

Medical Marijuana under the MMPR: A new crop of legal considerations

Medical marijuana has been making headlines in Canada after sweeping changes to regulations created a new market for commercial marijuana production. On April 1, 2014, the *Marihuana for Medical Purposes Regulations*¹ ("MMPR") replaced the previous *Marihuana Medical Access Regulations*² ("MMAR"). Under the old regulatory scheme, authorized patients could obtain licences to grow their own marijuana at home, designate a third party to grow marijuana on their behalf, or purchase it from Health Canada's approved supplier. Now, medical marijuana may only be obtained from a producer licensed by Health Canada, either directly or through a licensed dealer or health care practitioner.

Health Canada estimates that demand for medical marijuana will increase ten-fold and sales will reach \$1.3 billion dollars per year by 2024,³ making it an attractive market for prospective producers and those looking to invest. By requiring that medical marijuana must ultimately be obtained from independently licensed producers, the MMPR has effectively created the basis for this new industry. While "designated persons" were licensed under the MMAR to grow medical marijuana for use by others, they were limited to providing for a maximum of two authorized patients.

¹ *Marihuana for Medical Purposes Regulations*, SOR/2013-119.

² *Marihuana Medical Access Regulations*, SOR/2001-227.

³ *Marihuana for Medical Purposes Regulations* (2012) C Gaz I, 3422 [Regulatory Impact Analysis Statement].

The use of marijuana for medical purposes was banned in Canada in the 1930s and remained so until 2000 when *R. v. Parker*⁴ found the total prohibition on marijuana unconstitutional. While marijuana is still not an approved drug or medicine in Canada, the government subsequently took steps to exempt certain users from the provisions of the *Controlled Drugs and Substances Act* ("CDSA")⁵ that criminalize its possession, paving the way for patients to access the drug. Under the *Marihuana Medical Access Regulations*, patients or their designated persons were allowed to grow marijuana on a small scale, often in their homes. This system led to concerns over public health, safety and security; concerns that were the impetus behind the new MMPR which only provides access to marijuana through purchasing it from licensed and inspected commercial producers.

Key Considerations under the MMPR

There are several key aspects of the new regulations that anyone looking to enter or invest in this industry should take into consideration:

- [Licence Application](#)

In order to produce medical marijuana in Canada, a company must obtain a licence from Health Canada. The licensing process is extensive - prospective licensees must demonstrate that they meet a number of requirements set out in the MMPR such as strict security measures, good production practices, approval from local municipalities, police and fire authorities, and security clearance for key personnel.

There is currently no limit to the number of licences that Health Canada will approve. As of July 9, 2014, thirteen companies hold licenses (the current list is available [here](#)) and hundreds of additional applications have been made.

⁴ *R v Parker* (2000), 49 OR (3d) 481 (ON CA).

⁵ *Controlled Drugs and Substances Act*, SC 1996, c 19.

- **Strict Compliance**

Obtaining a licence is only the first step for prospective producers.

Because marijuana is not an approved drug or medicine in Canada it is likely that Health Canada will be rigorous in their oversight of licensed producers. Strict compliance with the MMPR will be necessary to ensure that licences, which expire after a maximum of two years, will in fact be renewed. Licences may be refused renewal or revoked for failing to comply with the MMPR and other applicable legislation including the CDSA, *Narcotic Control Regulations*, and *Food and Drugs Act*.⁶ Other grounds for failure to renew or revocation include improper security measures, not obtaining security clearances for specified personnel, or record keeping that does not comply with the regulations.

In addition, licences may be revoked: if there are reasonable grounds to believe that the licence was issued under false or misleading pretence; if the producer contravenes legislation; if there are reasonable grounds to believe that product has been diverted to an illicit market or use; or if any of the specified personnel do not hold security clearance.

- **Production**

Under the new regulations, only dried marijuana may be sold (under the old regulatory scheme, authorized users could possess marijuana in any number of forms) and must be mailed directly to the patient or his or her health care practitioner. Dried marijuana may also be exported with authorization from Health Canada. There is no limit on the strains that may be produced and no set requirements for pricing. However, each licensed producer must employ a quality assurance person with the necessary technical knowledge to maintain the appropriate quality of dried marijuana.

⁶ See *Controlled Drugs and Substances Act*, SC 1996, c 19; *Narcotic Control Regulations*, CRC, c 1041; *Food and Drugs Act*, RSC 1985, c F-27.

The MMPR requires indoor production and storage facilities that are secured by visual perimeter monitoring, restricted access, and other protective measures. Security clearance is required for specified personnel such as the senior person in charge, responsible and alternate persons in charge, each officer and director of the licensed producer, and any individuals authorized to order cannabis seeds on behalf of the licensed producer.

- [Marketability](#)

The ability to effectively market medical marijuana is also an important consideration. Because there is currently no set limit to the number of licences Health Canada will approve, there is the potential for an influx of producers into the marketplace which may lead to fierce competition for customers.

Advertising of medical marijuana must be in compliance with the *Narcotic Control Regulations* as it is still classified as a "controlled substance". As a result, licensed producers will only be able to market their products to health care practitioners and not to the general public. Producers must also be careful to comply with s.16 of the MMPR, requiring them to include their name as set out in their licence on all product labels, advertising, orders, shipping documents, invoices, and other such documents.

These limitations will not prevent a licensed producer from establishing a brand, promoting the merits of their product, and beginning to differentiate their proprietary strains and techniques. However, because marijuana is a controlled substance, and advertisements cannot be made to the general public, any awareness campaigns or targeted advertising will more likely follow the pharmaceutical advertising model, and less likely to follow the lifestyle-focused style of advertising of medicinal drugs commonly advertised to the public on TV or via the Internet.

[Judicial Challenge](#)

Any uncertainty surrounding how the new MMPR will work in practice has been increased by recent litigation seeking to declare the new

MMPR unconstitutional. In *B.C., Neil Allard et al v. HMTQ*⁷ has challenged the constitutionality of the new regulations under section 7 of the *Charter of Rights and Freedoms*.⁸ Plaintiffs argue that they will not be able to afford the marijuana sold by licensed producers, which is expected to be priced higher than the costs of growing for personal use, and so will either have to let their health suffer or use an illegal means to obtain the drug. An interim injunction was granted March 21, 2014, exempting patients who held valid licences under the old regulations from compliance with the new scheme, essentially allowing them to continue to grow the marijuana at home. The government has since filed an appeal of this injunction. Similar cases have been brought across Canada, though many have been put on hold pending the outcome in *Neil Allard et al v. HMTQ*, which is expected to go to trial in February 2015.

Conclusion

New industries do not appear every day, but when one does it is met with both excitement and caution. The commercial medical marijuana production industry created as a result of the MMPR is no exception, paving the way for new possibilities and markets, now and in the future. Questions remain as to how many licenses will be granted by Health Canada under the MMPR, and how the demand for medical marijuana will grow as producers become more commonplace.

The MMPR also opens opportunities in a variety of ancillary business channels, along with new legal issues. Potential lenders, landlords or investors considering involvement with a licensed producer must also consider a range of issues, including the risk of civil or CDSA forfeiture if unlawful activity occurs to the realization of security over

⁷ *Neil Allard et al v HMTQ* - The interim injunction was granted on March 21, 2014, and the government has since filed an appeal. The full trial is scheduled to begin in February 2015.

⁸ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982* being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11.

a regulated business which produces controlled substances. In the meantime, investors looking to make both public and private investments are eager to get in on the ground floor of this new growth industry, but will likely remain cautious as the market for medical marijuana producers as investment vehicles remains untested.

by Michael E. Reid and Lindsay Dykstra, Summer Student

For further information regarding medical marijuana businesses, please contact:

Vancouver	Michael E. Reid for licenses, business and investments	778.328.1634	michael.reid@mcmillan.ca
Vancouver	John Morrison for lenders and landlords	604.691.7411	john.morrison@mcmillan.ca

a cautionary note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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