SUBMISSIONS TO THE HOUSE OF COMMONS' STANDING COMMITTEE ON PUBLIC SAFETY AND NATIONAL SECURITY STUDYING BILL C-93

Presented by

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I. PREFACE:

The Campaign for Cannabis Amnesty (hereafter "the Campaign") is an independent, not-for-profit advocacy group focused on righting historical wrongs caused by decades of cannabis prohibition. It was founded in April 2018 in response to the absence of federal legislation addressing the stigma of previous convictions for offences that would no longer be illegal under the *Cannabis Act*. Since then, the Campaign has been calling on the government to enact legislation to delete criminal records relating to the simple possession of cannabis. We believe that no Canadian should be burdened with a criminal record for minor, non-violent acts that are no longer crimes.

II. INTRODUCTION:

For almost 95 years, the criminalization of simple cannabis possession has resulted in the imposition of unreasonably harsh penalties on hundreds of thousands of Canadians. It is estimated that as many as 500,000 Canadians currently have a criminal record for simple cannabis possession.[1] These records interfere with their ability to travel, find meaningful employment, and volunteer in their communities. To make matters worse, decades of unequal enforcement of cannabis possession offences has disproportionately affected racialized, low-income and Indigenous Canadians.

The Campaign supports the implementation of measures to remove the stigma of past cannabis convictions that disproportionately impact marginalized people. As it is currently drafted, however, Bill C-93, does not go far enough. We offer the following observations and modest recommendations on this proposed legislation.

III. THE HISTORY OF CANNABIS PROSECUTIONS IN CANADA

1. Disproportionate Enforcement: A Historical Injustice

"One of the great injustices in this country is the disparity and the disproportionality of the enforcement of these laws and the impact it has on minority communities, Aboriginal communities and those in our most vulnerable neighbourhoods."

- The Honourable Bill Blair, Former Toronto Chief of Police

The story of the enforcement of cannabis possession offences in Canada is one of historical injustice and inequality. Canadians of different backgrounds consume or possess cannabis at comparable rates. Indeed, Canada has one of the highest rates of cannabis use (and therefore simple possession) in the world. In 2017, 46.6% -- almost half -- of all Canadians admitted to using cannabis at some point their lifetime.[2]

[1] Erickson PG, Fischer B (1995). Canadian cannabis policy: The impact of criminalization, the current reality and future policy options. Available at: https://sencanada.ca/content/sen/committee/371/ille/presentation/erickson1-e.htm.
[2] Health Canada, Controlled Substances and Tobacco Directorate (2017). Canadian Alcohol and Drug Use Monitoring Survey (CADUMS) – detailed tables of survey data from 2017. Ottawa, Ontario: Health Canada. Available: https://www.canada.ca/en/health-canada/services/canadian-tobacco-alcohol-drugs-survey/2017-summary/2017-detailed-tables.html#t13

Despite widespread consumption, a growing body of social science evidence shows that not all Canadians face the same consequences for their actions. Racial profiling and suspicion of specific groups on the basis of stereotypes mean that some Canadians are more likely to be closely scrutinized by law enforcement than others. Black, Indigenous and low-income Canadians are more likely to be stopped, searched, arrested, prosecuted and incarcerated for cannabis possession offences than White Canadians.[3] This phenomenon exists throughout our country:

- In Vancouver, **Indigenous people** are nearly **7 times more likely** than White people to be arrested for possession.
- In Regina, **Indigenous people** were **9 times more likely** to get arrested for cannabis possession than White people.
- In Halifax, **Black people** are **4 times more likely** to be arrested than White people.
- In Toronto, **Black people** are **3 times more likely** to be arrested for simple possession of marijuana than White Torontonians despite equal rates of use.

The impact of disproportionate enforcement is neither marginal nor minimal. Under the *Controlled Drugs and Substances Act*, the implementation of cannabis laws was a central activity of Canada's law enforcement agencies. Under that legislation, around 60,000 Canadians were arrested annually for simple possession of cannabis,[4] and in the past 15 years, Canadian police agencies have reported more than 800,000 cannabis possession "incidents" to Statistics Canada.[5] Given these numbers, it would be hard to find a family in Canada that has not been impacted by the enforcement of cannabis possession laws. But decades of unequal enforcement have meant that Black and Indigenous families have been disproportionately burdened by the stigma and consequences of cannabis convictions.

This phenomenon represents a historical injustice and a systemic *Charter* violation that cries out for redress. The equality provision of the *Charter* was intended to ensure a measure of substantive and not merely formal equality. The Supreme Court of Canada has consistently held that a discriminatory purpose or intention is not a necessary condition to finding a violation of the equality provision of the *Charter*. It is sufficient if the effect of the legislation, while neutral on its face, is to deny someone the equal protection or benefit of the law.[6] While historical cannabis possession laws were not discriminatory on their face, they produced discriminatory effects in their enforcement. They perpetuate disadvantage on the basis of race, ethnic origin and colour – all prohibited ground of discrimination under the *Charter*.

The consequences of a conviction for cannabis possession are wide reaching, can be unexpected and last a lifetime. Keeping a person's criminal record for something that is no longer a crime serves no purpose other than to impose unnecessary hardship on that person, which prevents them from realizing their full potential and becoming contributing members of society. A conviction for cannabis

[3] For a more comprehensive analysis of this phenomenon, see, Owusu-Bempah, Akwasi & Alex Luscombe (May 4, 2018), *Cannabis Legalization and the Need for Amnesty*, Available at: https://www.cannabisamnesty.ca/cannabis_legalization_and_the_need_for_amnesty.
[4] CAMH, *Cannabis Policy Framework*, October 2014, Accessed May 1, 2019, citing Statistics Canada (2013). Police-reported crime for selected offences, Canada, 2011 and 2012.
[5] Boyce, J., Cotter, A., & Perreault, S. (2014). Police-reported crime statistics in Canada, 2013. Juristat, Statistics Canada Catalogue No. 85-002-X
[6] *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624, at paras. 61-62.

possession can limit employment prospects and volunteer opportunities. The continued existence of the criminal record imposes a *de facto* life sentence of fear, shame and uncertainty long after an individual's so-called "debt to society" has been paid.

The unequal and disproportionate enforcement of cannabis-related offences on this scale and of this magnitude encourages distrust and resentment of law enforcement, cynicism towards the administration of justice and an understandable sentiment that the promise of substantive equality before the law is a myth. An appropriately powerful response to this shameful history is, therefore, also necessary to maintain the integrity of the criminal justice system.

IV. OUTLINE OF POSITION

The Campaign applauds the government's willingness to recognize the disproportionate stigma and burden that results from the retention of conviction records for historical simple cannabis possession offences.

Given the serious consequences of a cannabis possession conviction on the lives of Canadians and the legacy of inequality through disproportionate and discriminatory enforcement, the federal government must respond to this historical injustice with a measure sufficiently powerful to denounce a shameful history. People with simple possession records should be put in the same position as those millions of Canadians who did the exact same thing, but—because of factors that have no bearing on their degree of responsibility, such as race, income, family connections and neighbourhood of residence—were never arrested or convicted. As a result, Bill C-93 should be amended to provide free, automatic, simple and permanent record deletions of simple cannabis possession records.

1. Expungements are permanent but record suspensions are not

Record suspensions do not result in the permanent deletion of an individual's criminal record; they merely set it aside. Without expungement, individuals convicted of possession remain vulnerable to having their convictions reinstated or inadvertently disclosed. Our government has recognized that removing the stigma of simple possession criminal records "enhances public safety and opportunities for all Canadians."[7] Given this recognition, the government should eliminate, rather than merely suspend, the harms that stem from a previous cannabis conviction. No purpose is served by leaving the door open to future reinstatement.

Expungements, on the other hand, provide for the destruction or removal of the judicial records of convictions from federal repositories and systems. Once an expungement is ordered, the RCMP would be required to destroy any record of a conviction in its custody. The RCMP would also notify any federal department or agency that, to its knowledge, have records of the conviction and direct them to do the same.

[7] Government of Canada, *No-cost, expedited pardons for simple possession of cannabis*. News Release. Available at: https://www.canada.ca/en/public-safety-canada/news/2019/03/no-cost-expedited-pardons-for-simple-possession-of-cannabis.html

While records in relation to criminal offences do not exist in a single national database, records of conviction do. The Canadian Police Information Centre ("CPIC") is a national database maintained by the RCMP. If someone is arrested, charged and convicted of a crime, this record exists in the CPIC database. CPIC is the database that is accessible to foreign authorities such as the US Customs and Border Patrol and the database that is accessed by employers when the perform a background check of a job applicant. Therefore, automatically removing all the simple cannabis possession offences from CPIC would go a long way to alleviate the impact of a conviction on the lives of Canadians.

2. The automatic deletion of CPIC entries is cost-effective and will benefit more people than an application process.

The automatic deletion of CPIC entries in relation to simple possession convictions is also a cost-effective way to provide immediate relief to Canadians. An application process involving the collection of records from provincial, territorial, and local police databases involves delays and hidden costs. Even if Bill C-93 eliminates the $631 application fee ordinarily required for record suspensions applications, applicants may still need to pay for fingerprinting, court Informations, and Local Police Records Checks which could add up to hundreds of dollars.

The review and processing of these applications will place further strain on an already over-burdened and backlogged record suspension process.

Moreover, an application process, even a simple one, that puts the burden on applicants to find historical government documents will discourage engagement. Months following the enactment of Bill C-66, the *Expungement of Historically Unjust Convictions Act*, and despite efforts to promote the program, the government only received seven applications.[8] Given the archaic and decentralized criminal record-keeping practices in Canada, applications requiring proof of historical events will invariably create an accessibility barriers for those who need pardons the most—the marginalized and vulnerable member of our community who have been disproportionately burdened by the enforcement of cannabis possession laws.

> **Recommendation #1: Bill C-93 should provide for the permanent destruction of the judicial records of simple cannabis possession convictions from federal repositories and systems by providing for the automatic deletion of all conviction entries for cannabis simple possession in the CPIC database.**

3. Bill C-93 creates an inconsistency regarding "good behaviour"

One of the positive aspects of Bill C-93 is that fact that once an applicant has demonstrated to an employee of the Parole Board that his or her only conviction is for simple possession of cannabis, a record suspension must be granted. Under Bill C-93, there is no requirement to demonstrate good conduct. This is required under s. 4.1(1) of the *Criminal Records Act* for all other applications. These requirements are usually the most onerous and costly aspect of the application process and where applicants most often require the assistance of a legal professional. Their elimination will facilitate engagement with this regime.

[8] Harris, Kathleen, "Law permitting destruction of LGBT criminal records has seen low uptake so far." CBC News, October 28, 2018. Available at: https://www.cbc.ca/news/politics/expungement-lgbt-criminal-record-1.4872703

However, because s. 7(b) of the *Criminal Records Act* will continue to apply to expedited simple cannabis possession convictions, an employee of the Board may revoke the record suspension of a person who received one under Bill C-93 if they are found to be, "no longer of good conduct." This means that a record suspension may be revoked for a ground that was not relevant when it was granted. "Of good conduct" is also a vague concept that does not require an individual to have been convicted of a subsequent offence. Keeping open the possibility of record suspension revocation on the basis of a vague concept frustrates the objective of finality that Bill C-93 seeks to achieve.

> **Recommendation #2: Bill C-93 should be amended to exempt cannabis possession pardons from the application of s. 7(b) of the *Criminal Records Act* which allows for the revocation of record suspensions on the basis that a recipient of a records suspension is "no longer of good conduct."**

4. Record suspensions do not assist Canadians when crossing the border to the United States

Record suspensions do not assist Canadians seeking to cross the border to the United States. The United States currently does not recognize any foreign pardon regardless, of their effect on the conviction. A Canadian with a record for possession of cannabis will not be able to enter the United States simply because they have received a pardon. In fact, neither foreign pardons nor foreign expungements are effective in preventing inadmissibility to the United States on their own.[9]

The relationship between expungements and border crossings into the United States was recently examined by this committee when it studied Bill C-66. On December 11, 2017, Kathy Thompson, Assistant Deputy Minister, Community Safety and Countering Crime Branch, Department of Public Safety and Emergency Preparedness testified that when the RCMP makes changes and deletes documents following an expungement decision of the Parole Board of Canada, this information would no longer appear in the database that is shared with foreign authorities. Therefore, expungements ensure that the database that the Canadian government shares with foreign countries no longer contains information relating to a simple cannabis possession offence.[10]

Moreover, those who receive an expungement could carry with them their Parole Board of Canada expungement decision as proof for United States border authorities. This protocol can mirror the protocol suggested for expungements under Bill C-66. During testimony before this Committee, Talal Dakalbab, CEO of the Parole Board of Canada testified that those who receive an expungement pursuant to Bill C-66 could carry with them their Parole Board of Canada expungement decision. They testified, "This document shows that their offence has been expunged or that they have obtained a pardon or a record suspension. This is usually how this information can be removed from the systems of other country."[11] A record suspension, therefore, is neither more effective nor preferable to facilitate crossing into the United States.

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[9] See Immigration Board of Appeals decision *In the Matter of Christopher John Dillingham,* Board of Immigration Appeals decision, August 20, 1997, 21 I. & N. Dec. 1001 (BIA 1997).
[10] 3:45 pm., Evidence of meeting #91 for Public Safety and National Security in the 42nd Parliament, 1st Session. At https://openparliament.ca/committees/public-safety/42-1/91/?page=2
[11] *Ibid.*

V. CONCLUSION:

The Campaign strongly recommends that Bill C-93 is amended as suggested and passed as soon as possible. The recommendations we propose would increase the bill's utility, assist in achieving its stated goals and allow for implementation that would benefit as many people as possible.