



# THE LEGALIZATION OF RECREATIONAL CANNABIS IN CANADA

## A PAN-CANADIAN PERSPECTIVE

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On June 21, 2018, the Canadian federal government passed Bill C-45 in order to regulate and legalize recreational cannabis in Canada beginning on October 17, 2018. Prior to this date, recreational cannabis remains illegal and subject to criminal prosecution. Medicinal cannabis will continue to be governed by a separate legislative framework.

Bill C-45 has legal and operational impacts for foreign businesses operating in Canada, especially in the areas of real estate, insurance, commerce, labor relations, rules of the road and criminal liability. Foreign businesses will need to understand and to adapt themselves not only to federal but also to provincial, territorial and municipal regulations, which may be quite different throughout Canada. They also need to be aware that their U.S., South American or European experience of cannabis legalization will not necessarily translate into the Canadian landscape.

### CONTEXT

The legalization of recreational cannabis was an electoral promise made in 2015 by the Liberal Party of current Prime Minister Justin Trudeau, with the twin goals

of preventing access to cannabis by youth and of depriving criminals and organized crime of the profits derived from its sale.

While some businesses, producers, distributors, municipalities, investors and consumers are thrilled by the impending legalization, this enthusiasm is not universal and there are other businesses, municipalities, employers, unions, organizations and individuals (parents, psychiatrists, teachers) that are worried about anticipated difficulties.

### LEGALIZATION OR PARTIAL DECRIMINALIZATION?

Beginning on October 17, 2018, dried and fresh cannabis, cannabis oil, and cannabis plants and seeds will be publicly available in a legal market. Edibles containing cannabis and cannabis concentrates are likely to be legalized at a later date, possibly in 2019, unless the Canadian federal government legalizes them earlier; currently they remain illegal.

Once legalization occurs, adult individuals at or over the minimal age limit chosen by each province or territory (currently 18 or 19 years of age, depending on the jurisdiction), may legally purchase, grow and possess a limited quantity of cannabis.

Generally, eligible individuals will be legally able to possess up to 30 grams of dried cannabis in public; however, under Schedule 3 of Bill C-45 there are equivalent quantities for each class of cannabis, which may complicate the understanding of this threshold, beyond which possession will remain a criminal offense:

CLASS OF CANNABIS	QTY EQUIVALENT TO 1 G OF DRIED CANNABIS
Dried cannabis	.1 g
Fresh cannabis	.5 g
Solids containing cannabis*	.15 g*
Non-solids containing cannabis*	.70 g*
Cannabis solid concentrates*	.0.25 g*
Cannabis non-solid concentrates*	.0.25 g*
Cannabis plant seed	.1 seed

*\*Edibles containing cannabis and cannabis concentrates are not yet legalized.*

When it comes to growing recreational cannabis, eligible individuals may grow up to four plants per dwelling-house. However, at the time of the writing of this article, two Canadian provinces, Quebec and Manitoba, have indicated that they want to enact a more severe rule or totally prohibit home

growth, which is likely to bring them into conflict with the Canadian government.

When examined more closely, it becomes clear that the “legalization” of recreational cannabis in Canada is actually a partial decriminalization, since the possession, sale, distribution, production (including alteration and cultivation), importation and exportation of cannabis outside or in excess of the restrictive legal framework created by Bill C-45, remain subject to criminal prosecution.

Business owners should be aware that, unless authorized under the rules enacted in Bill C-45, organizations, such as corporations, municipalities and trade unions, to name a few, are prohibited from possessing and distributing cannabis. Canadian criminal law provides specific rules for the criminal liability of organizations through individuals. For instance, senior officers, which may include an intermediate manager who is responsible for managing an important aspect of the organization’s activities, may incur the organization’s criminal liability through possession or distribution of cannabis themselves or through other agents of the organization, where their intent is to benefit the organization. The fines for organizations illegally possessing or distributing cannabis can be up to \$100 000 for an offense punishable on summary conviction, or a discretionary amount, which may be higher, if the company is found guilty of an indictable offense.

### DIFFERENT RULES FOR DIFFERENT JURISDICTIONS

As touched on above, the distribution and sale of recreational cannabis, along with its consumption and possession, may be regulated in some respects by Canadian provinces and territories, and peripherally by municipalities, as long as their regulations are compliant with Canada’s federal rules and do not exceed their respective jurisdictions. At the provincial and territorial level, this will create major differences with regard to the:

- retail sale of Cannabis (i.e. though public monopolies or private entities);
- legal age of consumption;
- places where use is forbidden;
- scope of new obligations (i.e. preventive measures regarding smoking, signage, storage, etc.) and associated fines; and
- cannabis-related services, objects or activities, such as promotional items, marketing, cannabis coffee shops, etc.

In summary, criminal offenses will be the same throughout Canada, however, provincial/territorial and municipal regula-

tions will vary such that behavior that is perfectly legal in one province may be prohibited in another. It will be critical for business owners that operate in multiple Canadian jurisdictions to realize that there will be variations between jurisdictions and to be aware of what these are and how they might impact their business.

### CANADA VERSUS THE U.S.

For businesses operating in Canada and the United States, there are important differences between the cannabis-related rules in the two countries. First of all, U.S. federal law prohibits the production, distribution, sale and possession of cannabis in any form, since cannabis is listed as a controlled substance under Schedule I of the Controlled Substances Act. The U.S. federal Government tolerates a different state approach regarding cannabis, where the state has passed a law to this effect.<sup>1</sup> Secondly, the business model used by these States is a model where the cannabis production and distribution system is based on private industry looking for growth and profits.<sup>2</sup> As discussed above, cannabis will no longer be completely illegal in Canada, however there will be a myriad of rules and prohibitions that will apply to limit the promotion of recreational cannabis, so as to limit the profitability to some degree. Finally, the guidelines for recreational cannabis use will also be different (for example, the legal minimum age and the possession limits). In general terms, in U.S. states allowing recreational cannabis use, the legal minimum age is 21 years old and, except for certain exceptions, legal possession is limited to 1 oz (28.35 grams).

### DRUG TESTING EMPLOYEES

The principal rules on cannabis drug testing by employers are currently similar throughout Canada, even though they are regulated separately by each Canadian province or territory. Generally speaking, since a 2013 Supreme Court of Canada decision, the Canadian rules regarding mandatory random or systematic drug tests by employers are very severe, requiring strong evidence of increased safety risks, such as evidence of a general problem with substance abuse in the workplace. This burden is difficult to achieve. On a more positive note, it is possible to conduct individual tests, which are subject to different rules, following valid consent or the occurrence of one of the events recognized by Canadian law as lawful justification for testing. Although this may vary on a case-by-case basis, the validity of individual tests is generally recognized in the following situations:

- if there is reasonable cause to suspect the employee of drug use in the workplace;
- after direct involvement in a work-related accident or incident that is not explained otherwise after investigation; or
- as part of a monitoring program for any employee returning to work following voluntary treatment for substance abuse.

### RIGHT REFLEXES AND PREPARATION

Foreign businesses and their lawyers need to be aware of the changes being enacted to legalize recreational cannabis and to start their preparation as soon as possible.

These steps may include, initially, gathering legal and medical information, taking and affirming a clear position, drafting a clear and complete policy, implementing appropriate internal and external procedures, training of managers, and meeting with employees to communicate the organization’s policy, as well as explaining the situation and raising awareness. Some businesses will also have obligations vis-à-vis their customers or other people located on their premises or nearby.

In the end, it is always better to set expectations beforehand and to clarify what is acceptable conduct before the occurrence of a problem. Change is coming, and you need to lead from the front!

*This article was submitted for publication on June 26, 2018, and was current as of that date.*

<sup>1</sup> National Institute of Public Health, Public Health Expertise and Reference Centre, « Jurisdictions that have legalized cannabis », online: <<https://www.inspq.qc.ca/dossiers/cannabis/jurisdictions-ayant-legalise-le-cannabis>> (consulted on June 29, 2018).

<sup>2</sup> Ibid.



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