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Reconciling Canada's Legalization of Non-Medical Cannabis with the UN Drug Control Treaties

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Reconciling Canada's Legalization of Non-Medical Cannabis with the UN Drug Control Treaties

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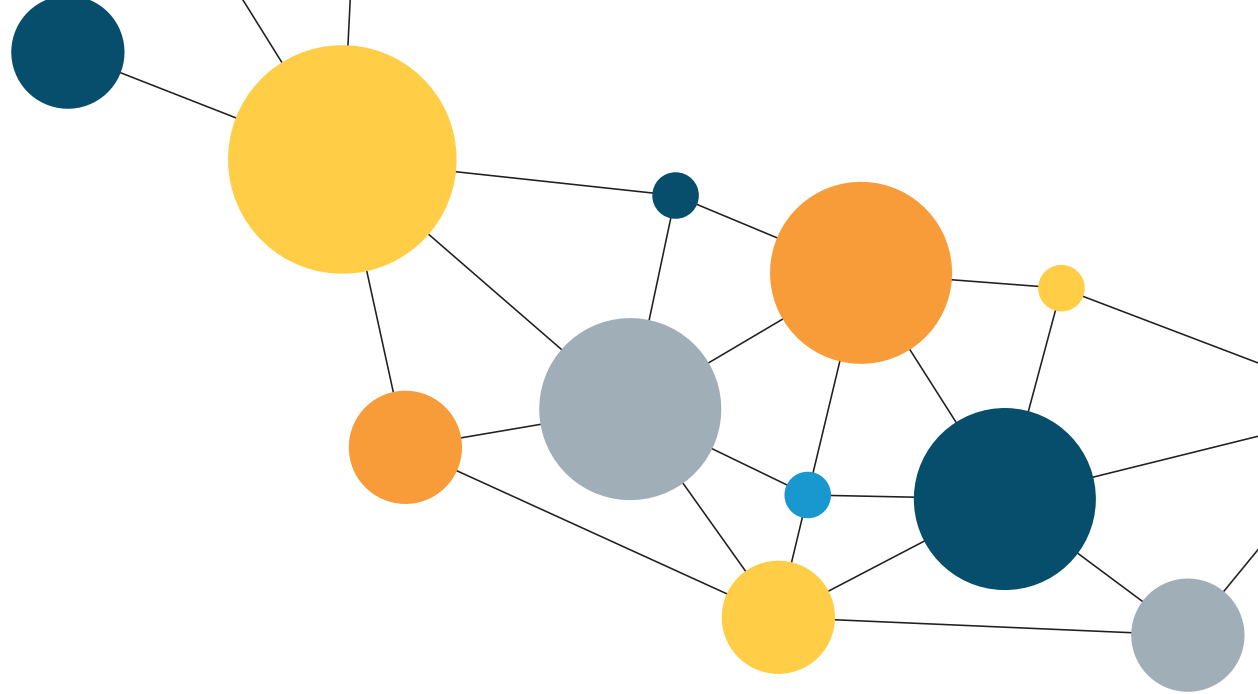


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INTRODUCTION

In 1923, cannabis was first designated an illegal drug in Canada through the *Act to Prohibit the Improper Use of Opium and other Drugs*.¹ It has remained so since. In 1961, Canada joined international efforts aimed at restricting the use of cannabis, as it became recognized as a global issue. The international community described the use of cannabis as “a serious evil for the individual... fraught with social and economic danger to mankind”.² Under the auspices of the UN, three treaties were established, setting the foundation for an international drug control regime to regulate and control narcotic drugs, including cannabis. These treaties are the:

- › *Single Convention on Narcotic Drugs of 1961 as amended by the 1972 Protocol (Single Convention)*;³
- › *Convention on Psychotropic Substances of 1971 (Psychotropic Convention)*;⁴ and
- › *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 (Trafficking Convention)*.⁵

Today, in Canada, cannabis is a Schedule II drug under the *Controlled Drug and Substances Act* and, unless otherwise regulated for production and distribution for medical purposes, is subject to offences under that Act.⁶ Consistent with Canada’s obligations under the UN drug control conventions, possessing and selling cannabis for non-medical purposes remains illegal across Canada. Today, the Government of Canada intends to change this. The Government’s agenda, as set out in the 2015 Speech from the Throne, entails “continu[ing] to work to keep all Canadians safe, while at the same time protecting our cherished rights and freedoms... To that end, the Government will introduce legislation that will... legalize, regulate and restrict access to marijuana”.⁷

To achieve the Government’s agenda, the Ministers of Justice, Public Safety and Emergency Preparedness, and Health, established the Task Force on Cannabis Legalization and Regulation (Task Force) in June 2016. Its mandate was to consult and provide advice on the design of a new legislative and regulatory framework for legal access to the non-medical use of cannabis. In establishing the Task Force, the Government established nine federal objectives with respect to its plans. These include:

- › Reduce the burdens on police and the justice system associated with simple possession of marijuana offences.
- › Prevent Canadians from being involved with the criminal justice system for simple possession of marijuana offences.
- › Protect public health and safety by strengthening certain laws and enforcement measures that deter and punish more serious marijuana offences, particularly selling and distributing to children and youth, selling outside of the regulatory framework, and operating a motor vehicle while under the influence of marijuana.
- › Establish and enforce a system of strict production, distribution and sales, taking a public health approach, with regulation of quality and safety, and restriction of access.
- › Conduct ongoing data collection, including gathering baseline data, to monitor the impact of the new framework.⁸

The purpose of this report is to reconcile the Government of Canada’s agenda on the legalization of non-medical cannabis, guided by the above objectives, with its international legal obligations under the UN drug control conventions. The report does not address using the denunciation or amendment provisions under the conventions, but rather



how a legalization scheme may adhere to the conventions in their current form. The report will address exemptions contained within the conventions and provide direction on how they may be leveraged to ensure that the Government of Canada may meet its stated objectives without violating the conventions, specifically the *Single Convention* and the *Trafficking Convention* as the *Psychotropic Convention* does not contain provisions with respect to cannabis.*

The report will begin with a brief overview of the UN drug control conventions. It will then discuss means of reconciling the Government's goals with the conventions. The report will be divided into three separate sections, addressing:

1. The arguments that certain human rights obligations supersede the obligations set out in the *Single Convention* and the *Trafficking Treaty*, and render them inapplicable;
2. The feasibility of using the provision stating that obligations set out in the conventions are to have "due regard to [the] constitutional, legal and administrative systems" of the parties; and
3. The feasibility of using the provisions granting exemptions from certain obligations "for medical and scientific research purposes".

* This report is written on the understanding that the Government of Canada's legislation will legalize cannabis. Cannabis is a substance controlled under the *Single Convention* and the *Trafficking Convention* only. The *Psychotropic Convention* establishes obligations with respect to particular isomers and stereochemical variants of tetrahydrocannabinol (synthetic THC). Should the Government of Canada's legislation also apply to synthetic THC, the obligations under the *Psychotropic Convention* reflect those in the *Single Convention*, therefore the findings of this report would remain applicable.

ABOUT THE UN DRUG CONTROL CONVENTIONS

The 1961 *Single Convention* was amended in 1972 by the *Protocol amending the Single Convention on Narcotic Drugs, 1961*. The original convention entered into force on December 13th, 1964 and the amended convention entered into force on August 8th, 1975. There are 185 parties to the amended convention. Canada has ratified both the 1961 *Single Convention* and the *Protocol*.

The *Trafficking Convention* entered into force on November 11th, 1990. There are 87 signatories and 189 parties to the convention. It was established as a framework within which Parties can collectively combat the illicit traffic of substances contained in Tables I and II.⁵ There were many national and regional drug control measures created in the 1970s and 1980s, several of which focused on the issue of trafficking.⁹ However, within the UN, there was a fear that these anti-trafficking conventions were insufficient, as many countries had either not signed on to one of them, or did not have sufficient domestic law enforcement capacity to actively stave off trafficking.⁹

HUMAN RIGHTS JUSTIFICATION

Human rights & The UN Drug Control Conventions

This section examines whether Canada can reconcile legalizing non-medical cannabis and establishing a regulatory regime with its international legal obligations to protect human rights. The human rights justification for legalizing cannabis has been developing for several years.¹⁰

Article 14(2) of the *Trafficking Convention* states that measures under the convention "shall respect fundamental human rights" and Article 14(4) stipulates that measures should be focused on "reducing human suffering and eliminating financial incentives for illicit traffic".⁵



Human Rights-Justified Legalization of Cannabis in Uruguay

Uruguay is the only country in the world that has legalized cannabis, therefore providing the sole example on this issue. Uruguay legalized cannabis in 2013 and has created a state monopoly on its production, processing, and distribution.¹¹ Uruguay maintains that its new regulatory regime is based on adherence to international human rights obligations, particularly those enshrined within the *UN Charter*, and that these supersede the obligations contained in the UN drug control conventions.^{12, 13}

Uruguay has championed the human rights perspective on drug reform for many years.¹⁴ In the fifty-first session of the Commission on Narcotic Drugs in 2008, with the support of Argentina, Bolivia, Switzerland, and the European Union, the Uruguayan delegation presented Resolution L.16, which called for consistency between the drug control conventions and human rights instruments.¹⁴

The Uruguayan position focuses on ensuring that policies for “prevention and treatment at the world level balance those of supply reduction and that criminal policies include a criteria of proportionality so as not to criminalize consumers and



“United Nations Flag”, Sanjitbakshi, CC, 2011

to address the prison crises suffered by many countries”¹⁴ The legalization and regulation of cannabis in Uruguay has been justified as a way to take business away from criminal organizations and a way to protect the safety and human rights of Uruguayans.^{11, 12}

While Canada is subject to the same international human rights obligations as Uruguay, the human rights argument for legalizing cannabis has encountered resistance. Both the international community and Uruguayans have been critical of the new law, stating that Uruguay is violating and weakening the overall strength of the UN drug control system.¹⁵ While Uruguay is an example for Canada with respect to legalization, taking a human rights approach will likely not provide a clear path forward. If Canada were to employ a similar approach, it would likely face the same international scrutiny.

Cannabis as a Fundamental Human Right in Mexico

In 2015, Mexico’s Supreme Court determined that the prohibition on personally producing, possessing, and consuming cannabis violates its citizens’ human rights.¹⁶ This decision was based on the view that access to cannabis is a fundamental human right, rather than the negative effect



“United Nations Office at Geneva”, Falcon Photography, CC, 2015



criminalizing cannabis has on public health or incarceration rates.¹⁶ The decision only applies to the four plaintiffs in this case, who are currently the only four people in Mexico who can legally consume cannabis.¹⁶ For cannabis to become legalized in all of Mexico, four more similar rulings would have to be made for the Supreme Court to issue what they call a “jurisprudential thesis”.^{17,18} A jurisprudential thesis is, in essence, a general ruling based on a series of previous rulings for individuals or groups.¹⁸ This is the process by which same-sex marriage became legal in Mexico.^{16,18}

The Mexican Society for Responsible and Tolerant Consumption (SMART) brought this landmark case.¹⁶ They supported their arguments, in part, by saying that legalizing the personal use of cannabis recognizes the reach of individual freedom for Mexicans.¹⁶ SMART argued that the government was “infringing on the constitutional doctrine of the free development of personality”, citing that the Mexican Constitution protects an individual’s right to be unique and independent.¹⁶ The plaintiffs argued that, “The imposition of a single standard of healthy living is not admissible in a liberal state, which bases its existence on the recognition of human uniqueness and independence”.¹⁶ The right to the “free development of personality” comes from Article 22 of the UN *Universal Declaration of Human Rights*, which several countries in the Americas have incorporated into their own constitutions.¹⁶ Conversely, Canada’s Constitution has not adopted similar language.

Although this decision is an important development in a changing political landscape on drug use and regulation, SMART’s arguments are likely significantly more challenging to make in Canada. Canada continues to debate the role of the state in regulating individual choices related to public health, such as the taxation of cigarettes and the potential taxation of sugar-sweetened beverages.^{19,20} Since the Government of Canada has enacted and is proposing to enact many policies that intervene in the public’s health-related choices, it is likely to face difficulty in making the same arguments as Mexico.

CONSTITUTIONAL EXEMPTION

This section examines whether Canada may use the constitutional exemptions of the *Single Convention* and the *Trafficking Convention* to justify legalizing cannabis.^{3,5} There are two avenues available for Canada to utilize the constitutional exemption. The first avenue focuses on whether Canadian courts have interpreted an existing right to use non-medical cannabis. The second avenue focuses on Parliament’s creation of a new constitutional right to non-medical cannabis. Canadian courts have interpreted case law concerning medical cannabis as engaging section 7 of the *Charter*.²¹ Nonetheless, a review of jurisprudence demonstrates that there is no recognized right to access medical cannabis. Canadian courts are unlikely to recognize a right to access non-medical cannabis and Parliament is highly unlikely to reopen the constitution to create a new right.

Provisions in the *Single Convention* and the *Trafficking Convention* contain a constitutional exemption.^{3,5} This exemption states that particular obligations within the conventions are subject to the Party’s constitutional law. Article 35 of the *Single Convention* requires Parties to implement national and international preventive action against the illicit traffic in narcotic drugs: “Having due regard to their constitutional, legal and administrative systems...”³



“Supreme Court of Canada”, Detsang, CC, 2007



Article 36 of the *Single Convention* stipulates the penal consequences that each Party shall adopt: “Subject to the constitutional limitations of a Party, its legal system and domestic law”.³ Article 3(1)(c) of the *Trafficking Convention* mandates that each Party must adopt the necessary penal measures and sanctions, which are “Subject to its constitutional principles and the basic concepts of its legal system”.⁵

A Jurisprudential Review of Cannabis Use in Canada

Charter interpretation could provide grounds for the constitutional protection of a right to cannabis use. A review of Canadian jurisprudence reveals that section 7 arguments regarding licensed users’ access to medical cannabis have been successful. Nonetheless, successful *Charter* challenges are unlikely to extend to non-medical cannabis use.

Canadian courts have recognized the relation between an individual’s right to life, liberty and security and the licensed cannabis user’s right to access medical cannabis. In *R v Clay*, the Supreme Court found that section 7 was triggered because of the possibility of imprisonment for the accused.²² The court concluded that personal, non-medical cannabis use does not fall under the freedom to make decisions of “fundamental personal importance,” the right to “make choices concerning one’s own body”, or the right to basic human dignity.²² In *Sfetkopoulos v Canada*, the court struck down section 41(b.1)

of the former *Marijuana Medical Access Regulations* (MMAR), which created limited channels through which patients could obtain medical cannabis.²³ The court agreed that this regulatory structure violated the security of the person because it forced legally entitled patients to use illicit channels in order to obtain medical cannabis.²³ Most recently, the Supreme Court held in *R v Smith* that the distinction between “dried marijuana” and “non-dried” forms under the MMAR regime violated the section 7 rights of licensed users to access certain cannabis forms.²⁴

Canadian courts have also limited the application of section 7 and 15 in relation to the right to use medical cannabis. In *R v Malmo-Levine*, the Supreme Court held that the former *Narcotic Control Act’s* prohibition on the possession of cannabis was constitutional and did not impair the accused’s section 7 and 15(1) rights.²⁵ Further, the court held that section 15, which prohibits discrimination on the basis of fundamental personal characteristics, excludes a person’s desire to consume cannabis as a lifestyle choice.²⁵ In *R v Mernagh* the Court held that the trial judge erred by interpreting a constitutional right to use medical cannabis under section 7 of the *Charter*.²⁶

The Constitutionalization of Coca in Bolivia and Potentially Cannabis in Canada

In 2009, the newly elected Bolivian president established a constitutional right to use coca for traditional and legal purposes.²⁷ Article 384 of the Bolivian Constitution now



“Parliament”, Tak, CC, 2006



states: “The State shall protect native and ancestral coca as cultural patrimony, a renewable natural resource of Bolivia’s biodiversity, and as a factor of social cohesion; in its natural state it is not a narcotic. Its revaluing, production, sale and industrialization shall be regulated by law”.²⁷ Bolivia’s constitutional amendment provided their government a four year period to denounce and renegotiate its international treaty obligations.²⁷ Bolivia denounced the *Single Convention* in June 2011 and communicated its intention to submit a reservation.²⁷ In February 2013, Bolivia’s reservation was accepted and the state re-acceded to the *Single Convention*.²⁷

While coca has historical, cultural, and religious significance in Bolivia, cannabis does not have similar significance in Canada. Parliament could theoretically amend the Canadian Constitution to recognize such a right. However, a constitutional amendment is highly unlikely; major efforts to revise the constitution since 1982, such as the Charlottetown and Meech Lake Accords, have failed.²⁸ Constitutionalizing the right to use cannabis is also arguably an issue of less importance in comparison to others, including indigenous rights, senate reform and division of powers matters.²⁸ Canadians are unlikely to support amending the constitution to provide a right to non-medical cannabis considering other long-standing issues that remain.

MEDICAL AND SCIENTIFIC PURPOSES EXEMPTION

The *Single Convention* contains a second exemption provided for in Article 36 that may offer Canada another avenue to justify legalizing non-medical cannabis. The *Single Convention* provides an exemption for the production, manufacture, export, import, or trading of narcotic drugs, including cannabis, for scientific and medical purposes under Articles 2(5)(b) and Article 4(1)(c).³ Article 2(5)(b) of the *Single Convention* states “a Party shall [...] prohibit the production, manufacture, export and import of, trade in, possession or use of any such drug

except for amounts which may be necessary for medical and scientific research only, including clinical trials therewith to be conducted under or subject to the direct supervision and control of the Party”.³ Similarly, Article 4(1)(c) of the *Single Convention* notes that states must “limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs”³

(a) The Medical Purposes Exemption

The “medical purposes” exemption referred to in Article 4(1)(c) allows Parties to permit the production, manufacture, export, import and trading of narcotic drugs, including cannabis, for treating ailments or symptoms associated with them.³ Presently, Canada makes use of this exemption by permitting health care practitioners to prescribe cannabis to Canadian patients.²⁹ Canadian medical practitioners may prescribe cannabis to patients to alleviate symptoms associated with a variety of disorders, which have not responded to conventional medical treatments.³⁰ Since the exemption is specifically for medical treatment and Canada already makes use of this exemption, the medical purposes exemption under the *Single Convention* is not useful in justifying Canada’s legalization of non-medical cannabis.

(b) The Scientific Purposes Exemption

The “scientific purposes” or “scientific research” exemption provided for in Articles 2(5)(b) and Article 4(1)(c) offers an alternative avenue to justify legalizing cannabis for non-medical use.³ If Canada’s legalization scheme can be designed to conduct scientific research, it may be able to justify legalization under this exemption, while maintaining its obligations under the conventions.

In order to determine whether Canada may use the scientific purposes exemption, the breadth and scope of this exemption and the words of these provisions must be examined. According to Article 31(1) of the *Vienna Convention of the Law of Treaties (Vienna Convention)*, “a treaty shall be interpreted in accordance with the ordinary meaning given to the terms of the treaty in accordance with the ordinary meaning given



to the terms of the treaty in their context and in the light of its object and purpose.”³¹ Where the ordinary words of the treaty are ambiguous and/or unclear, the *Vienna Convention* states that supplementary means of interpretation may be used.³² Supplementary means of interpretation include the preparatory work of the treaty and the circumstances of its conclusion.³²

An examination of the ordinary words of Article 2(5) of the *Single Convention* indicates that clinical trials fit within the scope of “medical and scientific research.”³ Clinical trials refer to the use of drugs on human beings in the context of an experiment.³³ Under Article 2(5)(b), only “clinical trials”, and not any other medical or scientific research involving drugs, must be “under or subject to the direct supervision and control of the Party” concerned.³³ According to the Commentary on the *Single Convention*, purely chemical research or research on animals does not need to be “under or subject to” such “supervision and control.”³³ The Commentary suggests the word “under” refers to continuous measures of supervision and control, whereas the words “or subject to” refers to intermittent governmental surveillance or control.³³ Thus, the provision suggests where a Party does not apply continuous measures of supervision, intermittent surveillance suffices.³³ The provision states that governmental supervision and control of research activities must also be “direct.”³ This implies that reporting to authorities on clinical trials and keeping records of research

activities may not suffice.³³ The Commentary suggests governmental authorities would have to inspect the clinical trials.³³ Finally, the provision requires governmental authorities to exercise measures of “supervision and control”, which states mere supervision of research activities is inadequate.³ In addition to supervising research activities, governments have to exercise an influence on the way clinical trials are conducted.³³ UN Commentary on the Article suggests such control may come in the form of general regulations or particular instructions.³³

The ordinary words of Article 2(5) also suggest that “medical and scientific research” includes research that does not involve clinical trials as evidenced by the use of the word “including.”³ However, since the *Single Convention* does not define “medical and scientific research” or “medical and scientific purposes” and does not provide other examples, it is unclear what other types of research besides clinical trials fall within the scope of “medical and scientific research.”³ It is also unclear whether the broader wording in Article 4(1)(c) broadens the scope of Article 2(5)(b). Article 4(1)(c) refers to an exemption for “medical and scientific purposes”, whereas Article 2(5)(b) refers to an exemption for “medical and scientific research.”³ The exemption mentioned in Article 4(1)(c) is likely broader than the exemption in Article 2(5)(b). For instance, Article 4(1)(c) allows states to permit the medical use of narcotics such as cannabis.³



“Grape Crush, Indica-4”, Dank Depot, CC, 2011

Since the ordinary words of the “scientific research” or “scientific purposes” exemption provision provide little guidance on the scope of the exemption, supplementary means of interpretation may be used to clarify its scope.³² The preparatory work of the treaty and the circumstances of its conclusion offer little guidance on the scientific research exemption.³⁴ However, the Commission on Narcotic Drugs (CND) and the International Narcotics Control Board (INCB) established under the *Single Convention*, other multilateral legal regimes containing scientific research exemptions, and the Committees established under these various treaties may elucidate what encompasses “medical and scientific research”.



1. The Commission on Narcotic Drugs and the International Narcotics Control Board



"Vancouver Global Marijuana March 2015", Jeremiah Vandermeer, CC, 2014

Both the CND and the INCB are responsible for administering the *Single Convention*.³ The Economic and Social Council (ECOSOC) established the CND to assist in supervising the application of the conventions.³⁵ The *Single Convention* authorizes the CND to consider all matters pertaining to the aims of this convention, including making recommendations related to programmes of scientific research and the exchange of information of a scientific or technical nature.³⁶ The INCB was established under the *Single Convention* to independently monitor state parties' implementation of the UN drug control conventions.³⁷ Accordingly, documents, resolutions, and decisions of these bodies provide supplementary means of interpreting the scientific research or scientific purposes provisions.

While neither the CND nor the INCB defines "scientific research" or "scientific purposes" for the purposes of the conventions in their decisions, resolutions, or publications, they identify types of research that may be conducted under them. For instance, in a *Guide on Estimating Requirements for Substances under International Control*, the INCB provides examples of scientific uses of narcotic drugs.³⁸ These uses include: forensic analyses

and research which usually requires only small quantities of new pharmaceutical formulations, industrial research for the development of new pharmaceutical formulations, and clinical trials.³⁸ This list, while illustrative, is not closed. Accordingly, "scientific research" may be conducted in other forms.

Resolutions of the ECOSOC have also referenced specific types of research on cannabis that should be pursued by State Parties. In one resolution, the ECOSOC "recommends...that scientific research, especially long-term investigations into the effects of cannabis abuse on humans should be continued and accelerated".³⁹ The CND and INCB also frequently reference objectives that scientific research on narcotic drugs should pursue. In stating these objectives, however, they do not identify what may be considered scientific research under the conventions. It will be important for Canada's cannabis legalization scheme to be justified in the context of these objectives should it seek to rely on this exemption.

The CND has identified data collection on cannabis use as a major objective in recent years. In fact, the CND has recently requested the World Health Organization (WHO) Expert Committee on Drug Dependence (ECDD), whose mandate is to carry out medical and scientific evaluations of the abuse liability of dependence-producing drugs falling within the terms of the *Single Convention* and the *Psychotropic Convention*,⁴⁰ to begin collecting data towards a pre-review of the status of cannabis and its related extracts under the conventions.⁴¹ Similarly, one of the Federal Government's stated objectives for the Task Force is to 'conduct ongoing data collection, including gathering baseline data, to monitor the impact of the new framework'.⁸ Making data collection a central piece of the legalization scheme would complement scientific research activities being conducted under the conventions at the international level. The Government's data collection objectives may complement the work of the ECDD.

Using collected data to complement evaluative research programs would achieve particular scientific objectives



"Humpback Whale", Whit Welles, CC, 2007

of the CND. The CND Resolution 58/7, 'Strengthening cooperation with the scientific community...', 'underlines the need for Member States to cooperate closely with the [UN] Office on Drugs and Crime, the [WHO], the [INCB] and other international and regional organizations, as well as the scientific community, including academia, in contributing to the scientific assessment of drug demand and supply reduction policies, drug markets and drug-related crime'.⁴² The federal government's data collection objectives provide Canada with a means of engaging with identified international organizations and scientific research being undertaken, which would serve to ensure Canada's legalization scheme complements scientific research principles expressed by the CND.

The data collection objective will also be of value in ensuring that Canada adheres to the estimates and statistical requirement obligations of the *Single Convention*. They require Parties to furnish statistical information to the INCB regarding drug quantities, both estimated and actually used, for medical and scientific research purposes.⁴³

The CND has also emphasized ensuring the availability of convention-controlled drugs for medical and scientific purposes, while pointing out the importance of preventing the diversion and abuse of these drugs from scientific research programs. CND Resolution 53/4, 'Promoting adequate availability of internationally controlled licit drugs

for medical and scientific purposes while preventing their diversion and abuse' sets out this CND objective in detail.⁴⁴ The federal objectives identify the intention to establish and enforce a system of strict production, distribution and sales.⁸ The objectives also place a focus on strengthening laws and enforcement measures that deter and punish particular cannabis offences, including selling and distributing to children and youth, and selling outside of the regulatory framework.⁸ Implementing and achieving these federal objectives would ensure the legalization scheme aligns with the CND principle that efforts should be taken to ensure that drugs for scientific research are not diverted from, and used outside of, scientific research programs.

2. Other Treaties Containing Scientific Research or Scientific Purposes Exemptions

A number of treaties contain scientific research exemptions including: the *International Plant Protection Convention*,⁴⁵ the *International Convention for the Prevention of Pollution from Ships*,⁴⁶ *Stockholm Convention on Persistent Organic Pollutants*,⁴⁷ *Agreement on Subsidies and Countervailing Measures*,⁴⁸ the 1959 *Antarctic Treaty*,⁴⁹ the *Agreement Governing the Activities of States on the Moon and Other Celestial Bodies*,⁵⁰ the *International Convention on the Regulation of Whaling*,⁵¹ and the *Agreement on Trade-Related Aspects of Intellectual Property*.⁵² However, like the *Single Convention*, none of these treaties provide a definition of medical and scientific research or a framework



for how scientific research must be conducted to fit within the exemption. Many other treaties also refer to scientific research, although not in the context of a scientific research exemption.

Among these treaties, the *United Nations Convention on the Law of the Sea* (UNCLOS) is the only one containing an entire section outlining a scientific research framework.⁵³ Article 240 of UNCLOS also sets out general principles for how scientific research shall be conducted.⁵³ These principles include that the research shall: be for peaceful purposes, be conducted with appropriate scientific methods and means, not unjustifiably interfere with other legitimate uses of the sea compatible with the convention, and be conducted in compliance with all relevant regulations adopted in conformity with the convention.⁵³ The first two and last principles in this list are also applicable to scientific research conducted under other treaties, including the *Single Convention*.

While the *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel mines and on their Destruction* (*Mine Convention*) does not contain a provision addressing scientific research, it contains a provision imposing a limitation on an exemption provided for in the treaty.⁵⁴ This limitation parallels the limitation on the medical and scientific purposes exemption in the *Single Convention*.³ In the *Mine Convention*, the number of anti-personnel mines retained for training purposes is limited to the minimum amount necessary.⁵⁴ Similarly, Article 19 of the *Single Convention* states that estimates of drugs required to fulfill medical and scientific purposes must be provided and Article 2(5)(b) states that only amounts necessary for medical and scientific research purposes are permitted.³ This parallel language may suggest that as a general principle, such exemptions seek to limit the permitted amount of a prohibited good.

The Committees responsible for administering the various treaties containing scientific research provisions or exemptions offer little additional interpretive guidance on what is “scientific research” or “scientific purposes”. While the *Convention on Biological Diversity’s* Subsidiary Body on

Scientific, Technical and Technological Advice did not define “scientific research” or provide a framework for research, the Conference of Parties adopted decisions highlighting research priorities.⁵⁵ By contrast, the CND and the INCB provide little guidance on the types of research on narcotic drugs that should be pursued by Parties. Unlike the provision on scientific research in the *Single Convention*, many of the provisions addressing scientific research in these other treaties contain additional guidance on what constitutes appropriate scientific research. The UNCLOS, for instance, lists principles for the conduct of marine scientific research.⁵⁶

3. The International Court of Justice on Scientific Research

The ICJ resolves disputes with respect to the interpretation or application of the *Single Convention* and *Trafficking Convention*.^{57, 58} Examining ICJ jurisprudence on the interpretation or application of scientific research provisions will provide valuable insight into what Canada must consider in using this exemption to justify legalizing non-medical cannabis. While the ICJ has not addressed the scientific research exemption contained within the UN drug control conventions, the ICJ recently addressed the interpretation and application of a similar exemption within another treaty.

In 2014, the ICJ addressed the meaning of ‘scientific research’ and laid out criteria for determining whether a program was ‘for the purposes’ of scientific research in the *Whaling in the Antarctic* case, brought by Australia against Japan. The ICJ was required to determine whether a Japanese whaling program, the ‘Japanese Whale Research Programme under Special Permit in the Antarctic’ (JARPA II), was for scientific research purposes, permitting it under an exemption clause of the *International Convention on the Regulation of Whaling* (*Whaling Convention*), Article VIII. Under the program, lethal methods were used to ‘scientifically study’ specific whale species. The carcasses were then sold for consumption as is permitted under Article VIII. The majority of states in the International Whaling Commission criticized the use of lethal sampling pursuant to JARPA II, and



some argued that the actual purposes of the program were commercial rather than scientific.⁵⁹

The case sets out criteria for determining whether a program is for the purposes of scientific research, which will be valuable in establishing whether Canada's non-medical cannabis legalization scheme may be permitted under the *Single Convention* by way of the medical and scientific research exemption. This section will address the scientific research exemptions of the *Whaling Convention* and the UN drug control conventions, before addressing the merits of the ICJ's decision with respect to whether a program is 'for the purposes of' scientific research, and what 'scientific research' is.

In comparing the scientific exemptions of the *Whaling Convention* and the drug control conventions, they similarly provide for exemptions from their obligations with respect to conservation or criminal sanction obligations, respectively, for scientific research. The *Whaling Convention*, through Article

VIII(1), allows parties to grant special permits authorizing nationals 'to kill, take and treat whales for purposes of scientific research'.⁶⁰ The *Single Convention* and *Trafficking Convention* require that Parties take the necessary legislative and administrative measures to 'limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs'.⁶¹

The exemptions both include language restricting their application to scientific research, however neither treaty provides a definition of 'scientific' research. Activity carried out under these exemptions is required to be for the 'purposes' of scientific research, undefined by the conventions. The conventions do not provide any indication of how to determine what purpose an activity is for. The ICJ addressed these two issues in the *Whaling* case.



Cannabis Culture, CC, 2012



Defining ‘For the Purposes’ of Scientific Research

The objective test, or standard of review, set out by the ICJ in assessing whether a program is ‘for the purposes’ of scientific research is: “whether the design and implementation of a programme are reasonable in relation to achieving the stated research objectives.”⁶²

This test sets out two parts to determine whether a program is ‘for the purposes’ of scientific research. The ICJ expands on both parts in the merits of the judgement: (1) identifying the stated research objective and (2) evaluating the reasonableness of the design and implementation of the program in relation to the identified objectives.

1. Identifying the Stated Research Objectives

“The stated research objectives of a programme are the foundation of a programme’s design, but the Court need not pass judgment on the scientific merit or importance of those objectives.”⁶³

The ICJ is deferential to the state in defining its scientific research objectives, which suggests Canada will have wide scope in identifying legitimate objectives for a cannabis legalization program for scientific research purposes. However, the ICJ notes that the design of a program will be evaluated in light of the identified scientific research objectives. Accordingly, the ICJ is more critical of the design of the research program than it is of the objectives. Therefore, Canada must define its objectives so that they can justify the national legalization of cannabis as part of a scientific research program. Such scientific objectives may be the study of the long-term impact on the criminal justice system, relating to the federal objective of reducing the burden on it. Scientific objectives may also be related to studying the long-term public health effects of non-medical cannabis use.

The ICJ also addressed the fact that a program may have more than one objective in implementing a program. The nine stated federal objectives identified by the Task Force mandated to provide advice to the Government of Canada on the design of a new legislative and regulatory framework for legal access to cannabis.⁸ The ICJ states that identifying additional non-scientific objectives will not jeopardize a finding that a program has a scientific research objective: “the Court considers that whether particular government officials may have motivations that go beyond scientific research does not preclude a conclusion that a programme is for purposes of scientific research.”⁶²

As noted, certain identified federal objectives, particularly those related to data collection, do complement scientific goals and principles that have been identified by the CND.

2. Evaluating the Reasonableness of the Design and Implementation of the Program in Relation to the Identified Objectives

“In order to ascertain whether a programme’s use of lethal methods is for purposes of scientific research, the Court will consider whether the elements of a programme’s design and implementation are reasonable in relation to its stated scientific objectives.”⁶³

The ICJ states that the evaluation of reasonableness will be based on the elements of the program’s design and implementation. The ICJ went further in identifying a non-exhaustive list of seven elements to be considered.⁷⁰ These can be summarized as:

- › Decisions regarding the use of selected methods
- › Scale of the programme, including methodology used to select sample sizes
- › Time frame associated with a programme
- › Programme’s scientific output
- › Degree to which a programme co-ordinates its activities with related research projects⁶³



An evaluation of decisions regarding the use of selected methods requires that Canada's decision to legalize cannabis and establish a population study to that effect be reasonably connected to the scientific objective it sets out, as addressed above. The extent to which the production, manufacture, export, import, distribution of, trade in, use and possession of cannabis are legalized under the Government scheme will be central to whether it's reasonably connected to the scientific objectives.

The ICJ will look for evidence that the program's scale and size are reasonable in light of the objectives. Canada's program would operate on a broad, country-wide scale because the Government of Canada is seeking to nationally legalize the non-medical use of cannabis. The Government may rely on the argument that the program, according to currently-identified federal objectives, would be heavily regulated, and penalties for operating outside of the regulatory scheme would be hefty. The sample size would be subject to few limitations; the Government will likely impose limitations on the basis of age. Such a sample size could be justifiable for the purposes of studying the burden on the national criminal justice system with respect to cannabis related offences, or conducting a population study of the effects of cannabis use.

The timeframe will be indefinite and ongoing. In order to rationalize this timeframe, the Government of Canada may seek to identify research objectives that justify such an open-ended timeframe. Examples could include intergenerational health impacts, or the ongoing implications for the criminal justice system.

Ensuring there is research output from such a program will also be critical to evaluating its reasonableness. The federal data collection objective of the legalization scheme will be valuable in meeting this element of the reasonableness test. Adhering to the federal objective may be critical to justifying the scheme under the scientific research exemption.

Identification of, and coordination with, scientific research programs with related objectives will also be of concern, particularly as this has been identified as being of importance by the CND through Resolution 58/7.⁶⁴ Using the federal data collection objective to support the research of international organizations, like the ECDD, may satisfy this criteria.

Defining 'Scientific Research'

While the ICJ addressed the issue of defining 'scientific research' prior to assessing whether a program was 'for the purposes' of scientific research, this section deals with this issue secondarily, as the ICJ held it was not necessary to devise criteria or offer a general definition of 'scientific research' to make its decision.⁶⁵ However, the ICJ addressed four criteria that Australia presented as essential characteristics of scientific research. These four criteria include: (1) defined and achievable objectives, (2) appropriate methods, (3) peer review, and (4) avoidance of adverse effects. The following examines how the ICJ addressed those criteria and their impact on Canada's cannabis legalization proposal.

1. Defined and Achievable Objectives

"Defined and achievable objectives (questions or hypotheses) that aim to contribute to knowledge important to the conservation and management of stocks."⁶⁶

The ICJ noted that experts in the case agreed that questions or hypotheses have a role in scientific research.⁶⁷ The ICJ's test as set out in the 'for the purposes' of scientific research evaluation also makes defined objectives central to determining whether a program is scientific research. Clearly, defined objectives will be necessary in establishing the scientific validity of a cannabis legalization program under the scientific research exemption. The form of a question or hypothesis is less clear.

In setting out its test to determine whether a program is 'for the purposes' of scientific research, the ICJ emphasizes the design of the research program and its methods being justified under the stated objectives. To justify a legalization scheme



as having scientific research objectives, the Government of Canada will be required to formulate the objectives (questions or hypotheses) as focused on non-medical uses of cannabis within a population.

2. Appropriate Methods

“Appropriate methods, including the use of lethal methods only where the objectives of the research cannot be achieved by any other means.”⁶⁶

The objectives will be critical to evaluating the reliance on legalization as a ‘method’. The scientific research objectives must be formulated so as to examine the effects of non-medical uses of cannabis within a population. Whether the stated objective is examining impacts on national health or on the criminal justice system, these objectives must be formulated in a manner that justifies ‘methods’ of nation-wide legalization.

The ICJ, addressing this issue in light of the overall treaty, noted parties had a duty to co-operate with the International Whaling Committee and the Scientific Committee and thus should give due regard to recommendations calling for an assessment of the feasibility of non-lethal alternatives.⁶⁸ The *Single Convention* establishes one of the functions of the CND as making ‘recommendations for... programmes of scientific research and the exchange of information of a scientific or technical nature.’⁶⁹ This suggests the requirement of a justification as to why the program as designed by Canada does or does not adhere to methods or program designs recommended by the CND. However, as addressed above, certain principles and objectives identified by the CND in relation to scientific research are complementary to the Government of Canada’s stated objectives.

The ICJ also stated that it is not for the ‘Court to decide whether the design and implementation of a programme are



“Vancouver Global Marijuana March 2015”, Danny Kresnyak and Cannabis Culture, CC,2015

the best possible means of achieving its stated objectives.⁶³ Therefore, the ICJ is not willing to evaluate the appropriateness nor whether there were more or less appropriate methods available. The test turns on a question of reasonableness, rather than appropriateness.

3. Peer Review⁶⁶

The ICJ rejected the peer review criteria outright, stating ‘it does not follow that a programme can be said to involve scientific research only if the proposals and the results are subjected to peer review.’⁷⁰ This should not be a necessary component of a scientific research program on the non-medical use of cannabis in light of this decision.

4. Avoidance of Adverse Effects

“The avoidance of adverse effects on stock.”⁶⁶

The ICJ noted that all parties to the dispute agreed with this criterion,⁷¹ which may be read to mean that a scientific research program that relies on the treaty’s exemption clause cannot have the effect of defeating the object and purpose of the treaty. The ICJ takes no determinative stance on this last criteria.



CONCLUSION

UN member states have decriminalized, legalized and in some cases, regulated the use of non-medical cannabis. While member states formerly conceived of cannabis as a social evil in the context of the UN drug control conventions' creation, its medicinal and scientific qualities have been increasingly focused on in international research. The Government of Canada expressed its objective to legalize, regulate and control access to non-medical cannabis through legislation in 2017. Public consultations have been held to advise the government on the domestic legislative process and its international implications. Key considerations from these consultations include the protection of vulnerable groups, the prevention of criminal organizations from profiting, and the creation of a strict regulatory system to manage access.

This report aimed to reconcile Canada's plan with its international treaty obligations, without invoking denunciation or amendment provisions. Canadian compliance with the conventions represents its commitment to globally-negotiated and predictable frameworks that guide member states' practices. The viability of the human rights justification, the constitutional exemption, and the medical and scientific exemption were examined as potential grounds for Canadian compliance. A human rights justification, based on the examples of Uruguay and Mexico, is likely not feasible in Canada. A constitutional exemption, like that relied on by Bolivia, lacks support from Canadian case law, and a constitutional amendment is unlikely.

The medical and scientific exemption outlined in the *Single Convention* provides the strongest grounds for Canadian compliance. Although the *Single Convention* does not directly define the meaning of "medical and scientific research", the *Vienna Convention* and other treaties assist in interpreting its language. Other treaties like UNCLOS and the *Mine Convention* were looked at, yet similarly failed to define the meaning of this exemption.

International jurisprudence was also examined to help define the medical and scientific exemption. In the *Whaling* case, the ICJ provided a list of criteria for determining whether a program is "for the purposes" of scientific research. In applying this criteria, the Government of Canada must (1) identify a stated scientific research objective and (2) evaluate the reasonableness of the design and the implementation of a research program in relation to that identified objective. The reasonableness of the medical and scientific purpose is assessed by many factors including its scale, methodology, and time frame.

This report recommends that to remain compliant with the conventions, the Government of Canada should justify its legalization and creation of a regulatory non-medical cannabis regime under the *Single Convention's* medical and scientific exemption. Further research may be directed towards other treaties and ICJ jurisprudence that may further illuminate this exemption.



Key Messages

- › The Government of Canada's proposed legalization and regulation of non-medical cannabis risks contravention of the 1961 *Single Convention on Narcotic Drugs*, the 1971 *Convention on Psychotropic Substances*, and the 1988 *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*.
- › The human rights justification to use, produce, and sell non-medical cannabis provides weak grounds for its legalization because arguments that human rights norms overpower the drug conventions or that access to cannabis itself is a human right lack credibility in the Canadian context.
- › The constitutional exemption in the *Single Convention* and the *Trafficking Convention* offers weak justification for legalizing and regulating non-medical cannabis because of insufficient jurisprudence on a right to use non-medical cannabis and the unlikelihood of reopening the Canadian Constitution to create a new right.
- › The *Single Convention's* scientific purposes exemption is the most persuasive justification available to the Government of Canada for legalizing cannabis, provided that the government frames its legalization and regulation of cannabis as being for a "scientific purpose".
- › The International Court of Justice, in its 2014 *Antarctic Whaling* case, addressed what constitutes scientific research and whether a government program was "for the purposes" of it; ultimately, the court stated that whether a program is legitimately for the purposes of scientific research turns on "whether the design and implementation of a programme are reasonable in relation to achieving the stated research objectives".



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