

**Bill C-45, An Act respecting cannabis and to amend the Controlled
Drugs and Substances Act, the and other Acts**

SUBMISSIONS

THE CRIMINAL LAWYERS' ASSOCIATION

Social Affairs, Science and Technology (SOCI)

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I. Preface

The Criminal Lawyers' Association is a non-profit organization that was founded on November 1, 1971. The Association is comprised of over 1000 criminal defence lawyers, many of whom practice in the Province of Ontario, but some of whom are from across Canada. The objects of the Association are to educate, promote, and represent the membership on issues relating to criminal and constitutional law.

The Association has routinely been consulted and invited by various Parliamentary Committees to share its views on proposed legislation pertaining to issues in criminal and constitutional law. Similarly, the Association is often consulted by the Government of Ontario, and in particular the Attorney General of Ontario, on matters concerning provincial legislation, court management, the Ontario Legal Aid Plan, and various other concerns that involve the administration of criminal justice in Ontario.

The Association has been granted standing to participate in many significant criminal appellate cases as well as other judicial proceedings. For example, the Association was granted standing in, and participated throughout, the Commission on Proceedings Involving Guy Paul Morin (the "Kaufman Inquiry"). The Association has intervened in many appeals heard by the Court of Appeal for Ontario and by the Supreme Court of Canada.

The Criminal Lawyers' Association finds it to be both a privilege and a pleasure to be given the opportunity to appear before this Committee to express its views on this particular piece of legislation.

II. Introduction

The “War on Drugs” has been a complete and abject failure. The social and financial cost of drug criminalization outweighs any illusory benefit. There is no area where this is truer than the criminalization of cannabis.

Despite some indication that arrests and prosecution for cannabis offences have recently been on the decline, the decade long trend shows that arrests for possession of marijuana have increased. In 2014, approximately 50,000 people were arrested for simply possessing marijuana. Ultimately, about 24,500 of those people ended up in court.

Even with decreasing charging rates for cannabis offences, between October 2015 and April 2017, nearly 7,000 people aged 25 and under were charged with marijuana possession and more than 8,300 people older than 25 were charged, according to numbers from the Public Prosecution Service of Canada.

Our already overburdened court dockets are not filled with privileged middle-class kids who were caught smoking a joint. These kids are cut slack. Police decline to charge and prosecutors often divert or withdraw these marijuana charges.

There are echoes of racism in Canada’s drug laws. As recognized by Bill Blair, the Parliamentary Secretary to the Minister of Justice, minorities and aboriginal communities are disproportionately charged, prosecuted, and incarcerated for marijuana offences.

Every year, scores of young men and women are killed over relatively small amounts of cannabis — killed because marijuana is illegal, making it the focus of a vastly profitable and violent black market.

Marijuana criminalization imposes unreasonable penalties on a relatively low-risk vice. In the real world, a drug record means limited employment opportunities, travel difficulties, immigration consequences, and many other devastating collateral consequences.

These costs, more often than not, are borne by the most vulnerable members of our communities.

In simple terms, it is the criminalization of marijuana, not marijuana itself, that is responsible for these harms.

The Criminal Lawyers’ Association (CLA) supports legislation that is fair, modest, and constitutional. The CLA support the legalization of marijuana. There are,

however, serious problems, including constitutional issues, with Bill C-45. Most of these problems however can be corrected with relatively minor amendments.

We urge the Senate to pass Bill C-45 with the appropriate amendments to ensure that it is as fair and constitutional as possible.

III. Specific Concerns and Recommendations

a. Legislation is over-broad

Bill C-45 is an unnecessary complex piece of legislation that leaves intact the criminalization of marijuana in too many circumstances.

Under Bill C-45 An adult who possesses over 30 grams of marijuana in public is a criminal. A youth who possesses more than five grams of marijuana is a criminal. An 18-year old who passes a joint to his 17-year old friend is a criminal. An adult who grows five marijuana plants is a criminal.

The continued distinction between legal and illicit marijuana and the continued criminalization of marijuana will result in continued court delays, and increased police enforcement and criminal justice costs that significantly undercut the rationales for legalization. Indeed, many police forces have claimed that because of cannabis legalization they will require millions of dollars in additional funding.

Additionally, given the historic enforcement of cannabis laws the continued criminalization will likely disproportionately impact young, racialized, and marginalized individuals.

The objectives of Bill C-45 would be better accomplished through regulation without continued criminalization.

Recommendation 1: The substance of Bill C-45 is overbroad. Amendments should be made to eliminate or reduce the number of situations where possession and distribution of cannabis is regulated through criminal prohibitions.

b. Asymmetrical criminalization of youth

The overbreadth of Bill C-45 is perhaps best illustrated in section 8(1)(c) which criminalized a young person who possess “cannabis of one or more classes of cannabis the total amount of which, as determined in accordance with Schedule 3, is equivalent to more than 5 g of dried cannabis.”

In other words, Bill C-45 deems it a criminal offense for a 17-year old to possess more than 5 grams of cannabis – an act that is perfectly legal for an 18-year old.

A century of failed drug policy has demonstrated that criminalization is a flawed and ineffective mechanism to discourage drug possession. Simply put there is no reason to believe that making it a criminal offence for youth to possess more than five grams of marijuana will deter youths from possessing marijuana.

Nowhere else in the *Criminal Code* is a youth criminalized for an act that is legal for an adult. This asymmetrical criminalization will only serve to further stigmatize youth through the imposition of criminal records.

This type continued criminalization is inconsistent with a rational and evidence-based criminal justice policy and will only serve to reduce some of the positive effects of Bill C-45. It is also likely violates the *Canadian Charter of Rights and Freedoms*.

Recommendation 2: Bill C-45 acts in a discriminatory manner and continues the over criminalization of youth. Amendments should be made to ensure that youth and adults are treated in a similar and non-discretionary manner by eliminating s. 8(1)(c), 9(1)(b)(i) and other provisions that criminalize young people and adults differently.

c. Flawed ticketing regime

Bill C-45 (section 51 and following) create a statutory mechanism for police officers to exercise their discretion to issue tickets in the place of criminal charges for certain offences. This is a well-meaning but problematic mechanism to remove marijuana offences from our criminal courts.

The ticketing option relies on discretionary police action. Currently, the choice whether to lay a criminal charge is also discretionary and the result is manifest in much of the discriminatory impacts of the current law. There is no reason to believe that the same problems won't be present in the new police choice of whether to charge or ticket an individual for possession of marijuana.

These discriminatory impacts of police discretion could be eliminated through full legalization and regulation.

To its credit Bill C-45 does attempt to reduce the prejudicial impact of ticketing through provisions designed to prevent the public disclosure of judicial records.

However, the ticketing regime operates in a discriminator manner and is not available to young persons. Nor is it available to an 18-year old who is charged with giving marijuana to a 17-year old friend.

Additionally, the ticketing regime's record disclosure provisions are dependent on the offender's ability to pay a fine. If the ticket fine remains unpaid 30 days after a conviction is registered there is no corresponding privacy rights in the judicial record. In other words, if you are poor and cannot pay the fine then you are further stigmatized through a public judicial record.

Given the research on the impacts of judicial, the inability of those under 18 and of the poor to purchase privacy in their judicial records, and the disproportional marijuana enforcement experienced by marginalized groups, it is likely that ticketing provisions in Bill C-45 will be found to violate the Charter.

Recommendation 3: The current criminalization of cannabis has failed to deter its consumption and distribution. Criminalization is also linked to discrimination, violence, stigma, and wasted resources. Section 51 should be amended to apply to all cannabis offences.

Recommendation 4: Section 51 as drafted acts in a discriminatory manner to exclude youth from the ticketing regime and should be amended to allow those under 18-years of age to take advantage of the ticketing regime.

Recommendation 5: Section 51 as drafted continues the stigmatizing impact of cannabis records by excluding marginalized and impoverished individuals who don't have the ability to pay a fine. Section 51 should be amended to mandate that court records must be sealed regardless of the ability to pay a fine.

d. Collateral immigration consequences

The penalties for offences in Bill C-45 will further ensure that more Canadian permanent residents and residents of Canada fall prey to unwarranted threats to their lawful status in Canada, unnecessary detention, and deportation. The impact of this will be seen in the number of appeals filed in the Immigration Appeal Division, overburdening the Immigration and Refugee Board which is already suffering from delays and backlogs. It will also be felt by the Canada Border Services Agency, which is tasked to oversee inadmissible persons in Canada and their removal, as well as Canadian permanent residents who have otherwise been contributing members of Canadian society. The latter being evident in the number of deportation appeals that are stayed and eventually allowed by the Immigration Appeal Division in the last five years.

Section 36(1) of the *Immigration and Refugee Protection Act* ("IRPA") considers individuals criminally inadmissible to Canada for "serious criminality" in one of two

ways: (1) if they are sentenced to a custodial sentence of six months or more, or (2) if they are convicted of an offence that carries a maximum sentence of 10 years or more, regardless of the actual sentence imposed.

Bill C-45 dramatically increases the maximum punishments for cannabis distributions offences. Currently the punishment for distribution of 3kg or less of marijuana is 5-years imprisonment. Bill C-45 increases the maximum punishment to 14-years. The failure to distinguish between various quantities in the face of the significant and costly consequences on Canada's immigration system and Canadian permanent residents is abhorrent.

Under Bill C-45, regardless of the sentence imposed, a Canadian permanent resident will face criminal inadmissibility and be subject to deportation upon conviction for many of the contained offences. Where the sentence imposed is less than six months in jail, a permanent resident retains the right to appeal the deportation on humanitarian and compassionate grounds.

In other words, an 18-year-old Canadian permanent resident convicted for passing a joint to his 17-year-old friend will receive a deportation order, even if they only receive a suspended sentence with no jail time. Since the offence of distribution pursuant to section 9(1) of the proposed bill carries a maximum term of imprisonment of 14 years, a conviction alone is sufficient to attract criminal inadmissibility followed by the issuance of a deportation order. Individuals are frequently detained for the purposes of attending an admissibility hearing and a subsequent detention review akin to a bail hearing before being released on conditions to await the final outcome of the appeal process.

The deportation appeal system impacts everyone in Canada. Individuals waiting for their appeals to be heard are typically on bail-like conditions and remain on these conditions for years. It is very rare for the Immigration Appeal Division to "allow" an appeal at a first hearing; normally, individuals will secure a stay of their deportation order for an additional number of years, anywhere from 1-5 years, before a final outcome of the appeal is decided. A failure to respect conditions pending the final outcome of an appeal has the consequence of cancelling the stay order and resuming the deportation process.

Individuals are typically afraid of travelling abroad during this time and suffer from significant delays to their eligibility to apply for citizenship. As a result, individuals on appeal are marginalized and live a life of uncertainty.

The impact of these horrible collateral consequences is disproportionate felt by the many Canadian permanent residents who suffer mental health issues, as canvassed in great detail in the discussion paper by the Schizophrenia Society of Ontario in 2010.

Moreover, the *Faster Removal of Foreign Criminals Act* amended provisions of IRPA limiting the right of appeal of deportation orders to individuals sentenced to less than 6 months. As a result, the appeals that are being launched are not from hardened criminals but rather individuals who committed what are considered to be “serious” offences, without the corresponding severity in the sentences imposed.

Based on these consequences, it is important to consider whether the sentence ranges proposed in this bill are rational and necessary. This is particularly significant where criminal courts are unlikely to impose sentences close to the maximum sentence range for many of the offences outlined in Bill C-45. The intended outcome of setting a sentencing range of 14 years is out of step with the significant consequences to Canadian permanent residents and Canadian society as a whole.

Recommendation 6: Given the disproportionate immigration consequences flowing from a sentence of 10-years or more, the maximum sentences in the bill should be limited to a period of incarceration under 10-years.

e. Lack of mechanisms to address past stigma

The Criminal Records Act was first enacted in 1970 to augment the discretionary Royal Prerogative of Mercy. The Act detailed the manner in which persons convicted of criminal offences could apply for forgiveness for past wrongdoings. With the enactment of the Canadian Human Rights Act in 1985, offences for which a person was pardoned could not be disseminated to an employer. Similar human rights legislation was introduced provincially.

It is in the public interest to have a robust system of pardons. It is in the interest of society to reintegrate people back into society after they have committed a criminal offence. The logic is that the (even partial) removal of the stigma of a conviction will aid in this reintegration. It is well documented that continued stigmatizing of offenders is ineffective in reducing reoffending.

A strong empirically based argument can be made that withholding pardons (or even ‘record suppressions’) contributes to crime since a pardon may make it easier for a person who once committed a criminal offence to become fully integrated into Canadian society.

It is also well documented that individuals with criminal records experience employment disadvantaged even though they are unlikely to reoffend. A 2003 study found that people who describe themselves as having criminal records are less able to get work than these same people who apply but do not mention anything about criminal records. This appears especially to be the case for racialized job applications

(the same applicants who have been disproportionately impacted by the criminalization of marijuana).

Those who have criminal records are, not surprisingly, also less likely to be able to obtain housing, cross international borders, and fully engage in educational opportunities.

Decades of criminological research have shown that pardons appear to be important for the full reintegration into society of those who have offended. Gaining employment and finding housing are each important to those seeking full reintegration into society after serving a sentence. Having a criminal record makes it harder to get a job and housing.

From the perspective of society as a whole – not just the offender applying for a pardon – the availability of pardons in a timely fashion is in the interest of public safety in that it is in society's interest to aid in the peaceful reintegration of those who have offended.

Bill C-45 does not offer any measures, such as automatic, expedited, or subsidized pardons, to individuals who were convicted of offences that Bill C-45 will make legal.

Nor does Bill C-45 contain any measures to amend the currently unconstitutional sections of the Criminal Records Act that retroactively increased pardon ineligibility periods.

Historically, section 4 of the Criminal Records Act provided for the availability for an individual to apply for a pardon after a waiting period of three years in the case of a summary conviction offence and five years in the case of an offence prosecuted by indictment.

In 2012 section 4 of the Criminal Records Act was amended to retroactively increase the pardon ineligibility period to five years in the case of a summary conviction offence and ten years in the case of an offence prosecuted by indictment.

These retroactive amendments were found to be unconstitutional and in violation of the *Canadian Charter of Rights and Freedoms* by superior courts in both Ontario and British Columbia. These courts declared the retrospective application of the 2012 amendments to be of no force or effect. However, the unconstitutional pardon provisions remain in force throughout the rest of Canada.

Currently, an 18-year old, first time offender, who is convicted of simple possession of marijuana the day before Bill C-45 comes into force will be required to wait at least five years before they are even eligible to apply for a record suspension.

Bill C-45 should amend the *Criminal Records Act* to remove the unconstitutional retrospective application of the increased ineligibility periods and restore the pre-amendment waiting period. A further reduction in waiting periods should be available for individuals convicted on marijuana offences that will be legal under Bill C-45.

Bill C-45 must remedy this situation.

Recommendation 7: Bill C-45 should amend the *Criminal Records Act* to remove the unconstitutional retrospective application of the increased ineligibility periods and restore the pre-amendment waiting period. A further reduction in waiting periods should be available for individuals convicted on marijuana offences that will be legal under Bill C-45.

Recommendation 8: Bill C-45 should be amended to allow for automatic and immediate record suspensions for those convicted of possession of marijuana for their personal consumption.

IV. Conclusions

Continued cannabis criminalization imposes unreasonable penalties on a relatively low-risk vice. In the real world, a drug record means limited employment opportunities, travel difficulties, immigration, and many other devastating collateral consequences.

These costs, more often than not, are borne by the most vulnerable members of our communities

Only full legalization, decriminalization, and regulation of marijuana will truly protect society and remove the unfairness, racism, and over-intrusion by state into an activity that - in the context of existing criminal laws - is relatively harmless.

The need for progressive and evidence-based drug legislation is so great that the CLA urges that Bill C-45 be amended as suggested and passed as soon as possible.

Make no mistake, Bill C-45 is flawed legislation but it is better than the status quo.

The CLA however strongly recommends that Bill C-45 be passed with the above recommendations that would increase the Bill C-45's utility and better guarantee its constitutional compliance.