

**CANADA'S INTERNATIONAL OBLIGATIONS UNDER  
THE LEADING INTERNATIONAL CONVENTIONS  
ON THE CONTROL OF NARCOTIC DRUGS**

**Daniel Dupras  
Law and Government Division**

**20 October 1998**



Library of  
Parliament  
Bibliothèque  
du Parlement

**Parliamentary  
Research  
Branch**

**NOT TO BE PUBLISHED**

**Projects prepared by the Parliamentary Research Branch are designed in accordance with the requirements and instructions of the Parliamentarian making the request. The views expressed should not therefore be regarded as those of the Parliamentary Research Branch nor of the individual preparing the project.**

## TABLE OF CONTENTS

	Page
INTRODUCTION.....	1
IMPLEMENTATION OF TREATIES IN CANADA.....	2
THE CONVENTIONS ON DRUGS AND PSYCHOTROPIC SUBSTANCES .....	3
A. <i>Single Convention on Narcotic Drugs, 1961</i> .....	4
1. Establishment of an International Institutional Structure.....	5
2. Prohibition and Control of Prohibited Substances .....	6
B. <i>Convention on Psychotropic Substances</i> .....	9
C. <i>Convention against Illicit Traffic in Narcotic Drugs and         Psychotropic Substances</i> .....	10
BRIEF DESCRIPTION OF THE <i>CONTROLLED DRUGS AND SUBSTANCES ACT</i> .....	13
PARTICULAR ASPECTS OF THE INTERNATIONAL CONVENTIONS ON DRUGS.....	15
A. Particular Features of National Legal and Judicial Systems .....	15
B. Possession of Cannabis and Rehabilitation Programs.....	18
1. Extracts from the Conventions.....	19
a. Single Convention, 1961 .....	19
b. Convention on Psychotropic Substances, 1971.....	20
c. Convention against Illicit Traffic, 1988 .....	21
2. Possession of Cannabis .....	22
3. Rehabilitation Programs.....	29
C. Legal Weight of the Resolutions and Declarations of International Organizations.....	30
CONCLUSION.....	31
APPENDIX: The Procedure for Concluding, Implementing, Ratifying and Coming Into Force of an International Treaty in Canada	



CANADA

LIBRARY OF PARLIAMENT  
BIBLIOTHÈQUE DU PARLEMENT

## CANADA'S INTERNATIONAL OBLIGATIONS UNDER THE LEADING INTERNATIONAL CONVENTIONS ON THE CONTROL OF NARCOTIC DRUGS

### INTRODUCTION

Over the years, the traffic in illicit drugs has grown to alarming proportions. Greater cooperation among countries seems to be the only hope if this scourge is to be eradicated one day. Such cooperation takes various forms, and is set out in more concrete form in three international Conventions: the *Single Convention on Narcotic Drugs, 1961* (Single Convention, 1961),<sup>(1)</sup> the *Convention on Psychotropic Substances* of 1971<sup>(2)</sup> and the *Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* of 1988 (Convention against Illicit Traffic).<sup>(3)</sup> As their titles suggest, these conventions deal with matters that are specific to the problems of narcotic drugs and psychotropic substances, and the traffic in these, which are discussed in greater detail below.

Canada is a Party to each of these Conventions, and takes an active part in the international battle against the illicit trade in drugs. These Conventions require that member states adopt specific legislative measures against the trade in illicit drugs. In 1996, the Canadian legislation on this subject was revised to, among other things, ensure that it complied with Canada's international obligations.<sup>(4)</sup>

- 
- (1) *Single Convention on Narcotic Drugs, 1961*, Canadian Treaty Series 1964/30, amended by the *Protocol amending the Single Convention on Narcotic Drugs, 1961*, Canadian Treaty Series 1976/48. The Single Convention came into force for Canada on 13 December 1964, while the Protocol came into force on 4 September 1976.
  - (2) *Convention on Psychotropic Substances*, Canadian Treaty Series 1988/35. This Convention came into force in Canada on 9 December 1988.
  - (3) *Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, Canadian Treaty Series 1990/42. This Convention came into force in Canada on 11 November 1990.
  - (4) *Controlled Drugs and Substances Act*, S.C. 1996, c. 19.

The following pages give a brief description of: the most important of the undertakings made by the parties to these three Conventions; key comments on the scope of those undertakings; and the procedures that the parties are to follow in complying with them. Before proceeding with the description and comments, however, the relationship between international law and Canadian domestic law is discussed. In addition, the appendix describes the procedure for concluding, implementing, ratifying and coming into force of an international treaty in Canada.

## **IMPLEMENTATION OF TREATIES IN CANADA**

In Canada, the legislative branch (i.e., Parliament and the provincial legislative assemblies) have sole jurisdiction to make rules,<sup>(5)</sup> which they do by enacting legislation.<sup>(6)</sup> They may also enact provisions delegating the rule-making power to a regulatory authority. The only limits on this power are those imposed on the legislative branch by the Constitution. Examples of limitations on the power of the legislative branch are the requirement that the division of legislative powers between the federal and provincial governments not be violated, and the *Canadian Charter of Rights and Freedoms*.<sup>(7)</sup>

However, other considerations apart from the Constitution may influence the exercise of legislative power. Implementation of an international treaty is one example. By becoming a party to the three treaties on illicit drugs and traffic in illicit drugs, the Government of Canada has undertaken to adapt its own legislation on drugs to ensure that it complies with the provisions of the treaties. All the measures that a state must take domestically to comply with the provisions of an international treaty constitute the “implementation” of the treaty. The most obvious step in implementing a treaty is the adoption or amendment of legislative provisions.

- 
- (5) The legislative branch includes both Parliament and the provincial legislative assemblies, acting within their respective spheres of jurisdiction.
- (6) All the laws and regulations in force in Canada are rules. In the case of regulations, the rule is made by a body which has been given authority to make it, pursuant to a legislative provision.
- (7) A legislative measure adopted by Parliament to implement a treaty but within the jurisdiction of a province or contrary to the Charter, could be declared by a court to be unconstitutional; this would put the Government of Canada in default of the terms of the treaty.

Not all treaties entered into by Canada require legislative action. If domestic legislation already complies with the undertakings made, as is often the case, there is no need for legislative action. If the treaty has no effect in domestic law, again, there is no need for legislative action.

However, before ratifying an international treaty, the Governor in Council should ensure that the Government of Canada complies with the obligations imposed on the States that are party to the treaty. Otherwise, the Government of Canada could be in default of a treaty as soon as it was ratified. One aspect of this verification process is to ensure that Canadian legislation, both federal and provincial, complies with the obligations in the treaty.

It can be assumed that, at the time the Government of Canada ratified the three drug Conventions, it had ensured that its legislation complied with the obligations undertaken. The relevant legislative provisions at that time were to be found in the *Criminal Code*, the *Food and Drug Act* and the *Narcotic Control Act*, provisions of which were later, in 1996, grouped into a single statute, the *Controlled Drugs and Substances Act*.<sup>(8)</sup> Today, this legislation, which has been in force since 14 May 1997, implements the essential aspects of Canada's obligations under the three drug Conventions.<sup>(9)</sup>

A detailed study of the implementation of all the undertakings made by the Government of Canada in the three drug Conventions cannot be made in the context of this paper. Some examples, however, are given in the following sections, which describe the content of each of the Conventions.

## **THE CONVENTIONS ON DRUGS AND PSYCHOTROPIC SUBSTANCES**

The three Conventions referred to above require that the signatory states enact minimum measures relating to the prohibition of narcotic drugs, psychotropic substances and their precursors, and to the traffic in those substances, and that they cooperate in the international battle against these substances. After the content of each of these Conventions is examined in more detail below, specific aspects of them are discussed.

---

(8) S.C. 1996, Chapter 19. For a description of this Act, see: Jane Allain, *Bill C-8: Controlled Drugs and Substances Act*, Ottawa, Parliamentary Research Branch, Library of Parliament, May 1997.

### **A. *Single Convention on Narcotic Drugs, 1961***

The *Single Convention on Narcotic Drugs, 1961* owes its name to the fact that it came into force to replace several international conventions that had been adopted earlier.<sup>(10)</sup> In addition to provisions regarding the control of prohibited substances, the Act provides for the establishment of an international institutional structure with responsibility for monitoring the application of the Convention.

The Single Convention, 1961 was amended, in 1972, by the *Protocol amending the Single Convention on Narcotic Drugs, 1961*.<sup>(11)</sup> Canada has ratified the Single Convention,

---

(9) See *Order Fixing May 14, 1997 as the Date of the Coming into Force of the Act*, TR/97-47, *Canada Gazette Part II*, Vol. 131, No. 10, May 14, 1997, p. 1502.

(10) Article 44 of the Single Convention, 1961 reads as follows:

**Article 44.**

Termination of previous international treaties.

1. The provisions of this Convention, upon its coming into force, shall, as between Parties hereto, terminate and replace the provisions of the following treaties:

- a) International Opium Convention, signed at The Hague on 23 January 1912;
- b) Agreement concerning the Manufacture of, Internal Trade in and Use of Prepared Opium, signed at Geneva on 11 February 1925;
- c) International Opium Convention, signed at Geneva on 19 February 1925;
- d) Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, signed at Geneva on 13 July 1931;
- e) Agreement for the Control of Opium Smoking in the Far East, signed at Bangkok on 27 November 1931;
- f) Protocol signed at Lake Success on 11 December 1946, amending the Agreements, Conventions and Protocols on Narcotic Drugs concluded at The Hague on 23 January 1912, at Geneva on 11 February 1925, and 19 February 1925 and 13 July 1931, at Bangkok on 27 November 1931 and at Geneva on 26 June 1936, except as it affects the last-named Convention;
- g) The Conventions and Agreements referred to in sub-paragraphs a to e as amended by the Protocol of 1946 referred to in sub-paragraph f;
- h) Protocol signed at Paris on 19 November 1948 Bringing under International Control Drugs outside the Scope of the Convention of 13 July 1931 for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, as amended by the Protocol signed at Lake Success on 11 December 1946;
- i) Protocol for Limiting and Regulating the Cultivation of the Poppy Plant, the Production of, International and Wholesale Trade in, and Use of Opium, signed at New York on 23 June 1953, should that Protocol have come into force.

2. Upon the coming into force of this Convention, article 9 of the Convention for the suppression of the Illicit Traffic in Dangerous Drugs, signed at Geneva on 26 June 1936, shall, between the Parties thereto which are also Parties to this Convention, be terminated, and shall be replaced by paragraph 2b of article 36 of this Convention; provided that such a Party may by notification to the Secretary-General continue in force the said article 9.

(11) *Protocol amending the Single Convention on Narcotic Drugs, 1961*, Canadian Treaty Series 1976/48.

1961 and the Protocol; thus, references in this paper to the text of the Single Convention, 1961 are to the amended version of that document.<sup>(12)</sup>

### **1. Establishment of an International Institutional Structure**

The adoption of the Single Convention, 1961 took place under the aegis of the United Nations (UN), and its institutional structure is closely associated with the UN.<sup>(13)</sup> Responsibility for applying the Single Convention, 1961 and for controlling narcotics is divided among the United Nations Economic and Social Council (the Council), the Council's Commission on Narcotic Drugs (the Commission), and the International Narcotics Control Board (the INCB).

The Council is a permanent organ of the General Assembly of the United Nations; the Commission and the Board are under the Council. Under the Single Convention, 1961, the Board is the international institution responsible for monitoring the application of the Convention by states, while the Commission is the forum in which the Parties discuss and decide issues, just like the Council at another level.

The INCB's supervisory role takes a variety of forms and imposes a variety of obligations on the Parties. The Parties must send to the INCB all information and estimates required under the Single Convention, 1961.<sup>(14)</sup> The INCB fixes the dates and prescribes the form for supplying information.<sup>(15)</sup> If a state fails to provide the information, the INCB may establish its own estimates and request the cooperation of the states concerned, to the extent practicable.<sup>(16)</sup>

---

(12) In its most recent annual report (1997), the International Narcotics Control Board (INCB) notes that 12 countries that ratified the Single Convention, 1961 have not yet ratified the Protocol thereto. That does not prevent the Protocol from coming into force on the international scene and applying to the countries that have ratified it. On the other hand, the Protocol (and the amendments it makes to the Single Convention, 1961) cannot apply in the countries that have not ratified it. See INCB, *Report of the International Narcotics Control Board for 1997*, Publications of the United Nations, Vienna, Chapter II (available on the Internet at the following address: <http://undcp.or.at/incb/AR/f/1997/index.htm>).

(13) The United Nations is responsible for the expenses of the Commission and the Board. See article 6 of the Single Convention, 1961.

(14) Single Convention, 1961, article 12.

(15) *Ibid.*, article 12(1).

(16) *Ibid.*, paragraph 12(3).



The INCB may request explanations from states that do not seem to be carrying out the provisions of the Single Convention, 1961 and may call upon a state to adopt remedial measures. The INCB may call the attention of the Parties, the Council and the Commission to any matter relating to the foregoing.<sup>(17)</sup> It may also publish a report on the matter and communicate it to the Council, which shall forward it to all Parties.<sup>(18)</sup> The INCB

shall prepare an annual report on its work and such additional reports as it considers necessary containing also an analysis of the estimates and statistical information at its disposal, and, in appropriate cases, an account of the explanations, if any, given by or required of Governments, together with any observations and recommendations which the Board desires to make. These reports shall be submitted to the Council through the Commission, which may make such comments as it sees fit.<sup>(19)</sup>

## 2. Prohibition and Control of Prohibited Substances

The central aspect of the Convention is limiting the production and trade in prohibited substances to the quantity needed to meet the medical and scientific needs of the state Parties. The Convention requires that states adopt the necessary legislative and regulatory measures for establishing the prohibitions and controls required, within their own territories. It would be too time-consuming to list all the measures that states are required to adopt, and so these comments will be limited to certain measures.<sup>(20)</sup> To summarize: anything relating to the trade in, and production and use of, the substances should be governed by legislative or regulatory measures.

In addition, the measures prescribed by the Single Convention, 1961 are the minimum measures that the states must adopt; there is nothing to prevent them from adopting more strict or severe measures of control.<sup>(21)</sup>

---

(17) *Ibid.*, paragraph 14(1).

(18) *Ibid.*, paragraph 14(3).

(19) *Ibid.*, paragraph 15(1).

(20) See below the section on specific aspects of the Conventions.

(21) On this point, article 39 of the Convention reads as follows:

“Notwithstanding anything contained in this Convention, a Party shall not be, or be deemed to be, precluded from adopting measures of control more strict or severe than those provided by this Convention and in particular from requiring that preparations in Schedule III or drugs in Schedule II be subject to all or such of the measures of control applicable to drugs in Schedule I as in its opinion is necessary or desirable for the protection of the public health and welfare.”

The substances to be controlled are determined according to Schedules appended to the Convention. There are four Schedules, each with its own specific features.<sup>(22)</sup> The substances in Schedule I are subject to all prohibitive measures set out in the Convention.<sup>(23)</sup> The substances in Schedule II are exempt from the application of two particular provisions of the Convention.<sup>(24)</sup> The substances in Schedule III are exempt from the application of a larger number of provisions of the Convention.<sup>(25)</sup> On the other hand, the substances in Schedule IV – in addition to being subject to all provisions of the Convention – are identified as narcotics and are subject to all the special measures of control that states are bound to adopt.<sup>(26)</sup> In addition, opium, the opium poppy, the coca bush, the cannabis plant, poppy straw and cannabis leaves are subject to special provisions.<sup>(27)</sup>

These Schedules may be amended, at the request of a Party or of the World Health Organization, to add or remove a substance, provided that all information in support of such an amendment is supplied. States receive and examine such requests and the Commission decides whether to amend the lists. The Secretary-General of the United Nations communicates that decision to the states.<sup>(28)</sup> The decision takes effect on the date of its receipt, and states must then take such action as may be required to implement it.<sup>(29)</sup>

At the national level, each state should maintain a special administration for the purpose of applying the provisions of the Single Convention, 1961. Under the Convention, states are required to supply an annual report to the Commission on the implementation of the Convention within their territory, and the text of all laws and regulations promulgated in order to give effect to the Convention.<sup>(30)</sup>

---

(22) Single Convention, 1961, article 2.

(23) *Ibid.*, paragraph 2(1).

(24) *Ibid.*, paragraph 2(2).

(25) *Ibid.*, paragraphs 2(3) and (4).

(26) *Ibid.*, paragraph 2(5). Cannabis appears in Schedule IV alongside morphine and heroin.

(27) *Ibid.*, paragraphs 2(6) and (7).

(28) The *Single Convention on Narcotic Drugs, 1961* does not specify the points that the Commission must take into account in making its decision, but presumably it will decide after reviewing the request for the change and the comments made thereon by the states.

(29) *Ibid.*, article 3.

(30) *Ibid.*, article 18.

Also under the Convention, states must estimate their needs for narcotics and inform the INCB of these.<sup>(31)</sup> They must also supply the INCB with statistics on the production, use in the manufacture of other drugs, of preparations in Schedule III or of substances not covered by the Convention, as well as consumption, imports, exports, seizures and stocks of drugs.<sup>(32)</sup> The total of the quantities of drugs should not exceed the quantity needed to satisfy consumption requirements, for use in the manufacture of other drugs and of preparations in Schedule III, or of substances not covered by the Convention, and also for needs in exportation, stocks and special projects.<sup>(33)</sup>

States that permit the cultivation of opium or cannabis must maintain national agencies to supervise their cultivation.<sup>(34)</sup> In addition, a state shall not permit the export of a drug unless it has ascertained that the transaction complies with the laws and regulations of the country receiving the goods.<sup>(35)</sup>

Provisions regarding the criminal nature of any form of transaction with respect to prohibited substances form much of the Single Convention, 1961. To summarize: in addition to measures for supervising and controlling lawful transactions with respect to drugs, any activity that is not directly medical or scientific in nature should be made an offence. The Convention deals with controlling the manufacture of drugs,<sup>(36)</sup> trade and distribution,<sup>(37)</sup> international trade,<sup>(38)</sup> possession,<sup>(39)</sup> measures of supervision and inspection,<sup>(40)</sup> action against illicit traffic,<sup>(41)</sup> the enactment of penal provisions,<sup>(42)</sup> seizure and confiscation<sup>(43)</sup> and the treatment of addicts.<sup>(44)</sup>

## ***B. Convention on Psychotropic Substances***

---

(31) *Ibid.*, article 19.

(32) *Ibid.*, article 20.

(33) *Ibid.*, article 21.

(34) *Ibid.*, articles 23 and 28.

(35) *Ibid.*, article 31.

(36) *Ibid.*, article 29.

(37) *Ibid.*, article 30.

(38) *Ibid.*, article 31.

(39) *Ibid.*, article 33.

(40) *Ibid.*, article 34.

(41) *Ibid.*, article 35.

(42) *Ibid.*, article 36.

(43) *Ibid.*, article 37.

(44) *Ibid.*, article 38.

The *Convention on Psychotropic Substances* supplements the Single Convention, 1961 in that it deals with substances that were not covered by the earlier Convention. Like the Single Convention, 1961, whose objective is to put controls on the manufacture and use of, and trade in, drugs, the objective of the *Convention on Psychotropic Substances* is to place equally stiff controls on these substances. In addition, it recognizes the roles of the existing institutions (the Council, the Commission and the INCB) as forums for discussion and decision-making or as supervisory bodies. The following is a summary of the main provisions of the Convention on Psychotropic Substances:

- Psychotropic substances are identified in four Schedules appended to the Convention.
- These Schedules may be amended by the Commission following a consultation process involving the World Health Organization; the Parties to the Convention must implement any such amendments.<sup>(45)</sup>
- A preparation (i.e., a mixture containing a psychotropic substance) is subject to the same measures of control as the psychotropic substance which it contains.<sup>(46)</sup>
- The use of psychotropic substances is limited to medical and scientific purposes.<sup>(47)</sup>
- The Parties should maintain a special national administration for the purpose of applying the Convention.<sup>(48)</sup>
- The Parties must exercise close supervision over the manufacture of and transactions with respect to psychotropic substances, including by establishing licensing and registration systems.<sup>(49)</sup>
- The Parties must ensure that substances listed in Schedules II, III and IV may be obtained only by individuals with medical prescriptions.<sup>(50)</sup>
- The Parties must specify the content of warnings to be printed on packages of psychotropic substances relating to directions for use, cautions and risks to the safety of the user.<sup>(51)</sup>

---

(45) *Convention on Psychotropic Substances*, article 2.

(46) *Ibid.*, article 3.

(47) *Ibid.*, article 5.

(48) *Ibid.*, article 6.

(49) *Ibid.*, articles 7, 8 and 11.

(50) *Ibid.*, article 9.

(51) *Ibid.*, article 10.

- The Parties must regulate and closely monitor international trade in psychotropic substances.<sup>(52)</sup>
- The Parties must establish a system of inspection of manufacturers, exporters, importers and distributors and of medical and scientific institutions that use psychotropic substances.<sup>(53)</sup>
- The Parties must provide the Secretary-General with such information as the Commission may request as well as an annual report regarding the working of the Convention in their territories. The Parties must supply the prescribed annual statistical reports to the INCB.<sup>(54)</sup>
- The Parties are required to take measures for the prevention of abuse of psychotropic substances and for the early identification, treatment, education, after-care, rehabilitation and social reintegration of the persons involved in such abuse.<sup>(55)</sup>
- The Parties are required to adopt measures against the illicit traffic in psychotropic substances and to enact penal provisions relating to illicit transactions with respect to those substances.<sup>(56)</sup>

### ***C. Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances***

The main objective of the Convention against Illicit Traffic is to promote cooperation among the Parties for eliminating the illicit traffic in narcotic drugs, psychotropic substances and their precursors. Like the other two Conventions, it refers to the international institutions that have already been established as bodies for discussion, and which exercise control. The main provisions of this Convention are as follows:

- The Parties are required to adopt legislative measures to establish as criminal offences all activities that may be directly or indirectly related to the illicit traffic in narcotic drugs, psychotropic substances or their precursors.<sup>(57)</sup>
- The possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal consumption contrary to the provisions of the Single Convention, 1961 must also be established as an offence.<sup>(58)</sup>

---

(52) *Ibid.*, article 12.

(53) *Ibid.*, article 15.

(54) *Ibid.*, article 16.

(55) *Ibid.*, article 20.

(56) *Ibid.*, articles 21 and 22.

(57) Convention against Illicit Traffic, article 3.

(58) *Ibid.*, paragraph 3(2).

- The sanctions associated with these measures must take into account the grave nature of the offence and include imprisonment or other forms of deprivation of liberty, pecuniary sanctions and confiscation.<sup>(59)</sup>
- In addition to these penalties, there may be additional measures such as treatment, education, after-care, rehabilitation and social reintegration.<sup>(60)</sup>
- If the offence is minor in nature, these measures may be substituted for the sanctions.<sup>(61)</sup>
- In the case of offences for personal use, the additional measures may be substituted for or added to the sanctions.<sup>(62)</sup>
- In all cases, the sentence imposed must take into account the serious nature of the act.<sup>(63)</sup>
- The sanction must have deterrent effect.<sup>(64)</sup>
- In addition, certain factors – such as the serious nature and circumstances of the offence – should be borne in mind when considering parole.<sup>(65)</sup>
- The Convention against Illicit Traffic also deals with the measures that states must take to establish jurisdiction and enable confiscation of property used in the commission of offences and the proceeds of those offences.<sup>(66)</sup>
- The Parties must adopt measures to provide for extradition, mutual legal assistance, the transfer of proceedings, cooperation and assistance for transit states and controlled delivery.<sup>(67)</sup>
- The Convention defines precursors as substances used in the manufacture of narcotic drugs or psychotropic substances, lists them in the Schedules, and requires that Parties adopt measures to prevent diversion of such substances.<sup>(68)</sup>

---

(59) *Ibid.*, subparagraph 3(4)(a).

(60) *Ibid.*, subparagraph 3(4)(b).

(61) *Ibid.*, subparagraph 3(4)(c). “Notwithstanding the preceding subparagraphs, in appropriate cases of a minor nature, the Parties may provide, as alternatives to conviction or punishment, measures such as education, rehabilitation or social reintegration, as well as, when the offender is a drug abuser, treatment and aftercare.”

(62) *Ibid.*, subparagraph 3(4)(d). “The Parties may provide, either as an alternative to conviction or punishment or in addition to conviction or punishment of an offence established in accordance with paragraph 2 of this article, measures for the treatment, education, aftercare, rehabilitation or social reintegration of the offender.”

(63) *Ibid.*, paragraph 3(5).

(64) *Ibid.*, paragraph 3(6).

(65) *Ibid.*, paragraph 3(7).

(66) *Ibid.*, articles 4 and 5.

(67) *Ibid.*, articles 6 to 11.

(68) *Ibid.*, paragraph 12(1).

- The Convention establishes the procedure for amending the lists of precursors; the final decision to amend a list is to be made by the Commission, as in the other Conventions.<sup>(69)</sup>
- The Convention requires that Parties adopt measures to eliminate illicit cultivation of plants containing narcotic or psychotropic substances and the demand for those substances, under the provisions of the Single Convention, 1961.<sup>(70)</sup> The Convention adds that these measures must respect fundamental human rights and take due account of traditional licit uses, where there is historic evidence of such use, as well as the protection of the environment.<sup>(71)</sup>
- The Convention calls for cooperation among the Parties in eliminating illicit cultivation.<sup>(72)</sup>
- The Parties must adopt appropriate measures to eliminate or reduce illicit demand for narcotic drugs and psychotropic substances with a view to reducing human suffering and eliminating financial incentives for illicit traffic.<sup>(73)</sup>
- The Convention requires that Parties adopt measures to control commercial carriers to ensure that they are not used to transport illicit substances.<sup>(74)</sup>
- The Parties must adopt labelling documents and procedures for lawful shipment.<sup>(75)</sup>
- The Convention also requires that Parties adopt measures for controlling illicit transport by sea and for monitoring free trade zones and free ports and the illicit use of the mail system.<sup>(76)</sup>
- The Convention sets out the information that the Parties must supply to the Commission, and the functions of the Commission.<sup>(77)</sup>
- The Convention sets out the functions of the INCB and the reports that the INCB must produce.<sup>(78)</sup>
- The Convention provides that the Parties may adopt more severe measures than those provided by the Convention.<sup>(79)</sup>

---

(69) *Ibid.*, paragraphs 12(2) to (7).

(70) *Ibid.*, paragraph 14(1).

(71) *Ibid.*, paragraph 14(2).

(72) *Ibid.*, paragraph 14(3).

(73) *Ibid.*, paragraph 14(4).

(74) *Ibid.*, article 15.

(75) *Ibid.*, article 16.

(76) *Ibid.*, articles 17, 18 and 19.

(77) *Ibid.*, articles 20 and 21.

(78) *Ibid.*, articles 22 and 23.

(79) *Ibid.*, article 24.

## **BRIEF DESCRIPTION OF THE *CONTROLLED DRUGS AND SUBSTANCES ACT***

As mentioned earlier, the *Controlled Drugs and Substances Act* covers the most important of the legislative provisions that Canada is required to enact under the three Conventions cited earlier.<sup>(80)</sup> The Schedules attached to the Act list the substances (narcotic drugs, psychotropic substances and precursors) which are subject to restrictions. These Schedules contain the same substances as are described in the Schedules to the three Conventions, divided into different groups.<sup>(81)</sup>

Part I of the Act creates offences associated with illicit transactions involving controlled substances (possession, possession for the purpose of trafficking, exporting and importing, production, etc.) and provides for the penalties that may be imposed for these offences.<sup>(82)</sup>

Part II of the Act provides for enforcement and coercion measures such as the issuance of warrants, searches, restraining orders, seizures, confiscations, etc.<sup>(83)</sup> Part III deals with disposal of controlled substances.<sup>(84)</sup> Part IV provides for the designation of inspectors to apply the regulations made under the Act.<sup>(85)</sup>

Part V gives the Minister of Health, who is the Minister responsible for the administration of the Act, the power to make orders for contraventions of regulations made under the Act and provides for the procedures that follow on the making of such orders.<sup>(86)</sup>

Part VI sets out certain rules of evidence and procedure that apply to the offences created by the Act.<sup>(87)</sup> This is also the Part describing the powers delegated to the Governor in Council to make regulations for carrying out the Act.<sup>(88)</sup> The regulatory powers of the Governor

---

(80) For a complete description of this legislation, see: Jane Allain, *Bill C-8: Controlled Drugs and Substances Act*, Ottawa, Parliamentary Research Branch, Library of Parliament, May 1997.

(81) Generally speaking, Schedule I to the Act reiterates the lists of drugs in the Single Convention, 1961 (except for cannabis, which is in Schedule II), Schedule III reiterates the lists of psychotropic substances in the Convention on Psychotropic Substances, and Schedule VI reiterates the lists of precursors in the Convention against Illicit Traffic.

(82) *Controlled Drugs and Substances Act*, sections 4 to 10.

(83) *Ibid.*, sections 11 to 23.

(84) *Ibid.*, sections 24 to 29.

(85) *Ibid.*, sections 30 to 32.

(86) *Ibid.*, sections 33 to 43.

(87) *Ibid.*, sections 44 to 60.

(88) *Ibid.*, section 55.



in Council are very broad and relate to almost all of the obligations set out in the three Conventions. For example, the following matters are determined by regulation:

- measures to control lawful transactions with respect to controlled substances (importation, exportation, production, packaging, sending, transportation, delivery, sale, provision, administration, possession or obtaining);<sup>(89)</sup>
- requirements regarding the issuance of, fees payable for, and classes of, permits;<sup>(90)</sup>
- the specifications of packages used for transactions with respect to controlled substances;<sup>(91)</sup>
- measures for controlling advertising with respect to controlled substances;<sup>(92)</sup>
- the books and records that must be kept by persons involved in transactions with respect to controlled substances.<sup>(93)</sup>

Lastly, it is important to note that “[...] the Minister may, on such terms and conditions as the Minister deems necessary, exempt any person or class of persons or any controlled substance or precursor or any class thereof from the application of all or any of the provisions of this [Act] or the regulations ... for a medical or scientific purpose or otherwise in the public interest.”<sup>(94)</sup> As well, the Governor in Council may, by regulation, exempt, “on such terms and conditions as may be specified in the regulations, any person or class of persons or any controlled substance or precursor or any class thereof from the application” of the Act or regulations.<sup>(95)</sup>

To date (October 1998), the Governor in Council has made three sets of regulations pursuant to the powers conferred by the Act. The *Narcotic Control Regulations* deal with the possession of narcotics by authorized persons, permits and authorized distributors, pharmacists, practitioners and hospitals.<sup>(96)</sup> The *Controlled Drugs and Substances (Police*

---

(89) *Ibid.*, section 55(1)(a).

(90) *Ibid.*, sections 55(1)(c) and (e).

(91) *Ibid.*, section 55(1)(j).

(92) *Ibid.*, section 55(1)(l).

(93) *Ibid.*, section 55(1)(m).

(94) *Ibid.*, section 56.

(95) *Ibid.*, paragraph 55(1)(z). The *Regulations Exempting Certain Precursors and Controlled Substances from the Application of the Controlled Drugs and Substances Act* (SOR/97-229) were made under this provision.

(96) *Narcotic Control Regulations*, C.R.C., c.1041, as amended.

*Enforcement*) Regulations allow police forces to be exempted from the application of certain provisions of the Act for the purposes of their investigations. Those regulations also prescribe the formalities for exemption and the reports that must be filed by the police forces.<sup>(97)</sup> Lastly, the *Regulations Exempting Certain Precursors and Controlled Substances from the Application of the Controlled Drugs and Substances Act* exempt the substances listed in the Schedule from the application of the Act.<sup>(98)</sup>

## **PARTICULAR ASPECTS OF THE INTERNATIONAL CONVENTIONS ON DRUGS**

As noted earlier, it would be too time-consuming to comment on all aspects of these Conventions and to examine how they are implemented in Canada or in other countries. Accordingly, comments are limited to three particular topics:

- respect for the particular features of national legal and judicial systems in implementing the Conventions;
- the possibility of Parties decriminalizing possession and use of cannabis and establishing programs to rehabilitate addicts; and
- the legal weight of the resolutions and declarations of international organizations.

### **A. Particular Features of National Legal and Judicial Systems**

Each state has its own legal and judicial system, and each of those systems has its own characteristics. For example, in Canada there is a presumption of innocence in criminal cases; a person is presumed to be innocent until he or she is found guilty following a judicial process. The consequence of this principle is that investigators are required to collect all the evidence that is needed for an accused to be charged and convicted. The accused may refuse to participate in the investigation, by remaining silent, and cannot be compelled to testify at his or her trial. In other countries, the rules may be different. As well, each country has its own approach to the penalties and sentences imposed. Some countries place greater emphasis on punishing the crime, while others prefer the approach of rehabilitating criminals.

---

(97) *Controlled Drugs and Substances (Police Enforcement) Regulations*, SOR/97-234.

(98) *Regulations Exempting Certain Precursors and Controlled Substances from the Application of the Controlled Drugs and Substances Act*, SOR/97-229.

The three Conventions recognize these particular features of national legal and judicial systems and specify that the measures adopted by the states will respect them. The words used are different from one Convention to another, but the intention seems to be the same. Article 36 of the *Single Convention, 1961* states: “subject to its constitutional provisions ...”; article 21 of the *Convention on Psychotropic Substances* states: “having due regard to their constitutional, legal and administrative systems ...”; and article 3 of the Convention against Illicit Traffic states: “subject to its constitutional principles and the basic concepts of its legal system.”<sup>(99)</sup>

In Canada, these particular features may be identified as being all the elements of constitutional law to which each level of government in the Canadian federation (the federal government and the provinces), and each branch of that government (legislative, executive and judicial), is subject.

The three Conventions recognize that implementation is subject to the particular legal features of the states that become Parties. In fact, the substance of these clauses is implied in all international treaties. A state can go ahead and enter into as many treaties as it likes, but implementation of those treaties will always be subject to “constitutional principles” and the “basic concepts of its legal system.” Implementation that does not comply with those principles and concepts will be void or non-existent at the national level; and failing implementation, there can be no ratification.

Respect for “constitutional principles” and the “basic concepts of its legal system” takes on particular importance in Canada. The division of legislative powers between the federal and provincial governments means that the federal government must not infringe the jurisdictions of the provinces in implementing and ratifying a treaty. If the subject matter of the treaty requires legislative action in a field within provincial jurisdiction, the federal government – before ratifying a treaty – will have to secure the cooperation of the provinces in ensuring that their legislation is in conformity with its terms.

With respect to the three drug Conventions, the legislative measures needed to implement the aspects of the Conventions making the illicit traffic of drugs an offence all fall under the criminal law. Criminal law is within federal jurisdiction, so Parliament could act alone to implement those aspects of the treaties. There could be a federation in which criminal law is

---

(99) More specifically, subparagraph 3(1)(c) and paragraph 3(2) of the Convention against Illicit Traffic.

within the jurisdiction of its provinces or states; in that case, the provinces or states would have to take action to implement the drug treaties before the federal state in question could ratify them.

On the other hand, health falls within provincial jurisdiction; as a result, it is the provinces that set up rehabilitation programs for addicts. This division of powers within the Canadian federation does not seem to create any difficulties in terms of the implementation of the three Conventions.

Since the *Canadian Charter of Rights and Freedoms* was enacted in 1982 and entrenched in the Canadian Constitution, there can be no doubt that its provisions are elements of the “basic concepts of the legal system” of Canada. Parliament and the legislatures may not disregard the Charter, and the numerous judgements of the Supreme Court of Canada act as a reminder of this fact.

This means that all the provisions of the Charter dealing with individual rights in the judicial system are basic elements of the Canadian legal system and may not be disregarded. Accordingly, it would be undesirable to infringe the following legal guarantees with the excuse of combatting the scourge of drugs:

- guarantee against unreasonable search and seizure;<sup>(100)</sup>
- guarantee against arbitrary detention or imprisonment;<sup>(101)</sup>
- guarantee of being informed of the reasons for arrest or detention;
- guarantee of access without delay to counsel, and of being informed of that right;<sup>(102)</sup>
- guarantee of being informed without unreasonable delay of the offence charged;
- guarantee of being tried within a reasonable time;
- guarantee of not being compelled to testify against one’s self;
- guarantee of being presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;
- guarantee of not being denied reasonable bail without just cause;
- guarantee of the benefit of trial by jury where the maximum punishment for the offence is imprisonment for five years or a more severe punishment;

---

(100) *Canadian Charter of Rights and Freedoms*, section 8.

(101) *Ibid.*, section 9.

(102) *Ibid.*, section 10.

- guarantee of not being found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognized by the community of nations;
- guarantee of not being tried again for an offence if finally acquitted of it;
- guarantee of not being tried or punished again for an offence if finally found guilty and punished for it;<sup>(103)</sup>
- guarantee against any cruel and unusual treatment or punishment.<sup>(104)</sup>

The “basic concepts of a legal system” should not be confused with the policy statements that a government may make from time to time. Normally, a statement of that nature expresses the policy of the government on a particular subject, and the process that it intends to follow to implement that policy. Neither the government policy nor the process should be considered as part of those basic concepts.

## **B. Possession of Cannabis and Rehabilitation Programs**

As explained above, the Conventions require states to adopt measures for the control of narcotic drugs and psychotropic substances within their territories. Those measures must be very restrictive, and the only authorizations permitted are limited to medical and scientific use. On the other hand, despite these Conventions, some countries have adopted measures that permit simple possession of cannabis, while others have chosen to take a tolerant attitude toward simple possession. Still other countries have adopted rehabilitation programs for addicts that allow them to continue to consume the drugs on which they are dependent, or substitutes for those drugs, during their period of rehabilitation. Opinion is divided as to whether such countries are free to adopt measures of this nature and still be in compliance with their obligations under the three Conventions.

For example, the Netherlands tolerates possession of cannabis for personal use; Belgium, like the Netherlands, has allowed “coffee shops” to be set up where certain quantities of cannabis may be consumed; and Switzerland has rehabilitation programs that allow addicts to receive the drugs on which they are dependent, or substitutes for those drugs.

---

(103) *Ibid.*, section 11.

(104) *Ibid.*, section 12.

The question remains as to whether these countries, which have in fact ratified the three Conventions, are free to permit the use of cannabis and to establish rehabilitation programs that use prohibited drugs or substitutes.

## 1. Extracts from the Conventions

The following provisions of the three Conventions are those considered to be the most relevant for the purposes of this paper (emphasis is added):

### a. Single Convention, 1961

#### **Article 4** (General obligations)

The Parties shall take such legislative and administrative measures as may be necessary:

- a) To give effect to and carry out the provisions of this Convention within their own territories;
- b) To co-operate with other States in the execution of the provisions of this Convention; and
- c) Subject to the provisions of this Convention, to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs.

#### **Article 33** (Possession of drugs)

The Parties shall not permit the possession of drugs except under legal authority.

#### **Article 36** (Penal provisions)

1. (a) Subject to its constitutional limitations, each Party shall adopt such measures as will ensure that cultivation, production, manufacture, extraction, preparation, possession, offering, offering for sale, distribution, purchase, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation and exportation of drugs contrary to the provisions of this Convention, and any other action which in the opinion of such Party may be contrary to the provisions of this Convention, shall be punishable offences when committed intentionally, and that serious offences shall be liable to adequate punishment particularly by imprisonment or other penalties of deprivation of liberty.

(b) Notwithstanding the preceding subparagraph, when abusers of drugs have committed such offences, the Parties may provide, either as an alternative to conviction or punishment or in addition to conviction or punishment, that such abusers shall undergo measures of treatment, education, after-care, rehabilitation and social reintegration in conformity with paragraph 1 of article 38.

[...]

**b. Convention on Psychotropic Substances, 1971**

**Article 5** (Limitation of use to medical and scientific purposes)

1. Each Party shall limit the use of substances in Schedule I as provided in article 7.
2. Each Party shall, except as provided in article 4, limit by such measures as it considers appropriate the manufacture, export, import, distribution and stocks of, trade in, and use and possession of, substances in Schedules II, III and IV to medical and scientific purposes.
3. It is desirable that the Parties do not permit the possession of substances in Schedules II, III and IV except under legal authority.

**Article 7** (Special provisions regarding substances in Schedule I)

In respect of substances in Schedule I, the Parties shall:

- a) Prohibit all use except for scientific and very limited medical purposes by duly authorized persons, in medical or scientific establishments which are directly under the control of their Governments or specifically approved by them;
- b) Require that manufacture, trade, distribution and possession be under a special licence or prior authorization;

[...]

**Article 9** (Prescriptions)

1. The Parties shall require that substances in Schedules II, III and IV be supplied or dispensed for use by individuals pursuant to medical prescription only, except when individuals may lawfully obtain, use, dispense or administer such substances in the duly authorized exercise of therapeutic or scientific functions.

[...]

3. Notwithstanding paragraph 1, a Party may, if in its opinion local circumstances so require and under such conditions, including record keeping, as it may prescribe, authorize licensed pharmacists or other licensed retail distributors designated by the authorities responsible for public health in its country or part thereof to supply, at their discretion and without prescription, for use for medical purposes by individuals in exceptional cases, small quantities, within limits to be defined by the Parties, of substances in Schedules III and IV.

**Article 20** (Measures against the abuse of psychotropic substances)

1. The Parties shall take all practicable measures for the prevention of abuse of psychotropic substances and for the early identification, treatment, education, after-care, rehabilitation and social reintegration of the persons involved, and shall co-ordinate their efforts to these ends.

[...]

**c. Convention Against Illicit Traffic, 1988**

**Article 3** (Offences and sanctions)

[...]

2. Subject to its constitutional principles and the basic concepts of its legal system, each Party shall adopt such measures as may be necessary to establish as a criminal offence under its domestic law, when committed intentionally, the possession, purchase or cultivation of narcotic drugs or psychotropic substances for personal use contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention.

[...]

6. The Parties shall endeavour to ensure that any discretionary legal powers under their domestic law relating to the prosecution of persons for offences established in accordance with this article are exercised to maximize the effectiveness of law enforcement measures in respect of those offences and with due regard to the need to deter the commission of such offences.

[...]

11. Nothing contained in this article shall affect the principle that the description of the offences to which it refers and of legal defences thereto is reserved to the domestic law of a Party and that such offences shall be prosecuted and punished in conformity with that law.

**Article 14** (Measures to eradicate illicit cultivation of narcotic plants and to eliminate illicit demand for narcotic drugs and psychotropic substances)

1. Any measures taken pursuant to this Convention by Parties shall not be less stringent than the provisions applicable to the eradication of illicit cultivation of plants containing narcotic and psychotropic substances and to the elimination of illicit demand for narcotic drugs and psychotropic substances under the provisions of the 1961 Convention, the 1961 Convention as amended and the 1971 Convention.



2. Each Party shall take appropriate measures to prevent illicit cultivation of and to eradicate plants containing narcotic or psychotropic substances, such as opium poppy, coca bush and cannabis plants, cultivated illicitly in its territory. The measures adopted shall respect fundamental human rights and shall take due account of traditional licit uses where there is historic evidence of such use as well as the protection of the environment.

[...]

## 2. Possession of Cannabis

To justify the legalization of possession of cannabis, some authors have defended the interpretation that it was the intention of the Parties for the prohibition on possession to be limited to possession for the purposes of trafficking.<sup>(105)</sup> In the view of those authors, simple possession of cannabis for personal use was never intended to be covered. To determine whether their interpretation is appropriate, the details of the interpretation must be considered.

Briefly, to justify possession of cannabis under the Conventions, these authors assert that article 36 of the Single Convention, 1961, which creates the penal offence of possession of cannabis, covers only possession for the purposes of trafficking. All grounds for the offences to which article 36 refers are directly related to the illicit drug traffic. It also refers to cultivation, production, manufacture, extraction, preparation, offering, offering for sale, distribution, purchase, delivery, brokerage, dispatch, dispatch in transit, transportation, importation and exportation of drugs contrary to the provisions of the Convention.

In arguing this interpretation, these authors also refer to the fact that the third version of the draft Convention, i.e., the version that preceded the version ultimately adopted, was divided into chapters, and that article 45 in the third version (which corresponds to paragraph 36(1) of the Single Convention, 1961) was part of a chapter clearly identified as referring to offences in relation to illicit traffic. In addition, article 36 appears between two articles dealing with matters directly related to illicit traffic; article 35 is entitled “Action against the illicit traffic,” and article 37 is entitled “Seizure and Confiscation.” Accordingly, the possession to which article 36 refers could only have been possession for the purposes of

---

(105) United States, National Commission on Marihuana and Drug Abuse, *Marihuana – A Signal of Misunderstanding*, Washington, 1972. A. Noll, “Drug Abuse and Penal Provisions of the International Drug Control Treaties,” *Bulletin on Narcotics*, Vol. XXIX, No. 4, October/December 1977, pp. 41-57. South Australia, Royal Commission into the Non-Medical Use of Drugs, *Cannabis: A Discussion Paper*, Adelaide, 1978. These three references are cited in Commonwealth of Australia, *Legislative Options for Cannabis Use in Australia*, Sydney, 1994, Chapter 3. That document is available on the Internet at the following address: <http://www.health.gov.au/pubs/drug/cannabis/cannabis.htm>

trafficking; it is argued that this was the intention of the Parties. The same argument points to the Commentary of the UN Secretary-General on the Single Convention, 1961.<sup>(106)</sup> However, in recounting these facts concerning the preparatory work, the Commentary of the Secretary-General does not claim that this interpretation is necessarily the right one; it simply gives one interpretation of this specific provision of the Single Convention, 1961.<sup>(107)</sup>

Other authors take the position that possession of cannabis, like that of any other drug or psychotropic substance, must be made an offence by the Parties to the Conventions.

In 1972, the Le Dain Commission stated that the expression “possession” in article 36 of the Single Convention, 1961 had to include possession for personal use.<sup>(108)</sup> It also referred to article 33. The Commission stated:

It has generally been assumed that “possession” in article 36 includes possession for use as well as possession for the purpose of trafficking. This is a reasonable inference from the terms of article 4, which obliges the parties “to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs.” There is also article 33, which provides that “The Parties shall not permit the possession of drugs except under legal authority.” [...] On the face of article 26 it would not be unreasonable to argue that what is contemplated is possession for the purpose of trafficking rather than possession for use, and that the requirements of the article are satisfied if the former kind of possession is made a penal offence. The prevailing view, however, is that the word “possession” in article 36 includes simple possession for use.<sup>(109)</sup>

---

(106) Office of the UN Secretary-General, *Commentary on the Single Convention on Narcotic Drugs, 1961*, Geneva, 1973.

(107) The relevant passage of the Commentary of the Secretary-General reads as follows:

Article 45 of the Third Draft, which serves as the working document of the Plenipotentiary Conference, enumerated in its paragraph 1, subparagraph (a) “possession” among the actions for which punishment would be required. This paragraph is identical with the first part of paragraph 1 of article 36 of the Single Convention, dealing with “possession” as one of the punishable offences. Article 45 of the Third Draft is included in chapter IX, headed “Measures against Illicit Traffickers.” This would appear to support the opinion of those who believe that only possession for distribution, and not that for personal consumption, is a punishable offence under article 36 of the Single Convention. The Draft’s division into chapters was not taken over by the Single Convention; this was the reason why the chapter heading just mentioned was deleted, along with all the other chapter headings. Article 36 is still in that part of the Single Convention which deals with the illicit traffic. It is preceded by article 35, entitled “Action against the Illicit Traffic,” and followed by article 37, entitled “Seizure and Confiscation.” (p. 112 of the Commentary)

(108) Commission of Inquiry into the Non-Medical Use of Drugs (Gérald Le Dain, Chairman), *Cannabis – Report*, Ottawa, 1972.

(109) *Ibid.*, p. 212.

The Netherlands Ministers of Health, Welfare and Sports are also of the view that: “if the Netherlands decided unilaterally to legalise the market in cannabis and cannabis products ... [it] would be incompatible with article 2, paragraphs 1 and 5, article 4, article 36 and article 49.”<sup>(110)</sup>

In New Zealand, the Drug Policy Forum Trust – which argues for greater liberalization in the use of cannabis – acknowledges that the Single Convention, 1961 and the Convention against Illicit Traffic require that legislative provisions be enacted prohibiting the possession of cannabis for personal use.<sup>(111)</sup> The Trust believes article 33 of the Single Convention, 1961 is clear and does not seem to be open to interpretation.

It must not be forgotten that paragraph 3(2) of the Convention against Illicit Traffic reiterates the Parties’ obligation to make the possession, purchase and cultivation of narcotic drugs for personal consumption, contrary to the Single Convention, 1961, a criminal offence. This reminder, which appears in a Convention concluded more than 20 years after the Single Convention, 1961, does not seem to leave any doubt as to the Parties’ intention.

Article 33 of the Single Convention, 1961 seems clear. It prohibits the possession of drugs. It remains to be determined whether this interpretation of the Convention is justified. For that purpose, a few comments must be made on the principles of the interpretation of treaties in international law. Those principles are codified in articles 31 and 32 of the *Vienna Convention on the Law of Treaties*, which read as follows:<sup>(112)</sup>

**Article 31** (General rule of interpretation)

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

---

(110) Netherlands, Ministries of Health, Welfare and Sports, *Drug Policy in the Netherlands – Continuity and Change*, Annex III. This document is available on the Internet at the following address: <http://nederland.drugtext.nl/vws/drugnota/0/drugall.htm>

(111) Drug Policy Forum Trust, *Alternative Systems of Cannabis Control in New Zealand – A Discussion Paper*, July 1997. Drug Policy Forum Trust, *New Zealand Should Regulate and Tax Cannabis Commerce – Final Report*, 30 March 1998. These documents are available on the Internet at the following addresses, respectively: <http://www.nzdf.org.nz/fulltext.htm> and <http://www.nzdf.org.nz/1998.htm>

(112) *Vienna Convention on the Law of Treaties*, Canadian Treaty Series 1980/37.

- (a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
- (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty.

3. There shall be taken into account, together with the context:

- (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
- (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
- (c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

**Article 32** (Supplementary means of interpretation)

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to section 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.

Article 31 of the *Vienna Convention on the Law of Treaties* establishes the basic principle that applies to the interpretation of treaties. The terms of a treaty must be understood according to their ordinary meaning, in light of its object and purpose. Agreements entered into in connection with the conclusion of the treaty (paragraph 31(2)) and subsequent legal instruments relating to the interpretation of the treaty or the application of its provisions (paragraph 31(3)) should also be considered. On the other hand, a term will be given a special meaning if it is established that this is what the parties intended (paragraph 31(4)).

Because there seem to have been no supplementary agreements made when the Conventions were concluded, or any subsequent agreements regarding the interpretation or application of the Conventions, any reference to paragraphs 31(2) and (3) in consideration of how to interpret the terms of the treaties can be eliminated. The question that remains is whether it can be established that the Parties' intention was to give a special meaning to certain terms (or to certain provisions of the treaties), as set out in paragraph 31(4) of the *Vienna Convention on the Law of Treaties*.

On the other hand, it is curious that these same authors seem to disregard article 33 of the Single Convention, 1961; this would appear clear, to say the least, with respect to the possession of drugs: “The Parties shall not permit the possession of drugs except under legal authority.” This article did not appear in the chapter dealing with offences in relation to illicit traffic in the third version of the Convention. Lastly, it should not be forgotten that under the Single Convention, 1961, cannabis is a narcotic drug on the same footing as opium, heroin or morphine, and is intended to be treated in the same manner.

The Commentary of the Secretary-General is a publication that comments on each of the articles of the Single Convention, 1961. It may provide explanations of the process whereby the provision in question was adopted or the interpretation that Parties (and not the Parties) give to the provision, or a “personal” interpretation of the provision in question.

The Commentary was prepared in response to a request from the Economic and Social Council. The resolution of the Council reads as follows: “[r]equest the Secretary-General to prepare a legal commentary on the Single Convention giving an interpretation of the provisions of the Convention in the light of the relevant conference proceedings and other material.”<sup>(113)</sup> This resolution must be read bearing in mind article 32 of the *Vienna Convention on the Law of Treaties*; that article deals with supplementary means of interpretation. It is easy to interpret the resolution as asking the Secretary-General to report on the supplementary matters that might be used in interpreting the treaty: “in the light of the relevant conference proceeding and other material.” On the other hand, article 31 of the *Vienna Convention on the Law of Treaties* does not take this approach where a treaty needs to be interpreted. First, the ordinary meaning of the provisions of the treaty is to be applied; if there are difficulties, recourse may be had to supplementary means.

Moreover, the Commentary has no legal weight. It was not adopted by the Parties to the Convention nor was it the subject of a resolution of the United Nations or of any of its organs, such as the Economic and Social Council. An international court (or arbitration tribunal) could well interpret a provision of the Convention in a way contrary to the Commentary.

That being said, one item in the Commentary mentioned earlier must be clarified. The Commentary points out that the Single Convention, 1961 is not divided into chapters like the third version of the Convention on which the Parties worked; the justification given for the

---

(113) See Resolution 914 (XXXIV) D of the Economic and Social Council, 3 August 1962.

disappearance of the chapters, however, seems quite weak.<sup>(114)</sup> It is a principle of statutory interpretation, applicable to the interpretation of treaties, that the legislature does not speak in order to say nothing. If the legislature amends a provision, it means that it wants the amendment to have a meaning. Applying this principle to the disappearance of the chapter divisions between the third and final versions of the Single Convention, 1961 implies that disappearance must mean something. One possible interpretation is that the Parties had agreed on this step in order to ensure that the Convention could not be interpreted on the basis of those divisions, and so that the prohibition on possession in article 36 could not be limited to possession for the purposes of trafficking alone.

The only way to settle the debate definitively, as to whether possession of cannabis (or another drug) must be made an offence by virtue of one of the three Conventions, would be to obtain a decision on the matter from the International Court of Justice. Articles from each of the three Conventions – article 48 of the Single Convention, 1961; article 31 of the *Convention on Psychotropic Substances*; and article 32 of the Convention against Illicit Traffic – provide that any dispute relating to the interpretation of these Conventions should be settled by agreement between the Parties and, failing agreement, by the International Court of Justice.

Even if the Single Convention, 1961 requires that possession of cannabis be made an offence, it still allows the Parties latitude as to the sanctions or penalties they impose. The sanctions imposed must have a deterrent effect on the offender or any other individual who might be tempted to commit the same offence. The sanction must be determined on the basis of the seriousness of the offence.<sup>(115)</sup> In less serious cases, the sanction may even be replaced by measures for treatment, education, rehabilitation or social reintegration.<sup>(116)</sup>

The Conventions recognize, implicitly and explicitly,<sup>(117)</sup> that imposing sanctions is a matter within the domestic law of the Parties. Each Party may choose the approach that it considers most appropriate to deal with the various situations that may arise.

Contrary to what some commentators believe, the possession or use of cannabis in the Netherlands and Belgium has not been decriminalized; it is still an offence. On the other hand, the authorities of those countries have chosen to take a lax approach to such offences; the use of cannabis is tolerated in clearly identified places.

---

(114) See the passage from the Commentary quoted in footnote 107.

(115) Single Convention, 1961, subparagraph 36(1)(a); Convention against Illicit Traffic, paragraph 3(6).

(116) Single Convention, 1961, subparagraph 36(1)(b).

(117) Convention against Illicit Traffic, paragraph 3(11).

The administration of justice within the territory of a Party is a matter within its exclusive jurisdiction. The state need account to no one. No international organization has any right to scrutinize the manner in which the Parties apply the legislative provisions they have enacted pursuant to the Conventions. They do not have to justify their decisions. At most, they could be criticized if their conduct were injurious to other Parties or harmful to the mutual cooperation in which they must engage.

The tolerance exhibited by the Netherlands and Belgium may be criticized, but no other state or international body may interfere. The authorities of those two countries seem to have chosen, for their own reasons, not to enforce their legislation prohibiting the possession and use of cannabis.

In accordance with the drug Conventions, Canada has enacted a legislative measure prohibiting the possession of cannabis.<sup>(118)</sup> An offender is liable to a maximum term of imprisonment of five years less a day on indictment, and a possible maximum fine of \$1,000, or a maximum term of imprisonment of six months, or both, on summary conviction.<sup>(119)</sup>

In the case of possession of 1 gram or less of cannabis resin or 30 grams or less of cannabis (marihuana), an offender, who would then be charged with a summary conviction offence, would be liable to a maximum fine of \$1,000, or a maximum term of imprisonment of six months, or both.<sup>(120)</sup> Thus, Canada, like other countries, has chosen to be less severe in the case of simple possession of cannabis.

For people who favour the decriminalization of possession of cannabis for personal use, none of this is an acceptable position. As long as the drug Conventions are worded as they currently are, the Parties will have to maintain legislative provisions prohibiting the possession of cannabis for personal use. The Parties could choose to change this situation by adopting amendments to the Conventions to that effect.

Each of the three Conventions has provisions whereby they can be amended.<sup>(121)</sup> By following the process set out in the Conventions, a Party can propose amendments to each of

---

(118) *Controlled Drugs and Substances Act*, section 4(1).

(119) *Ibid.*, section 4(4). If a repeat offender is prosecuted for an offence punishable on summary conviction, the offender will be liable to a maximum fine of \$2,000 and a maximum term of imprisonment of one year, or both.

(120) *Ibid.*, paragraph 4(5).

(121) Single Convention, 1961, article 47. *Convention on Psychotropic Substances*, article 30. *Convention against Illicit Traffic*, article 31.

them. Briefly, the Parties may choose to accept the proposed amendments and ratify them, the effect of which would be to bring them into force within such time as the Conventions provide. If only one Party chooses not to ratify the proposed amendments, the Secretary-General could convene a conference on the subject. If this led to an agreement among the Parties to amend the Conventions to permit possession of cannabis, the amendment would be in the form of a protocol which, in order to come into force, would have to follow the process for implementation and ratification described earlier, with respect to the coming into force of an international treaty.

It must be noted that in one very specific case, the Convention against Illicit Traffic authorizes the cultivation and use of narcotic drugs or psychotropic substances apart from medical and scientific uses: traditional licit use of these substances, where there is historic evidence of such use.<sup>(122)</sup> This might refer to use in certain religious rites. The fact that the addition of this kind of use must be supported by historic evidence avoids the creation of new religions that could incorporate the use of these substances in their rites, solely in order to circumvent the general prohibition.<sup>(123)</sup>

### 3. Rehabilitation Programs

Rehabilitation programs in which addicts receive doses of the drugs on which they are dependent, or substitutes, are usually established and carried out under medical supervision. Compliance with this one formality (medical supervision) brings the use of drugs under the heading of use for medical purposes, and should therefore bring these programs into compliance with the undertakings given under the three Conventions.

Although it may be surprising, a program that prescribes heroin for a heroin addict is easier to justify under the three Conventions than is simple possession of cannabis. The reason is straightforward. Prescribing heroin is a medical act, and the program that authorizes it is in fact a treatment whose purpose is rehabilitation. It should not be forgotten that medical or scientific supervision would be an essential requirement (the condition *sine qua non*) for the program in question to be legal.

---

(122) Convention against Illicit Traffic, paragraph 14(2).

(123) When it ratified the *Convention on Psychotropic Substances*, Canada attached the following reservation to its ratification instrument:

“Whereas Canada is desirous of acceding to the *Convention on Psychotropic Substances*, 1971, and whereas Canada’s population includes certain small clearly determined groups who use in magical and religious rites certain psychotropic substances of plant origin included in the Schedules to the said Convention, and whereas the said substances occur in plants which grow in North America but not in Canada, a reservation of any present or future application, if any, of the provisions of the said Convention to peyote is hereby made pursuant to article 32, paragraph 3 of the Convention.”



### C. Legal Weight of the Resolutions and Declarations of International Organizations

As mentioned earlier, the Commentary of the Secretary-General has no legal weight in international law. This assertion requires some explanation.

To have legal weight, the rules must have been accepted by the international community. Acceptance of rules is formal (express) when it is done by means of a treaty. The Parties to a treaty agree on the rules that they intend to apply among themselves. Those rules are then set out in a document. It is not the existence of the treaty that establishes the rule, but the voluntary agreement of the Parties to accept it.

International organizations are bodies that are independent of their members, although the members participate in their activities and decisions. An international organization does not have the power to establish rules through resolutions and decisions. The decision-making assemblies of those organizations are independent of the member states. The resolutions they adopt and decisions they make are theirs alone. Those resolutions and decisions do not carry the weight of a treaty among the Parties, because the formal procedure required for concluding a treaty is lacking. For example, the participants in a decision have not been given the mandate to enter into a treaty by their own countries.

The resolutions and decisions are non-obligatory declarations for the members of the organization, and at best may give them guidelines for their conduct. Any measures taken by the members on the basis of the resolutions or decisions are purely voluntary.

A resolution of an international organization may become an international treaty if there are provisions for this. This was the case for the *International Covenant on Economic, Social and Cultural Rights*<sup>(124)</sup> (Covenant on Economic Rights) and the *International Covenant on Civil and Political Rights*<sup>(125)</sup> (Covenant on Civil Rights). Articles 26 and 27 of the Covenant on Economic Rights and articles 48 and 49 of the Covenant on Civil Rights provide for procedures for ratification by the members of the United Nations and for the formalities for coming into force. When these procedures and formalities were completed, the two protocols became international treaties that are binding on the states that ratified them.

Similarly, declarations by the participants at an international conference are merely statements of principle that have no legal weight. They serve only to guide the future work of the conference or international organization under whose aegis they were adopted.

---

(124) *International Covenant on Economic, Social and Cultural Rights*, Canadian Treaty Series 1976/46. Resolution of the United Nations of 16 December 1966.

(125) *International Covenant on Civil and Political Rights*, Canadian Treaty Series 1976/47. Resolution of the United Nations of 16 December 1966.

Accordingly, the resolutions and declarations adopted at the United Nations Conference on Drugs in June 1998 are merely statements of principle. They have no legal weight and serve only to guide the future work of the participants in the conference.

Lastly, the Commentary of the Secretary-General, referred to above, was probably written by staff at the United Nations Secretariat. It was likely never submitted to the members for adoption or comment before being published. Accordingly, it carries even less weight than the resolutions and decisions of international organizations.

## **CONCLUSION**

As might be expected, the negotiation of international treaties is not an easy task. In addition to establishing means of attacking a common problem, it is necessary to take into account the concerns of the various parties with respect to the subject at issue. The Conventions on drugs seem to blend national interests harmoniously with the need for cooperation in the fight against illegal trafficking. States continue to be free to impose sanctions on those who break their laws, and cooperation mechanisms (judicial cooperation, extradition, etc.) seem to be effective.

There is still room for improvement and modifications. To effect any necessary changes, however, each Party must give evidence of being in favour of them. Some states are more reluctant than others to soften the laws dealing with personal drug consumption. Those in favour of more relaxed measures must arm themselves with patience and with evidence from numerous studies in order to convince the more reluctant states of their point of view.

If, in the face of the problem of drug use, these shifts in attitude are possible in Canadian society, it seems likely that similar changes could come about in other societies. Laws evolve to reflect changes in the society that adopts them. International standards will evolve as the international community evolves, but time and effort must go into the process.

## **APPENDIX**

### **THE PROCEDURE FOR CONCLUDING, IMPLEMENTING, RATIFYING AND COMING INTO FORCE OF AN INTERNATIONAL TREATY IN CANADA**

## **THE PROCEDURE FOR CONCLUDING, IMPLEMENTING, RATIFYING AND COMING INTO FORCE OF AN INTERNATIONAL TREATY IN CANADA**

In Canada, the federal executive – for which the Governor in Council is the decision-making body – is the authority with jurisdiction to make binding commitments on behalf of Canada on the international scene. On the other hand, a treaty does not become applicable in Canada simply because it has been signed by Canada's representative. To sort out the complex process of concluding and implementing treaties in Canada, this Appendix explains the various steps that must be taken in order for an international treaty to come into force in Canada.

The three international Conventions on drugs examined in this paper are the product of three conferences held under the aegis of the United Nations. The conclusion of an international treaty is normally the result of an international conference at which the signatory countries are represented by officials of the relevant government departments, selected by the executive branch of the government. For instance, it would be logical to assume that in matters relating to drugs, Health Canada and Justice Canada, in addition to Foreign Affairs, would be involved and send representatives.

### **NEGOTIATING AND CONCLUDING A TREATY**

In order for there to be a treaty, there must be agreement (an expression of intention) by the states to that effect. To express its agreement, each state must delegate its duly instructed representative (its plenipotentiary) to the conference and give that representative powers to make binding commitments, to make agreements on its behalf. The act of delegation by Canada is known as conferring “full powers.” Formally, it will normally take the form of an order of the Governor in Council authorizing the Prime Minister, a minister or another Canadian representative to participate in the negotiations (at the conference) and ultimately to conclude and sign the treaty on behalf of Canada.

As mentioned above, in practice, when negotiations take place with a view to concluding a treaty, a team of people will be working for Canada. The Governor in Council receives periodic reports concerning the progress of the negotiations and the likely content of the treaty. When it is apparent that the treaty will be concluded, and the Governor in Council is satisfied with the content of the treaty, the Governor in Council will give the representative full powers. The representative thereby acquires authority to sign the treaty on behalf of Canada.

## **RATIFYING AND IMPLEMENTING A TREATY**

Merely signing the treaty, however, does not operate to bring the treaty into force, let alone to bring it into force in Canada. For that to occur, it must be ratified and implemented, if implementation is required.

Ratification takes the form of an order of the Governor in Council stating that Canada has completed the formalities of implementing the treaty in Canada and that it intends to be bound by the terms of the treaty. However, before the order is made, it must be ascertained that Canada is in compliance with the obligations it undertook in the treaty.

The terms of a treaty do not apply directly in Canada. The only body that is competent to make rules is the legislative branch. If a treaty were to be allowed to apply directly, this would amount to giving the executive the power to make rules, by entering into a treaty, that would apply throughout the territory of Canada. This is not the case.

Implementation consists of all of the steps that are needed in order for the treaty to apply in Canada. If the Canadian legislation is not in conformity with the undertakings given in the treaty, the legislative branch will have to make the necessary amendments before the treaty can be ratified.

In Canada, before ratifying a treaty, the government should ensure that Canada is capable of complying with the obligations undertaken in the treaty and that it will in fact comply with those obligations. It must then ensure that Canadian legislation does not contravene the obligations undertaken, and if necessary obtain the appropriate legislative amendments. As indicated above, the three drug Conventions require that the signatory states enact legislation consistent with the obligations undertaken by them in the Conventions. Accordingly, the government could not ratify the Conventions in question before the necessary legislation had been adopted, or at least before it had ascertained that the legislation in force complied with the obligations undertaken.<sup>(1)</sup> Implementation of a treaty in Canadian domestic law occurs with this

step, by which the Canadian legislation is amended to comply with the obligations undertaken in the treaty.

## COMING INTO FORCE OF THE TREATY

Conclusion of the treaty must be distinguished from its coming into force. A treaty may be signed by all the parties and still not be in force. Modern treaties usually establish their own procedures for coming into force. For example, paragraphs 1 and 2 of article 29 of the Convention against Illicit Traffic provide:

1. This Convention shall enter into force on the ninetieth day after the date of the deposit with the Secretary-General of the twentieth instrument of ratification, acceptance, approval or accession by States or by Namibia, represented by the Council for Namibia.

2. For each State or for Namibia, represented by the Council for Namibia, ratifying, accepting, approving or acceding to this Convention after the deposit of the twentieth instrument of ratification, acceptance, approval or accession, the Convention shall enter into force on the ninetieth day after the date of the deposit of its instrument of ratification, acceptance, approval or accession.

Thus, the coming into force of a treaty is based on the domestic ratification, acceptance, approval or accession procedures of the signatories. In order for the treaty to come into force, 20 signatory states must have completed their domestic procedures (ratification, acceptance, approval or accession) for implementing treaties and have notified the Secretary-General of the United Nations that these formalities have been completed. Although Canada signed the Convention against Illicit Traffic at the time it was concluded, on 20 December 1988, it deposited its instrument of ratification with the UN Secretary-General on 5 July 1990. Even on that date, the treaty had not received the approval of 20 states, as it came into force only on 11 November 1990. In addition, for states that had not deposited their instruments of ratification, acceptance, approval or accession to the Convention on the date it came into force, it would come into force for them only 90 days after that instrument was deposited. The date on which a treaty comes into force for a state is crucial because it determines the date as of which the state is bound by the treaty.

---

(1) In fields under provincial legislative jurisdiction, the Canadian government must secure the participation of the provinces so that their legislation will comply with the obligations undertaken.