Concurrent Session B:
Beyond Prohibition: Developing Public Health Based Models for Regulating Illegal Drugs

Moderator: Dr. Brian Emerson

Medical Consultant, Population and Wellness Division, B.C. Ministry of Health

While leniency undoubtedly has its own dangers, there is growing concern that a harsh enforcement approach has failed to end illegal drug use, said Dr. Brian Emerson, Medical Consultant with the Population Health and Wellness Division, British Columbia Ministry of Health.

Citing a recent book by historian Catherine Carstairs, he told participants that current approaches to enforcement have destabilized users' lives, harmed their health, and made drug use attractive to a small community of rebellious users.

Dr. Emerson said it is useful to remember that consumption of legal and illegal drugs can range from beneficial use, to problematic use, to dependency. "When one realizes that we're talking about a spectrum, it tends to put a lot of the issues into perspective," he said: Out of 47,000 substance-related deaths per year, 37,200 are due to tobacco. Out of $40 billion in annual spending related to substance abuse, illegal drugs only account for $8 billion. Between 1992 and 2002, tobacco's share of acute health care costs declined from 10.3 to 7.3 percent, largely due to public health approaches, while alcohol increased from 2.8 to 7.2 percent and illegal drugs increased from 0.1 to 1.6 percent.

Policy analysis suggests a continuum of approaches to illegal drug use, from prohibition based largely on ideology, to a philosophy of commercialization that sees illicit substances as products, to a public health approach that seeks to minimize harm and maximize benefits from a base of solid evidence. While prohibition has benefits as a tool for combatting impaired driving or tobacco sales to minors, Dr. Emerson said concerns about prohibition can be found in a growing body of literature that dates back to the 1973 LeDain Commission report.

The effects of prohibition include specific impacts on substances, individuals (both users and people who work in the criminal justice system), families, communities, and society as a whole. Substances become more concentrated, since smaller volumes are easier to transport and conceal, and more dangerous. Users face violence, stigmatization, and a cycle of imprisonment and poor relationships that leads them back to drugs and other criminal activities, while criminal justice workers are subject to violence, stress and anxiety, bribery, and corruption. Families are disrupted by the chaotic lifestyle associated with illicit drug use, while communities and society at large must deal with a mix of drug trade violence and crime, increased police surveillance, the creation of a black market of interest to organized crime and, more broadly, the military, environmental, and intercultural aspects of the international drug trade.

From a public health point of view, Dr. Emerson pointed out that 7.8 percent of adult AIDS patients and 17 percent of positive HIV tests among adults are linked to injection drug use. Four out of five injection drug users test positive for Hepatitis C, and overdoses account for half the illegal drug deaths each year.

The challenge, Dr. Emerson said, is to move beyond indiscriminate prohibition to a public health regulatory approach, while avoiding the problems created by the commercialization of alcohol and tobacco. Citing a mid-1880s author in British Columbia who considered whiskey a more serious concern than opium, he commented that "the key is to get the discussion going and try to figure out solutions together."

Eugene Oscapella
Department of Criminology, University of Ottawa
Canadian Foundation for Drug Policy

Eugene Oscapella, a lecturer in the University of Ottawa Department of Criminology and co-founder of the Canadian Foundation for Drug Policy, described drug policy as an area where "doing more of what has not worked, and is not working, will not work." But despite mounting evidence that the criminal law is an ineffective tool for dealing with this form of social behaviour, he said harm reduction advocates "have a huge selling job to do" with police and Parliamentarians.

A key concern is limited resources, Mr. Oscapella said. While foundation documents for Canada's Drug Strategy describe illicit drug use as primarily a health and social issue, a 2001 report by the Auditor General of Canada found that 95 percent of the federal budget for drug programming is spent on law enforcement and criminal justice. He warned against fostering "self-interested bureaucracies that might not be quite as powerful as tobacco or alcohol companies, but are still a powerful force" in shaping government approaches to substance abuse.

In shifting the focus of drug policies, he said governments must be careful not to exacerbate the health consequences of substance abuse through the use of adulterated drugs or (generally) drugs of increased potency, through more harmful ways of using drugs, or by educating dishonestly, neglecting the causes of problematic use, or stigmatizing users. Nor should governments or practitioners violate human rights, foster terrorist activities, or cause harm beyond Canada's borders.

This logic brings harm reduction proponents back to a 1982 federal policy statement that "the criminal law should be employed to deal only with that conduct for which other means of social control are inadequate or inappropriate." But contrary to that policy, Mr. Oscapella said criminal justice is the instrument of first resort in dealing with many drugs. One "externality" of this policy is that a kilogram of opium that sells for US$90 fetches US$290,000 on the retail market, while the assault on poppy production has devastated the subsistence economy in Afghanistan.

“These are not evil drug traffickers,” he said. “These are poor farmers, and growing poppies means the difference between feeding their kids and their kids starving to death.”

Mr. Oscapella said governments have a range of legal options for dealing with illegal drugs:

- Total criminal prohibition, a response that applies to relatively few substances in Canada;
- Criminal prohibition with medical access (cocaine, heroin, amphetamines);
- Decriminalization, in which a substance is prohibited but there is no criminal conviction for violating the law;
- Decriminalization with medical access, but punishment for non-medical uses;
- Various degrees of regulation;
- Total, unrestricted legalization.

He noted that society regulates different substances according to their properties and potential impacts. Virtually nothing is unrestricted—even coffee is subject to labelling requirements—but “impaired smoking is not generally a problem driving a car,” he said. “We need to tailor the regulation according to the class of drug we’re dealing with.” By applying prohibition across the board, the system deprives itself of a necessary level of subtlety.

Existing federal legislation already gives the Minister of Health and Cabinet “enormous leeway” to regulate specific substances as they see fit, Mr. Oscapella added, and there are a number of legitimate ways of working around the “essentially prohibitionist treaties” that exist at the international level. But criminalization is not needed to regulate drug use: laws banning distribution of noxious substances would cover the sale of adulterated drugs, licencing would control production and distribution, and methods are already in place to deal with problems like impaired driving or selling to minors.

Cynthia Callard
Executive Director, Physicians for a Smoke-Free Canada

Cynthia Callard, Executive Director of Physicians for a Smoke-Free Canada, noted the confused viewpoints of Canadians who believe marijuana should be legalized but tobacco should be banned. She traced the history of laws dealing with tobacco, suggesting that the real challenge in regulating substance abuse is to move beyond human and corporate behaviours motivated by profits from those substances.

Canada banned tobacco advertising in 1986, and subsequently raised taxes to inhibit sales, Ms. Callard said. But with each new government measure, manufacturers found ways to maintain their brand connection with audiences. “They didn’t change their business practices,” she said. “They adapted them to overcome the regulation.” Most recently, to counter publicity around a series of lawsuits in the late 1990s, the industry launched a series of public relations initiatives that included education programs aimed at youth. The up-front message is that smoking is an adult activity and illegal for youth, thereby “instantly turning it into a rite of passage,” according to independent studies. “They have deceptively used programs designed for one thing to achieve a market objective.”

It is commonly understood in tobacco control circles that cigarette companies are to lung cancer what the mosquito is to malaria. Ms. Callard said the parallel is more meaningful than it might seem. We would never blame an insect for acting as a disease vector and causing millions of deaths per year. But the reality is that a business corporation is a legal construct, set up for the sole purpose of making money, and cannot be expected to operate against its basic “genetic” programming.

“It’s their need to make money that causes them to undermine public health,” she said. “It’s the law that requires them to do this,” since public companies are legally obligated to maximize value to shareholders.

But Ms. Callard pointed out that corporations only manage about half of Canadian enterprise. The rest is carried out by public institutions, associations, and co-ops, “and it’s from those lessons that we can find other ways of managing tobacco.” Citing the “power walls” behind convenience store counters, where several Canadian jurisdictions will soon be prohibiting massive cigarette displays, she pointed out that the same space could be used to deliver positive messages that contribute to public health goals.

Expropriating Canadian tobacco companies would cost about $15 billion, based on market prices established in 2000, before a number of companies went into bankruptcy. But expropriation at any price has not been subjected to cost-benefit analysis, Ms. Callard said, because a regulation mindset has prevented decision-makers from considering public ownership as a means of managing the industry. This has led to major differences in the way tobacco and marijuana are regulated:

- Both products consist of leaves that are predominantly rolled and smoked.
- Cigarettes are sold in regulated packages, with health warnings and tax stamps; marijuana is an unmarked product.
- Many people think marijuana is less harmful than tobacco, reflecting poor public understanding that inhaling any kind of smoke increases cancer risk.
- Tobacco is regulated under corporate law, marijuana under criminal law.
- The two products are sold differently, and are subject to different forms of social control and appreciation.

“By some measures, both systems produce roughly comparable results,” given the proportion of Canadians who have recently or ever used either product, Ms. Callard said. But “neither system really works very well” in building social consensus that less consumption is better than more. In the 33 years since the LeDain Commission, a clutter of “grievances, folklore, and poor relationships between policy-makers” has inhibited any discussion of how to communicate risks and manage population health impacts of a substance that people are going to continue using. “Once we can answer that,” Ms. Callard said, “we will be able to accelerate the process of moving beyond prohibition.”

Questions and Discussion

A participant noted that chicken production is more tightly regulated than cigarettes and asked whether licencing would be one way of controlling tobacco companies. Ms. Callard said there are many ways to impose quotas, but the approach is unfamiliar to most public health practitioners, whose understanding of other industrial models is limited. “Governments have the power to make sweeping, broad changes,” she said. But in public health, “we’re so used to doing things by one little measure, one little study,” rather than looking 10 years down the road.

Mr. Oscapella said the electoral cycle creates a short window of opportunity to counter the economic power of commercial interests. After an election, it may take 18 months to set the stage for new initiatives, leaving “very limited time [for elected officials] to take the brave measures they actually need to take” before their focus shifts to the next campaign.

A participant noted that needle exchange programs have yet to achieve recognition under criminal law, 17 years after the first official program was set up in Montreal. “We are tolerated,” he said. “There is nothing in any kind of legislation, not even in provincial public health legislation, that is clear enough in saying you have a right to stand and a right to health.” The result is that needle exchanges’ relationship with police is not as easy as it could be. The participant said it is difficult to relate the fight against tobacco to harm reduction campaigns involving illegal drugs “because here we’re fighting bikers and mafia. We’re not fighting pharmaceutical companies.”

Mr. Oscapella said a dozen or so police officers have attended his criminology courses over the years. “The fact that they’re taking a course on drug law reform suggests that they’re willing to open their minds,” he said. “Some of them are there to challenge every point. Maybe the psyche is that police are there to enforce the laws, not to reform society. And, unfortunately, we’ve given them a vested interest in prohibition,” reflected in the hard line that police associations have taken against harm reduction legislation.

Ms. Callard cited Montreal’s Bronfman family as an example of what happens when a prohibited substance is brought under public management. “They were rum runners until the end of prohibition. Then they became the scions of Montreal, and it didn’t seem to take more than a couple of heartbeats before they were invited to everybody’s parties,” she said. Public health people “are just incapable of catching up” with the engineering, marketing, and product knowledge that would become available if the in-house expertise within tobacco companies were turned to a public purpose.

A participant cited her three teenagers’ determination not to smoke as a microcosm of the progress that has been made on tobacco control and reduction. “It’s no longer socially acceptable to smoke, nor is drinking and driving,” she said, but alcohol abuse is still rampant as a rite of passage for youth. Panellists said there has been recurring discussion of a national alcohol strategy, but noted that Health Canada only has three or four staff devoted to alcohol control, compared to more than 100 for tobacco. In contrast to tobacco, they noted that alcohol is a product for which society accepts a safe, even desirable level of consumption, so controls and messaging become more complicated.

An audience member asked whether the discussion of illegal substance use had extended to associations representing pediatricians and general practitioners. Ms. Callard agreed that “physician advocacy is very powerful. They’re not a homogenous group,” and one of the delights of medical culture is that “it doesn’t suffer from group think. It’s continually re-evaluating methods and exploring evidence.”