Decriminalization of Marijuana

Although it is far from clear whether it will actually become law, Bill C-38 proposing the decriminalization of the possession of small amounts of marijuana and hashish is a significant law reform measure. Since the advent of the Charter, it is rare that decriminalization would by proposed by the government as opposed to the courts.

To be sure, there has been much marijuana litigation. The evolving fallout from exemptions for the medical use of marijuana and the delayed declaration of invalidity of the possession of marijuana offence in *R. v. Parker* (2000), 146 C.C.C. (3d) 193 (Ont. C.A.) have probably played a role in making decriminalization more palpable. Nevertheless, especially outside Ontario, the Charter does not appear to have driven the decriminalization debate.

Indeed, the Charter may stand in the way of decriminalization because the courts have not been receptive to wholesale Charter challenges to the non-medical use of marijuana law. Assuming that s. 7 of the Charter constitutionalizes the harm principle, the Ontario Court of Appeal in *R. v. Clay* (2000), 146 C.C.C. (3d) 276 held there was sufficient harm to justify the criminal prohibition. A majority of the British Columbia Court of Appeal reached the similar conclusion in *R. v. Malmo-Levine* (2000), 145 C.C.C. (3d) 225. The accused’s appeals in both cases are under reserve by the Supreme Court.

The Supreme Court may well uphold the possession offence under the Charter. Even if the court accepts that the harm principle is a principle of fundamental justice, its treatment of hate propaganda and pornography suggests that it may well defer to Parliament’s reasoned apprehension of harm. Such a judicial decision, however, should not resolve the policy debate about decriminalization. The fact that an offence may be consistent with the Charter does not mean that it represents effective or enlightened criminal justice policy.

Although the court’s adjournment on December 13, 2002 of the marijuana cases until government policy on decriminalization became clearer
has linked the Charter cases with the decriminalization debate, they should be kept separate.

The Attorney General of Canada has a legitimate interest in opposing the constitutionalization of the harm principle and, if unsuccessful, in advocating a restrained application of such a principle. At the same time, the Minister of Justice and the Cabinet of which he is a part can be praised for showing some leadership on the policy issue.

Legislative reform can avoid the blunt all-or-nothing nature of Charter litigation by keeping possession of even small amounts of marijuana illegal, but only punishable under the Contraventions Act.

The number of marijuana possession charges appears to be rising. In 1999, there were over 21,000 charges for possession of marijuana. It is a matter of political judgment whether this game is worth the candle or whether there are better ways to allocate scarce resources in the criminal justice system.

Some fear that the United States may react negatively to Canadian decriminalization. Leaving aside the fact that some states have decriminalized, the point of principle is that Canada must determine its own sovereign criminal justice policies. We should not allow our anxieties about keeping the border open drive our criminal justice policy.

With some notable exceptions, there are few fans in Canada of an American-style drug policy in Canada. Canadians are entitled to reject its heavy and costly reliance on imprisonment and its disproportionate effects on minorities. Both Senate and House of Commons committees that have recently examined the issue have recommended a more European-style harm reduction approach.

This is not to say that the proposed legislation could not be improved. Although there are provisions in the Contraventions Act designed to ensure that people are not stigmatized with a criminal record or conviction, the bill proposes nothing for the many Canadians with a possession record. The type of arbitrary police discretion that many defenders of the bill argue is a justification for decriminalization is also maintained for those found with between 15 and 30 grams of marijuana.

There has been much criticism about discounted fines for youth, but these actually follow the structure of other parts of the Contraventions Act. A more pressing issue is ensuring that a youth found with marijuana receives information about its adverse health effects. The parental notification required by the bill may have some positive effects, but it does not ensure that the youth will receive such information and there will be no pictures of diseased lungs on dime bags.

And this raises the question of the sale and cultivation of marijuana. The bill does not go as far as the Senate Committee’s recommendations for legalized access or the Le Dain commission’s recommendations that the growth of marijuana for personal use should also be decriminalized. It is not clear that the bill’s enhanced trafficking and cultivation penalties will reduce the role of organized crime in the supply of drugs. And the bill also does not address the issue of access for medical purposes even though the regulations enacted in response to R. v. Parker have been criticized by the Senate Committee and others as being overly restrictive.

Finally, it is not clear that the harms that marijuana may cause with respect to drivers and students are adequately addressed by the slightly enhanced fines available under the bill. The effects of decriminalization on our roads, schools and public health should be carefully monitored. At the same time, it is a sign of maturity and rationality when we accept that criminal punishment causes its own harms and is not the only way that society can control harm.

K.R.