

# Canada's Principled Drug Policy

A Summary of Chapter 3 of the 2002  
Canadian Senate Report on *Cannabis*

excerpted and annotated by Julie Ruiz-Sierra

As the ever more costly domestic war on drugs redoubles its paternalistic efforts to protect Americans from themselves, the Canadian government begins to see the merit of a drug policy based on allowing Canadians to decide for themselves.

*In March of 2001, the Canadian Senate Special Committee on Illegal Drugs was formed and charged with the task of examining the effectiveness of Canadian policies on Cannabis. Composed of five senators, the committee was empowered to call for expert witnesses, documentary evidence, and governmental records, and even to look to the policies of other nations in accomplish its task. The committee reported its extensive findings and recommendations last September in a report entitled Cannabis: Our Position for a Canadian Policy. Reluctant to make policy recommendations based solely on public opinion or scientific evidence, both of which it deemed constantly subject to interpretation and verification, the committee took care to ground its work in guiding principles. In this excerpt from the report, they*

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*make explicit those principles that clarified their conception of the appropriate roles that the state, criminal law, science, and ethics must play in the development of a public policy on Cannabis. These considerations ultimately informed their recommendation that criminal regulation of cannabis be limited only to behavior that causes demonstrable harm to others, namely: illegal trafficking, selling to minors, and driving while impaired. —JRS*

What should public policy on illegal drugs consist of, policy here being understood in the strict sense of the word, as government through public debate and not party politics? As we are part of the Senate of Canada and therefore of Parliament, and having legislative authority, one might wonder why we ask ourselves the question. As legislators, are we not guided by the principles of good government, that is to say by public interest? In fact, what is public interest, and how is it determined? Does our position as Senators give us the *de facto* ability to say what is, or what should be, in the interest of Canada? We do not believe so.

When faced with social issues such as illegal drugs, we are like all Canadians, struggling with our beliefs, our knowledge, our values, our doubts and our myths. Our special access to some one hundred expert witnesses, our reading of numerous research papers and our discussions with dozens of people across the country have forced us to confront our preconceived ideas and images about drugs and to compare them with those of “others”, and if not to change them, at least to refine them along the way. However, this is not sufficient to determine what is in the public interest. Experts, no more so than the many citizens we heard from, do not determine what is in the public interest. Studies show only the most superficial aspects of what Canadians think. In addition, when polls that are more sophisticated provide us

with a more in-depth picture of public opinion, we will be no further ahead in trying to decide on the direction that public policy on cannabis should take. This is primarily because the greater good is not determined by polling to see which way the winds of public opinion are blowing, and also because, as is the case with our personal opinions, public opinion relies on unverified information, on preconceived ideas that are sometimes biased, and on values that are not always clear.

We heard quite frequently that the public policy decisions should be based on the future of our children, on the kind of society in which we wish to live and that we wish to leave them. Over the last two decades, Canadian society has implemented costly anti smoking programs. Do we want to be in conflict with these by allowing the smoking of cannabis? Cannabis is a psychoactive substance that can impair certain cognitive abilities linked to learning in young people. Do we want to send the message that it is okay for them to take drugs?

Others said that the fundamental values of Canadian society, values of respect for people’s rights and freedoms, of tolerance and openness towards diversity, were compromised by existing legislation on cannabis. They added that these laws are no longer in step with society, reflecting an inter-generational conflict between adults and youth, they bring about more harmful consequences than good, and on top of being ineffective they are iniquitous.

This is an issue of values, therefore, which opposes various ideas about public health, of community health, meaning both the physical well being of people as well as of the entire community, of its moral fiber as well as the model of interrelationships that it proposes. However, we do not all share the same values.

In the fragmented, disillusioned world in which we live, a world open to the sharing of cultures and of identities, albeit

not always by choice, the issue of values is constantly at stake, and from this the very meaning of social life. Even the transcendental values that we all share, of sacred respect for life and of immanent justice, are not readily turned into public policy: abortion or capital punishment, for example. As for other values, such as freedom, truth or law, they are the subjects of constant debate in democratic societies and they are precisely the kinds of values that are at stake in a public policy on illegal drugs.

It has now been thirty years since the Royal Commission of Inquiry on the Non Medical Use of Drugs, the Le Dain Commission, named for its Chairman, studied issues similar to those we are studying today. Its report on cannabis, whose scientific conclusions on the effects of the drug were generally accepted by all members of the commission, nevertheless led to ... three reports: a majority report by three of the members, and two minority reports. During our first day of public hearings, Professor Line Beauchesne presented the fundamental differences of opinion among the members: The dissension stems primarily from different visions of the values that should underlie a drug policy. I will refer to the report to illustrate the three positions that can be taken on drug use.

The first position, based on legal moralism, is that advocated by Ian Campbell. This public policy approach founded on legal moralism justifies the current prohibition and resulting repression on the grounds that it protects common values. (...) Briefly put, the government is perceived as having the responsibility of establishing common values, which are then imposed on society with a view to achieving optimum social harmony. If everyone thinks the same way, then there will be fewer problems.

(...) The second position, held by the majority of the Le Dain Commission members, is based on legal paternalism. Public policy based on legal paternalism justifies current pro-

hibitions on the grounds that the State has a responsibility to protect non-independent persons, particularly young persons.

*(...) When we come to the third position, that taken by Marie-Andrée Bertrand advocating the legalization of cannabis, this brings us around to the whole question of values (...). Legal liberalism implies that the government maintains some responsibility for preserving individual autonomy to the maximum extent possible. (...) A public drug policy based on legal liberalism is founded on the premise that the government's role is to maximize opportunities for each individual to be a full citizen and to ensure that criminal law is never used.<sup>1</sup>*

Moralism is an affirmation of a set of shared values. Paternalism is protection of the weak. Liberalism is maximization of the independence of citizens. These three categories do not include all of the possibilities: communitarianism, for example, represents another approach. In some areas of public policy, at certain times, these various approaches can co-exist. Nevertheless, each one expresses a different concept of the role of the State and of criminal law, and the roles of science and ethics in the choices that must be made.

Having examined each of these subjects, we have elected to set down the guiding principles that clarify the concept we have of the roles that the state, criminal law, science and ethics must play in the development of a public policy on cannabis. These principles will then help us in our analysis of the information resulting from the research and current practices in Canada, and most of all, influence our recommendations. In this way, the reader will have the benefit of our attempts to make explicit the principles which all too often remain implicit, therefore giving the opportunity to all to take us to task for inconsistency, or to voice their disagreement with our conclusions, because they do not share

these principles. We feel this exercise has the virtue of being both clear and transparent.

In order to assist our preparations for this work on the guiding principles, we asked four Canadian academics, well known both in their respective fields and for their independence, to prepare issue papers on each of the four main themes: governance, criminal law, science and ethics.<sup>2</sup> We strongly encourage Canadians to read these texts, which are of an exceptional richness and quality. We will use these texts freely, without pretending to render the complexity of their thinking, but neither will we simply echo their sentiments. Just as we did not ask witnesses to tell us what to think, but rather to share their knowledge with us while being as rigorous and as precise as possible, whether their knowledge comes from research or from experience, so we asked for issue papers and not for answers to our questions. We must formulate our own responses to the illegal drug issues before us, and that is what is expected of us.

We will begin with a reflection on ethics. We feel that such an examination, insofar as it affects the very bedrock of our values, as it imposes a requirement for communication and dialogue<sup>3</sup>, is the cornerstone upon which the other guidelines are based. Our principles dealing with governance—that is to say the role of the State—and with criminal law as a tool for achieving social conditions, then, hinge on this ethical concept. We will conclude with thoughts on the role of science, or more specifically of knowledge.

### **Ethics, Or The Principle Of Reciprocal Autonomy**

Let us assume that science, with supporting evidence, had shown the harmfulness of a given drug—say tobacco—and that it is a “cause” of serious, indeed fatal illnesses. To what extent are doctors, judges, and in the end, the State, authorized to go to ensure that people do not smoke? What limits are there on intervention? This is the question posed by eth-

ics, more specifically the ethics of “health”. Should we simply ban tobacco and punish both its users and its producers? Should we educate people through prevention campaigns? Should we discourage smokers through their pocketbooks, for example with a surtax for the hospital care that their habit could make necessary?

We see that ethical reflections take us through what is, through the realm of facts, to the realm of what should be, of what would be desirable. Moving therefore from recognized facts (that cigarettes “cause” lung cancer) to standards (the majority recognizes that smoking is harmful), but, more important than standards, to values (health is the greater good) and finally to the means of passing on and above all implementing these values (smoking is forbidden and subject to a fine). At any of these steps, one could speak out and say just a minute, I do not agree. I do not agree with the statement of fact: what is the basis of, what studies support this “finding”, one might ask. I do not agree with the standard: even though a public opinion poll may show that most people believe cigarettes cause lung cancer, is that reason enough to put an end to the debate? I do not agree with the established values: freedom is the greater good and not health—what is the use of being in good health under a totalitarian regime? Finally, disagreeing with the means chosen to implement the value—it being unacceptable to ban cigarettes under the pretext that they cause cancer because the means is disproportionate to the fact.

Anyone who has followed the debates on cannabis to any degree will have drawn a parallel. Because cannabis “causes” health problems (both physical and moral), the standard states that its use is “dangerous” and, under the banner of public health values (and of the protection of the most vulnerable: children, adolescents, etc.), its production, manufacture, sale and use, etc. will be prohibited. This is the basis of the existing public policy.

As Professor Malherbe reminds us, this way of setting out the cannabis problem—as in fact is true for other substances—encourages us to rethink our ideas on health, medicine and science. Moreover, going one step further, it obliges us to consider the issue of risk and of life itself in society. We live in a risk-taking society, but in a paradoxical manner. On the one hand, we place great value on risk-taking: venture capital, risk management, putting no limits on success. We see this as much in the appreciation of certain kinds of political or corporate decisions, as in the emulation of certain kinds of risky activities, such as Formula 1 racing, paragliding, and other extreme sports. On the other hand, we are becoming intolerant of risks of life in society, of the risks that others represent to our individual lives. It is a search for safety, both individually and collectively, vis à vis the smalltime crook or the terrorist. Risk would be in conflict with safety and security as illness would be in conflict with health.

Between these two apparently opposed attitudes towards risk, a subtle change in connotation slips in and partly explains the paradox. In the first sense (risks we like to take or will accept others taking), the issue is clearly risk. Here, risk is seen as being positive, and offers a number of options: when faced with this kind of risk, the person can decide to forge ahead, to wait, or to give up. In any case, there is a broadening of possibilities, therefore of autonomy, an extension that is no doubt linked to the admiration these people elicit, which is also tinged with envy as we observe this action that our position as “mere mortals” rarely permits us. The shift in meaning happens with the second sense, which does not relate to our ideas on safety but rather of danger. Safety is a collective and individual good, as in food or occupational safety. Danger, on the other hand, is usually a loss or a limitation of freedom of action: when faced with danger, most of us stop, and withdraw from the scene. In this sense, danger reduces the range of autonomy. There-

fore, it is not safety that is in conflict with risk, but rather danger.<sup>4</sup> The distinction is fundamental, because it refers us to the degree—whether real or perceived—to which we control our own existence. We sense that the “crazy Canuck” bombing down the slopes is at least in relative control of the risks he is taking; danger is different in that it implies loss of control.

We are collectively learning how to manage this risk/danger equation. The “risk” here, if one can put it this way, is thinking of risk as a kind of acquired individual autonomy, and of danger as a limitation of this very autonomy by “the other”, bringing about in its wake withdrawal, intolerance, and concisely, fear. For if risk is the source of intense pleasure, danger generally gives rise to fear. If risk points to the improvement of the means that allow me to be more in control of my safety, danger points to threats coming from the outside, chiefly from the ‘other’, over which I have little control.

Some concepts in medicine, and in science in general, add to this paradox when they address risk factors, such as when smoking is considered a risk factor for lung cancer. This is also the case with delinquency: dropping out of school is a risk factor as regards delinquency. Within these meanings, risk here becomes a danger factor, the ultimate danger, of course, being death (cancer). This mechanistic and causalist concept of prevention erases the fundamental difference between the body-machine we occupy and the body-subject we are, to use the distinctions proposed by Professor Malherbe. There is, in fact, no direct link between the “objective” characteristics of our environment (including the personal traits of genetic history, family and culture, etc.) and the subjective perception we have of ourselves and of our relationship with our environment. In other words, it is precisely why two children born in a similar environment, in the same era and friends from a very young age, will take two entirely different paths in life. We have a body

with a genetic inheritance and predispositions; what we do with it and how we interact with others and our environment is something else entirely. Just as there is no immediate transfer of the recognized fact to the norm, neither is there any direct translating my biopsychological make-up into actions and thoughts.

The scientific approach searching to identify a statistical “norm”—the correlation between two facts—does not take into account the fact that we are not all equal in the face of this risk/danger equation. What for some would constitute a risk—going down an icy mountain on skis—would represent a real danger for another.

[Translation] *Despite all we think we know about addiction, a considerable number of well-informed subjects “happily continue committing suicide” through their dependencies. While health education is largely thwarted, and not only in the field of toxic substances, it is because human subjects are in fact subjects, that is to say “subjective” beings whose behavioural reactions are linked much more to the meaning they attach to their behaviours than to the objective mechanical-medical consequences which statistical analysis claims to define.*

*Some risks are no doubt worth taking for life to be worth the trouble of being lived, for it not to dissolve into a maniacal and fearful sequence of endless precautions (...). Lastly, what is most human (the most autonomy, we dare wonder): succumbing to fearful hypochondria and enclosing oneself in a cocoon of universal prevention (to the point of death by asphyxiation and loss of will) or living one’s life through risks freely chosen and accepted.<sup>5</sup>*

This is where the central position of the concept of autonomy comes in. Autonomy, however, is to be understood here in a critical manner as *reciprocal autonomy*, and not as autonomy where isolated individuals establish standards to their own liking. It should be borne in mind that autonomy, etymologically speaking, means “establishing one’s own

laws”. This is not a question of arbitrary legislation, created for oneself, but of laws that permit, whenever possible, the successful interaction with others, which is the very bedrock of society. This autonomy is based on the ability to recognize the existence, the difference, and the equivalence of the other, allowing one to assume solitude, finiteness and uncertainty, respectively, to then move on to practice solidarity, dignity and liberty in return.<sup>6</sup>

The “dependent” person is not autonomous, some would say. Indeed, in their dependency, the drug addict, the alcoholic and the inveterate smoker are not. Neither the emotionally dependent person nor the person addicted to gambling, money or sex is fully autonomous. Next comes the question of the extent to which the state or society can intervene to encourage the slow achievement of this autonomy, and how to go about it. What are the respective roles of collective governance and criminal law as mechanisms of this governance? How can science contribute to this emancipation?

In any case, we note Professor Malherbe’s comment, that: [Translation] (...) *the fundamental problem of our civilization is not whether it is acceptable to prohibit the trade in cannabis derivatives or even their use, but rather not to repress the expression of anxiety when it arises and, even better, to invent new ways of taming it. On this point, it is useful to recall that every unjustified restriction, which adds to the already heavy burden of civilized individuals, can only increase their sense of being the object of some form of totalitarianism rather than the subject of their own destiny. From this standpoint, anti-drug campaigns seem decidedly like attempts to deny death rather than recognize its presence in collective and individual life. (...) In this respect, we agree with N. Bensaid, who says that preventive medicine conceals our fear of death by making us die of fear.<sup>7</sup>*

From this base ensues a definition of ethics as *“constant work, to which we can consent and which we perform with one another in order to reduce, as far as possible, the inevitable difference between our values as practiced and our values as stated.”*<sup>8</sup> With one another, indeed, thereby imposing constraints so that reciprocity and equivalence of the ‘other’ can be realized; this is the role of governance.

As a guideline, we will adopt the principle that an ethical public policy on illegal drugs, and on cannabis in particular, must **promote reciprocal autonomy built through a constant exchange of dialogue within the community.**

### **Governance: Maximizing The Actions Of Individuals**

We are social beings. It is a trivial assertion, however it must be stated because it means that, *necessarily*, we always find ourselves in paradoxical situations where to a certain degree, each person has the free will to make decisions, and makes free decisions for himself, while at the same time, in order to regulate interactions with others, rules are established, a normativity, that is more or less complex or more or less formal, as is appropriate. This is true of relationships between couples, families, in sports, and at work, as it is of relationships between citizens and the government. Self governance—acquired through the arrival of liberal democracy—is never complete and inevitably yields in part to the governance of the community.

Governance is relatively easy to develop within simple relationships: within couples, families, or businesses. This is not to say that its practice is easy: anyone with any experience of relationships as a couple will be well aware of how difficult it can be to make implicit rules explicit, and to agree on the rules of a shared life. However, the standards that are established between friends, between lovers, between

parents and children, are in fact a set of relatively simple rules, and most importantly, rules whose effectiveness does not require the intervention of other parties, except in the case of a break-up or of abuse.

In feudal, pre-modern or pre-democratic societies, the prevailing rules for even the simplest social relationships were stipulated from the outside: by the sovereign, the lord, the church representative, the father or forefather, the head of the business, each one could issue orders and expect to be obeyed, being all powerful in his domain. The establishment of normativity was largely done without the involvement of “subjects”, without their consent, and without any input on their part; they were excluded from the power relationship.

Over the centuries, during which our modern day democracies were built, we have moved on to styles of governance of ourselves and others that allow people to participate more and more in the development of the rules of life, both personal and social. We have also moved on from a situation whereby each person’s life was decided by his or her destiny, and limited to the narrow prospects dictated by the place of birth and status, to an “indeterminate” life situation, which is open to the building a personal identity and history.

These are therefore (1) changes in the sources of normativity and their operationalization in society, and (2) changes in our relationship to these norms. In the first case, we are slowly becoming involved in the external formalization of the sources of behavioral norms. As they no longer ensue from divine right, from the sovereign or the church prelate, they are built through the political manifestation of the will of the people. They are entrenched in national constitutions, in legal decisions (in British Common Law) or in legal codes (the Civil Code). It follows that the supra-legal normativity (inherited from divine right) or the infra-legal (not set out in law), lose both their symbolic value and their real influence

on social relationships, to the benefit of legal rules that are registered according to a recognized and legitimate procedure in the social system by means of statutory provisions. Modern societies are legal societies, that is to say societies that base their management of relationships between people and between individuals, groups and institutions, on the rule of law. Never completely incorporated into the legal system, other sources of normativity have not disappeared completely but the pre-legal or infra-legal sources of normativity are less apparent, and sometimes less legitimate.

With this change of source comes a change in operation: while the sovereign or the church representative could convict, or even execute, without challenge to the legitimacy or rationality of their decision—except by risking the same fate—the means of expressing the will of the people, setting it out in the legal system, is now in the hands of judges and the legal system entirely. The legal establishment of norms is set in motion either by the public authority provided in the legislation (civil and criminal cases, for example) or by citizens themselves (private and civil lawsuits) and is put in effect primarily by the courts. Remedies exist, and most importantly, these remedies are theoretically the same for, and accessible to, one and all.

The relationship that a person has to the norms, and through this to all aspects of social life, is the third change. Choice and uncertainty have both increased, to the point that, today, the connection is not so much to the other person, but to the risk represented by being in contact with them. Normativity in and of itself is no longer considered inevitable, nor even a duty. Without being rejected, social normativity is called into question based on personal experience and worldview. The gap between the subject of the norm and the norm itself seems to be widening, while conflict resolution models are being made more formal. Through the conjunction of these processes, governance becomes more and more instrumental. The mechanisms of

formal normativity, i.e. lawyers, judges and the courts, sometimes take on a greater importance than the actual substance of the norms themselves: the immediate personal question is whether I have access to the recognized mechanisms of conflict resolution, or if, through my condition or my actions, I am excluded in one way or another. In other words, the means is replacing the end, the rule of law is replacing the requirement for a connection to the other, which is the very basis of normativity and of social life itself.

Modern societies are therefore faced with a series of sometimes paradoxical injunctions. Collective governance must: (1) allow social relationships to be regulated in the most orderly but least restrictive manner possible, (2) give expression to the norms and values shared by the community and (3) give each person the opportunity to define themselves in relationship to these norms and values. How can these seemingly obvious opposites be reconciled?

Based on Professor Taylor's work<sup>9</sup>, we can say that there are two central spheres or preferred means of governance: the governance of relationships with others, and the governance of the self. The governance of collective relations is obviously part of the traditionally recognized areas of intervention of the state, even if the form and substance change. On the other hand, governance of the self does not come immediately or systematically under the jurisdiction of the state.

### **Collective Governance**

The state is far from the only source of normativity. But the fact that democratic states must act in accordance with the law and that most public policies come in the form of legislative texts, produces a kind of short circuit whereby the source of law and the state appear as one.

Yet, as Professor MacDonald rightly points out, if the actions of the state are subject to the rule of law, the legal sphere is not limited to the State. In all known societies, rules have always been established for the governance of the self and of collective relations. They are implicit or explicit, formal or informal, all-encompassing or limited in their appli-

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cation, codified or recorded in the collective memory, extensive or limited to certain spheres of activity. In every case, whatever the nature or specific form of the rules, they serve to express for members of the community the conditions of collective life. They

deal with marriage and parenthood, the ways in which one respects the life and property of others, as well as the connections to the invisible and the beyond. They take the form of prescriptions and bans, are implemented by the bishop or the mullah, by the king or his representative, or by the judge. Much as we might like to believe, we in modern times have not invented the codification of laws because the first legal code goes back to Hammurabi, the King of Babylon. In Roman law, Justinien was the first to suggest a code of laws, not to mention the Ten Commandments "handed down" to Moses.

In this sense, we agree with Professor MacDonald as concerns legal pluralism, according to which there are multiple sources of normativity and therefore of rules of action that are not exhausted by formal legislation. This is the dis-

inction between law and "juridicity". As we mentioned above, juridicity can be derived as much from the family as from business, from school as from the trade union, from political parties as from religion. In this sense, juridicity "is the business of subjecting action to rules-based governance"<sup>10</sup>

Juridicity, of course, co-exists with other ways of governing individual and community actions: the brute exercise of power and war are examples of other forms. One of the main differences, however, between juridicity and other forms comes from the nature and the origin of its legitimacy. The establishment of legal rules of action involves a form of consent, if not of active participation, in the development and implementation of the rule, qualities that are not needed nor sought out in the case of domination by a tyrant or an occupying army.

The development of a formal juridicity, in the form of legal texts passed by legislative assemblies prescribing both objective and subjective rights, is at the very heart of modernity. It is in fact around these kinds of issues that the more specific question of the role of the State arises: when and to what extent should formal legal rules be developed, and how should they be enforced?

Modern societies are unique in that they have, amongst other things, given precedence to the formal rule of law over other sources of juridicity as regards the governance of social relationships, established the need for these formal laws to be adopted and implemented by legislative and executive arms of the State, and set up arbitration systems in the form of courts of law born of the State but having an arm's length relationship with the former two.

This formality of the law, or to be more precise, the legal normativity found in the legislative texts passed by the State, in no way signifies the disappearance of the other forms of normativity. Here Professor MacDonald gives us a relevant example of this:

*For example, activity that the official criminal law sanctions and stigmatizes may be rewarded and valued in certain other normative communities. In socio-economically impoverished neighbourhoods where economic opportunities are limited, the manufacture and sale of illicit drugs may be an attractive means of escaping poverty. For those who are successful in the enterprise, the consequent advancement in social standing may more than offset the potential harms visited by criminal sanctions. Similarly, in an international context, in countries where the raising of traditional crops which are capable of being converted into illicit drugs is an indigenous cultural activity, and where conditions of poverty are such that the attendant economic benefits are necessary for subsistence, the criminal law (whether domestic or international) has little purchase.<sup>11</sup>*

In other words, juridicity is not exhausted in the formal law, and the role of the State is not limited to the processes of passing, enforcing and arbitrating formal legislation.

### **Governance Of The Self**

Historically, juridicity has often been equated with moral standards, or has tried to model itself on them. These standards could come from religion, from philosophy, from an ethic, or a universal theory of nature as in Plato. In every case, they tried to say what constituted the “good life”, how to conform one’s life with the immanent rules of life, ending the cycle of reincarnations, or avoiding eternal damnation. In every case as well, the good life corresponded more or less to “life” in the most abstract sense, that is to say the focus was not so much on the destiny of the individual, but on that of the community, the group, the clan.

It is only as of the second half of the second millennium, during what we refer to as the Age of Enlightenment, that individual life slowly began to register as a primary concern in the governance of the community. This major change resulted in what Taylor calls “ordinary life”, that of the “average sensual man”, at the heart of which we find his connection to the world and his manner of connecting with it through the agency of family and work, being suddenly recognized. Having had no means by which to participate in the development of juridicity in general until then, the “citizen” acquired some legal authority and right to active participation (to simplify things, we could give as an example the right to vote), not only as a member of the community but as a whole and unique individual.

Up until that time, communities had a juridicity that was largely based on relationships with others, granting strong objective rights (the right to life: you shall not kill; the right to property: you shall not steal; etc.), with a weak cognitive component: while admitting that it continues (unfortunately one might add), to pose certain problems (take racial or sexual inequality) even throughout the twentieth century—accepting respect for life as a universal norm has not met with great opposition. It is in this sense that we speak here, particularly following Pires’ work discussed in the following section, of norms with weak cognitive components. These fundamental norms, which certain philosophers of law have said are natural laws, do not require a strong empirical justification. The same cannot be said of other norms concerning conduct such as homosexuality, abortion... or taking drugs. These norms are an issue of what we might call subjective rights that relate to individual behaviours that express personal choices achieved through a consensual exchange and thus being of little or less direct concern to the community. This is why we could say this is an issue of norms with a strong cognitive component: in order to be imposed as

negative laws, that is to say as constraints or prohibitions, these standards need an exogenous justification drawn from the external knowledge of juridicity itself.

In this way, parallel to the process of legal formalization of the norms of governance in the community described in the preceding sub-section, the modern individual has acquired more and more room for governance of the self. This space is no longer, as in the past, entirely dictated by the determinations stemming from one's birth in a given place, in a given family, with given genetic "baggage". Except in some totalitarian regimes, neither is this space for the governance of the self entirely subjected to collective or religious rules. This space consists of a vast area of uncertainty that, in part, precisely explains why it is sometimes called "disenchantment with the world", or more prosaically "loss of sense" or "lack of values". In fact, we would say that neither comes into play, so much as a process of slow and hesitant reinvention of social life, in and through new ways of relating as individuals.

### The Role Of Governance

Governance is part of both the spheres of collective governance of the State and of governance of the self. If the State's chosen vehicle is formal law, the passing of legislation does not exhaust all the possibilities in terms of collective governance. Moreover, governance of the self is the slow discovery—in the strong sense of the term—of the juridicity that underlies human action.

Professor MacDonald addresses the issue eloquently:

*How ought law and legal institutions to be deployed to achieve the symbolic governance of human agency in a manner that facilitates the just achievement of individual and collective human purposes?<sup>1 2</sup>*

The issue brings us back to the purposes of community governance, which is to facilitate human relationships and self-realization, with a minimum of interference in such a way as to stimulate individuals' discovery of the source of normativity rather than having it dictated by an external body. It is not the responsibility of State governance to ensure either the health or the happiness of its citizens. It is, however, its duty to ensure that the rules that it enacts and the way in which they are carried out do the least possible harm to the individual's ability to develop his or her own moral code. Not a single morality, or at least a morality for everyone, as the majority position of the Le Dain report maintained, but a facilitation of access to morality for citizens, morality here being understood in the sense of the ethical discovery of fundamental laws regarding relationships with others, as Professor Malherbe pointed out.

Professor MacDonald proposes a definition of governance that is drawn from the work of the Law Reform Commission, which gives guidance: the goal of governance is freedom, and not control. It is a question of defining the goals of society through policies and action programs that are then implemented through systems and processes and upheld by actors, allowing for the encouragement and affirmation of human action. The law, vehicle of choice of governance, does not seek instrumental pur-

**This reflection on the role of criminal legislation is specifically intended to bring us back to principles of the appropriateness of turning to criminal law. The central issue is to attempt to identify the criteria that will help us decide in what circumstances society can—or must—turn to criminal law. It must then be determined if these criteria justify the use of the criminal law in relation to cannabis.**

poses of simple expressiveness of rules or limitations passed for and on behalf of citizens, but a reciprocal process of building social relationships through which people, citizens and governments, can constantly adjust their expectations in terms of behaviour.

We therefore accept as a guiding principle for governance that **all of the means the State has at its disposal must work towards facilitating human action, particularly the processes allowing for the building of arrangements between collective government and governance of the self.**

### **Criminal Law And The Limits Of Prohibition**

During the course of this report, we will have plenty of opportunity to describe the degree to which criminal law is at the very heart of any discussion of illegal drugs. It has come to the point that debates between those we refer to as prohibitionists on the one hand, and liberalists on the other, have overshadowed all other considerations. The Italian sociologist Pareto (1848-1923), quoted by Professor Pires in his issues paper, said of human beings that even if we would like to believe that we are rational, we are above all argumentative beings, that is to say that we want “to give a logical aspect to behaviours that do not have the substance thereof.”<sup>13</sup> In the context of the debate on cannabis, this sentiment takes on its fullest meaning: both sides hurling their arguments at the other, claiming they are recognized “truths”.

Any discussion on the role and the place of criminal law as concerns illegal drugs, here being a question of cannabis, in effect poses questions regarding principles of the appropriateness of turning to criminal law. In general, both sides are quick to escape this stringent argument on the principles to turn to justifications. As is true of both sides, justification has nothing to do with the mechanism itself, being the criminal law, but with the target, being cannabis. The result

is the litany of “proofs” of the effects of cannabis. For some, the effects are significant enough to “justify” turning to the criminal law, and to list the risks associated with the use of cannabis: addiction, learning difficulties, delinquency, and impaired driving. For others, these same risks are so minimal, or are already covered by other criminal legislation (driving under the influence), that they do not justify the use of the criminal law. Whatever the case may be, the debate is no longer in relation to the principles but on justification.

This reflection on the role of criminal legislation is specifically intended to bring us back to principles of the appropriateness of turning to criminal law. The central issue is to attempt to identify the criteria that will help us decide in what circumstances society can—or must—turn to criminal law. It must then be determined if these criteria justify the use of the criminal law in relation to cannabis.

### **Requirement For Distinctions**

Raising the question as to whether or not the use of criminal law as concerns cannabis is justified necessarily brings us back to a primary observation: the use of criminal law is not justified in all cases, but, in some cases, it must be. This observation is supported by three findings: (1) that most social relationships are regulated without the use of criminal law; (2) that certain behaviours are forcibly within the sphere of criminal law; and (3) that certain behaviours legislation has criminalized, at certain points in time, have since been excluded from this domain. The possibility of including or excluding human actions from the sphere of criminal legislation rests on the ability to make distinctions.

However, a significant difficulty arises as soon as this principle of distinction is accepted *in practice*, and not simply in theory. Once an act has been recognized as being a “crime”, it becomes part of the body of what defines all offences: behaviours against society. According to the inter-

nal logic of criminal law, the only eligible distinction would *precede* the decision to incorporate a behaviour into the law or not. If the behaviour at issue is one that goes against the common good, it is a crime. Otherwise, it would be an uncivilized act, perhaps even an immoral one, but certainly not a crime. Once such a decision is taken, the only remaining distinctions to make would be with respect to form: the kind of procedure to follow and the severity of the punishment according to the nature of the offence.

Everything is done as if there were no positive distinctions made within criminal law between offences, as if the distinction was made only from the outside, before making the act an offence. In fact, distinctions between types of offences do exist. These are the distinctions made by Professor Pires, between standard prohibited behaviours and “two-sided” prohibited behaviours. It is more usual to distinguish between “victimless” crimes and crimes “with victims”, but this categorization is incorrect. On the one hand, under criminal law, the victim is all of society. There are certainly individual victims, but by some kind of extension, the harm has in fact been done to all of society. This would explain the principle of deterrence, in criminal legal theory: by punishing a guilty party, we try to dissuade all those who might be tempted to behave in the same way.

On the other hand, this categorization brings us back to a single aspect, the subject of the offence, losing view of the other processes by which criminal law distinguishes between different kinds of offences. In this way, another kind of distinction that is intrinsic to criminal law falls under the modes of justification. A decision to criminalize homicide does not require, as Professor Pires stresses, the undertaking of comparative studies in order to determine if one kind of murder is more or less harmful than another to the victim. The cognitive component is weak: here, there is no need to turn to external arguments to justify the criminalization. The act, in

and of itself—this is the concept of *malum in se*—is enough to establish the legitimacy of the criminal standard. There is no such thing when the issue is drugs: since the beginning of prohibition, external justifications were needed regarding the harm caused by drug use. These subjects of criminalization have a strong cognitive component, in that they require a higher level of justification.

The distinction between kinds of prohibitive behaviours is therefore an analytical tool that is necessary in order to understand and think about the role of the criminal law as concerns drugs. What then are the criteria we can use in order to make these distinctions? This is the goal of the following sub-section.

### **Criteria For Distinction**

Professor Pires proposes seven criteria allowing for distinctions to be made between the various kinds of prohibitive behaviours in criminal law. (...)

We will briefly examine these, one at a time.

### **The nature of the offence**

In order for there to be an offence, harm must have been done, which brings us to the victim. As we said above, in the broadest sense, criminal law sees society as the ultimate victim of any offence. The direct victim of an assault or theft is a witness, in the technical sense of the law. However, at a concrete level, the law recognizes direct victims. In certain cases, the concept of victim falls somewhere between the two: it is the neighbourhood or the surrounding area, for example, in the case of nuisance caused by solicitation for the purposes of prostitution. However, these nuisance situations are themselves at the limit of criminal law, in a sort of gray area between standard offences and two-sided offences.

What is remarkable is that the criminal law cannot take all three levels into account at the same time. If it recognizes the direct victim, then society becomes invisible. If it considers the neighbourhood, it becomes even more evident that it can no longer recognize a direct victim or society as a whole. Finally, and above all, if it takes the perspective of society as a whole, then it loses sight of not only the direct victim, but what is more, it loses its specificity. In effect, in the latter case, one could say that civil law also protects society: without respect for sales contracts and debts, society would go down the drain.

It is therefore not only the harm caused, nor even the presence of a victim that gives certain acts their criminal character, but the fact that they bear witness to conflict, abuse of power, infringement of one social actor upon another. Obviously, civil law also serves to resolve conflicts, from which comes the need for more criteria.

### **Capacity of the law for discernment**

Is the law able to differentiate a victim from a perpetrator? In the case of standard prohibited behaviours, it generally can. For example, the victim of a homicide can clearly be distinguished from the perpetrator. Of course, there are exceptions to these standard scenarios, for example, where the victims themselves face criminal charges. A case in point would be where a victim of sexual assault is convicted of contempt of court for refusing to testify against her attacker. When faced with two-sided prohibited behaviours, criminal law is hard-pressed to distinguish the victim from the perpetrator. Or, it finds the perpetrator to be the victim that must be protected from himself. Consequently the perpetrator becomes the victim of his/her own behaviour.

Alternatively, cognisant of the limitations and difficulty involved in punishing the victim—for example, a prostitute—criminal law shifts from the phenomenological world (the facts) to a different mode of reasoning. It moves from an

analysis-based mode of reasoning (evidence enabling deduction) to one based on consequentialism or teleology (the goals underlying behaviour). For instance, criminal law justifies its intervention by the need to protect children. Consequently, it loses, and causes us to lose, sight of the (ultimately inexplicable) reasons why the offence was brought before the courts in the first place.

### **Referentiality**

This term refers to the capacity of perpetrators of the offence to recognize—despite “explanations”, denial or other self-justification methods—the harm caused to others by their actions. Even in case of some borderline standard prohibited behaviours, such as cruelty to animals, the perpetrator of the offence—who, for example, has hanged his neighbour’s dog from a tree—may recognize the harm caused by his/her action to the animal’s owner. The criminal act in the case of two-sided prohibited behaviours may be self-destructive, but is not motivated by maliciousness towards others, since it does not create a direct relationship with others. Indeed, the sociologist A. Ehrenberg raises the issue of the absence of a relationship with others exhibited in all types of drug use when interpreted as a form of withdrawal from the world. However, this is already beyond the issue of criminal law into the realm of political discussion on democracy.

### **Limitation on natural liberty**

We shall deal only briefly with this issue here since it is discussed at greater length later. Suffice it to say, however, that the law places special restrictions on what Kant called the “unfettered freedom of action”: criminal law restricts an individual’s liberty to take the life or property of others. Consequently, it institutes specific rights and freedoms, i.e. the right to enjoy life and property. Fundamental problems arise where

the law seeks to restrict the very rights and freedoms that it provides. A case in point is prostitution, where the law seeks to restrict the very right to enjoy one's own body and the freedom provided for by the law.

### Justification of the offence

Criminal law very seldom uses external sources to justify the criminalization of offences. A good example to illustrate this is our original homicide scenario. Criminal law does not refer to sociology, anthropology, history, economics or medicine to establish the various effects of different types of homicides and various ways of taking life. The same rationale can be applied to sexual assaults, theft, fraud, etc. The cognitive component in the justification process is weak. The rationale underpinning the standard prohibited behaviour is deeply rooted in the social relationship. It is quite clear that any society even considering legalizing homicide would become untenable and would cease to be a society at all. Consequently, our society does not question the validity of the criminalization of homicide. The sole issue that arises in some countries, but which was addressed in Canada a long time ago, is the sentence society imposes on murderers. Quite the opposite situation exists for two-sided prohibited behaviours. They require empirical demonstration and justification with a strong cognitive component. As one might expect, this issue is central to any debate on drugs. Indeed, this report accords a great deal of importance to this matter.

...

As professor Pires points out, the criterion here is not to establish whether there is consensus or "dissensus" on the criminal standard or on the terms relating to the type and possibility of democratic debate but rather to determine whether the source of the legitimacy of the standard is endogenous or exogenous. In the case of standard prohibited

behaviours, the source is endogenous. In the case of two-sided prohibited behaviours, it is exogenous. However, the criminal law creation process remains the same, i.e. democratic debate resulting in the adoption of enabling legislation. It is for this reason that it is all too easy to lose sight of the fact that the two types of offences are not in fact of the same nature.

[Translation] *The important point to remember is that all two-sided prohibited behaviours to which this criterion applies exhibit certain specific problems. (i) They all have a more precarious, more ideological or more fragile endogenous basis because they are not rooted in a concrete, conflictual deviance and because the norms are not sufficiently detached from certain forms of (purely moral or religious) knowledge or are not sufficiently unaffected by knowledge of facts. (ii) They are therefore more subject to a process of selection from the available knowledge and to the actual value of the knowledge that we select or that is available to us in respect of them at a particular point in time. That means that a critical and serious examination of the knowledge is of crucial importance. (iii) They are, to all intents and purposes, more polemical and subject to public debate at a particular point in time, and more likely to be based on major cultural or cognitive misapprehensions.*<sup>14</sup>

**This analysis indicates to us that only offences involving significant direct danger to others should be matters of criminal law.**

### Application of the law

In the vast majority of cases involving standard prohibited behaviours, offences are brought to the attention of the police by way of a complaint. Complaints to the police most

often involve theft, sexual assault and homicide. Indeed, approximately 90% all offences that come to the attention of the police do so through complaints. In the case of two-sided prohibited behaviours, close to 100% of offences are discovered pro-actively.

One might point to the increase in complaints from people living near cannabis plantations in British Columbia. However, these people's complaints perhaps deal either with the very real danger of fire—since the illegal nature of cannabis production forces producers to illegally tap into electricity lines—or with pressure on them from criminals to keep quiet—also because producers are forced to operate illegally. The pro-active application of the criminal law in the case of two-sided prohibited behaviours has harmful consequences, including social and human costs but also the possibility of discriminatory application of the law or police corruption. This raises the question of whether the endogenous basis of the offence warrants these consequences.

### Effects of the law

The effects of the law stem, to a certain extent, from the previous criterion and all the others before it. This criterion relates to the legitimacy of the standard. The difficulties and criticism arising from pro-active police action, changes in social normativity or in the knowledge base, make the law counter-productive, which, in turn, raises questions *sui generis* as to its basic tenets and legitimacy.

We have compiled Professor Pires' suggested criteria under three headings. Each criterion includes an "action-related" and a "law-related" element, which can be used in distinguishing between various criminal offences.

**Nature of the offence.** The action here refers to the relationship between the "victim" and the "perpetrator", i.e. are they in a conflict or exchange-type situation? The law-related criterion focuses on establishing whether criminal

law is able to distinguish between the victim and the perpetrator.

**Justification.** The action in this case is to determine whether perpetrators are able to recognize the harm caused to others by their actions. The legal aspect of the equation deals with determining the basis of the legitimacy of the standard.

**Operativity.** The action relates to identifying whether the application of the appropriate standard is triggered by the victim or witness or whether pro-active action is required by law-enforcement agencies. The legal side of the equation is to establish whether the enforcement of the standard could potentially sabotage itself.

It is our view that the analysis of *Criminal Code* offences based on these three criteria addresses the fundamental issue of whether limiting the liberty of an individual to act is justified in the criminal law. It is for this reason that we are less concerned about the criteria themselves than about the result of the application of these criteria to the criminal law standard.

### Application To Illegal Drugs Issues

Are illegal-drug-related offences two-sided prohibited behaviours under criminal law? Undoubtedly so.

The offence created implies an exchange-type situation and it is relatively unimportant whether the subject of the transaction is a prohibited substance or not. It is deemed to be a consented exchange between two parties. In the case of cannabis use—or the personal use of the opium or cocaine that just happens to be growing in my garden—no exchange with another party takes place. Nevertheless, possession is prohibited in Canada, as is use in certain other countries.

Criminal law is hard pressed to find a victim. With respect to impaired driving endangering the lives of others, the *Criminal Code* contains a provision for the punishment

of an individual operating a vehicle under the influence of any substance. The argument that cannabis poses enforcement difficulties is not valid. The same difficulties apply to driving under the influence of prescription drugs. What about the issue of children? It is difficult to see how cannabis use harms children, except where an “uncontrolled” market, brought about either by a lack of regulations or by the current illegality of cannabis fostering illegal markets, does cause harm to children.

In relation to referentiality, a user or even a seller does not see himself or herself as causing harm to others. At least, this is the case for cannabis derivatives. Of course, a situation where “grass” is mixed with other substances and adulterated substances are sold to users is reminiscent of the era of prohibition and is one of the reasons why prohibition was scrapped. To justify behavioural standards and the offence, criminal law has to refer to external sources over which—and the interpretation of which—it exerts no control. The operativity of the standard raises both application problems and on-going questions as to the legitimacy of the standard itself.

On the whole, the legal basis of the criminal law is weak where the prescribed standard (1) does not concern a relationship with others and where the characteristics of the relationship do not create a victim and a perpetrator able to recognize his/her actions; (2) has to find its justification outside fundamental social relationships; and (3) results in a form of enforcement, the harmful effects of which, undermine and challenge the very legitimacy of the law. (Where criminal law is involved in these issues, the very standard prescribed by the law makes the perpetrator the victim and tries to protect him from himself, which it can do only by producing a never-ending stream of knowledge, which remains constantly out of his reach.)

This analysis indicates to us that **only offences involving significant direct danger to others should be matters of criminal law.**

### Science Or Approximate Knowledge

The public is generally willing to leave the choice of control methods to the interaction between health care experts and government agencies because they recognize that the drug is being used essentially for their well-being and they rely on expert knowledge to decide the best way to protect that. (...)

*Therefore, in formulating social policy on non-medical use, you must consider not only at the harm done by the law or at the harm done by the drug, but as far as possible a full cost/benefit analysis of drug use and the control measures, and any change in control measures that you may contemplate. This is a matter for all of society to decide - not for experts to decide as a matter of scientific knowledge.<sup>15</sup>*

From the very outset of the Committee’s proceedings, we have been aware that knowledge—even science-based, is not of itself a sufficient basis for the development of public policy on illegal drugs, in particular cannabis. One might be tempted to think that a Special Committee on Illegal Drugs—in this case, cannabis—should base its conclusions and recommendations solely on knowledge. However, no amount of knowledge alone could determine public policy. There are several reasons for this.

Firstly, the process of knowledge development is ongoing. This process is by definition a continuing study of the unknown. The pursuit of knowledge, in view of the scale and complexity of the task, is always approximate—or, as the French anthropologist Claude Lévi-Strauss would have put it, cobbled-together. To search for knowledge is to acknowledge our ignorance of fundamental questions, which by

definition remain open-ended. According to Professor de Koninck:

[Translation] *It is appropriate for us to celebrate the ignorance we have at last discovered because it is now part of our known ignorance (ordinary ignorance, in the classical vocabulary), as opposed to unknown ignorance (twofold ignorance)—thanks to neuroscience, oceanography, astrophysics, but also to depth psychology, the history of religion (to cite only two of the advanced “humanities”) and to other disciplines which have particularly progressed in our era. We must celebrate it with the wonder and puzzlement which are still the necessary prerequisite of all discovery.*<sup>16</sup>

This situation might seem ironic, since never at any other time has such a wealth of information been produced—in all areas of human culture but also specifically on the issue of drugs—than in the modern era. So much knowledge has been gained in fact, that experts, such as economists, sociologists, criminologists, psychologists, and geneticists have become necessary players in the whole public policy justification process. It is only thanks to the ability of a team of scientists to successfully influence decision-makers that the greenhouse effect and the global warming phenomena have been acknowledged as real and that action has been taken to protect our environment. Governments’ macro-economic decisions will be explained to the public on the nightly news by a senior economist. Where urban violence occurs or a serial killer is on the rampage, psychologists and criminologists are brought in to explain what is taking place, or to justify the thrust of criminal policy. The mass production of information and reference to experts in policy development give the public decision-making process at least credibility, if not legitimacy. Consequently, people who feel disenfranchised or even disillusioned by what they perceive as the

disparity between the real world and the world presented to them in the media, will feel less inclined to challenge political decisions which are based on the “authority of knowledge”. Information is becoming knowledge, the learned are becoming experts and politicians, (who are increasingly allergic to independent reflection on principles and fundamental issues), have come to rely on this handy army of “experts”, who are ever ready to proffer advice.

However, information is not knowledge. Indeed, knowledge cannot be reduced to mere information. The Internet teams with information, but no one would dare contend that all of it could be deemed knowledge.

Secondly, the knowledge production process is fragmented and, like modern life itself, has difficulty addressing the issue of meaning. No better knowledge is produced with the addition of academic disciplines all studying issues through the lens of their own field of expertise than is produced when one of these disciplines works in isolation. The promotion of inter-disciplinary and trans-disciplinary approaches will remain as meaningless as calls for a social “partnership”, until there is genuine resolve to grasp the issues of meaning and comprehension. Prestigious institutes such as NIDA may have huge research budgets and conduct research, which in itself, is both fascinating and useful, but they function as if their sole goal were

**Prestigious institutes such as NIDA may have huge research budgets and conduct research, which in itself, is both fascinating and useful, but they function as if their sole goal were to demonstrate the biopsychological mechanisms of “drug addiction” and the dangerous abuse that results from the consumption of “drugs of abuse”, as they call them.**

to demonstrate the bio-psychological mechanisms of “drug addiction” and the dangerous abuse that results from the consumption of “drugs of abuse”, as they call them.

However, the reasons for particular practices cannot be reduced to the sum of their constituent parts, or a jumble of re-enactments. Remarkable knowledge about cell mechanisms and genetics does not provide answers to the ethical and political issues raised by cloning. In the same way, knowledge about the mechanisms of the atom and nuclear fission did not provide answers to the issue of the manufacture and use of nuclear weapons. The highly abstract and math-based discipline of economic “science” is so far removed from reality that it is no longer able to explain the gulf that exists between nations or between extravagant wealth and human misery.

Researchers seem more concerned with mathematical equations and abstractions, and as a result, fail to ask fundamental questions. Their fields of knowledge are patchy and highly compartmentalized and there often remains a confusion between knowledge, information and technology. To ask fundamental questions, is to link issues and to re-acknowledge the complex nature of these issues in an attempt to identify the underlying reasons. There are on-going debates between scientists and philosophers over linking issues and over the shift towards an integrated knowledge base of human beings.<sup>17</sup>

Thirdly, this raises the whole issue of the so-called “learned idiot” “experts”.

[Translation] *Idiots is the right word (from the Latin idiota, meaning “ignorant person”, borrowed from the Greek idiôtês, of the same meaning, as opposed to pepaideumenos, “cultivated man”). What is unfortunate is that their unearned reputation as experts extends all the more the influence of this “idiocy” in societies such as ours where*

*“science” exercises a magic power and “that power appears increasingly legitimized by ‘learned’ experts,” as Jacques Testart notes. “Indeed, the expert provides reassurances and citizens are reluctant to decry the absurdity or cynicism of a political decision approved by ‘the most qualified experts’.”<sup>18</sup>*

We are not trying to take issue with science but rather to challenge the difficulty scientists have in reflecting on their research. It is one thing to conduct cutting-edge research on specific issues, but it is quite another to claim to use the resultant fragmented knowledge to provide “explanations”. It is yet another to attempt to provide answers that science is quite simply not able to provide. It is one thing to conduct studies of the behaviour of laboratory rats, which have been administered a dose of Delta 9-THC (the principal active component in cannabis), but it is quite another to claim that this type of experiment is useful in understanding cannabis use and its effects on human beings. It is still another issue to contend that this research can provide an answer to cannabis public policy-related issues.

Drug use is a social action and forms part of a particular individual’s behavioural pattern and as such, cannot be reduced to mere neuro-psychological mechanisms. It might be useful to understand the mechanisms involved but this knowledge alone will not explain the reasons underlying drug use in our society.

Fourthly, the colonization of the mind by the authority of experts—acting as mediators between politicians and the community—equates to the dangerous colonization of social sciences by natural sciences. This is nothing new. This process began in the 19<sup>th</sup> century but significantly accelerated during the 20<sup>th</sup> century. The most significant manifestation of this process is the ever closer links between psychology and neuroscience. Consequently, a transposition of meth-

ods and problem-approach systems has taken place. As a result, human sciences have now taken on a quantitivist-reductionist approach, which in turn has led to a knowledge crisis. A sample of 100 young people chosen at random to undergo a battery of psychological tests aimed at determining why they use cannabis will provide apparently serious anecdotal research and a series of correlations, which are unlikely to reveal the reasons behind drug use.

In some academic and decision-making circles, it is fashionable to refer to “*evidence-based*” policies. By this, we mean policies based on “scientific” evidence of approaches that work. One of the most striking examples of this approach was the Crime Reduction Strategy implemented in the United Kingdom in 1998 by the then newly elected Labour government. Under this scheme, considerable money was earmarked to support those crime prevention initiatives that studies had shown to be effective with the goal of reducing various types of crime by a specified percentage over a five-year period. Despite this scheme, the United Kingdom is currently facing a crime “crisis”, in part because crime rates have risen, and the Crime Reduction Strategy is a shambles.

It is tempting to ask how the outcome could have been any different. Social engineering strategies in areas such as population control and crime prevention date back to the 19<sup>th</sup> century and have rarely provided tangible results. These initiatives, which are built on one or two “formulae”, themselves drawn from a small number of controlled experiments, do not take account of the complex nature of the modern world, with its ever growing, increasingly fluid and intangible interdependent and multi level relationships. Is it in an attempt to flee this reality that we seek refuge in the mathematical abstraction of correlations between supposedly predictive variables?

The Committee’s report—especially the second part—has put great emphasis on research-based knowledge. This focus is an attempt to do justice to the knowledge that has been developed over the past few decades. We considered it important and indeed necessary to give it detailed consideration. Indeed, the Committee recommends that the drive for knowledge acquisition on specific issues that we deem to be important be continued.

We do not claim, however, to have answered the fundamental question of why people consume psychoactive substances, such as alcohol, drugs or medication. We were indeed surprised, given the quantity of studies conducted each year on drugs, that this area has not been covered. It is almost as if the quest for answers to technical questions has caused science to lose sight of the basic issue!

Scientific knowledge cannot replace either reflection or the political decision making process. It supports the process. Indeed, we consider that its greatest contribution to public drug policy is in doing so. Our guiding principle is that **science, which must continue to explore specific areas of key issues and reflect on overarching questions, supports the public policy development process.** No more, but no less.

## Conclusions

One of the greatest challenges for modern societies is to collectively invent new forms of social life and community belonging that stretch beyond the tools of formal law. As individuals with objective and subjective rights, people can participate fully in the development—we would even go as far as to say the conquest—of the collective project of creating a society. It is no longer sufficient just to develop legislation and for people to automatically accept this legislation just because it was democratically decided by Parliament. We need to promote ethical participation—through discus-

sion—in the development of collective and individual governance. The groups from civil society, whether they oppose the “behind-closed-doors” globalization process or support promoting fair and sustainable development, are asking how we can collectively develop a joint-participation normativity process, in which collective governance and individual governance are mutually supportive.

This discussion brings us to the conclusion that **public policy on illegal drugs, specifically cannabis, ought to be based on an ethic of reciprocal autonomy and a resolve to foster human action. It ought to defer to criminal law only where the behaviour involved poses a significant direct danger to others. It ought to promote the development of knowledge conducive to guiding and fostering reflection and action.**

### Notes

The above is excerpted from Senate, Special Committee on Illegal Drugs, *Cannabis: Our Position for a Canadian Public Policy*, (Ottawa, 2002), Chapter 3.

1. Professor Line Beauchesne, witness appearing before the Special Committee on Illegal Drugs, Senate of Canada, Second session of the Thirty-sixth Parliament, October 16, 2000, Issue 1, pages 33-36.
2. They are: R. Macdonald, Professor of Public and Constitutional Law, McGill University, *The Governance of Human Agency*; A.P. Pires, Professor of Criminology, University of Ottawa, *Legislative Policy and “Two-Sided” Crimes: Some elements of a pluridimensional theory of the criminal law*; T. de Koninck, Professor of Philosophy, University of Laval, *The Role of Knowledge and Culture in Public Policy on Illegal Drugs*; and J.F. Malherbe, Professor of Social Work, Université du Québec à Montréal, *The Contribution of Ethics in Defining Guiding Principles for a Public Drug Policy*.

These texts are available online at: [www.parl.gc.ca/illegal-drugs.asp](http://www.parl.gc.ca/illegal-drugs.asp).

3. On this subject, see the work of the German sociologist and philosopher Jürgen Habermas, particularly *De l'éthique de la discussion*. Paris: Cerf. The author presents the process of ethical discussion as follows: Through debates, all participants must acknowledge that, in principle, each person participates fully, freely and equally, in the cooperative search for truth in which the unlimited strength of the best argument will carry the day. Practical discussion is considered as a demanding form of argumentative training of the will, which (...) must guarantee, through the universal presuppositions on communication, the fairness of all possible normative agreements negotiated under these conditions. (...) Furthermore, practical discussion is considered to be a process of inter-comprehension in which, due to its own nature, all participants ideally adopt a role. Therefore, the individual and ideal adoption of a role played by each person in particular and privatim is transformed into a practical public operation by all, intersubjectively and in common. (pages 18-19).

4. There is an interesting discussion on the subject in Professor Pires: pages 41 passim.
5. Malherbe, J.F. (2002) op. cit., page 7.
6. See Malherbe's discussion of the subject on pages 23-26.
7. *Ibid.*, page 21.
8. *Ibid.*, pages 27-28.
9. Among others: Taylor, C., (1989) *Les sources du moi*. Montréal: Boréal.
10. MacDonald, op. cit., page 24 of the English version.
11. *Ibid.*, page 25.
12. MacDonald, op. cit., page 78.
13. Quoted in Pires, A.P. (2002), op. cit. page 8.
14. Pires, A.P., (2002), op. cit., page 59.

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15. Evidence by Dr. Harold Kalant, professor at the University of Toronto, before the Senate Special Committee on Illegal Drugs, Senate of Canada, first session of the thirty-seventh Parliament, issue no 4, pages 69 and 78.

16. De Koninck, T., (2002), op. cit., page 25.

17. Based on a very eloquent exchange between a philosopher and a neurobiologist: Changeux, J.P. et P. Ricoeur (1998)

*What makes us Think*, (translation of: *Ce qui nous fait penser. La nature et la règle*. Paris: Odile Jacob), pages 77-78.

18. De Koninck, T. (2002) op. cit., page 6.