while incarcerated, are associated with riskier injection practices. The comparatively large magnitude of the association between police employees per capita and HIV prevalence suggests that the total size of police departments may be an important factor in heightening these risks. In addition, the stigmatization side of legal repressiveness may create, among drug users, lowered self-concepts and other psychological or social conditions conducive of greater risk; and may lead to public opinion that makes it more difficult to set up, fund, or find locations for syringe exchanges and drug treatment facilities.

25

**Conclusions:** These findings suggest that legal repressiveness may have little deterrent effect on drug injection and may have a high cost in terms of HIV and perhaps other diseases among injectors and their partners--and thus that alternative methods of maintaining social order should be investigated.

Friedman, S.R. et al, "Relationships of deterrence and law enforcement to drug-related harms among drug injectors in U.S.A. metropolitan areas," (2005) (publication forthcoming)

26

## **Drug Addiction as a Moral Failing**

---

It must be a vivid image to us that people who use drugs are the low-hanging fruit when it comes to filling police arrest quotas in every corner of the world. Massive abuses of the rights of people who use drugs are the collateral damage of senseless and counterproductive wars on drugs. Their lives are destroyed when societies insist on treating drug addiction as a moral failing that merits criminal punishment, rather than as a health challenge that merits medical treatment.

Joanne Csete, Executive Director, Canadian HIV/AIDS Legal Network,  
Address to a panel discussion at the United Nations 2006 High-Level Meeting on  
AIDS, New York, May 31, 2006

27

## **What Should We Do About It?**

---

- Challenge the rhetoric
  - ▶ Cost
  - ▶ Corruption
  - ▶ Damage to society
    - Users, their communities, society in general
  - ▶ Benefits of current system for precisely the wrong people
    - Criminal organizations, insurgent and terrorist groups
  - ▶ A century of prohibition has taken us to our current state; why do we want more of the same (Humpty Dumpty)
- Don't let the police and politicians get away with rhetoric
- Personalize the issue
- Discuss alternatives:
  - ▶ Not Prohibition (more of the same)
  - ▶ Not commercialization, unless appropriately regulated
  - ▶ Public health models

28