Legislative Summary LS-240E

BILL C-8: THE CONTROLLED DRUGS AND SUBSTANCES ACT

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LEGISLATIVE HISTORY OF BILL C-8

HOUSE OF COMMONS	
Bill Stage	**Date**
First Reading:	6 March 1996
Second Reading:	6 March 1996
Committee Report:	6 March 1996
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SENATE	
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N.B. Any substantive changes in this Legislative Summary which have been made since the preceding issue are indicated in **bold print.**

Legislative history by Peter Niemczak

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BILL C-8: THE CONTROLLED DRUGS AND SUBSTANCES ACT*

BACKGROUND

Bill C-8, the Controlled Drugs and Substances Act, was passed by the House of Commons on 6 March 1996. The bill was previously introduced in the first session of the 35th Parliament as Bill C-7, and was under review by the Standing Senate Committee on Legal and Constitutional Affairs when Parliament prorogued on 2 February 1996. Bill C-8 is also a revised version of Bill C-85, the Psychoactive Substance Control Act, which died on the Order Paper in the 34th Parliament. Like its two predecessors, Bill C-8 builds upon current legislation while attempting to strengthen its impact and to cure perceived defects.

Bill C-8 forms part of the National Drug Strategy, a multi-year program set up to combat the illicit drug trade within our boundaries. The bill would consolidate and supplement provisions found in the *Narcotic Control Act* and Parts III and IV of the *Food and Drugs Act.* Consequently, the *Narcotic Control Act* would be repealed in its entirety, as would the relevant sections of the *Food and Drugs Act.* The explanatory notes at the beginning of the bill emphasize that Canada, by enacting Bill C-8, would also be fulfilling its international obligations under the *Single Convention on Narcotic Drugs* (1961), the *Convention on Psychotropic Substances* (1971) and the *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.*

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* The bill was originally introduced in the first session of the 35th Parliament as Bill C-7. By motion adopted 4 March 1996, the House of Commons provided for the reintroduction, in the second session, of legislation that had not received Royal Assent before Parliament prorogued.

Furthermore, the bill is intended to provide a framework for the control of import, production, export, distribution and use of mind-altering substances. The introductory summary still states that, apart from controlling scheduled substances, the enactment would provide for the control of non-scheduled substances if they fell within the parameters of the enactment. This statement appears to be an oversight since the "deeming clause" contained in both Bill C-85 and the first version of Bill C-7 has been removed. A person could be convicted of a drug-related offence under Bill C-8 only if the illegal activity pertained to one of the substances listed in the Schedules.

In response to criticisms raised by witnesses in the course of hearings on the predecessor bills, the government introduced several substantive and consequential amendments, which were subsequently adopted by the House of Commons. These amendments have since been incorporated into Bill C-8; at times, this legislative summary will compare the different versions of the bill, as well as make reference to submissions of various witnesses before the House of Commons and Senate committees that had previously studied it.

DESCRIPTION AND ANALYSIS

A. Definitions and Interpretation (Clauses 1 to 3)

The bill would borrow several definitions currently found in the *Food and Drugs Act*, the *Narcotic Control Act* and the *Criminal Code*. This would include such standard words as analyst, inspector, judge, justice, possession, prescribed, and sell.

Some slight variations on current terms would be introduced. For example, the definition offered of "Attorney General" reverses the general principle outlined in the *Criminal Code*. Another noteworthy adaptation is the term "designated substance offence," which is akin to the "designated drug offence" found in the *Criminal Code*. Both concepts refer to those offences that are profit-motivated (such as production, trafficking, laundering of proceeds). Under Bill C-8, reference to "Attorney General" would mean the Attorney General of Canada, unless proceedings were commenced and conducted by his or her provincial counterpart. The predecessor bills did not originally state which Minister would be given the mandate to administer the legislation but simply indicated that the Governor in Council could designate a member of the Queen's Privy Council for Canada for that purpose. This, in turn, would have depended on the final organization of various

federal departments. An amendment specifically designating the Minister of National Health and Welfare as the Minister responsible for Bill C-8 was adopted.

Bill C-8, like its predecessors, would add a few new expressions that merit further attention. It should first be noted that, although all references to psychoactive substances in Bill C-85 have been replaced with the term controlled substances in Bill C-8, a major purpose of the legislation would remain the same: to extend criminal sanctions to mind-altering drugs. Bill C-8 would introduce the term "analogue," which is defined as a substance having a chemical structure similar to that of a controlled substance. "Controlled substance" now refers only to those substances included in Schedules I, III, IV or V of the bill. Interestingly enough, Schedule II, which lists cannabis in all its forms, is no longer included in the definition of "controlled substance." This omission is significant, given that several provisions related to enforcement and investigations make specific reference to "controlled substances" rather than to the Schedules themselves. For example, a peace officer would seek a warrant in relation to a controlled substance (clause 11), the disposal of "controlled substances" is governed in Part II (clauses 24 to 28), and inspectors are authorized to inspect businesses which deal in "controlled substances" (clauses 30 to 32). Departmental officials have indicated that the exclusion of Schedule II was an oversight and they will be seeking an amendment to include it in the definition of "controlled substance." **The Senate, during its deliberations, amended the bill to include Schedule II.**

At first, the Schedules provided were not meant to be exhaustive. The original definition of controlled substance in the earlier bills would have included any drug intended for human consumption that produces a stimulant, depressant or hallucinogenic effect if ingested. In its original version, the bill would have extended a definition of controlled substances and their analogues far beyond the drugs entrenched in the Schedules. A non-scheduled substance would thus have been deemed a scheduled substance if the following conditions had been established:

i) that a person produced, possessed or provided a substance,
ii) with the intent that the substance be introduced into the body of another,
iii) for the purpose of producing an effect substantially similar to or greater than those substances listed in Schedules I to III,
iv) and that the substance, if introduced, would produce the desired effect.

This deeming clause found in the earlier bills was an attempt on the part of the legislator to curb the proliferation of both "designer drugs" (psychoactive substances that have a different chemical structure from drugs listed in the Schedules) and "look-alike drugs" (psychoactive substances that mimic the effects of the scheduled drugs). Departmental representatives stated that enforcement problems arise when 'new' potent substances are developed that do not appear on any given Schedule and therefore elude all governmental sanction. The broad definition initially introduced under the bill would have enabled the legislator to adopt regulations to control, govern and limit the use of as yet unnamed substances. Criminal sanctions would also have applied to a person who deliberately produced drugs that had not yet been properly classified but had a high abuse potential and dependence liability.

Many witnesses, especially consumers of herbal products, were highly critical of the "deeming" provision found in the earlier version and were concerned that "lawful" products would henceforth be prohibited. In addition, many criminal law experts, including the Canadian Bar Association, the Quebec Bar Association and the Criminal Lawyers' Association of Ontario, called for the deletion of the clause on the basis that it lacked certainty and clarity. It might permit a person to be convicted of a drug offence for a substance not explicitly listed in one of the appended Schedules, contrary to the established legal principle that people must know the law in order to govern their behaviour accordingly. As a result of the many criticisms, the government agreed to withdraw the "deeming" clause; and it no longer appears in Bill C-8.

Another substantial change flowed from the removal of the "deeming" clause. In its original form, several substances would have been specifically excluded from the scope of the bill, namely, nicotine, ethyl alcohol and any prescribed substance. Since the "deeming" clause was defeated, there was no reason to maintain these specific exemptions. Bill C-8 now applies only to cases involving a substance listed in one of the Schedules. Neither ethyl alcohol nor nicotine appears in any Schedule, nor can either one be "deemed" to appear there.

Other interpretative clauses remain unchanged. Any matter that contained a controlled substance would still be regarded as being that very substance. In other words, any lawful substance combined with a prohibited substance would be viewed as that illicit substance overall (i.e. a mixture of sugar and cocaine = cocaine). Yet in cases where two scheduled

substances were mixed together (i.e. amphetamine and cocaine), the bill would *not* deem the entire substance as one falling under the Schedule carrying the highest maximum sentence. Rather, a separate charge would need to be laid for each substance. That would not be necessary, however, in cases where a person had misrepresented the true nature of a controlled substance. If the substance had been held out to be morphine, it would be treated as morphine.

Any object used, designed, or intended to produce or introduce a controlled substance into a body would be treated in the same way as that illicit substance. This would facilitate the forfeiture of needles, scales and other apparatus since there would no longer be a need to establish a direct link between the use of the object and the *specific* offence for which the accused was convicted. The Addiction Research Foundation and the Canadian Foundation for Drug Policy has urged the Senate Committee to clarify that "needle exchange programs" would not be caught by the definition of "controlled substance" as found in clause 2(2) of the bill. The bill would also envelop scheduled substances in any form, whether they were synthetic or natural products.

Under Bill C-8, known substances would be grouped together in six main Schedules. According to departmental officials, the Schedules are arranged in descending order of severity, with Schedule I containing those substances designated the most harmful and Schedule V listing those substances considered least harmful. There is also a Schedule VI, which lists precursors, elements that do not provoke any psychoactive effect by themselves, but can be converted or used to produce more harmful substances. Drugs that once formed a separate distinct group (i.e. controlled drugs) would now be affiliated with other categories of drugs (i.e. restricted drugs). It is important to stress that the penalties for drug offences would be closely linked to the particular Schedule involved. The penalties set for offences involving cannabis would also vary greatly depending on how much of the substance was confiscated.

Schedule I of the bill mostly reiterates those drugs enumerated in the schedules attached to the *Narcotic Control Act* and the *Single Convention on Narcotic Drugs* (1961). This would include narcotics such as opium, morphine and cocaine. Cannabis, though scientifically not a narcotic, was initially slotted in Schedule I. Cannabis would now appear on its own in Schedule II. As mentioned earlier, the definition of "controlled substance" under Bill C-8 at present no longer refers to Schedule II. In addition, Schedules VII and VIII refer to specific amounts of cannabis resin and marihuana. Schedule VII sets the amount at 3 kg for both

compounds; Schedule VIII sets the amount at 1 gram for cannabis resin, and 30 grams for marihuana. When a person was charged with a cannabis-related offence under Bill C-8, the potential penal consequences would depend on the specific amount seized. This matter will be explained in more detail in the section dealing with specific offences and punishment.

Schedule III would retain current restricted drugs listed in Schedule H of the *Food and Drugs Act*, some elements of the controlled drugs listed in Schedule G of the same Act, and substances found in the *Convention on Psychotropic Substances* (1971). This would include stimulants such as amphetamines, hallucinogens such as mescaline, LSD and DET and hypnotic-sedatives such as methaqualone, better known as quaaludes. Schedule IV would incorporate the remaining controlled drugs currently listed in Schedule G of the *Food and Drugs Act*, certain prescribed substances found in Schedule F of the same Act, anabolic steroids and some substances mentioned in the *Convention on Psychotropic Substances* (1971). Sedatives such as barbiturates and benzodiazepines (more commonly known under their trade names of Seconal, Luminal, Valium and Librium) would fall under this category, as would many different anorexiants such as chlorphentermine and diethylpropion used in weight reduction programs. Schedule IV also refers to 'catha edulis Forsk.,' a plant more commonly known as 'khat' or 'qat.' When representatives of the Canadian Foundation for Drug Policy appeared before the Senate Committee studying the bill in December 1995, they advocated against criminalizing "indigenous drugs" such as khat, since it is used primarily by Somalian and other African communities for social and ceremonial purposes. Schedule V would list substances subject to abuse, some of which were included in the *Convention on Psychotropic Substances* (1971). These substances are sometimes ingredients in non-prescription medication. Phenylpropanolamine, for example, can be detected in appetite suppressants or nasal decongestants (i.e. dexatrim).

As mentioned earlier, controlled substances would not be the only substances governed by Bill C-8. The introduction of the notion of "precursor" substances (listed in Schedule VI) would be in keeping with our international obligations under the *Single Convention on Narcotic Drugs* (1961) and the 1988 *Vienna Convention*. Precursors by themselves do not provoke any psychoactive effect but can be converted or used to produce "designer drugs," "look-alike drugs" or scheduled substances. It is anticipated that regulations enacted to control the import and export of precursors would attempt thereby to thwart the production of psychoactive substances in Canada and elsewhere.

Other definitions found in Bill C-8 are noteworthy. The term "practitioner" now refers specifically to any person registered and entitled under provincial law to practise the profession of medicine, dentistry or veterinary medicine. In the earlier versions, the term "practitioner" was not explicitly defined in the bill itself but was left to be defined later, in the regulations. Many health professionals argued that the term should be clarified in the bill itself, and the government agreed to do this. The terms "provide" and "traffic" were also changed to correspond to this amendment. The earlier versions of the bill explicitly stated that practitioners who issued prescriptions in the course of a legitimate practice could not be charged with trafficking offences. In the new version, the term "provide" would no longer contain such an exemption. The term "traffic," however, now prohibits the selling of an authorization to obtain the substance, unless it was carried out under the authority of the regulations. This amendment is in part justified because there is no longer any cross-reference to the term "provide" in the term "traffic" itself. In its appearance before the House of Commons legislative committee, the Quebec Bar Association had recommended that the bill incorporate the terms "sell" and "traffic" into one single definition; this recommendation was not adopted by the House of Commons.

B. Part I: Offences and Punishment (Clauses 4 to 10)

Bill C-8 would establish four main offences: possession, trafficking, importing/exporting and production. The penalties imposed would vary according to which scheduled substance was confiscated and how the Crown elected to proceed, by way of indictment or by summary conviction. Yet, participation in these activities would not necessarily entail criminal sanctions. Regulations could be enacted to authorize the possession, import/export and production of these substances for medical, scientific, industrial or enforcement purposes. No such exemption would exist, however, with regard to trafficking.

In the most recent version of the bill, many of the options for paying fines in relation to the various offences have either been reduced or dropped altogether. As well, there have been significant changes to the proposed maximum penalties set for various cannabis-related offences.

Clause 4: Possession, Seeking and Obtaining

A charge of possession could only be laid under clause 4(1) if the substance were included in either Schedule I, II, or III. Similarly, a charge would arise under clause 4(2) in situations where a party sought or obtained a Schedule I, II, III, or IV substance or the necessary prescription from a practitioner. Bill C-8, unlike its first predecessor, Bill C-85, would create an exemption for persons who had given to their practitioner particulars of other prescriptions for these substances received from another practitioner within the preceding 30 days. The clause in Bill C-8 is now similar to existing provisions in the *Narcotic Control Act* and the *Food and Drugs Act* which prohibit the canvassing of "practitioners" such as physicians, dentists or veterinarians.

The simple chart below illustrates the maximum penalties possible for possession, or seeking and obtaining. A similar outline will be used for the other offences.

Possession of a Schedule I substance:

indictable offence:	7 years' imprisonment
summary conviction:	first infraction: $1,000 (reduced from $2,000) or 6 months' imprisonment or both
	subsequent offence: $2,000 (reduced from $5,000) or 1 year's imprisonment or both

Possession of a Schedule II substance (namely cannabis in all its forms)

indictable offence:	5 years' imprisonment less a day
summary conviction:	first offence: $1,000 or 6 months' imprisonment or both
	subsequent offence: $2,000 or 1 year's imprisonment or both

Possession of a Schedule VIII substance
(less than 1 gram of cannabis resin (hashish) or less than 30 grams of marihuana)

Summary conviction only: $1,000 or six months' imprisonment or both

Possession of a Schedule III substance:

indictable offence:	3 years' imprisonment
summary conviction:	first infraction: $1,000 (reduced from $2,000) or 6 months' imprisonment or both
	subsequent offence: $2,000 (reduced from $5,000) or 1 year's imprisonment or both

The penalties for seeking or obtaining a Schedule I, II, or III substance would be identical to those set out for possession offences, where the prosecutor had proceeded by way of indictment. For summary conviction offences, the penalties would vary: for a first offence, a guilty party would face a maximum fine of $1,000 (reduced from $2,000) or 6 months' imprisonment or both; for a subsequent offence, the fine would be set at a maximum of $2,000, and the period of imprisonment would rise to a maximum of 1 year. In the case of a Schedule IV substance, an offender convicted on indictment would face a maximum of 18 months' imprisonment but for summary convictions the penalties would be the same as those set out above.

The new terms of imprisonment correspond to those currently applicable under the *Narcotic Control Act* and the *Food and Drugs Act*. The bill would have initially increased the maximum amount payable in fines for possession: however, the clauses in Bill C-8 now follow the current legislation, which permits a maximum fine of $1,000 for the first offence and $2,000 for any subsequent offence.

There have been significant changes to the bill with regard to cannabis-related offences. In its earlier version, the bill would have set a maximum penalty of seven years for cannabis possession in cases where the prosecution elected to proceed by indictment. The amended Bill C-8 would set the maximum penalty for possession of cannabis at 5 years less one day in all cases involving more than 30 grams of marihuana, or 1 gram of hashish. If the Crown did elect to proceed by way of indictment for cannabis possession, Bill C-8 would require that the matter be heard by a provincial court judge. Under clause 72 of the bill, possession and trafficking offences related to certain amounts of cannabis would fall within the exclusive jurisdiction of a provincial court judge, with the result that an accused would not be entitled to a preliminary inquiry or a jury trial. Under section 11(f) of the *Canadian Charter of Rights and Freedoms*, an accused is entitled to a trial by jury only if the maximum punishment for the offence is imprisonment of five years or more. Hence, by setting the maximum penalty at five years less one day, the legislator need not provide the accused with the option of a jury trial. The Law Union of Ontario told the Senate Committee that the absence of a jury trial would favour the prosecution and, hence, lead to more convictions. The Law Union recommended that the maximum penalty be set at five years, so that the accused could still seek a jury trial.

The proposal that possession of small amounts of cannabis resin or marihuana be a strictly summary conviction offence, is also contained in a recent amendment. Many witnesses argued that the maximum penalties imposed for simple possession of cannabis were too harsh: some advocated that persons convicted of the offence be subject to a fine only, so that they would incur no criminal record. Others witnesses opposed proposals to "decriminalize" cannabis possession. As a compromise, Bill C-8 would now create a strictly summary conviction offence for possession of less than 1 gram of hashish or 30 grams of marihuana. The maximum penalties a person could face would be a fine of $1,000 and six months in jail. The *Identification of Criminals Act* permits the police to fingerprint and photograph only persons charged with indictable offences (which include hybrid offences); thus a person charged with this strictly summary conviction offence would not be subject to this procedure. Departmental officials stated that a convicted person would still have a criminal record, but the record would be more difficult to retrieve, since it would not appear in CPIC (the R.C.M.P.'s database). In his appearance before the Senate Committee, Robert Kellerman, on behalf of the Law Union of Ontario, vehemently disagreed; he maintained that records of summary conviction offences appear in CPIC, whether or not a person has been fingerprinted for that offence.

To determine the amount of cannabis seized for the purposes of prosecution, clause 4(8) in Bill C-8 clarifies that the "entire amount of any mixture or substance, or the whole of any plant" would be included in that amount.

Clause 5: Trafficking

Clause 5 would prohibit the trafficking of any substance listed in Schedules I, II, III, or IV held out to be one of those substances. The bill would consolidate the definitions of "traffic" as elaborated in the *Narcotic Control Act* and the *Food and Drugs Act*. To traffic would not only mean to sell, administer, transport, send or deliver but would also mean to give, transfer or sell an authorization to obtain the substance. It would not be necessary to complete the transaction; simply offering to do one of the enumerated actions would fall within the definition of "traffic." It would not be essential for the prosecution to prove payment for the substance in order to obtain a conviction. It would also be an offence to possess such substances for the purposes of trafficking.

Bill C-8 would permit the prosecution of persons for trafficking if they represented or held out a substance to be an illicit drug (e.g., selling "sugar" as "heroin.") The Law Union of Ontario recommended the removal of clause 5(1) of the bill which equates trafficking with the act of representing or holding out a substance to be an illicit substance. In its place, the Law Union of Ontario urged Parliament to prohibit and prosecute such action as fraud-related offences.

The maximum penalties that could be imposed for trafficking offences can be summarized as follows:

Trafficking in a Schedule I or Schedule II substance (except in cases involving less than 3kg of cannabis)

indictable offence: life imprisonment

no summary conviction offence

Trafficking in a Schedule III substance

indictable offence: 10 years' imprisonment

summary conviction: 18 months' imprisonment

The option of a $10,000 fine contemplated by earlier versions of the bill has been removed.

Trafficking in a Schedule IV substance

indictable offence: 3 years' imprisonment

summary conviction: 1 year's imprisonment

The option of a $5,000 fine contemplated by earlier versions of the bill has been removed.

The proposed penalties for Schedule I and II substances are equivalent to those currently applicable to narcotics under the *Narcotic Control Act*. The periods of imprisonment for Schedule III substances would match the penalties for restricted drugs under the *Food and Drugs Act*. The bill initially provided a fine option of $10,000; the recent clauses no longer contain that option. The penalties for Schedule IV substances would not be as harsh as those currently applicable for

controlled and restricted drugs under the *Food and Drugs Act*, (a maximum ten-year term for indictable offences, and eighteen months for summary convictions). Again, the option of a $5,000 fine introduced in the previous versions of the bill has been removed.

Not all trafficking offences for cannabis would carry the maximum penalty of life imprisonment. Clause 5(4) would create a strictly indictable trafficking offence for cannabis in quantities of three kilograms or less. A person trafficking in modest amounts of cannabis (resin or marihuana) would now face a maximum penalty on indictment of five years less a day. Clause 5(6) clarifies that, in order to detect the exact quantity of cannabis involved, the entire amount of any mixture or substance or the whole of any plant would be weighed.

In its earlier versions, the bill had created a hybrid trafficking offence for small quantities of cannabis. A different threshold was established in the two previous versions of the bill to allow for this option. Under Bill C-85, it was set at ten kilograms or less; this amount was subsequently reduced to three kilograms or less under Bill C-7. The maximum penalties for trafficking in small amounts of cannabis were the same under both versions of the bill:

- fourteen years in prison if the Crown proceeded by indictment, and
- $15,000 in fines and two years' imprisonment for summary conviction offences.

As mentioned earlier, these options have been replaced by an exclusively indictable offence, carrying a maximum penalty of five years less one day. In addition, clause 72 of Bill C-8 states that a provincial court judge would have the exclusive jurisdiction to hear prosecutions of trafficking offences involving less than 3 kilograms of cannabis. As a result, accused persons would not be entitled to a preliminary inquiry or a jury trial.

As mentioned above, it is important to note that the earlier bills provided the option of fines for summary conviction offences involving substances listed in either Schedule III or Schedule IV. Bill C-8 no longer makes any reference to such fines.

Clause 6: Importing and Exporting

Clause 6 would mostly consolidate the import/export offences currently contained in the *Narcotic Control Act* and the *Food and Drugs Act* to all scheduled controlled substances and precursors. Possession for the purpose of exporting would be the only newly created offence.

The range in sentences for importing and exporting would be slightly different from the existing penalties.

Importing or exporting a Schedule I or II substance

indictable offence: life imprisonment

no summary conviction offence

Importing or exporting a Schedule III or VI substance

indictable offence: 10 years' imprisonment

summary conviction: 18 months' imprisonment

The option of a $10,000 fine contemplated by earlier versions of the bill has been removed.

Importing or exporting a Schedule IV or V substance

indictable offence: 3 years' imprisonment

summary conviction: 1 year's imprisonment

The option of a $5,000 fine contemplated by earlier versions of the bill has been removed.

The penalty imposed for Schedule I and II substances, although similar to the *Narcotic Control Act* penalty provisions, would not be identical. The seven-year *minimum* sentence under the *Narcotic Control Act*, which was held to be unconstitutional by reason of its violation of section 12 of the Charter,(*) would not be incorporated into the new bill. Precursors, listed in Schedule VI, would be grouped with Schedule III drugs and therefore be subject to harsher penalties than those substances listed in Schedules IV and V. The fact that precursors, although not drugs themselves, are used to produce what are considered the more harmful psychoactive drugs such as LSD, would appear to be the rationale underlying this alliance.

As noted above, under Bill C-8, all references to fines as penalties for summary conviction offences have been removed.

(†) *Smith* v. *The Queen*, [1987] 1 S.C.R. 1045.

Clause 7: Production

Clause 7 would advance the offence of "production." The expression "produce" would replace the term "manufacture" at present found in the trafficking provisions of *Food and Drugs Act* and the *Narcotic Control Act*. It would also include the cultivation offence found in the latter Act. To produce a controlled substance could entail *any method or process*. Bill C-8 would therefore cover all aspects of drug production, whether manufactured, synthesized, chemically or physically altered, cultivated, propagated, harvested or extracted. It would also include the offer to make an illicit substance. This wider definition was deemed necessary to cover all possible future means of production of prohibited substances, and to ensure that the restrictions imposed by the current legislation be eliminated. For example, it is not an offence to cultivate "magic" mushrooms, even though the drug "psilocybin" is a restricted drug under the *Food and Drugs Act*, simply because that process does not come within the definition of "manufacture." Under Bill C-8, such cultivation would amount to an offence.

A person charged with a production offence could face the following penalties:

Producing a Schedule I or II substance (other than cannabis/marihuana)

indictable offence: life imprisonment

no summary conviction offence

Producing cannabis (marihuana)

indictable offence: 7 years' imprisonment

no summary conviction offence

Producing a Schedule III substance

indictable offence: 10 years' imprisonment

summary conviction: 18 months' imprisonment

The option of a $10,000 fine contemplated by earlier versions of the bill has been removed.

Producing a Schedule IV substance

indictable offence: 3 years' imprisonment

summary conviction: 1 year's imprisonment

The option of a $5,000 fine contemplated by earlier versions of the bill has been removed.

The general penalty provision for Schedule I and II substances would parallel the one currently in force for narcotics under the *Narcotic Control Act*. As noted above, cannabis would again be distinguished from other substances: the maximum penalty to be imposed for cannabis (marihuana) production would be seven years' imprisonment. This exemption would be based on section 6 of the *Narcotic Control Act*, which provides a lesser sentence for the cultivation of marihuana and opium poppy. The latter substance would however no longer be advantaged under Bill C-8 but would be subject to the general provision of life imprisonment.

The penalties for production of Schedule III and Schedule IV substances are similar to those set out for restricted and controlled drugs under the *Food and Drugs Act*, the harshest penalties being reserved for restricted substances. It should be noted, however, that certain controlled drugs are now listed in Schedule III. Consequently, controlled drugs such as amphetamines would be subject to harsher penalties under Bill C-8.

Once again, Bill C-8 would no longer provide fines as a penalty option for summary conviction offences.

Clauses 8 and 9: Illegal Gains

The remaining offences under Bill C-8 merely recapitulate existing legislation. Clause 8 of the bill would consolidate existing provisions regarding the possession of illegally obtained property, while clause 9 would incorporate the current money laundering offences under the *Narcotic Control Act*, the *Food and Drugs Act* and the *Criminal Code*. Bill C-8 would, however, cover additional situations and offences, such as proceeds of crime obtained from "double-doctoring" scams.

Clause 10: Sentencing

Clause 10(1), a new provision, provides an explicit statement on the purpose of sentencing under Bill C-8. The fundamental purpose of any sentence would be to contribute to the respect for the law and the maintenance of a just, peaceful and safe society while encouraging

rehabilitation, and treatment, in appropriate circumstances, of offenders and acknowledging the harm done to victims and to the community. This amendment was introduced to respond to the criticism that the bill did not provide any court diversion programs (treatment) for adults or young offenders who are drug users with major psychological, addiction or abuse problems.

Drug policy analysts and organizations who appeared before the Senate Committee have already been critical of this new amendment. The Canadian Foundation for Drug Policy maintained that clause 10 is an "illusory" provision which cannot be effectively implemented under the current framework; the few treatment centres that exist already have extensive waiting lists. The Addiction Research Foundation (ARF) urged the legislator to provide explicitly in clause 10(1) what alternatives to incarceration would be made available to those convicted of drug offences. According to ARF, the bill should provide specifics on the various treatment options available to those convicted of offences, namely:

- who would qualify for treatment and under what circumstances
- how offenders would be assessed with respect to their need for treatment
- how much treatment would be given
- whether treatment could be given before, after or during incarceration, and
- whether treatment could be a substitute for incarceration or other penalties.

Clause 10(2) would introduce another new concept: a list of factors the court would be required to regard as "aggravating" when sentencing a person convicted of a designated substance offence. Such an assessment would need to be undertaken for all Part I offences, except mere possession of a prohibited substance. The factors to be weighed would be: use of a weapon, use or threat of violence, trafficking on school grounds or in a public place frequented by minors, trafficking to a minor, and previous convictions for a drug offence. In addition, Bill C-8 classifies as an aggravating factor using the services of a minor in the perpetration of a designated substance offence. Written reasons would be required of any judge who failed to impose a prison term in the presence of any one of these factors. It is anticipated that this provision might deter drug dealers from using weapons, threatening violence, selling to young people or recruiting their services.

C. Part II: Enforcement (Clauses 11 to 22)

Clauses 11, 12, 13: Search, Seizure and Detention

Clauses 11 and 12 of the bill would dictate the manner in which search and seizure operations should take place. In most circumstances, the police would need to obtain a warrant before conducting a search of any location. Former provisions in the *Narcotic Control Act* and the *Food and Drugs Act* fully sanctioned the execution of warrantless searches of any place other than a dwelling-house where a peace officer had reasonable grounds to believe that narcotics were kept on the premises. These general endorsements were not incorporated into Bill C-8, however, because they had been declared inoperative and in violation of section 8 of the Charter.(*) However, clause 11(7) of the bill would permit a peace officer in exceptional circumstances to conduct a warrantless search where the conditions for obtaining a warrant existed but it would be impractical to obtain one. There might well be times when the delay in obtaining a warrant would jeopardize the life and security of an individual or the very existence of crucial evidence. In such circumstances, a warrantless search would be justified and Charter-proof.

Clause 11(1) would allow for the seizure of substances similar to those described in the current legislation with two notable additions: precursors and offence-related property. The concept of "offence-related property" would greatly expand the type of property that could be subject to court-ordered seizure and forfeiture. Any property, other than a controlled substance or real estate, used for illegally distributing prohibited substances for profit would be regarded as "offence-related property." The definition has since been amended to include real property built or significantly modified to facilitate the commission of a designated substance offence. This was to target "fortified drug houses," dwellings purposely fortified to thwart entry by police in the course of legitimate drug investigations. The *Narcotic Control Act* only permits the seizure and forfeiture of narcotics, needles, similar apparatus and drug money; the *Food and Drugs Act* has comparable restrictions. The new concept would envision the seizure and forfeiture of drugs, apparatus and money but would include other objects as well, such as a vehicle used in an illegal drug transaction.

Clause 11(5) would authorize peace officers to search any individual found on the premises, when they had reasonable grounds to believe the individual had on his or her person any controlled substance, precursor, property or other thing set out in the warrant. Clause 12 would enable them to use force where necessary. Both provisions have counterparts in the *Narcotic*

(‡) *R.* v. *Rao* (1984), 12 C.C.C. (3d) 97 (Ont.C.A.), leave to appeal to S.C.C. refused 11 October 1984.

Control Act and the *Food and Drugs Act*. Most of the changes are largely stylistic. The requirement for police officers to have reasonable grounds prior to searching other persons found on the site is a recent addition. Clause 12, unlike its predecessors, does not list the particular objects an officer could break open to execute a search but merely gives an officer the general power to use force.

The remaining provisions have been modelled after existing *Criminal Code* sections. In brief, these provisions would sanction the granting of a telewarrant in certain situations, the execution of the warrant in another province, the seizure of items not specified in the warrant and the gathering of evidence associated with another offence.

Clause 13 would merely adopt the *Criminal Code* sections setting up a comprehensive scheme for the restitution, return or continued detention of the seized goods. A person would no longer be required to apply to a judge for the return of his or her property, the mechanism currently in place under the *Narcotic Control Act* and the *Food and Drugs Act*; rather, the burden would be placed upon the prosecution to satisfy a judge that the seized goods were needed for further investigation or court proceedings.

Some categories of goods would not be subject to the *Criminal Code* procedures, namely offence-related property and controlled substances. The forfeiture of offence-related property would be regulated by clauses 16 to 22 of the bill. Clause 24 to 29 would establish a distinct scheme to govern the disposal of controlled substances. Clause 13(4) also highlights provisions of the new regime for controlled substances. To simplify matters, all the elements of this latter scheme, including those contained in clause 13(4), will be reviewed together in Part III.

Clause 14 is a recent addition to Bill C-8. It would allow a restraint order to be made against offence-related property, and more specifically, fortified drug houses, with which the original version of the bill did not deal. As the original definition of "offence-related property" in the bill excluded real property, a court could not have ordered the forfeiture of real property to the Crown, even where the property had been used to commit a drug offence. Clause 14 would now permit the Crown to seek a restraint order against a person who had built or significantly modified a property to facilitate the commission of a drug offence. A judge could issue an order appointing a person (and, if specifically requested, the Minister of Supply and Services) to take control, manage or otherwise deal with the property. The wording of clause 14 is quite similar to that of

section 462.33 of the *Criminal Code*, which provides for the issuance of restraint orders in relation to "proceeds of crime."

Clauses 16-22: Forfeiture of Offence-Related Property

Clause 16 of the bill would guide the court in ordering forfeiture of offence-related property. As already stated, offence-related property simply means any property, other than a controlled substance or real estate (but not fortified drug houses), used for illegally distributing prohibited substances for profit. Once a person was found guilty of a drug offence, the court would be required to order that any offence-related property in respect of which the particular offence was committed be forfeited to the Crown. The court need only be satisfied on a balance of probabilities that the property was actually used to commit the offence. Similar provisions are currently in place under the *Narcotic Control Act* and the *Food and Drugs Act*. There would, however, be an interesting addition. Clauses 16 (b)(i) and (ii) now provide that the goods seized could be forfeited either to the provincial or the federal Crown, depending on which one had initiated the prosecution. These changes were newly incorporated in order to correspond with provisions set out in Bill C-123, now the *Seized Property Management Act*, which established a federal program to share forfeited proceeds of crime with other government jurisdictions. Bill C-123 was given Royal Assent on 23 June 1993.

In cases where the offence-related property could not be connected to the particular offence for which a person was convicted, the court would still be able to order its forfeiture. The new provision contained in clause 16(2) would empower the court to order forfeiture of confiscated property in cases where it was satisfied beyond a reasonable doubt that the property was somehow destined for the illegal distribution of controlled drugs. This new clause would ensure the forfeiture of goods such as lab equipment that could not be directly linked to the particular conviction secured. The higher onus imposed on the prosecution, proof beyond a reasonable doubt, is intended to guarantee that no person would unjustly lose his or her property. There would also be an automatic right of appeal for both the prosecution and the accused, as confirmed by clause 16(3).

Offence-related property could be forfeited even if a trial had never taken place. Clause 17, which is modelled after current *Criminal Code* provisions, would authorize the

forfeiture of property in cases where the accused had fled the jurisdiction or had died. In addition to establishing the flight or death of the accused, the Crown would need to establish beyond a reasonable doubt that the property was offence-related and that criminal proceedings had been properly commenced. Pursuant to clause 17(3), a person is presumed to have fled if, in a six-month period, all reasonable attempts to execute the warrant for his or her arrest have been futile. In its submission to the Senate Committee, the Law Union of Ontario called for the deletion of this clause on the basis that persons should risk losing their property only if it can be established that they have absconded with the intention of avoiding their arrest.

Clauses 18 to 22 reiterate substantially the same elements as those in sections 462.4 to 462.45 of the *Criminal Code*. In a forfeiture application, the court would be able to void any transfer or conveyance of offence-related property made after the seizure of the property. Only those individuals who knew or ought to have known that the property had been involved in a drug-related offence would be at risk of losing their property, and not *bona fide* purchasers for value. Innocent third parties would be entitled to appear before the court to assert their property claims at the forfeiture hearing. If a successful claim was mounted, the court could order that the property be returned to the person entitled to lawful ownership or possession rather than declare it forfeited to the Crown.

Even if the forfeiture had already been ordered, persons with legitimate property interests would still be able to assert their claims. The court would set a date for determination of the claim within 30 days of its filing, and the Attorney General would need to be given at least fifteen days' notice. Only those claimants who had not been convicted or accused of a drug-related offence and who had not fraudulently obtained the property but had rather exercised reasonable care in securing its acquisition, would have their rights safeguarded by the court. Applicants must show that they exercised all reasonable care to be satisfied that the property had not been used in connection with the commission of an unlawful act. The Law Union of Ontario has recommended that the phrase "commission of an unlawful act" in clause 20(4) be replaced with the phrase "commission of a criminal act."

Once an order for relief from forfeiture had been granted, the Minister designated for the purposes of this bill (the Minister of Health and Welfare) would be required to abide by its terms. The claimant would be entitled to the return of his or her property or full payment in lieu.

Again, both the Attorney General and the claimants would have an automatic right to appeal any order adverse to their interests. It follows that no order would be carried out until the period for appeals had expired or the appeal itself had been decided. In effect, all final forfeiture-related orders made under *any* federal legislation would be suspended for a 30-day grace period to ensure the availability of the property.

Clause 23: Forfeiture of Proceeds of Crime

Clause 23 would merely incorporate the provisions of the *Criminal Code* with regard to the forfeiture of proceeds of crime (money laundering). Consequently, the same procedure would be set up for the forfeiture of proceeds from designated substance offences. This mechanism is already secured by section 19.3 of the *Narcotic Control Act* and sections 44.4 and 51 of the *Food and Drugs Act*.

Again, the proceeds of crime could be forfeited to either the provincial or the federal Crown, in conjunction with Bill C-123, the *Seized Property Management Act*.

D. Part III: Disposal of Controlled Substances (Clauses 24 to 29)

Whenever a controlled substance was seized, under clause 13(4) of the bill a report outlining the place searched, the controlled substance seized and its current location would have to be filed with the appropriate justice. It should be recalled that the definition of "controlled substance" refers only to Schedules I, III, IV and V and does not include cannabis. An expeditious filing of the report would not be mandatory in all situations; the regulations could provide for postponement, for example, in cases where on-going police investigations would be jeopardized by any immediate disclosure.

Clauses 24 to 29 of the bill would comprise the core of the scheme governing the disposal of controlled substances. Many of the provisions would merely clarify and add to current sections of the *Narcotic Control Act* and the *Food and Drugs Act*.

Clause 24 would set up the "pre-trial" application procedure for the return of controlled substances. Any person would be able to apply in writing to a justice within 60 days after the seizure, acquisition or finding of a controlled substance by a police officer or inspector. The Attorney General would need to receive prior notice of the application. The current provisions

in the *Narcotic Control Act* and the *Food and Drugs Act* do not require that the application be in writing, nor do they apply to substances found or acquired by an inspector. As a result, the new provision would enable a person to regain lawful ownership or possession of a regulated substance that had been stolen or improperly detained. Where no application was made within the 60-day period, and it was not anticipated that the substance would be needed in any legal proceedings, the substance would be delivered to the Minister.

The justice hearing the application would need to consider only two main factors:

i) whether the applicant was lawfully entitled to the substance, and

ii) whether the substance might be needed as evidence in any legal proceedings.

Different answers would result in different outcomes:

- if the answer to the first factor was yes but the answer to the second factor was no (the applicant was the owner or lawful possessor, no proceedings were pending), the substance would be immediately returned to the applicant.

- if the answer to both factors was yes (the applicant was the owner or lawful possessor, and proceedings were pending), the substance would be returned to the claimant only at the end of 180 days, or at the end of the court proceedings, provided that the applicant was acquitted.

- if the answer to both factors was no (the applicant was neither the owner or lawful possessor, and no proceedings were pending), the substance would be forfeited to the Crown.

One crucial clause has no similar counterpart in the *Narcotic Control Act* and the *Food and Drugs Act*. By virtue of clause 26, the Minister of National Health and Welfare could apply to a justice for a forfeiture order of a controlled substance, at any time, on the grounds that the substance constituted a potential security, public health or safety hazard. The application would be, in essence, *ex parte*. The only person put on notice of the hearing would be the Attorney General, to ensure that the necessary evidence be safeguarded for any subsequent proceedings. If a justice found that the Minister had reasonable grounds to believe that the substance amounted to a

potential health or security risk, he or she would have to order the substance forfeited. The Minister would then be free to dictate the terms of its disposal.

The justice could not exercise any discretion in the matter once the reasonableness of the request had been confirmed. However, lawful owners or possessors deprived of their property under the terms of clause 26 would be entitled to receive the cash value of the substance destroyed. The claimant would need to bring an application under clause 24(5) before a justice in order to secure this payment. This would be beneficial to those claimants whose goods had been forfeited through no fault of their own (e.g., a pharmacist whose delivery had been stolen and later recovered by police officers).

Clause 27 would govern the "post-trial" procedure for the return of seized controlled substances. At the end of the trial or proceedings, the person from whom the substance had been seized would be entitled to its return if the court had deemed his or her activities to be lawful. Otherwise, the substance would be returned to the "true" lawful owner of the substance, if that person could be identified. In the case of neither scenario, the substance would be forfeited for the Minister to dispose of in accordance with applicable regulations. The bill now states that where there were no applicable regulations, the controlled substance would be dealt with as directed by the Minister.

A full hearing before an impartial adjudicator would not be required in all forfeiture matters. By obtaining the consent of the lawful possessor or owner of the controlled substance in question, the Minister could avoid a forfeiture hearing altogether in certain situations. Clause 28, which has no corresponding equivalent in the current legislation, would authorize the Minister to dispose of a controlled substance (Schedule I, III, IV or V but not cannabis) whenever the proprietor agreed to the destruction of his or her goods.

Furthermore, the Minister would not be required to obtain the approval of either the court or the owner for the destruction of any plant from which a Schedule I to IV substance could be extracted, if that substance was not being produced under the terms of a properly issued licence. Clause 29 does not refer to "controlled substances," but rather lists Schedules I to IV. As a result, cannabis is covered by this provision. Clause 29 is similar to the provision of the *Narcotic Control Act* dealing with opium poppy and marihuana plants. The new expansive wording in clause 29 would permit the destruction of all illegally cultivated plants, such as coca plants. The owner would not be entitled to any compensation for his or her loss.

E. Part IV: Administration and Compliance (Clauses 30 to 32)

Part IV would deal with the powers conferred upon inspectors to ensure that those licensed and authorized to deal in controlled substances fully complied with the regulations, which have yet to be promulgated. There are no similar provisions in the *Narcotic Control Act*. Most of the provisions correspond to sections 23 to 26 of the *Food and Drugs Act* with no substantial changes. The minor amendments that have been introduced will be highlighted below. Once again, however, it should be recalled that the definition of 'controlled substance' under Bill C-8 does not include cannabis.

Under clause 31, inspectors would be entrusted to enter and search any place of business or professional practice where a person was authorized or licensed to deal in controlled substances or precursors. The bill has since been amended to clarify that inspectors might enter an establishment only when they had reasonable grounds to believe that the place was used to conduct the business or professional practice of a person licensed to deal in controlled substances. The current provisions under the *Food and Drugs Act* refer exclusively to "places where articles are manufactured, prepared, preserved, packaged or stored." The new broad wording would also emphasize the main purpose of the inspection: to ensure compliance with the regulations. This amendment was deemed necessary in order to clarify that investigators would be merely fulfilling their administrative duties when entering those premises. They would not be conducting "criminal" investigations; that is to say, accumulating evidence to lay criminal charges. Such an investigation would require a warrant.

Under the bill, inspectors would be authorized to examine any electronic data with respect to any controlled substance or precursor found in the place. They would also be empowered to copy the data, for example, on printouts or computer diskettes. Computerized technology now provides a viable alternative to the traditional methods of compiling information in written records and books. Investigators would thus be equipped to examine and copy electronic data. By virtue of a recent amendment, inspectors would be precluded from examining or copying the records that pertained to the medical condition of persons. This amendment was introduced to allay fears that individual's privacy would be unduly violated if inspectors could gain unlimited access to patients' private medical records.

The current restrictions on conducting searches of private dwellings would be upheld; the inspector would first need to obtain the consent of the occupant or a search warrant. There would be one slight amendment in clause 31(2). The term "dwelling-place" would replace the term "dwelling-house" so that all types of private accommodations would fall within that category.

Clause 31(7) is a new proposal that has no counterpart in the *Food and Drugs Act*. An inspector who had seized a controlled substance or precursor would have to inform the owner or person in charge. The inspector would be duty bound to give details of the seizure and specify the location where the substance was being detained. Consequently, the owner or person in charge would always be apprised of the whereabouts of a seized substance.

Clause 31(8), which deals with the return of seized items by inspectors, offers another modification. Inspectors would no longer simply release seized articles once they had established compliance with the regulations, as section 26 of the *Food and Drugs Act* currently instructs them to do. Rather, inspectors would first need to notify the owner or person in charge in writing that it was no longer necessary to detain the controlled substance or precursor. The inspector would then return the substances only upon being issued a receipt by the owner or person in charge. The receipt mechanism is meant to protect inspectors from false claims.

Clause 31(9) further dictates that, within 120 days of a seizure of controlled substances or precursors by an inspector, steps would have to be taken either to return the product to its rightful owner or otherwise dispose of it.

F. Part V: Administrative Orders for Contraventions of Designated Regulations (Clauses 33 to 43)

Part V of the bill sets out the administrative procedure to be followed if regulations "designated" by the Governor in Council were contravened. Neither the *Narcotic Control Act* nor the *Food and Drugs Act* contains analogous provisions. The proposed provisions would apply to the activities of those practising in such health fields as pharmacy or medicine.

Clauses 34 and 36 to 43 would spell out the steps to be taken before an administrative order could be issued. First, pursuant to clause 34, the Minister would have to serve notice to appear on the person believed to have contravened the regulation and to send a copy

of this to the adjudicator in charge of conducting the hearing. Clause 37 lists the relevant information that should be contained in the notice, including the designated regulation believed to have been contravened, the grounds on which the Minister based this belief, and the fact that the matter had been referred to an adjudicator. The presumed contravener would therefore be made aware of the vital elements of the contravention and of his or her responsibility to request a hearing date. If the person failed to request a hearing within 45 days of being served the notice to appear, under clause 36(3) the adjudicator would be free to proceed to make a determination, as would be the case if the person suspected did not appear for a hearing.

Under clauses 36(1)*a* and 36(4), the adjudicator would fix the date, time and place of the hearing at the request of the presumed contravener. The latter would have to ensure that the adjudicator received two days' notice of the hearing date. When the date was firmly fixed, the adjudicator would have to meet certain conditions: the hearing date could not be less than 30 days, or more than 45 days, after the day the notice was served. The adjudicator would, however, have some latitude in that, if unable to conduct the hearing on the proposed date, he or she could, under clause 36(2), fix a new date, provided the person believed to have contravened the regulation agreed to it.

Under clause 39, the adjudicator would be vested with the powers of a person appointed as a commissioner under Part I of the *Inquiries Act* and would thus be able to require witnesses to appear or to table documents deemed appropriate. Although exercising powers similar to those of a court of civil records, the adjudicator would not proceed in the same fashion. Under clause 40, the adjudicator would deal with matters as informally and expeditiously as the circumstances and considerations of fairness and natural justice permitted. Thus, it would be possible for the adjudicator to hear the matter by telephone or for the accused to give evidence by affidavit rather than orally.

The adjudicator would then be required to make a determination within the applicable period prescribed and to notify the alleged offender and the Minister. When the adjudicator determined that the person had contravened the designated regulation, that person would be able to make representations in writing to the Minister. After considering the determination and any representations made, the Minister would have the power to order the alleged offender to cease all activities that he or she was licensed to carry out or to submit to certain

specific conditions. The Minister would be able to suspend, cancel or amend the person's licence or permit and to take any other measures set out in the regulations. The order would have effect from the moment it was served on the person to whom it was directed. A presumed contravener, while not able to appeal the Minister's final determination, could request that the order be revoked. Clauses 42(3) and (4) would uphold the rights of the person believed to have contravened a designated regulation in cases of non-compliance with the regulatory provisions. While enjoying a certain amount of latitude, the Minister could not act in an arbitrary manner, but would have to respond to the specific facts of the case in point.

In the event of an emergency, much quicker action would be taken. Under clause 35, the Minister, without having to give prior notice, would be empowered to make an interim order restricting the privileges of a presumed contravener, where there were reasonable grounds to believe that a designated regulation had been contravened and where the Minister was of the opinion that the contravention represented a substantial risk of imminent danger to the health or safety of any person. The person believed to have contravened the designated regulation would subsequently be notified of the interim order, setting in motion each of the previously mentioned procedures. The interim order would remain in effect either until the adjudicator made a favourable determination or until the presumed contravener was notified of the Minister's final determination.

Thus, health professionals who produce or supply controlled substances for medical, scientific or industrial purposes would be required to comply with the restrictions on the privileges granted to them by the government, or run the risk of losing them. They would also have to comply with the terms of any order made under Part V.

G. Part VI: General (Clauses 44 to 60)

Clauses 44 to 60 would provide general measures meant to simplify and clarify procedural issues. Many clauses have their basis in comparable sections of the *Food and Drugs Act* and the *Narcotic Control Act*. For example, clauses 44, 45 and 51 would reiterate current provisions regarding how analysts would be designated, the scope of their duties, and the admissibility of their reports in a court proceeding. Others clauses would introduce totally new concepts. For example, clause 58 advocates the paramountcy of Bill C-8 and its regulations over

the *Food and Drugs Act* and clause 59 would create the offence of falsifying books or documents that certain professionals would be compelled to maintain under the regulations.

Clause 46 would provide a general penalty clause to cover all offences in the bill that do not specify applicable sentences. Similar provisions can be found in the *Food and Drugs Act* and the *Narcotic Control Regulations*. An indictable offence would carry a maximum fine of $5,000 coupled with three years' imprisonment. A summary conviction offence would now be liable to a $1,000 fine and six months' imprisonment. This is a slight reduction from the $2,000 fine option originally established in the bill: the new penalties concur with the existing *Food and Drugs Act* provisions for first offences. Persons who violated regulations enacted under the bill could also face these penalties. The designated regulations discussed in Part V would, however, not be subject to these general penalties.

Under clause 47, the period for commencing summary conviction proceedings for certain offences under the bill and the regulations would be extended to one year. This would include such offences as seeking or obtaining a substance listed in Schedule I, II, III, or IV, making false and misleading statements to an inspector, or violating a ministerial order. All other summary matters would need to be brought forth within six months of the offence. Again, this clause is comparable to current provisions.

Most of the remaining clauses dealing with matters of evidence and procedure merely repeat existing principles:

- that the prosecution need only rebut the defence's argument that a licence, permit or other qualification operated in his or her favour (clause 48),

- that a copy of a document filed with a department would be admissible in evidence without proof of the signature of the official (clause 49),

- that service of a document might be proved by testimony, affidavit or solemn declaration, although the court would still have to compel the attendance of the declarant or affiant (clause 52).

There are a few clarifications in the bill that were not present in its first version, namely, Bill C-85. Clause 49(3) states that records made in the course of an investigation or inquiry would not *per se* be admissible as evidence in a subsequent legal proceeding. Clause 50 is also a new provision: it governs the admissibility (in subsequent court proceedings) of a certificate

issued to a police officer exempting him or her from the application of the Act or its regulations. Such a certificate would be useful in cases where police officers were involved in clandestine drug investigations. The defence might, with leave of the court, cross-examine the person who issued the certificate.

Clauses 53 and 54 do not have counterparts in either the *Food and Drugs Act* or the *Narcotic Control Act*. Both these provisions are intended to expedite the judicial process without impinging on the rights of the accused. In order to prove continuity of possession of an exhibit, clause 53(1) would permit evidence by testimony, affidavit or solemn oath. This would eliminate the necessity of having every individual who handled an exhibit, such as a controlled substance, appear in open court. However, under clause 53(2) the court, on its own initiative or at the defence's request, could order the presence of the person making the affidavit or the declarant in order to quell any doubts on that very issue. Department officials maintain that the right of an accused to mount a full defence would thus be secured, but defence counsel who made submissions on the bill strongly disagreed. The Law Union of Ontario favoured amending clause 53(2) of the bill to read the court 'shall' require the affiant or declarant to appear before it for examination or cross-examination in respect of the issue of continuity of possession "upon request of the accused or his/her counsel." Clause 54 would permit the prosecution to present certified copies of any book, record, electronic data or other document seized as admissible evidence. The copied version would have the same probative force as the original, unless the accused presented evidence to the contrary. Again, by providing the accused with an opportunity to introduce evidence to rebut the presumption, departmental officials contend that the clause would not likely succumb to a Charter challenge.

Clause 55(1) would greatly expand the authority of the Governor in Council to make regulations. The main thrust of the authority would be to regulate the medical, scientific and industrial **applications** and distribution of controlled substances and precursors and to facilitate the enforcement of the bill. The list of subjects to be regulated in clauses 55(1)(a) to 55(1)(z.1) was not meant to be exhaustive and would add new elements to the current legislation. For example, regulations could be enacted under clause 55(1)(a) to supervise a range of activities, from the production of controlled drugs or precursors to their exportation from Canada. Regulations under clause 55(1)(f) would dictate the method of production, preservation, testing, packaging or storage

of restricted substances. As well, clause 55(1)(h) would envision regulations defining the qualifications needed for persons to engage in any of those activities. Clause 55(1)(h) has been amended to clarify that these regulations would be directed at those who performed such activities "under the supervision of a person licensed under the regulations." This amendment was introduced to respond to the criticism that the provision as initially worded would have allowed the Governor in Council to dictate the qualifications of medical professionals, such as physicians or dentists.

Clause 55(2), in turn, would entrust the Governor in Council, on the recommendation of the Solicitor General of Canada, to make regulations pertaining to investigations and other law enforcement activities. This would include regulations outlining the proper detention, storage or disposal of controlled substances and regulations exempting police force officers, in certain circumstances, from the application of Part I the Act (which sets out the offences). Again, some witnesses have been highly critical of this clause. The Law Union of Ontario called on the legislator to further restrict the ambit of clause 55(2)(b), which exempts from the workings of Part I a member of the police force or persons acting under their direction. According to the Law Union of Ontario, the police should be required first to obtain a warrant from a judge in order to receive an exemption from the workings of the bill. In other words, the police should be required to seek judicial authorization prior to engaging in any "sting" operations whereby undercover officers might be required to "sell" illicit substances.

The Governor in Council would also be empowered under clause 60 to modify any of the attached Schedules by either adding or deleting a named substance if deemed necessary in the public interest. A substance could therefore be totally removed or simply inserted into another Schedule.

Under clause 56, the Minister could always exempt an individual or a substance from the application of the bill or its regulations on medical or scientific grounds. This ministerial discretion could also be exercised to create exemptions in the public interest.

The ability of the Minister and the Solicitor General to delegate their powers, duties and functions would be somewhat extended under clause 57. Not only would they be able to delegate powers to a provincial associate but they could also delegate them to a

designated position. It would thus no longer be necessary to designate every new appointee by name.

The original clause 59 would have offered another striking addition: no person convicted of a designated substance offence could ever have obtained a licence, permit or authorization to deal in controlled substances. This disqualification could have been removed only if the convicted person were granted a pardon. Furthermore, any existing holder of a licence, permit or authorization would have lost all attached rights and privileges upon being found guilty of a drug-related offence. In both scenarios, the forfeiture would have been automatic and not subject to any Ministerial discretion. During clause-by-clause consideration of the bill in the House of Commons, original clause 59 was eliminated in its entirety. Department officials indicated that this matter would now be dealt with in the regulations instead.

H. Part VII: Transitional Provisions, Consequential Amendments, Repeal and Coming into Force (Clauses 61 to 95)

Part VII contains housekeeping provisions. Clauses 61 to 63 would offer the customary transitional provisions. A person convicted of an offence under the *Narcotic Control Act* or the *Food and Drugs Act* in the interim would normally be sentenced in accordance with Bill C-8. However, if new harsher penalty provisions had been enacted, the accused would be entitled to the lesser penalty provided in the former legislation. Any licence or authorization issued under the previous regulations would still be considered valid unless explicitly revoked.

Clauses 64 to 76 would ensure that relevant sections of the *Criminal Code* and the *Corrections and Conditional Release Act*, which previously referred to the *Narcotic Control Act* and the *Food and Drugs Act*, would now accord faithfully with the new wording and schemes found in Bill C-8. Clause 83 would do the same for a specific section of the *Immigration Act*, as would clauses 84 to 93 for relevant sections of the *Proceeds of Crime (money laundering) Act* and the *Seized Property Management Act*. Obsolete expressions, terms and provisions would be struck and replaced by the correct terminology and points of reference. Clauses 77 to 82 would repeal Parts III and IV of the *Food and Drugs Act* and substitute other related provisions, while clause 94 would repeal the *Narcotic Control Act* in its entirety. Clause 95 would provide for the coming into force of the bill by order in council.

As mentioned earlier, the only contentious provision is clause 72, which grants provincial court judges exclusive jurisdiction to preside over trials for possession and trafficking offences related to small amounts of cannabis. This, in turn, would mean that an accused had no right to a preliminary inquiry or a jury.

COMMENTARY

The vast majority of witnesses who appeared before the House of Commons Committee studying the bill were highly critical of the legislation. Broad criticisms of the bill focused on three areas: first, the lack of a clear philosophical base or explicit statement of purpose for the bill; second, the fact that the bill followed the system of prohibition dominant in the 1920s and later codified in the *Narcotic Control Act*; and third, the absence of a focus in the bill on the harm reduction and prevention criteria which are at the base of Canada's Drug Strategy.

Many substantive amendments were introduced in response to the criticisms. The most significant is the elimination of the "deeming" provision, which many feared would have resulted in the criminalization of inoffensive behaviour. A person could now be convicted of a drug-related offence under Bill C-8 only if there was criminal activity linked to one of the substances listed in the Schedules. As well, a strictly summary conviction offence was created to deal with cases involving possession of small amounts of marijuana and hashish. Other significant changes were the introduction of sentencing guidelines in clause 10(1), measures to deal with fortified drug houses in clause 14, and the restrictions on copying the records pertaining to the medical conditions of persons in clause 31(1)(c).

Despite these significant amendments, many outstanding criticisms have not been addressed; this was reflected in the testimony of witnesses who appeared before the Senate Committee in December 1995. For example, many witnesses stated that the bill, in its appended Schedules, fails to classify drugs according to the degree of harm they pose. Many feared that the bill would create confusion and bring the law into disrepute, since drugs with essentially the same physiological action appear in different Schedules and carry different penalties. Some witnesses, such as those from the Addiction Research Foundation and the Canadian Foundation on Drug Policy, demanded that precise and rational criteria, based on public health and safety concerns,

should govern the scheduling of drugs, particularly new ones. Another major criticism, still unresolved, was that section 55 of the bill would grant overly broad regulatory powers to the Governor in Council, which was seen as inappropriate in criminal legislation. As well, because the regulations were not yet available, many witnesses commented on the impossibility of predicting how the legislation would work in practice. In addition, many witnesses found the bill far more complex and difficult to understand than the existing *Narcotic Control Act*. Given the severity of the potential sanctions, it was argued that the law in this area should be as simply stated and as accessible as possible.

Departmental officials indicated that the House of Commons Standing Committee on Health has agreed to conduct a comprehensive review on substance abuse, but this study would likely be undertaken only after Bill C-8 was adopted. Many criticized this approach, and called for a more open, non-partisan reassessment of Canada's drug laws and policies prior to the adoption of Bill C-8 or any other drug-related legislation. Given that our drug laws have not been amended in several decades, witnesses emphasized that Canada should take this opportunity to explore other viable alternatives to drug control rather than continuing its severe prohibitionist stance with Bill C-8.