

PROHIBITION TO GO UP IN SMOKE: GOVERNMENT OF CANADA INTRODUCES LEGISLATION TO LEGALIZE AND REGULATE NON-MEDICAL ACCESS TO CANNABIS

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Today the government of Canada tabled two sister bills, *An Act respecting cannabis and to amend the Controlled Drugs and Substances Act, the Criminal Code and other Acts*, and *An Act to amend the Criminal Code (offences related to conveyances) and to make consequential amendments to other Acts* (Bill C-45 and Bill C-46, respectively), which, once passed will establish a framework for the production, sale, distribution, and possession of non-medical access to cannabis (marijuana) in Canada and strengthen impaired driving measures.

Under the proposed legislation, which is based largely on the [Final Report of the Task Force on Cannabis Legalization and Regulation](#) (the “**Report**”), adults (aged 18 years and older) are permitted to possess up to 30 grams of dried or fresh cannabis, though provincial and territorial legislatures may set higher age limits.

Cannabis Derivative Products

Initially, the sale of cannabis will entail only fresh and dried cannabis, cannabis oils and seeds, and plants for cultivation. Sales of non-medical cannabis derivative products, such as food and beverages, may become available later, once regulations for production and sale can be developed. However, adults are permitted under the draft legislation to produce non-medical cannabis derivative products, such as food and beverages, for personal use in their homes.

Restrictions and Penalties

The proposed legislation provides for ticketing for possession that exceeds the personal limit by small amounts, or up to 14 years in jail for an illegal distribution or sale, and imposes tough new penalties of up to 14 years in jail for giving or selling cannabis to minors.

A new offence with a penalty of up to 14 years in jail will also be created for using a youth to commit a

cannabis-related offence. However, youth who are found in possession of up to five grams of cannabis would not be criminally prosecuted.

As part of an overhaul of Canada's impaired driving laws, the proposed legislation makes it illegal to drive within two hours of having an illegal level of drugs in the blood, with penalties ranging from a \$1,000 fine to life imprisonment, depending on the level of drugs in the blood and whether someone was injured or killed as a result of the impairment.

Further, tourists are prohibited from bringing cannabis into Canada, but would be permitted to use cannabis while in Canada (assuming that they are the requisite age). Possession, production, and distribution outside the legal system would remain illegal, as would imports or exports without a federal permit. Such permits will cover only limited purposes, such as medical or scientific cannabis and industrial hemp.

Further, there will be regulations introduced to restrict advertising and marketing activities in relation to cannabis. It is currently contemplated that specific rules related to items such as use of colour, labels, celebrity endorsements, and other similar considerations will be brought forward by regulation, which is slated to be effective when the legislation becomes federal law.

Home Growing

The proposed legislation includes the following provisions related to the activity of home-growing cannabis:

- adults aged 18 and older would be permitted to cultivate up to four cannabis plants at home;
- cannabis plants grown in homes could not exceed 100 cm in height (not including any part of the plant that is not normally exposed to the air);
- adults aged 18 and older could also produce derivative cannabis products legally, such as foods and drinks, for personal use;
- only personal production of edible cannabis products will be addressed by this proposed legislation; commercial production of edible cannabis products will not form part of the proposed legislation; and
- the federal government's existing medical cannabis regime will continue to service those in need.

Recently, the Canadian Association of Chiefs of Police argued that allowing the activity of home-growing will increase enforcement costs for law enforcement as they attempt to ensure that Canadians grow the permitted amount and do not profit from the sale of their home grown cannabis.^[1] These risks were also a focal point of the Report's discourse, which concluded that the risks of production involved in home grown cannabis would, over time, follow the same trajectory as those of homemade wine and home-grown tobacco in a post-prohibition era.^[2]

Other safeguards against such risks were recommended and will form part of the proposed legislation,

including a prohibition on dangerous personal manufacturing processes and requiring the implementation of mandatory security measures for home-growers.

Provincial and Territorial Powers

Provinces and territories would oversee and approve the sale of cannabis in their respective regions. The powers being granted to the provinces and territories are consistent with the federal-provincial coordination regarding issues of public health and public safety. The powers granted to the provinces and territories would include items such as setting license conditions, conducting inspections, suspending or amending licenses, and the ability to impose fees or monetary penalties.

The result is that the retail model for cannabis is not prescribed in the tabled legislation, and would largely be left to provincial and territorial legislators to craft, however there are four minimum conditions that provinces and territories would need to meet:

- only cannabis obtained from a federally licensed producer can be sold;
- selling to a person younger than 18 years of age is prohibited;
- the province/territory would need to develop a system that authorizes distributors and retailers, who would be required to keep appropriate records; and
- develop the retail model with a view to public health and public safety, and the prevention of the growth of an illegal cannabis market.

Most notably, the tabled legislation provides for mail order for both non-medical access and medical access. In the event that a province or territory does not have legislation in place by the time the federal law is in place, consumers will be allowed to purchase directly via mail order from federally licensed producers.

Licensing of Producers

Under the new regulatory plan for non-medical access to cannabis, all producers from whom consumers can buy from, directly or indirectly, must be federally licensed. The current licensing regime for medical access is being deemed to be a license under the proposed legislation for non-medical access, and will remain in place if the proposed legislation becomes law.

The current medical cannabis regime permits patients to obtain cannabis from a licensed producer, with the licensing process being conducted under the *Access to Cannabis for Medical Purposes Regulations* (the “**ACMPR**”). As at the date of this bulletin, there are 43 licensed producers in Canada under the ACMPR. The proposed legislation appears to contemplate that the government will retain the ACMPR for the time being; the Task Force on Cannabis Legalization and Regulation had recommended to keep the ACMPR in place for up to five years and to then conduct a review of the existing regulations. It is likely that the government will

conduct such a review in the future to determine whether new regulations would be implemented or if two regimes – a medical regime and a non-medical regime – will continue to operate side by side.

International Treaties

Canada is the first country in the G8/G20 to propose legislation on a national, rather than sub-national, basis to legalize and regulate non-medical access to cannabis; the importance of this proposed legislation cannot be overstated. One critical issue Canada must address is how it will comply with its international treaties. Specifically, Canada's legalization of cannabis would breach three international treaties to which the country is a party. The treaties in general require the criminalization of the production, sale, and possession of cannabis for non-medical and non-scientific purposes and each have their own timeline for withdrawal from the treaty. If Canada chooses to withdraw from these treaties, specific notice provisions must be followed. In the case of the *Single Convention on Narcotic Drugs, 1961, as amended by the 1972 Protocol Amending the Single Convention on Narcotic Drugs, 1961* and the *Convention on Psychotropic Substances, 1971* if Canada provides notice of withdrawal on or before July 1, 2017, it would take effect on January 1, 2018. If notice is provided after July 1, 2017, it would take effect on January 1, 2019. In the case of the *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988*, withdrawal would take effect one year after the notice is received by the Secretary-General.

If notice of withdrawal is provided in the spring of 2017, the earliest it could take effect for all three treaties would be the spring of 2018. However, if notice is provided after July 1, 2017, the earliest date that Canada could be clear of all three treaties moves to January, 2019.

It is currently uncertain how the government of Canada will proceed in ensuring compliance with international treaties given the timeframe provided for legalization and regulation of cannabis.

Conclusion

The driving factors of the federal government's proposed regime have been stated as being a commitment to legalizing, regulating, and restricting access to cannabis to reduce the operation of illicit markets and associated organized crime.^[3] However, the complexity of this task, both domestically and internationally, suggests that the legalization and regulation of cannabis in Canada will require extensive coordination with provinces, territories, and law enforcement authorities. Provinces and territories in particular will be tasked with navigating some of the most onerous aspects of cannabis legalization, namely how the purchase and sale of the product will be regulated, taxed, managed, and how compliance related to purchase and sale will be enforced.

The proposed legislation is the first, but significant, step along the road to legalization of non-medical access to

cannabis. There remains uncertainty with respect to how each province and territory will legislate the retail model pursuant to which cannabis can be sold to consumers. Uncertainty also remains as to how Canada will comply with its international obligations once non-medical access to cannabis becomes federal law. Additionally, future bills are expected to be introduced to flesh out the regulatory regime taking place. Notably, the tabled legislation does not contain provisions related to price control or taxation, and it is expected that the Minister of Finance will table a bill in the future to address such issues. While the introduction of legislation to legalize non-medical access to cannabis is a fundamental step to ending the current prohibition on non-medical cannabis, many more steps must be taken in order to ensure that Canada's non-medical cannabis regime becomes a well-founded and secure regulatory system for all stakeholders.

If Canada is able to succeed with crafting a well-founded and secure regulatory system, then there can be no doubt that Canada will become a world leader, among industrialized nations, in cannabis regulation and commercialization for both medical and non-medical uses.

We will continue issuing bulletins on this matter as developments occur.

About McMillan's Medical Marijuana Industry Group

Medical marijuana businesses are booming in Canada, after recent legislation including 2016's *Access to Cannabis for Medical Purposes Regulation* came into effect. McMillan is on the leading edge of these developments, helping clients who are entering or expanding in the market as growers, retailers, supporters, or technology providers, with comprehensive legal services required for businesses to operate in the industry.

McMillan's Medical Marijuana Industry Group is made up of lawyers who understand the laws, regulations, and business landscape in Canada. Our professionals provide valuable legal solutions for financing, accessing public markets, mergers and acquisitions, licensing and regulation, employment law, workplace issues, and intellectual property to help businesses succeed in this new and evolving industry.

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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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[1] Catherine Cullen, “Hold off on homegrown pot, police chiefs urge government”, CBC (8 February 2017), online: <cbc.ca>.[ps2id id='1' target='']

[2] A Framework For The Legalization And Regulation Of Cannabis In Canada (Task Force on Cannabis Legalization and Regulation: Government of Canada, 2016) page 37, online: <<http://healthycanadians.gc.ca/task-force-marijuana-groupe-etude/framework-cadre/alt/framework-cadre-eng.pdf>>.[ps2id id='2' target='']

[3] David Cochrane, “Liberals want to move up pot legalization to avoid Canada Day celebrations”, CBC (8 Apr 2017), online: <cbc.ca>.[ps2id id='3' target='']