

**CANADA'S PROPOSED DECRIMINALIZATION OF MARIJUANA:
INTERNATIONAL IMPLICATIONS AND VIEWS**

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CANADA

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OVERVIEW

In 2003 and 2004, the Government of Canada introduced versions of a bill that would “decriminalize” minor marijuana-related offences.⁽¹⁾ This paper reviews Canada’s international obligations in relation to cannabis laws and discusses varying interpretations of those obligations. It then examines the impact that marijuana decriminalization might have on Canada’s foreign policy programs. Finally, the paper discusses statements made by other governments and international bodies relating to this possible change in Canadian law.⁽²⁾

There is a generally accepted view that countries have flexibility to attach less severe consequences to minor cannabis-related offences, so that Canada’s proposed decriminalization of marijuana would not likely result in a violation of the three international agreements to which it is a party. It would also probably not directly affect Canada’s foreign policy programs, although there might be an indirect effect as a result of the United States’ general disapproval of Canada’s proposed reform. Several statements critical of Canada’s

(1) Bill C-38, An Act to amend the Contraventions Act and the Controlled Drugs and Substances Act, 2nd Session, 37th Parliament, introduced on 27 May 2003; Bill C-10, An Act to amend the Contraventions Act and the Controlled Drugs and Substances Act, 3rd Session, 37th Parliament, introduced on 12 February 2004; and Bill C-17, An Act to amend the Contraventions Act and the Controlled Drugs and Substances Act and to make consequential amendments to other Acts, 1st Session, 38th Parliament, introduced on 1 November 2004. The terms “decriminalize” and “decriminalization” are used throughout this paper, although “depenalize” and “depenalization” may also be appropriate terms.

(2) For a description and analysis of other aspects of the proposed legislative reform, see Wade Raaflaub, *Bill C-17: An Act to amend the Contraventions Act and the Controlled Drugs and Substances Act*, LS-488E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 5 November 2004. For a synopsis of the history of marijuana law reform in Canada and a summary of the most recent bill, see Wade Raaflaub, *Marijuana (Cannabis) Law Reform*, TIPS-108E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, revised 2 November 2004.

proposed decriminalization of marijuana have been made on behalf of the United States, particularly in the context of border control and drug smuggling. While two international bodies responsible for the implementation of drug treaties have expressed some reservations and disapproval when nations have liberalized their cannabis laws, they have not stated that marijuana decriminalization comparable to that proposed in Canada would contravene the relevant international conventions.

CANADA'S INTERNATIONAL OBLIGATIONS RELATING TO MARIJUANA

Canada is a party to three major international drug control treaties:⁽³⁾

- The *Single Convention on Narcotic Drugs, 1961* (“*Single Convention*”)⁽⁴⁾ aims to combat drug abuse by coordinated international action. First, it seeks to limit the possession, use, trade in, distribution, import, export, manufacture and production of drugs exclusively to medical and scientific purposes. Second, it combats drug trafficking through international cooperation to deter and discourage drug traffickers.
- The *Convention on Psychotropic Substances, 1971* establishes an international control system for psychotropic substances. It responded to the diversification and expansion of the spectrum of drugs of abuse and introduced controls over a number of synthetic drugs according to their abuse potential on the one hand and their therapeutic value on the other.
- The *Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988* (“*Trafficking Convention*”) provides comprehensive measures against drug trafficking, including provisions against money laundering and the diversion of precursor chemicals. It provides for international cooperation through, for example, extradition of drug traffickers, controlled deliveries and transfer of proceedings.

(3) These summaries and copies of the three conventions are available on the Web site of the United Nations Office of Drugs and Crime: http://www.unodc.org/unodc/en/un_treaties_and_resolutions.html. For a more detailed review, see Jay Sinha, *The History and Development of the Leading International Drug Control Conventions*, paper prepared for the Senate Special Committee on Illegal Drugs, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 21 February 2001; available on-line at <http://www.parl.gc.ca/37/1/parlbus/commbus/senate/com-e/ille-e/library-e/history-e.htm>.

(4) As amended by the 1972 *Protocol Amending the Single Convention on Narcotic Drugs, 1961*, which highlighted the need for treatment and rehabilitation of drug addicts.

To assist in understanding the scope of Canada's international obligations, it may be helpful to refer to some of the key provisions in the UN Conventions, as follows:

Single Convention, 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.

Trafficking Convention, 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.

[...]

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.

INTERPRETATIONS OF CANADA'S INTERNATIONAL OBLIGATIONS

Given the wording of their provisions and arguments concerning the intention of the drafting parties, the UN Conventions have been subject to a variety of interpretations.⁽⁵⁾ For example, although article 36 of the *Single Convention* requires the production and possession of

(5) For a detailed review of the varying interpretations as they relate to the possession of cannabis, see Daniel Dupras, *Canada's International Obligations under the Leading International Conventions on the Control of Narcotic Drugs*, paper prepared for the Senate Special Committee on Illegal Drugs, Library of Parliament, 20 October 1998, pp. 22-29; available on-line at <http://www.parl.gc.ca/37/1/parlbus/commbus/senate/com-e/ille-e/library-e/dupras-e.htm>.

drugs to be “punishable offences,” it does not expressly state that the offences must be criminal. Further, the obligation to attach adequate punishment, such as imprisonment, to “serious offences” suggests that minor offences may have less severe consequences.⁽⁶⁾ While article 3 of the *Trafficking Convention* requires Canada to establish a “criminal offence” under domestic law for the possession and cultivation of narcotic substances, paragraph 11 of that article recognizes that the description of offences is reserved to each country and that offences shall be punished in conformity with domestic law.

A. Views Expressed in Parliamentary Reports

The House of Commons Special Committee on Non-Medical Use of Drugs summarized some of the opposing views regarding Canada’s international obligations relating to marijuana in its December 2002 report:⁽⁷⁾

... Interpretations as to the limitations [the three Conventions] may impose are numerous and varied, particularly with respect to cannabis products. For example, it has been argued that the intention of Article 36 of the Single Convention was “for the prohibition on possession to be limited to possession for the purposes of trafficking.”⁽⁸⁾ Conversely, the Le Dain Commission expressed the view that Article 36 of the Single Convention would oblige Canada to make possession of “cannabis, cannabis resin, and extracts and tincture of cannabis, a punishable offence” [i.e., even for personal use].⁽⁹⁾ Nevertheless, it is apparent that some European Parties to the three Conventions have managed to find ways to attenuate the impact of their drug laws without necessarily removing prohibitions. ...⁽¹⁰⁾

(6) Subparagraph 36(1)(b) of the *Single Convention* also permits parties, notwithstanding subparagraph 36(1)(a), to impose alternative measures, such as treatment and education, on abusers of drugs rather than conviction and punishment.

(7) House of Commons Special Committee on Non-Medical Use of Drugs, *Policy for the New Millenium: Working Together to Redefine Canada’s Drug Strategy*, Ottawa, December 2002, p. 116; available online at <http://www.parl.gc.ca/InfoComDoc/37/2/SNUD/Studies/Reports/snudrp02/snudrp02-e.pdf>.

(8) Dupras (1998), p. 22.

(9) Commission of Inquiry into the Non-Medical Use of Drugs (Gérald Le Dain, Chair), *Cannabis: A Report of the Commission of Inquiry Into the Non-Medical Use of Drugs*, Information Canada, Ottawa, 1972, p. 210.

(10) Nicholas Dorn and Alison Jamieson, *Room for Manoeuvre*, DrugScope, London, March 2000. DrugScope is the United Kingdom’s leading independent centre of expertise on drugs.

It may be that the legalization (or repeal of prohibitions) of any of the substances covered by the United Nations Conventions would place Parties in a position of non-compliance. That said, the impact of a small or incremental change is much less clear. For example, an official from the Department of Foreign Affairs and International Trade told the Committee “[t]he consensus view in the Department of Foreign Affairs legal community would be that it is not possible to decriminalize cannabis and to be in conformity with the three conventions.” However, the same official also said “Parties do have some latitude with respect to the penalties and sanctions they can implement to be in conformity with the conventions,” and the requirement to make some things criminal offences “does not limit the thresholds at which certain activities need to be criminal offences, so it would be possible to assert certain thresholds.”⁽¹¹⁾ The Committee believes those comments mean that Canada does have some leeway, within the limits of the Conventions, to alter the nature of the legal consequences that may flow from offences under domestic laws like the *Controlled Drugs and Substances Act*, and/or the point at which various penalties will attach. ...

The House of Commons Special Committee’s report indicates that despite differing interpretations that may be given to the UN Conventions, a balanced view is that Canada would not be contravening its international obligations if it chooses to prohibit the production and possession of small amounts of cannabis by means short of criminal measures, and chooses to require a greater quantity of possession or production before criminal sanctions apply. The key point is that under Canada’s currently proposed legislation, possession and production of small amounts of marijuana would not be legalized but would remain prohibited. Penalties in the form of fines would still attach to minor cannabis-related infractions; and the possession of more than 30 grams of marijuana, possession of more than 1 gram of hashish, and production of more than three marijuana plants would be subject to criminal punishment, including the possibility of imprisonment.

In its September 2002 report,⁽¹²⁾ the Senate Special Committee on Illegal Drugs also concluded that Canada has some flexibility in meeting the requirements of its UN

(11) Terry Cormier, Director, International Crime Division, Department of Foreign Affairs and International Trade, Testimony before the House of Commons Special Committee on Non-Medical Use of Drugs, 27 August 2002.

(12) Senate Special Committee on Illegal Drugs, *Cannabis: Our Position for a Canadian Public Policy*, Ottawa, September 2002, pp. 466-467; available on-line at http://www.parl.gc.ca/common/Committee_SenRep.asp?Language=E&Parl=37&Ses=1&comm_id=85.

obligations. The Committee cited three factors: the Conventions recognize the primacy of national legal systems; sanctions on possession apply only to possession for the purpose of trafficking (i.e., not possession for personal use); and the Conventions impose moral obligations on states, and not legal obligations. Although the second factor would not apply to lower penalties for the production of three marijuana plants or less, as would exist under Canada's proposed legislation, the decriminalization of the production of small amounts of marijuana for personal use would arguably remain justifiable on the basis that Canada's international obligations are subject to its particular constitutional, legal and administrative systems.

B. Views Expressed by International Bodies

An interpretation that countries have flexibility in determining the penalties that attach to minor drug offences is also available from comments made by the International Narcotics Control Board (INCB), which monitors compliance with the provisions of the international drug control treaties. In its 2003 Annual Report, the INCB strongly disapproved of disparities in the punishment of drug trafficking offences across countries, but stated that “diversity and differences in the approach used by States regarding penalties and sanctions for the same class of minor offences are appropriate.”⁽¹³⁾ The fact that Australia, several European countries, and several states of the United States have already decriminalized marijuana to some extent would also demonstrate an emerging consensus that international obligations are not contravened by the reduction of penalties associated with minor cannabis-related offences.

On the other hand, the INCB responded disapprovingly to a 2001 change in Portugal's law, which no longer applies penal sanctions but rather administrative penalties, such as fines or other limitations of rights, to the illicit use, possession and acquisition for personal use of all drugs. The INCB “reminded” states that article 3 of the *Trafficking Convention* (reproduced above) requires the establishment of a criminal offence for the listed drug activities.⁽¹⁴⁾ It should be noted, however, that Canada's proposed legislation, unlike that of

(13) International Narcotics Control Board, *Report of the International Narcotics Control Board for 2003*, United Nations Publication, New York, March 2004, para. 212; available on-line at http://www.incb.org/e/ind_ar.htm (“2003 INCB Report”).

(14) International Narcotics Control Board, *Report of the International Narcotics Control Board for 2001*, United Nations Publication, New York, March 2002, para. 509; available on-line at http://www.incb.org/e/ind_ar.htm (“2001 INCB Report”).

Portugal, would not apply to all drugs and would make the possession and production of small amounts of marijuana a “contravention” and not an “administrative” offence. This distinction should be taken into consideration in any analysis of whether a sufficient prohibition within the meaning of the *Trafficking Convention* remains.⁽¹⁵⁾

In summary, while there are opposing views on the matter, there is a general consensus that Canada’s proposed decriminalization of marijuana would not contravene the UN Conventions to which Canada is a party. This consensus is notably reinforced by the fact that the United Nations Office of Drugs and Crime, which assists countries in the implementation of the international drug treaties, endorsed Canada’s initial marijuana legislation in 2003 as complying with the UN Conventions. It should be noted, however, that Canada’s proposed bill at the time did not reduce the penalties for production of three marijuana plants or less.⁽¹⁶⁾

IMPACT OF MARIJUANA DECRIMINALIZATION ON FOREIGN POLICY PROGRAMS

There do not appear to be any foreign policy programs that would be directly affected by Canada’s proposed decriminalization of marijuana, because Canada’s drug policy and drug strategy are essentially internal matters, apart from its participation in the three UN Conventions. That said, the decriminalization of marijuana could have an indirect effect on foreign programs and initiatives to the extent that Canada’s approach might be viewed unfavourably by another country. The most obvious example is in the context of Canada-U.S. relations, and border control in particular.

(15) It may be argued, for example, that there is a continuum of responses to drug activities, such as designating them “criminal” offences (or imposing “penal” sanctions), making them “contraventions,” making them “administrative” violations, failing to enforce against them (however the offence is framed), and legalizing the activity altogether. At what point a measure no longer “prohibits” the activity within the meaning of the UN Conventions is debatable. For instance, Canada’s decision to make minor cannabis-related offences “contraventions” could still mean that the activities remain “criminal,” as they are regulated under the federal criminal law power. The primary reason for designating them “contraventions” is to change the consequences that flow from the infraction. Again, article 3(11) of the *Trafficking Convention* allows a state to “describe” the offence as it deems appropriate under domestic law.

(16) See further discussion in this paper below under the heading “United Nations Office of Drugs and Crime.”

The Canada-United States Cross-Border Crime Forum (CBCF) was established in 1997 to improve bilateral cooperation and information sharing. It is co-chaired by Canada's Minister of Public Safety and Emergency Preparedness and the U.S. Attorney General, and brings senior law enforcement and justice officials together annually to discuss transnational crime issues including drug smuggling, money laundering, telemarketing fraud, and cyber-crime. CBCF working groups meet throughout the year to develop joint strategies and initiatives, including binational threat assessments.⁽¹⁷⁾ In October 2004, the CBCF released its *United States-Canada Border Drug Threat Assessment*,⁽¹⁸⁾ which analyzes the two-way movement of illicit drugs across the border, notes key facts about cross-border drug trafficking, establishes best practices, and provides the foundation for future joint enforcement activities.

While the decriminalization of marijuana has not been formally addressed by the CBCF, concerns have been expressed by others that Canada's proposed decriminalization of marijuana would cause congestion at the borders. As a result of perceptions that marijuana would be more easily obtained in Canada, U.S. customs officials might increase their efforts to prevent drug trafficking, thereby creating delays at the border that would affect both personal travel and commercial trade.⁽¹⁹⁾ Whether or not any other aspects of Canada-U.S. relations might be affected by the proposed decriminalization of marijuana remains unclear. Although Canada would likely not be acting counter to any programs or policies that it has with the United States, the United States may nonetheless view Canada's proposed drug approach in a manner that compromises the two countries' foreign relations in an indirect fashion. For example, the media have suggested that the decriminalization of marijuana in Canada would further affect Canada-U.S. diplomatic relations already strained by differing views of the war in Iraq, refugee rules, trade matters and environmental policy.⁽²⁰⁾ That said, it should be noted that at least 12

(17) See, e.g., Public Safety and Emergency Preparedness Canada, "Canada and the United States Strengthen Partnerships to Tackle Cross-border Crime," News release, Ottawa, 22 October 2002; available on-line at http://www.psepc-sppcc.gc.ca/publications/news/20041022_e.asp.

(18) Canada-United States Cross-Border Crime Forum, *United States-Canada Border Drug Threat Assessment*, joint publication of the Government of Canada and Government of the United States, October 2004; available on-line at http://www.psepc-sppcc.gc.ca/publications/policing/drug_threat_e.asp#15.

(19) See, e.g., "Cellucci assails pot law," *National Post* [Toronto], 10 November 2004, p. A1.

(20) See, e.g., "Canada offers liberal marijuana bill; Decriminalization would hike U.S. use, White House warns," *The Boston Globe*, 28 May 2003, p. A8; and "Canada may bag tough marijuana penalties; Plan threatens to increase strain on ties with U.S.," *Chicago Tribune*, 28 May 2003, p. 1.

American states have also reduced penalties associated with minor marijuana-related offences (although federal drug laws continue to apply).⁽²¹⁾

INTERNATIONAL VIEWS OF CANADA'S PROPOSED DECRIMINALIZATION OF MARIJUANA

A. International Narcotics Control Board

As mentioned earlier in this paper, the International Narcotics Control Board (INCB) monitors compliance with the provisions of the three United Nations Conventions. It ensures that adequate supplies of legal drugs are available for medical and scientific purposes, and makes certain that no leakage from licit sources of drugs to illicit trafficking occurs. It identifies and helps to correct weaknesses in drug control systems, and determines which chemicals used to illicitly manufacture drugs should be under international control.

In its annual reports, the INCB has commented on Canada's enforcement of cannabis laws, and its approach to medical marijuana and marijuana for other personal uses, as follows:

The impact of the cannabis eradication efforts by the law enforcement agencies in Canada, however, has remained limited; in some parts of the country, most illegal cannabis growers receive little or no punishment and it has been difficult to deter them from continuing their illicit activity...⁽²²⁾

Though efforts to eradicate cannabis have been made by law enforcement agencies in Canada, the impact of those efforts has been reduced by Canadian courts giving lenient sentences to cannabis growers and couriers.⁽²³⁾

The Government of Canada has passed a regulation allowing individuals to access cannabis for medical purposes, although the medical usefulness of the drug has not been proved and the action was explicitly opposed by the Canadian Medical Association.⁽²⁴⁾

(21) See the state-by-state laws on the Web site of NORML, a U.S. non-profit public interest lobby that opposes marijuana prohibition: http://www.norml.org/index.cfm?Group_ID=4516.

(22) International Narcotics Control Board, *Report of the International Narcotics Control Board for 2000*, United Nations Publication, New York, March 2001, para. 270; available on-line at http://www.incb.org/e/ind_ar.htm ("2000 INCB Report").

(23) *Ibid.*, para. 287.

(24) 2001 INCB Report, para. 316.

Cannabis remains the most common drug of abuse in Canada, Mexico and the United States and is widely available in all three countries. The hydroponic cultivation of cannabis continues to be a problem in Canada and the United States. Canadian companies continue to sell over the Internet cannabis seeds and paraphernalia for growing cannabis. A significant portion of the cannabis produced in Canada is smuggled into the United States.⁽²⁵⁾

The Board is concerned that the Senate Special Committee on Illegal Drugs in Canada, in a report issued in September 2002, proposed to amend the Controlled Drugs and Substances Act by introducing a criminal exemption and regulatory scheme for the production, possession and distribution of cannabis for non-medical purposes. The Board trusts that the Government of Canada will act in accordance with its obligations under the international drug control treaties.⁽²⁶⁾

The Board notes that Canada's Parliament is currently considering legislation by which simple possession of, in some cases, up to 30 grams of cannabis would result in a ticket and a fine. The new legislation would also introduce new penalties for the production of cannabis that vary according to the amount of cannabis produced. While the possession of cannabis would remain a criminal offence in Canada under the new legislation, the Board is concerned that the revisions could contribute to the mistaken perception that cannabis is a harmless substance.⁽²⁷⁾

The last quotation above is somewhat inaccurate in stating that the possession of marijuana would remain a criminal offence, as in fact the Government of Canada's proposals regarding possession of small amounts of marijuana would make it a non-criminal contravention. On the other hand, the fact that the INCB refers to the proposed measures as remaining "criminal" could be interpreted to mean that the INCB, which monitors compliance with the UN Conventions, considers a system of tickets and fines to sufficiently prohibit possession of marijuana within the meaning of the *Trafficking Convention*, which requires a "criminal offence."⁽²⁸⁾

Some of the other comments above made by the INCB relate to the regulation of marijuana for medical purposes, although these may have some application to decriminalization generally. For instance, concerns expressed about the appropriateness of cannabis for medical

(25) International Narcotics Control Board, *Report of the International Narcotics Control Board for 2002*, United Nations Publication, New York, June 2003, para. 301; available on-line at http://www.incb.org/e/ind_ar.htm ("2002 INCB Report").

(26) *Ibid.*, para. 304.

(27) 2003 INCB Report, para. 320.

(28) *Trafficking Convention*, article 3(2), reproduced in this paper above.

use would likely extend to the use of cannabis for non-medical, or recreational, purposes. Comments of the INCB regarding limited enforcement and punishment of marijuana-related offences in Canada may or may not have a negative bearing on the latest proposed bill. On one hand, the current bill reduces the maximum penalties for possession and production of small amounts of marijuana⁽²⁹⁾ but, on the other hand, it increases the maximum penalties for production of larger quantities.⁽³⁰⁾ A reduction in the efforts of police and courts to counter minor cannabis-related offences could result in increased enforcement and punishment of more serious crimes.

Also relevant to the Government of Canada's proposed decriminalization of marijuana are comments by the INCB regarding the liberalization of cannabis use in the United States and Europe:

The Board notes that, in several states of the United States, discussions on liberalizing or legalizing cannabis continue. The Board appreciates that the Government continues to ensure that national laws in line with the international drug control treaties are enforced in all states.⁽³¹⁾

Some countries in western Europe have decriminalized offences related to the possession and abuse of controlled drugs and openly tolerate the abuse of drugs, particularly cannabis and MDMA (Ecstasy). The Governments of those countries should consider whether that is a proper strategy for achieving the targets set by the General Assembly at its twentieth special session, in particular the target of significantly reducing drug abuse by the year 2008. So far, none of the Governments concerned have been able to provide to the Board information showing that the application of such measures reduces the demand for illicit drugs.⁽³²⁾

(29) For possession of up to 1 gram of hashish or up to 30 grams of marijuana, the maximum penalty would be reduced from a \$1,000 fine and/or 6 months in prison to a \$300 fine for an adult and a \$200 fine for a young person, if the relevant offences are designated as contraventions. The maximum penalty for production of three marijuana plants or less would be reduced from 7 years in prison to a \$500 fine for an adult and a \$250 fine for a young person, if the relevant offence is designated as a contravention. The maximum penalty for production of between 4 and 25 marijuana plants would change from 7 years in prison (all offences are currently indictable) to 5 years in prison (if prosecuted by indictment) or a \$25,000 fine and/or 18 months in prison (on summary conviction).

(30) The maximum penalty for production of between 26 and 50 marijuana plants would increase from 7 years in prison to 10 years in prison (all offences would remain indictable). For production of more than 50 marijuana plants, the maximum period of imprisonment would change from 7 to 14 years (all offences indictable).

(31) 2002 INCB Report, para. 302. But note that the INCB has also suggested that different ways of meeting the obligations of the UN Conventions are available to countries: 2003 INCB Report, para. 212.

(32) 2001 INCB Report, para. 499.

There continues to be significant illicit cultivation of cannabis throughout Europe. There appears to have been a notable increase in cannabis cultivation in member States of the European Union, which may be linked to policies in some of those States that are more lenient toward the possession of cannabis.⁽³³⁾

The Board is concerned about any relaxation of controls over cannabis in Europe, which might promote further illicit cultivation and abuse in Europe and counteract required efforts of eradicating illicit cultivation and combating trafficking in Europe and elsewhere in the world.⁽³⁴⁾

Although the INCB has expressed concerns about the effects of decriminalization of marijuana in certain countries and has reminded their governments to ensure that their policies comply with the drug control treaties, the INCB has not gone so far as to say that the liberalization of marijuana laws means that those countries have failed to meet their obligations under the UN Conventions. One exception is the INCB's response to a proposed Swiss law that would have, among other things, decriminalized the production, purchase, possession and consumption of cannabis for personal non-medical purposes, provided that the activities did not give third parties the opportunity to consume. Although Switzerland disagreed with the INCB's interpretation, the INCB concluded that such measures, and other aspects of the Swiss bill, would contravene the UN Conventions because they would provide for much more than the depenalization of cannabis consumption and preparatory acts, in that such acts would cease to be prohibited. Canada's proposed marijuana legislation certainly does not go as far as the proposed Swiss law, which in fact was defeated in the Swiss Parliament in 2003.⁽³⁵⁾

B. United Nations Office of Drugs and Crime

The United Nations Office of Drugs and Crime (UNODC) assists UN member states in the areas of illicit drugs, crime and terrorism. Among other things, it carries out research and analytical work to increase knowledge and understanding of drugs and crime issues and expand the evidence-base for policy and operational decisions. It also conducts what it calls

(33) 2002 INCB Report, para. 508.

(34) 2003 INCB Report, para. 532.

(35) The proposed Swiss law is discussed in 2001 INCB Report, para. 180-184; 2002 INCB Report, para. 222-226; and 2003 INCB Report, para. 530.

“normative work” to assist states in the ratification and implementation of the international treaties, and the development of domestic legislation on drugs, crime and terrorism.

The UNODC compiles a library of Resolutions and Decisions related to international drug control that have been adopted since 1946 by the United Nations General Assembly, its Economic and Social Council and the Commission on Narcotic Drugs.⁽³⁶⁾ While several of them concern the cultivation and trafficking of narcotics as a class, or the use of particular narcotics for medical purposes, none of the Decisions and Resolutions appear to address the general decriminalization of marijuana possession or production.

Importantly, Canada’s initial proposal for marijuana law reform in May 2003 was endorsed, though apparently with some reservations, by Antonio Maria Costa, Director of the UNODC, who indicated that the proposals “conform[ed] with the three main United Nations agreements on drugs.”⁽³⁷⁾ It should be noted, however, that Canada’s initial marijuana bill decriminalized only the possession of certain quantities of marijuana, and did not decriminalize the production of three marijuana plants or less. The latest proposals also make the production of up to three plants or less a possible contravention,⁽³⁸⁾ and it is not clearly known whether this would affect any endorsement by the UNODC. Arguably, Canada would be entitled to reduce the penalty for certain production offences, without contravening any of its international obligations, for many of the same reasons already discussed in this paper in relation to possession offences. In particular, the production of three marijuana plants or less would remain prohibited by law; the applicable drug control treaties do not necessarily require a cannabis-related offence to be “criminal,” as the description of offences is reserved to each country; and the international conventions generally allow their terms to be met flexibly in accordance with domestic legal systems.

(36) The Resolutions and Decisions are available on the Web site of the UNODC at <http://www.unodc.org/unodc/en/resolutions.html>.

(37) “U.N. Agency OKs proposed pot bill,” *Edmonton Journal*, 5 June 2003, p. A6.

(38) A reduced penalty for the production of three marijuana plants or less was further to an amendment proposed by the House of Commons Special Committee on Non-Medical Use of Drugs (Bill C-38) in its November 2003 report on the initial bill. The objective was to discourage marijuana-users from buying from criminal organizations.

C. United States Agencies and Officials

The reports of the House of Commons and Senate Special Committees in relation to cannabis in 2002 caused some immediate concern in the United States. The Director of the White House Office of National Drug Control Policy, John Walters, warned that relaxed marijuana laws would lead to an increase in drug abuse in Canada, stating, “When you weaken the societal sanctions against drug use, you get more drug use. Why? Because drugs are a dangerous addictive substance.” The United States also expressed concern that liberalized marijuana laws in Canada would lead to more drugs crossing into the United States. For example, Colonel Robert Maginnis, a drug policy adviser to U.S. President George W. Bush, asserted that the United States would not look kindly on changes to Canadian marijuana laws and warned that it would be forced to take action. He stated, “It creates some law enforcement problems and I think it creates some trade problems and some perception problems, especially in the U.S., with regard to whether Canada is engaged in fighting drug use rather than contributing to drug use” and “We’re going to have to clamp down even stronger on our border if you liberalize and contribute to what we consider a drug tourism problem.”⁽³⁹⁾

After Canada introduced its initial marijuana bill in May 2003, John Walters, the U.S. Drug Control Policy Director, warned that if the bill passed, the result would be increased security and lengthy delays at the border.⁽⁴⁰⁾ He was quoted as saying, “We don’t want the border with Canada looking like the U.S.-Mexico border,”⁽⁴¹⁾ “You expect your friends to stop the movement of poison toward your neighbourhood” and “We have to be concerned about American citizens ... When you make the penalties minimal, you get more drug production, you get more drug crime.”⁽⁴²⁾ David Murray, special assistant to Mr. Walters, stated that the proposed decriminalization initiative was “a matter we look upon with some concern and some regret” and “We would have no choice but to respond.”⁽⁴³⁾ Mr. Murray was also quoted as

(39) Information taken from Maple Leaf Web, a non-profit, non-partisan Canadian political education Web site located at the University of Lethbridge, Alberta; available on-line at http://www.mapleleafweb.com/education/spotlight/issue_24/american.html.

(40) “It’s time to ease nation’s laws on marijuana,” *The Detroit News*, 29 July 2003, p. 9.

(41) “Canada offers liberal marijuana bill; decriminalization would hike U.S. use, White House warns,” *The Boston Globe*, 28 May 2003, p. A8.

(42) “Ottawa’s marijuana plan irks U.S.,” *The Boston Globe*, 10 May 2003, p. A1.

(43) *Ibid.*

saying, “We have a working partnership that has been mutually beneficial with enormous amounts of trade. Eighty-five percent of Canada’s exports go into the United States. ... That trade is mutually beneficial, but we might have to make sacrifices for the integrity of the border on both sides if we recognize that drug trade is hurting us.”⁽⁴⁴⁾

Also in 2003, Asa Hutchinson, Under Secretary for Border and Transportation Security for the U.S. Department of Homeland Security, was quoted as saying, “We don’t want the northern border to be a trafficking route for drugs” and “If countries have divergent policies on drugs, then that increases the potential of the borders becoming a trafficking route.”⁽⁴⁵⁾ Will Glaspy, spokesman for the U.S. Drug Enforcement Administration, was quoted as saying, “Liberalizing drug laws will lead to an increase in drug use ... and drug supplies. They will lead to increased security at the border.”⁽⁴⁶⁾

While it does not appear to have commented on the decriminalization of marijuana itself, the U.S. National Drug Intelligence Center has identified what it considers to be a significant issue regarding the growing importation of marijuana into the United States from Canada. It has noted that Canada is the source of considerable and increasing amounts of high-grade marijuana available in U.S. drug markets.⁽⁴⁷⁾

In response to Canada’s most recent bill regarding marijuana law reform, Paul Cellucci, the American ambassador to Canada, has commented on Canada’s proposed legislation with the following statements: “Why, when we’re trying to take pressure off the border, would Canada pass a law that would put pressure on the border?” and “If people think it’s easier to get marijuana in Canada, then our people at the border are going to be on the lookout, and I think they will stop more vehicles, particularly vehicles driven by young people, whether they’re citizens of Canada or the United States.”⁽⁴⁸⁾

(44) “U.S. may tighten border security if pot law passes,” *South Florida Sun-Sentinel*, 3 May 2003, p. 17A.

(45) “U.S. Officials fret over Canada’s shift on pot,” *The Columbian* [Clark County, Washington], p. C2; and “Canada marijuana plan raises border fears,” Associated Press on-line, 20 June 2003.

(46) “Canada may bag tough marijuana penalties; Plan threatens to increase strain on ties with U.S.,” *Chicago Tribune*, 28 May 2003, p. 1.

(47) National Drug Intelligence Center, *National Drug Threat Assessment 2004*, U.S. Department of Justice, Johnston, PA, April 2004; available on-line at <http://www.usdoj.gov/ndic/pubs8/8731/marijuana.htm>; and *United States-Canada Border Drug Threat Assessment*, December 2001; available on-line at <http://www.usdoj.gov/ndic/pubs07/794/marijuan.htm>.

(48) “Cellucci assails pot law,” *National Post* [Toronto], 10 November 2004, p. A1.

Although officials and agencies of the United States administration have commented negatively on Canada's proposed decriminalization of marijuana in the past, the United States does not appear to have taken any formal position on the latest bill to reduce penalties for marijuana possession and production in small amounts. During his visit to Ottawa on 30 November 2004, President George W. Bush would not publicly speculate on whether marijuana decriminalization in Canada would result in a border crackdown, saying that "it'll probably affect those who use marijuana a lot more than it'll affect the border."⁽⁴⁹⁾ The President preferred not to discuss Canada's marijuana law reform, adding "I don't have a comment on what you're doing internally about that."⁽⁵⁰⁾ Deputy Prime Minister Anne McClellan confirmed that the issue "was certainly not brought up in either of the meetings I attended with the President and his people."⁽⁵¹⁾ However, newspaper sources stated that Mr. Bush expressed some reservations about marijuana decriminalization, similar to those of Ambassador Paul Cellucci, in a private conversation with Conservative Leader Stephen Harper.⁽⁵²⁾

Given the lack of an official American position on Canada's proposed marijuana law reform, it is unclear what impact the latest bill, if adopted, would have on Canada-U.S. relations and, in particular, border control.

D. Other Countries

There appears to be little commentary on Canada's marijuana legislation by or in nations other than the United States. A German newspaper, commenting on the International Narcotics Control Board's view that treating cannabis like alcohol and tobacco would be a "historic mistake," noted that the INCB's 2001 report also disapproved of Canadian regulations allowing access to medical marijuana.⁽⁵³⁾ More recently, the International Association for

(49) "Marijuana law concerns U.S., Harper says," *The Ottawa Citizen*, 2 December 2004, p. A6; and "President has concerns about pot laws: Harper," *Vancouver Sun*, 2 December 2004, p. A6.

(50) *Ibid.*

(51) *Ibid.*

(52) *Ibid.*, and "President tells Harper, but not reporters, looser pot laws will affect border crossings," *National Post* [Toronto], 2 December 2004, p. A5.

(53) "Narcotics board warns of 'Cybercriminals' selling drugs on Internet," Deutsche Presse-Agentur, 26 February 2002. The INCB's comments on Canada's medical marijuana regulations are reproduced in this paper above under the heading "International Narcotics Control Board."

Cannabis as Medicine, headquartered in Germany, commented on Canada's latest bill to decriminalize marijuana.⁽⁵⁴⁾ It noted that the proposed legislation would result in only fines, rather than a criminal record, for possession of small amounts of marijuana, and that it had been introduced in conjunction with another Canadian bill to allow police to test for drugs in motorists believed to be under the influence of a controlled substance.⁽⁵⁵⁾

In 2001, a British newspaper cited Canada's decriminalization of marijuana in an article discussing the U.K. government's own decision to relax the law on cannabis possession.⁽⁵⁶⁾ In August 2004, an Australian parliamentary research service reviewed Canada's medical marijuana laws and programs along with those of other countries.⁽⁵⁷⁾ However, the report did not discuss possible Canadian decriminalization of marijuana for non-medical purposes. Perhaps there will be an increase in international commentary if and when a Canadian bill to decriminalize particular cannabis-related offences is adopted and becomes law.

(54) International Association for Cannabis as Medicine, "Canada: Decriminalization of cannabis for personal use," *IACM Bulletin*, Neunkirchen, Germany, 14 November 2004; available on-line at <http://cannabis-med.org/english/nav/home-bulletin.htm>.

(55) Bill C-16, An Act to amend the Criminal Code (Impaired Driving), 1st Session, 38th Parliament, introduced on 1 November 2004.

(56) "A softer approach to cannabis use: The more liberal regime in Britain leaves the U.S. more isolated in its 'Just Say No' attitude," *Financial Times* [London, U.K.], 25 October 2001, p. 23.

(57) Rowena Johns, *Medical Cannabis Programs: A Review of Selected Jurisdictions*, New South Wales Parliamentary Library Research Service, Sydney, Australia, August 2004; available on-line at <http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/0/E41FE1F44A766F82CA256EF40003BAB6>.