



Developments in Cannabis Law: Canada and the United States

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Why now?

- Law is changing rapidly
- Legalization in Canada:
- Changes in U.S.:
 - State laws
 - 2018 Farm Bill
 - Attorney General Barr:
 - “The current system is untenable”
 - “To the extent that people are complying with state laws in distribution and production and so forth, we’re not going to go after that.”
- Where are we?
- Where are we going?



The Legalization of Recreational Cannabis in Canada

- Previously only cannabis for medicinal use was legal - regulated under the *Controlled Drugs and Substances Act*
- As of October 17, 2018 recreational cannabis is also now legal - all forms of cannabis now regulated by Health Canada under the *Cannabis Act* and its regulations as well as legislation in the provinces and territories.
- Strict framework for controlling the production, distribution, sale and possession of cannabis across Canada.
- Provinces and territories are responsible for determining how cannabis is distributed and sold within their jurisdiction.
- Legal age is 19 except in Alberta and Quebec where the legal age is 18.

What's Legal?

- Possession of up to 30 grams of legal cannabis (dried);
 - Sharing of up to 30 grams of legal cannabis with adults;
 - Buying cannabis/cannabis oil from licensed retailers;
 - growing up to 4 cannabis plants per residence for personal use (from licensed seeds or seedlings);
 - making food and drinks with cannabis at home (without the use of organic solvents)
- Depending on the province/territory – sales are made through physical provincial brick-and-mortar stores; licensed private retailers and/or online.

Licensing



- Federal licenses are required for:
 - cultivation or processing of cannabis;
 - selling cannabis for medical/non-medical purposes;
 - manufacturing prescription drugs containing cannabis;
 - conduct analytical testing of or research with cannabis;
- Provinces may require additional licenses/permits for retail sales.



Advertising and Marketing

Only limited forms of advertising and marketing are available and only to licensed producers, sellers or distributors of cannabis:

- B2B advertising (where both businesses licensed);
- informational or brand-preference promotion related to cannabis, a cannabis accessory or a service related to cannabis which is:
 - specifically addressed to an individual who is 18+;
 - made in a place where young persons are not permitted by law; or
 - communicated via telecommunication (i.e., email, online) so long as the person responsible for the advertising content has taken reasonable steps to ensure that the promotion cannot be accessed by young persons.

Prohibited Advertising

- inducements to purchase cannabis;
- false, misleading or deceptive promotions;
- communicating information about its price or distribution;
- doing so in a manner that there are reasonable grounds to believe could be appealing to young persons (anyone under 18);
- testimonials or endorsement, however displayed or communicated; the depiction of a person, character or animal, whether real or fictional; or
- presenting cannabis or any of its brand elements in a manner that associates it or the brand element with, or evokes a positive or negative emotion about or image of, a way of life such as one that includes glamour, recreation, excitement, vitality, risk or daring.
- Additional restrictions in Quebec

Records of Key Investors

Except for companies whose equity securities (or a class of those securities) are listed on a published market, a license holder for the cultivation, processing or sale of cannabis must maintain records that contain information about "key investors", including, among other things:

- key investor's name and mailing address;
- detailed description of the means by which the key investor exercises control over the license holder;
- details regarding the transaction by virtue of which the key investor became such an investor (including if money or goods and services were provided and a description/value);
- details of each instance money and/or goods or services were provided directly or indirectly to the holder (including the terms of any loan)
- details related to benefits to the investor; and
- details pertaining to any assigned, pledged, mortgaged, or sold ownership interest.

The records will be submitted annually to the governmental authority.



Import, Export and Crossing the Border

→ Import and Export

- Import and export of cannabis permitted only for medical or scientific purposes;
- Each importation and exportation requires a federal permit

→ Travelling

- Canadian/US border rules have not changed
- It is illegal to bring cannabis into Canada - failure to declare any cannabis products when entering Canada can result in arrest and prosecution.
- It is also illegal to transport cannabis out of Canada.





Offences under the Cannabis Act

Offence	Penalty
Possession over the limit	<ul style="list-style-type: none">• tickets for small amounts;• up to 5 years in jail
Illegal distribution or sale	<ul style="list-style-type: none">• tickets for small amounts;• up to 14 years in jail
Producing cannabis beyond personal cultivation limits or with combustible solvents	<ul style="list-style-type: none">• tickets for small amounts;• up to 14 years in jail
Taking cannabis across Canada's borders	<ul style="list-style-type: none">• up to 14 years in jail
Giving or selling cannabis to a person under 18	<ul style="list-style-type: none">• up to 14 years in jail
Using a youth to commit a cannabis-related offence	<ul style="list-style-type: none">• up to 14 years in jail

- Civil fines are also available



Effects on the Market

- Economic Benefits
 - reportedly CAD \$1.6 billion (approx. USD \$ 1.2 billion) was spent in the first few months by Canadians
- No reported increase or decrease in related crime

Coming Soon...

- Three new categories of cannabis expected to become legal by the end of this year:
 - edible cannabis
 - cannabis extracts
 - cannabis topicals
- Proposed amended regulations will also address new control measures for public health and safety risks;
- New rules governing the production of cannabis products, which include THC limits as well as restrictions on product composition and ingredients.

Cannabis Regulation in the U.S.

1. Current state of the law
2. Current enforcement policy
3. Possible scenarios for the future



Controlled Substances Act 1970

- Passed by Congress in 1970 in order to bring US into compliance with the 1961 UN Single Convention on Narcotics
- Classified “controlled substances” into 5 “schedules”
- Cannabis classified as Schedule I
- Schedule I substances:
 - *high potential for abuse*
 - *no currently accepted medical use in treatment in the US*
 - *lack of accepted safety for use of the drug under medical supervision*
- Cocaine, methadone classified as Schedule II
- Provides for complicated process for rescheduling, involving findings by Department of Justice and Department of Health and Human Services

Applicable Criminal Laws

- 21 USC 841– “manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance”
- 21 846 – conspiracy to commit a Title 21 offense
- 18 USC 2 – “aids, abets, counsels, commands, induces or procures” the commission of a federal crime
- 18 1956/1957 – money laundering
 - 21 USC 841, 846 are money laundering predicates
 - “with respect to a financial transaction occurring in whole or in part in the United States, an offense against a foreign nation involving [narcotics]”
 - 1956 – concealment, promotion, conspiracy
 - 1957 - “knowingly engages or attempts to engage in a monetary transaction in criminally derived property of a value greater than \$10,000 and is derived from specified unlawful activity.”
- Contrast with U.K. money laundering laws (sua if would be an offense in U.K.)

Immigration Laws

- Immigration and Nationality Act (INA):
 - Section 212(a)(1)(iii) renders inadmissible any alien who is determined to be a drug user or addict.
 - Section 212(C) renders inadmissible any alien who is coming to the U.S. to engage in any commercialized vice, including aiding and abetting narcotics trafficking.
- CBP policy statements:
 - Very case by case
 - Usually don't inquire absent some other basis for suspicion
 - In cannabis industry in Canada and coming to the US for unrelated reasons "will generally be admissible"
 - Travel to U.S. related to marijuana industry "may be deemed inadmissible"
 - "Officers are expert lie detectors"; misrepresentation can bar entry

State Laws/Prop 64

- 48 states have laws decriminalizing or permitting cannabis in one form or another
- California Prop. 64 “Adult Use of Marijuana Act” (2016) most significant:
 - Population of 40 million,
 - “5th largest economy in the world”
 - Largest cannabis producer in the US
- Prop. 64 key provisions:
 - Permits those over 21 to use, possess, buy and grow under defined conditions
 - Prohibits marketing to children or placement of businesses within 600 feet of schools
 - Imposes mandatory packaging, labelling, testing and environmental requirements
 - Prohibits large scale cultivation licenses for 5 years to protect SMEs
 - Allows resentencing of those convicted under old rules under certain circumstances
 - Allows hemp to be grown as an agricultural product

Supreme Court on State vs. Federal

- U.S. v. Oakland Cannabis Buyers Cooperative (2001)
 - California Compassionate Use Act of 1996 allowed medical marijuana under certain circumstances
 - Court held that:
 - Activities that are legal under state law can still violate CSA
 - No “medical necessity defense” or other “implied exceptions” under CSA
- Gonzales v. Raich (2005)
 - Same California statute
 - Commerce Clause challenge to application of CSA to “intrastate, noncommercial cultivation and possession of cannabis for personal medical purposes as recommended by a patient’s personal physician pursuant to valid California state law.”
 - Court held CSA a valid exercise of Congressional power and noted Congress’ “power to regulate purely local activities that are part of an ‘economic class of activities’ that have a substantial effect on interstate commerce.”

Liberalization at federal level: Appropriations Rider

- Blumenauer/Rohrabacher appropriations rider prohibits DOJ from spending funds to prevent states' implementation of their medical marijuana laws
- Has passed every year since 2014
- In U.S. v. McIntosh (2016), 9th Cir. enjoined prosecution of defendants who claimed that they were acting in accordance with state law and remanded for evidentiary hearing on compliance with state law. Held:
 - Rider “prohibits DOJ from spending funds from relevant appropriations acts for the prosecution of individuals who engaged in conduct permitted by the State Medical Marijuana Laws and who fully complied with such laws.”
 - But individuals “who do not strictly comply with all state-law conditions” are not shielded from prosecution.

Liberalization at federal level: 2018 Farm Bill

- 2018 Farm Bill:
 - Removed hemp, defined as having less than .3% THC concentration, from the definition of marijuana under the CSA
 - Prohibits states from prohibiting the transportation of hemp and hemp products through the state
 - **But** requires that hemp and hemp products be produced in accordance with a USDA approved state, tribal or federal plan (none of which exist yet)
 - **Also**, does not change the FDA regulatory requirements and approval process
 - FDA Commissioner Scott Gottlieb: “We heard Congress loud and clear...I understand Congress wants there to be a pathway for CBD to be available.”
 - Gottlieb promised to convene an experts working group, but is now scheduled to leave in April, leaving uncertainty.
 - USDA also working on guidelines and recently held an interactive webinar to solicit feedback from the industry

Enforcement: DOJ Policy Statements

- Cole Memorandum (August 29, 2013)
 - Noted joint state-federal approach and fact that where states have implemented robust regulatory regimes, federal priorities are less at risk
 - Stated that federal resources with respect to marijuana enforcement would be concentrated on cases involving:
 - organized crime
 - cover for other illegal drugs
 - violence, firearms
 - distribution to minors
 - diversion from states where it is legal to states where it is illegal
 - drugged driving
 - public lands/federal property
- Sessions Memorandum (Jan. 4, 2018)
 - “previous nationwide guidance specific to marijuana enforcement is unnecessary and is rescinded, effective immediately.”
- Attorney General Barr: “To the extent that people are complying with state laws in distribution and production and so forth, we’re not going to go after that.”
- Various USAO statements mirror Cole priorities

FINCEN Guidance (Feb. 14, 2014) Summary

- In assessing the risk of providing service to a marijuana related business, a financial institution should:
 - consider Cole memorandum priorities
 - conduct kyc dd focused on compliance with all relevant state laws and regulations
 - closely monitor for any adverse information or red flags (see list of red flags)
- Noted that Suspicious Activity Report (SAR) filing obligations are unaffected by state laws on marijuana
- Provided classification of marijuana related SARs:
 - *Marijuana Limited SAR Filings (customer business does not implicate Cole priorities)*
 - *Marijuana Priority SAR Filings (implicates Cole priorities or violates state law)*
 - *Marijuana Termination SAR Filings (needs to terminate a customer in order to maintain effective aml program)*

Possible Future Scenarios

- STATES Act
 - CSA would no longer apply to any person acting in compliance with State or tribal laws relating to the manufacture, production, possession, distribution, dispensation, administration or delivery of marijuana
 - Proceeds of state compliant transactions would not be considered criminal proceeds for purposes of money laundering statutes
- De-scheduling proposals:
 - Marijuana Justice Act
 - Next Step Act
 - Compassionate Access Act
- SAFE Banking Act of 2019:
 - Harmonize federal and state law by prohibiting federal banking regulators from engaging in certain actions against financial institutions that serve cannabis legitimate (i.e., state compliant) businesses
 - Exemption from federal investigation or prosecution for providing services to a state authorized cannabis related business
 - Proceeds of state compliant transactions would not be considered criminal proceeds for purposes of money laundering statutes

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