

Freedom of Expression Litigation and the Harms of Cannabis

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In April 2016, the Canadian federal government announced its intention to legalize and regulate recreational cannabis. Minister of Health Jane Philpott indicated that legalizing recreational cannabis would “keep marijuana out of the hands of children and profits out of the hands of criminals.”¹ In April 2017, the government released the proposed legislation, to come into effect no later than July 2018, legalizing recreational cannabis use for adults in Canada.² *The Cannabis Act*, Bill C-45, was to operate concurrently with the medical cannabis regulations, the *Access to Cannabis for Medical Purposes Regulations*.³ Since the initial announcement in April 2016, academics, politicians, scientists, doctors, and citizens have been clamouring for answers to a seemingly endless list of questions. What age should the minimum age of purchase be set at? Who should be able to sell cannabis? Will using cannabis legally in Canada exclude me from travelling to the United States? How will legalization impact rates of cannabis use among youth? Are health care professionals trained to inform patients about cannabis use?

Underlying many of these questions is a central concern about the harms associated with cannabis use.^{4,5} Numerous organizations have written position statements on the risks and harms associated with cannabis use and researchers continue to assess the evidence.⁶ While the debate about potential harm rages on, an important concern about the new legislation has received relatively little attention even though it could have significant legal and economic consequences. For example, can the advertising of cannabis, cannabis products, and cannabis services⁷ legally be prohibited or restricted?

The purpose of this commentary is to examine how freedom of expression litigation concerning cannabis advertising and marketing will force the courts to consider whether cannabis is a legitimate public health harm. It begins with a discussion about legalization as a harm reduction strategy before moving to examine the importance of “harm” in the constitutional analysis involved in freedom of expression litigation. This example serves to highlight the impact that harm will inevitably play in any constitutional litigation pertaining to the *Cannabis Act* or *Cannabis Regulations*. How the government and litigants, and ultimately, the courts categorize the harm of legal recreational cannabis use will have significant implications on the constitutionality of various policy tools.

Legalization of Recreational Cannabis and Harm Reduction

Harm reduction is often used to refer to the policies and programs established that aim to minimize the “negative health, social, and legal impacts associated with drug use, drug policies, and drug laws.”⁸ One of the goals of a harm reduction approach is to reduce the harm of drug laws. While the *Cannabis Act* does not

explicitly identify harm reduction as an underlying principle, the Canadian government has identified harm reduction as a broader policy goal with respect to all drugs.⁹ Additionally, minimizing harm has long been a motivating factor for legalization of recreational cannabis, as articulated in the final report of the Task Force on Cannabis Legalization and Regulation.¹⁰ Specifically, the government has taken a “public health approach” to minimizing harm, although some have suggested that this is an unclear and undefined standard.¹¹

Some of the harms that legalizing cannabis for recreational use aims to reduce are those associated with the criminalization of cannabis, including: interacting with the black market,¹² illegal crops, adulterated products, barriers to seeking treatment, and the burden imposed on the Canadian legal system. In addition to displacing the criminal market, the *Cannabis Act* aims to protect youth by enacting criminal penalties for those that sell or provide cannabis to youth.

While legalization allows the state to regulate cannabis, it does not necessarily reduce the harms and health risks that are associated with cannabis use.¹³ Whether legalization has a positive or negative impact on public health and safety will depend on how regulatory decisions are made, implemented, and enforced. Indeed, legalization comes with its own harms including increased rates of use and associated risks, normalization of use, and potential increased access of cannabis to minors. Cannabis use is not risk-free, and any legalization regulatory scheme should attempt to mitigate or eliminate harms where possible.

Given the recency of the implementation of the *Cannabis Act*, it is too early to assess whether legalization has reduced harms. What is clear is that many organizations have welcomed the move. For example, in 2014 the Centre for Addiction and Mental Health (CAMH) released a policy framework for cannabis that advocated for a public health approach, concluding that “legalization, accompanied by strict health-focused regulation, is the most promising means of reducing ... risks and harms.”¹⁴ CAMH, however, notes that it is necessary for the public to know about the risks associated with cannabis use,¹⁵ a sentiment echoed by many public health and medical organizations, like the Canadian Public Health Association.¹⁶

The notion of harm will be particularly important if the regulatory framework is subject to any constitutional analysis. If the *Cannabis Act* or the *Cannabis Regulations* are challenged, potential harms will be considered against the actual or potential benefits by the court when assessing the objective of the impugned legislation, as well as the proportionality of the legislation. Therefore, a court will need to be presented with the best current knowledge regarding the potential for harm with recreational cannabis use, as well as possible benefits. However, because cannabis is a class of

products rather than a homogeneous product, research does not always account for variation between specific products and how they are used, such as cannabinoid content, history of use, method of delivery, or individual factors that impact the effects of cannabis, such as age, experience, and tolerance. It is beyond the scope of this commentary to review the current state of evidence and is ultimately unnecessary. Instead, what follows is an articulation of why a consideration of “harm” in the context of cannabis will have significant policy implications in Canada.

The Concept of Harm in Freedom of Expression Litigation

Section 2(b) of the *Canadian Charter of Rights and Freedoms* protects the rights everyone has to freedom of expression. Deemed a fundamental right, “everyone” here includes corporations. In *Irwin Toy v Quebec (AG)*, the Supreme Court of Canada (SCC) held that commercial speech, including advertising and marketing, benefits from *Charter* protection.¹⁷ Thus, legislative attempts to limit commercial expression, such as restrictions or prohibitions on advertising cannabis, can be subject to *Charter* litigation. Given that subdivision B of the *Cannabis Act* and Part 7 of the *Cannabis Regulations* attempt to restrict advertising, it is entirely possible that these provisions will be challenged.

The concept of harm plays a significant role in freedom of speech litigation. Unfortunately, the way that courts have considered and treated harm in these cases has been inconsistent, and even contradictory. In some instances, the concept of harm prevails throughout the entire judicial decision and serves as an animating force of the court’s decision,¹⁸ whereas in other decisions harm is not mentioned at all.¹⁹ While this may be explained by the facts of each case, it nevertheless results in confusion concerning what constitutes harm and how this will factor into the court’s decision. The following are four ways that the concept of harm has factored into the leading SCC freedom of expression cases that deal with commercial expression: (1) at the division of powers analysis, (2) in determining whether section 2(b) has been infringed, (3) in the use of evidence, and (4) in the *Oakes* analysis.

(i) Harm in the Division of Powers Analysis

First, harm is relevant in the division of powers analysis. The *Constitution Act*²⁰ divides powers between the federal and provincial governments. Often courts are charged with determining which level of government has authority over a particular area. The federal government’s involvement in matters protecting the public’s health relies on its authority over criminal law.²¹ One way to justify the use of its criminal law power is for the federal government to demonstrate that a matter poses “a significant and serious risk of harm or causing significant and serious harm to public health, safety, or security.”²²

This has been affirmed in various cases before the SCC. In *R v Keegstra*, Chief Justice Dickson (as he then was), stated that “[i]t is well accepted that Parliament can use the criminal law power to prevent the risk of serious harms.”²³ In *R v Swain*, Chief Justice Lamer (as he then was), stated that “it has long been recognized that there also exists a preventative branch of the criminal law power.”²⁴ In *RJR-MacDonald v Canada (AG)*, the SCC confirmed that the power to legislate with respect to dangerous goods also includes the power to introduce legislation regarding health warnings on said goods.²⁵

That said, in *RJR-MacDonald*, the SCC did consider whether tobacco advertising itself was harmful thereby entitling Parliament to prohibit or regulate it under the criminal law. Comparing tobacco advertising to other types of speech that Parliament had criminalized, such as obscenity, the SCC did not see a clear comparison.²⁶ Any challenge to the *Cannabis Act* will likely argue that the legislation is both *ultra vires* the federal government and that it infringes freedom of expression, and thus consideration of whether the Act prevents harm, which would enable the federal government to utilize its criminal law power, is an important consideration.

(ii) Role of Harm in Section 2(b) Analysis

While the *Charter* protects the freedom of commercial expression, there has been some question about whether commercial speech should be afforded protection where the product (or service) being promoted is harmful. In *Ford v Quebec (Attorney General)*, the SCC supported the argument that Parliament cannot “suppress truthful and non-misleading advertising of lawful products on the grounds that the information to be conveyed would have a harmful effect.”²⁷ This suggests that the potential harm a product may inflict is not a sufficient reason to strip commercial expression of protection. In contrast, the Attorney General in *RJR-MacDonald* argued that freedom of expression does not protect “promotion [of] activities relating to a product described as being harmful, if not fatal to one’s health.”²⁸ The Attorney General filed evidence in an attempt to demonstrate the harmful nature of tobacco use and that advertising is used to increase consumption.²⁹ The trial court was not convinced by this argument. Justice Chabot held: “[a]ssuming...that the evidence before the Court clearly established the harmfulness of tobacco, the Court must nonetheless conclude that the [Act] does not in any way address this harm.”³⁰

Justice Chabot stressed that it was not the advertising that caused harm, but the use of tobacco.³¹ Chabot J interpreted the Attorney General’s argument to be that tobacco is so harmful that any expression connected to it, except for the State’s, should be prohibited, and found this position to be “unacceptable under the Canadian Charter.”³² At the Court of Appeal, the respondent tobacco companies defended their right to advertise a product widely recognized to be harmful.³³ The Court of Appeal recognized that the issue was a balancing of the companies’ right to promote their economic interests and the public health concerns connected to smoking tobacco.³⁴ The SCC held that the specific form of expression examined in *RJR-MacDonald*, tobacco advertising, was not closely linked to the core values underlying freedom of expression as articulated in *Ford* and *Irwin Toy*.

In *Ford* and *Irwin Toy* the SCC identified three reasons for protecting expression: (1) truth-seeking; (2) participation in social and political decision-making; and (3) cultivating individual self-fulfillment and human flourishing.³⁵ According to the SCC, tobacco advertising serves no political, scientific, or artistic purposes, but is intended to inform consumers about a product that is ultimately harmful and to persuade them to purchase it.³⁶ Given that it was not closely linked with the rationales for protecting expression the court held that it was entitled to a very low degree of protection. In contrast, expression that is closely linked to the underlying rationales will be afforded a high degree of protection. In sum, the potential or actual harm that a product may pose is not sufficient to strip it of constitutional protection entirely, but may result in a

lesser degree of protection. Additionally, as will be discussed below, it will also inform the section 1 *Oakes* analysis.

(iii) Harm and Evidence

Scientific evidence can play a key role in a court's decision when assessing harm, although courts have inconsistently utilized scientific evidence. In some cases, significant amounts of scientific evidence have been necessary to satisfy a court, whereas in other instances a common sense causal relationship has been satisfactory. In the trial decision of *RJR-MacDonald*, for example, the Attorney General introduced a significant amount of evidence relating to the health harms of tobacco use. However, Chabot J stated that it was not the court's role to decide whether tobacco is or is not harmful, stating "the expert scientific evidence...was...irrelevant to the case."³⁷ This failure to rule on the harmful effects of tobacco was the Appellant's first ground of appeal to the Court of Appeal.³⁸ At the SCC, Justice La Forest (in dissent) disagreed with Chabot J's finding, noting "the nature and scope of the health problems raised by tobacco consumption are highly relevant to the s. 1 analysis, both in determining the appropriate standard of justification and in weighing the relevant evidence."³⁹

In contrast, in *R v Butler* the majority accepted that it would be difficult to show a direct link between obscenity and harm, but accepted that "it is reasonable to presume that exposure to images bears a causal relationship to changes and attitudes and beliefs."⁴⁰ Further, the Court noted "[w]hile the accuracy of this perception is not susceptible of exact proof, there is a substantial body of opinion that holds that the portrayal of persons being subjected to degrading or dehumanizing sexual treatment results in harm, particularly to women and therefore to society as a whole."⁴¹ Based on this jurisprudence, the role of scientific and medical evidence in determining the harm of cannabis use is unpredictable. As will be discussed, in the case of cannabis, harm is not nearly as clear-cut as it is for tobacco or obscenity, and so how much evidence the court considers, if any, could have a significant impact on the *Oakes* analysis.

(iv) Harm and the *Oakes* analysis

While the *Charter* protects freedom of expression, section 1 of the *Charter* provides the state an opportunity to limit rights, provided that any such restrictions are "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."⁴² To ascertain whether a limitation on a right is justified, the court relies on a test articulated in *R v Oakes*.⁴³ The test has four stages: (1) there must be a pressing and substantial objective for the law; (2) the means chosen to achieve the objective must be rationally connected to the limit on the *Charter* right; (3) the limit must minimally impair the right; and (4) there needs to be proportionality between the benefits of the limit on the right and its deleterious effects. When assessing a limit on a *Charter* right, should the court find that the limit does not satisfy any one of these tests, the limitations is not justified, and therefore renders the legislation (or sections challenged) unconstitutional and of no force or effect.

Judicial reasoning suggests that the degree of harmfulness of the product being advertised may affect all stages of the *Oakes* analysis. In determining whether the objective of the impugned legislation is pressing and substantial, harm is a central concept. Courts have consistently accepted the avoidance or mitigation

of harm as sufficient to satisfy this step. In *Butler*, the avoidance of harm was identified by the applicant as one pressing and substantial objective for overriding the constitutional protection afforded to the distribution of obscene materials. The respondents re-characterized this as the state acting as a "moral custodian."⁴⁴ In its decision, the majority referred to *Keegstra*, where the SCC accepted that the prevention of the effects of hate propaganda was a legitimate objective.⁴⁵ In *Keegstra*, the harm was two-fold: hate speech directly harms those to whom the speech is directed and it harms society at large. The majority questioned whether hate propaganda was significant enough in Canada to warrant Parliamentary intervention before ultimately concluding that it "was not insignificant."⁴⁷ In fact, the majority noted that hate propaganda harms not only the persons on the receiving end of the hate propaganda, but also those who spew hate propaganda, noting, "breeding hate is detrimental to society for psychological and social reasons and that it can easily create hostility and aggression which leads to violence."⁴⁸ Based on jurisprudence, avoidance of harm appears to be sufficient to pass the pressing and substantial requirement of the section 1 analysis.

When the court is satisfied that the avoidance of harm is a pressing and substantial objective and thus can justify a limitation on a *Charter* right, this determination impacts the remainder of the *Oakes* test depending on how narrowly or broadly the harm is categorized. If the harm being avoided or mitigated is defined broadly, it is generally easier for it to pass the rational connection test, because it will be easier to connect the infringement of the right to the objective of avoiding or mitigating the harm in question. In *Butler*, Justice Sopinka conceptualized the harm in question broadly, and in so doing, made it difficult for the statutory definition of obscenity that was under consideration to fail the rational connection test.⁴⁹ When harm is defined more narrowly, however, it will be more difficult to pass the rational connection test, because it will necessarily be more difficult to connect the infringement to the objective.

Harm is also considered in the minimal impairment analysis. In *RJR-MacDonald*, the SCC advised the legislature that it needed to differentiate between harmful advertising and benign advertising, suggesting that restrictions must be sufficiently specific to prevent the articulated harm, and no more.⁵⁰ If the harm is defined more broadly, this will afford the defendant government greater latitude than if the harm is articulated more specifically, which will require an equally specific response. It was at this stage the *Tobacco Products Control Act* failed the *Oakes* test. Indeed, the Court did not think that the limitation was minimally impairing, characterizing the ban implemented by the legislation as a total ban. In the follow-up case of *Canada (AG) v JTI-MacDonald*, where the Court assessed the successive legislation, the *Tobacco Act*, the Court found that the revised legislative scheme constituted a "partial ban" and thus passed this part of the *Oakes* test.⁵¹

Finally, the nature of the harm also impacts the proportionality analysis. In Justice Sopinka's dissenting decision in *RJR-MacDonald*, he stated: "I believe that any concern arising from this technical infringement of their rights is easily outweighed by the pressing health concerns raised by tobacco consumption."⁵² In that case, the significant harms associated with tobacco use made it easy for the dissenting opinion to justify the negative impact of the legislation on the advertiser's rights, a position that was later affirmed in

JTI-MacDonald.⁵³ In *JTI-MacDonald*, the Court found significant benefits associated with decreasing tobacco use and discouraging young people from becoming addicted to tobacco, and that the deleterious effects on the right to freedom of expression were slight in comparison. Specifically, a unanimous Court noted, “[w]hen commercial expression is used, as alleged here, for the purpose of inducing people to engage in harmful and addictive behavior, its value becomes tenuous”, suggesting that it will be easier to restrict commercial expression if a product is harmful.⁵⁴ From this, it is likely that the harms associated with cannabis use will play a role in the *Oakes* analysis.

Freedom of Expression and the Harms of Cannabis

The harmfulness of cannabis will inevitably play a role in determining whether advertising restrictions are a justified infringement on freedom of expression. How narrowly or broadly the government characterizes the harm will impact the rational connection stage of the *Oakes* test, and the degree of harm will also affect the proportionality analysis. The more potential for harm, the easier it will be for Parliament to justify their actions. Tobacco advertising litigation is informative. In both *RJR-MacDonald* and *JTI-MacDonald*, the Court accepted the clear risks associated with tobacco use. Unfortunately, the risk of harm is not as clear with cannabis. For example, cannabis has numerous medical applications, and many more currently under investigation, and therefore has the possibility to provide benefit to Canadians. Tobacco, on the other hand, has little, if any, medical benefits to users. Additionally, determining the harmfulness of cannabis use has been complicated by politics. Canada is still transitioning from a Conservative government that focused on the adverse effects of cannabis, while ignoring the possible benefits, to a Liberal government that has prioritized legalization. Contextually, this means that Canadians are not starting from neutral ground. Care must be taken not to over-correct for the conservative views of cannabis use by overly focusing on the benefits it offers. But the historical vilification of cannabis use is a relevant contextual factor out of which cannabis legalization arises, and should inform the analysis.

To be sure, there are risks associated with the use of cannabis. There are some widely accepted risks of using cannabis, but they are primarily acute, such as anxiety and paranoia, or associated with smoking, such as bronchitis or decreased lung function. While there are long-term effects associated with regular cannabis use, such as decreased cognitive abilities, most long-term effects appear to be reversible with the termination of cannabis use.⁵⁵ Additionally, most of the adverse effects are associated with long-term, regular cannabis use, and a very small portion of the Canadian population matches this description. While the majority of tobacco users smoke daily, most cannabis users use infrequently. Unfortunately, the science on the effects of cannabis are overwhelmingly unsettled, and more research is needed. However, the potency of cannabis, measured by its tetrahydrocannabinol (THC) content, has increased exponentially over the last few decades. Selective breeding for the illicit market has resulted in higher concentrations, with most cannabis now containing over 10% THC, and even up to 30% in the case of some medical cannabis products. While THC concentrations have risen, cannabidiol (CBD) content has decreased, dropping to below 0.2%.⁵⁶ The increasing THC-to-

CBD ratio increases the risk of adverse side effects, psychosis, and addiction.⁵⁷ Additionally, higher potency forms of cannabis are being used with greater frequency, and hash oil concentrates, also known as “wax”, “dabs”, or “shatter”, may contain as much as 80-90% THC.⁵⁸ The use of high potency products similarly increases the risk of adverse effects.

While it is beyond the scope of this commentary to provide a comprehensive summary of all the research on the safety and risks of cannabis use, what can be stated is that while cannabis use is not risk-free, compared to other common substances, including alcohol, tobacco, and opioids, the cannabis-attributable disease burden is lower.⁵⁹ Additionally, cannabis is not presently associated with the social effects of drugs like alcohol and tobacco. It is commonly noted that alcohol is far more dangerous and represents a far greater harm than cannabis, and presently alcohol advertising is widespread and, when compared to tobacco or regulations about cannabis under the *Cannabis Act*, quite permissive. The fact that the alcohol industry has been successful in lobbying against state intervention should not be a reason to avoid pursuing meaningful regulation of cannabis products. However, when restrictions on cannabis advertising are brought to the court, it will be imperative for the state to present convincing evidence of the harms associated with cannabis. There is also an opportunity as the regulation of recreational cannabis evolves to reconsider what constitutes a public health harm.

Conclusion

Over the past few decades, tobacco control efforts have had a significant impact on where and how tobacco products can be advertised, sold, and used. There may be a temptation to simply apply the lessons of tobacco to cannabis, but this is short sighted and is unlikely to find success in the courts if challenged. Harm is a central consideration in the constitutional analysis a court will undertake in freedom of expression litigation. While commercial speech may not garner the same level of protection as other types of speech, it nevertheless remains a protected form of expression. How the courts accept and rely on evidence relating to the harms associated with cannabis use, as well as how broadly or narrowly the courts define the harms, will have a significant impact not only on freedom of expression litigation, but any constitutional challenges to the *Cannabis Act* or *Cannabis Regulations*.

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