



BC Civil Liberties Association

Submission of the British Columbia Civil Liberties Association (BCCLA) to Health Canada

Re: Consultation on adding Salvia Divinorum (“Salvia”) to Schedule III of the Controlled Drugs and Substances Act (CDSA)

March 18, 2011

Position Summary

The BCCLA opposes the addition of Salvia to Schedule III of the CDSA on the grounds that there is insufficient research into the alleged harm of this product to warrant the use of the criminal law in its regulation. The deleterious effects of criminalizing the sale and possession of this substance far outweigh any benefits of criminal prohibition. Experience has shown that criminalization would be highly counterproductive: negatively impacting product safety by driving the sale of the product to the black market, stigmatizing the citizens who use this product, bringing all the disruption and prejudice of the criminal process into their lives and serving as a substantial barrier to needed research and safety testing. The appropriate stance to health and safety considerations with respect to this product is not to criminalize the use and sale of the product, but to enforce its current regulation under the Natural Health Products Regulations.

Introduction – A Lacuna of Research

Since our founding nearly 50 years ago, the BCCLA has advocated that the non-medical use of drugs be approached as a health issue rather than a criminal law issue. The abject failure of a criminal prohibition approach to address health and safety issues is notorious. Thus, it is troubling to find Health Canada contemplating abrogating from its mandate to protect the health and safety of Canadians by relinquishing the regulation of a product about which so very little is scientifically known. Health Canada’s mission states that in order to achieve its

mandate it relies on the highest quality scientific research. The extent of the research on Salvia is woefully inadequate and we submit that in the absence of quantifiable harms, there cannot be any justification for the use of criminal sanctions.

We have reviewed the publically available resources and the scientific literature that is referenced on Health Canada's website regarding Salvia. We note that many of the physical and mental effects of this product that are cited on the Health Canada website – including “slurred speech and awkward sentence structure”, “lack of physical coordination” and “uncontrollable laughter” -- beg a comparison with the effects of alcohol, which is a legal but regulated product.

This comparison holds even if we consider other effects like “hallucinations” and “loss of consciousness” – both of which can occur with alcohol use as well. If the effects are not dissimilar, why does Health Canada find that one product should be criminalized and the other regulated? This analogy is important, especially in light of the well-researched long-term health effects of regulated substances like alcohol and tobacco. It is difficult indeed to reconcile how products such as alcohol and tobacco, which can and do cause serious diseases and even death, are seen fit for regulation, while Health Canada proposes to criminalize a product which has similar short-term effects and virtually unknown long-term effects.

Christelle Legault, a spokesperson for Health Canada was quoted by CTV news stating,

“Canadians should not use products containing S.Divinorum and/or Salvinorin A because very little is known about the substance and its potential effects on the brain and/or body and its impact on physical and mental functions,”

We say that there can be no effective and responsible policy making in such an evidentiary vacuum. Simply put: criminalization has no role as a substitute for scientific research. Health Canada's mandate cannot properly be outsourced to the criminal law.

The Proper Scope of the Criminal Law

We reserve the criminal law for harms that we, as a society, believe are deserving of a criminal sanction. In the late 1800's, Sir James Fitzjames Stephen, discussing the evolving modern notion of crime and punishment in **A History of the Criminal Law in England** (New York: Burt Franklin, 1883) wrote at p. 78 (Vol.2):

In different ages of the world injuries to individuals, to God, to the Gods, to the community, have been treated as crimes, but I think that in all cases the idea of crime has involved the idea of some definite, gross, undeniable injury to someone.

The Canadian Committee on Correction's delimitation of the criminal law in the 1969 paper, **Towards Unity: Criminal Justice and Corrections** remains singularly useful for setting out the criteria for the appropriate scope of the criminal law.

These criteria are:

- 1) No act should be criminally prosecuted unless its incidence, actual or potential, is substantially damaging to society.

- 2) No act should be criminally prohibited where its incidence may adequately be controlled by social forces other than the criminal process. Public opinion may be enough to curtail certain kinds of behaviour. Other kinds of behaviour may be appropriately dealt with by non-criminal legal processes, e.g. by legislation relating to mental health or social or economic condition.

- 3) No law should give rise to social or personal damage greater than it was designed to prevent.

The BCCLA endorses this approach. There are dire incursions into civil liberties when the criminal law oversteps its bounds into arenas where societal harms are vague or speculative. These useful criteria clearly show that Salvia regulation is not appropriately assigned to the criminal law.

Criminal Law's inability to fix alleged problem

Health Canada's position would appear to be that Canadians are best protected from the possible, but unproven, negative health effects of Salvia through sanctions imposed by the criminal law. This is a curious stance to take given that criminalization obviously mitigates against virtually all effective safety measures. Certainly any individuals who are deterred from using the product will not be exposed to either its benefits or harms. However, those who continue to use the product will be facing greater safety risks than currently exist; and the evidence based on the use of like-substances in Canada suggests that this will be a very large number of people, in the main the Canadian youth that Health Canada indicates it is most concerned with protecting.

Obviously, criminalizing this product will not advance much needed safety research. And while we would continue to know little about the health effects of the product, all means of effectively regulating the quality of the product will have been eradicated. Criminalization is merely a consigning of this product to the black market where experience in analogous circumstances indicates that many people will be purchasing substances that are alleged to be Salvia but which may be completely different substances altogether or Salvia contaminated with other substances, either of which could have dire health consequences for the purchaser.

However well motivated Health Canada may be in wishing to assist young Canadians to avoid potentially negative effects of this product, the proposed reclassification of Salvia in effect simply consigns some youth to exposure to more egregious health risks. Research, education and regulation are the approaches needed to genuinely protect the health of all Canadians.

We note that at present Salvia is regulated under the Natural Health Products Regulations, which is to be read in conjunction with the Food and Drug Act. S.31 of the Act states that anyone who contravenes any of the provisions of the Act could be liable to a fine not exceeding five hundred dollars or to imprisonment for

a term not exceeding 3 months or to both (for first offence). Thus it cannot be said that the sanctions available under the current regulatory regime 'lack teeth'. Indeed, it would be expected that criminal prohibitions would produce similar penalties. Given this similarity, it is difficult to avoid the notion that what is at issue is fundamentally an outsourcing of enforcement to the police, rather than a principled policy decision based on considerations of health and citizen well-being.

As of February 2011, Health Canada had not authorized for sale any natural health products which contain Salvia as an ingredient and yet, there appears to have been no significant efforts made to educate the public or take any enforcement action.

The current interest in policy pertaining to Salvia appears to coincide with the release of a much-viewed Youtube video of Miley Cyrus. The calls for criminalization in response to parents' apprehensions may be understandable, but an effective policy response is never one of "doing something", but rather of doing the "right thing". In this case, the regulatory regime under which the product is currently listed is the one which provides the most benefit with the least amount of harm.

We say that the position that best supports the fulfillment of Health Canada's mandate is regulation under the current scheme. We urge Health Canada to resist political and public pressures calling for this product's criminalization in the misguided hopes that such a course will protect vulnerable youth. While proposed criminalization might protect some youth from the health risks of Salvia, if it indeed were found to have any serious health risks, the cost of this speculative protection is entirely too high. The harms of this approach are only too evident in comparable spheres and we urge Health Canada to uphold its mandate and undertake the needed research for evidence-based policy-making on this issue.