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BARREAU CANADIEN

## **Legalization, Regulation and Restriction of Access to Marijuana Response to Discussion Paper**

**CRIMINAL JUSTICE, HEALTH LAW AND MUNICIPAL LAW SECTIONS  
CANADIAN BAR ASSOCIATION**

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## **PREFACE**

The Canadian Bar Association is a national association representing 36,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the CBA's Criminal Justice, Health Law and Municipal Law Sections, with assistance from the Legislation and Law Reform Directorate at the CBA office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the CBA Criminal Justice, Health Law and Municipal Law Sections.

## TABLE OF CONTENTS

### Legalization, Regulation and Restriction of Access to Marijuana – Response to Discussion Paper

I.	INTRODUCTION .....	1
II.	MINIMIZING HARM AND PROTECTING CHILDREN AND YOUTH .....	3
III.	SAFE AND RESPONSIBLE PRODUCTION .....	7
IV.	DISTRIBUTION MODELS .....	10
V.	ENFORCING PUBLIC SAFETY AND PROTECTION .....	13
VI.	APPROPRIATE ACCESS FOR MEDICALLY AUTHORIZED PERSONS .....	15
VII.	CONCLUSION .....	17



# Legalization, Regulation and Restriction of Access to Marijuana – Response to Discussion Paper

## I. INTRODUCTION

The Canadian Bar Association Criminal Law Section and its Committee on Imprisonment and Release, Municipal Law Section and Health Law Section appreciate this opportunity to comment on *Toward the Legalization, Regulation and Restriction of Access to Marijuana Discussion Paper* (Discussion Paper). The CBA has a long history of urging change to Canada's laws on possession and use of marijuana. In 1978, we urged the government of the day to stop criminalizing simple possession and cultivation of cannabis for an adult's own use and the non-profit transfer of small amounts of cannabis between adult users. We also said that cannabis should be moved from the *Narcotic Control Act* to the *Food and Drug Act*. In 1994, we commented on Bill C-7, *Controlled Drugs and Substances Act* (CDSA), saying it should not be enacted, as it furthered “a model of dealing with drugs through criminalization and incarceration that has been proven ineffective and counterproductive”. More recently, in 2013, the CBA urged the government to take a harm reduction approach to dealing with all drugs, and “adopt legislation and policies that provide opportunities for drug users to access health and social supports rather than subjecting them to criminal sanctions”.<sup>1</sup>

The Discussion Paper seems to start from a similar place to these CBA statements, suggesting that cannabis use, production and distribution should be regulated across Canada in a manner like other non-criminal, regulated substances. Legalization represents a fundamental change in the federal government's approach to marijuana, which the CBA fully supports. The Discussion Paper makes numerous statements acknowledging that any harms of marijuana use and production are comparable to well-known harms of other legal but regulated substances, like alcohol and tobacco.

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<sup>1</sup> See, Resolution 78-06-A; Criminal Justice Section, *Bill C-7, Controlled Drugs and Substances Act* (Ottawa: CBA, 1994) and Resolution 13-01-A, as just a few examples of CBA policy positions on point.

While aimed at advancing discussion about legalization, the Discussion Paper omits any plan for removing marijuana as a scheduled substance from the CDSA. It seems to suggest that the criminal law would continue to be engaged for licensing production, possession limits and the minimum age for legally using marijuana. The approach in the Discussion Paper might be called a step toward 'decriminalization' but in our view cannot accurately be referred to as 'legalization' as has been suggested to Canadians.

It is problematic to proceed with a new system that maintains the current CDSA offence structure but allows marijuana activity to proceed by way of legally recognized exceptions. Those who contravene the exceptions would still fall within the ambit of existing offences. Section 46 of the CDSA currently provides for breaches of regulatory offences under the regulations, but this option is often ignored in favour of charges for substantive CDSA offences.<sup>2</sup> The existing jurisprudence dealing with these offences would be obsolete as built up under a different conceptual framework than that which would exist after legalization.

This aspect of the Discussion Paper is confusing. On the one hand is the strong suggestion that production, distribution and possession of marijuana would be treated like any other substance with some mind-altering effect, such as alcohol and prescribed drugs. This factors in the harsh impact of the criminal law, including imprisonment, criminal records and other collateral effects inappropriate and unproductive for production and possession of marijuana.<sup>3</sup> The last Canadian Commission of Inquiry on the subject<sup>4</sup> also generally concluded:

Scientific evidence overwhelmingly indicates that cannabis is substantially less harmful than alcohol and should be treated not as a criminal issue but as a social and public health issue. Whether or not an individual uses marijuana should be a personal choice that is not subject to criminal penalties...as a drug, it should be regulated by the State much as we do for wine and beer, hence our preference for legalization over decriminalization.<sup>5</sup>

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<sup>2</sup> Also see *R v. Neary* 2016 SKQB 218 (being appealed) as to what happens during such an 'interregnum' period where principles of sentencing of 'general deterrence' and 'denunciation' are concerned.

<sup>3</sup> See, Criminal Justice Section, *Collateral Consequences of Criminal Convictions* (Ottawa: CBA, forthcoming).

<sup>4</sup> See the Senate Special Committee on Illegal Drugs, *Cannabis: Our Position for a Canadian Public Policy* (Nolin Report) (Ottawa: Senate of Canada, 2002). [www.parl.gc.ca/content/sen/committee/371/ille/rep/summary-e.html](http://www.parl.gc.ca/content/sen/committee/371/ille/rep/summary-e.html)

<sup>5</sup> *Ibid.*

On the other hand, the Discussion Paper appears to contemplate that marijuana would continue to be criminally sanctioned, leaving provinces and territories to regulate as they do for other products.

Simple analogies with how Canada currently manages alcohol and tobacco offer good guidance when thinking about regulation of marijuana use and production, though there are certainly important distinctions. For example, alcohol is legal and there are no limits on possession or regulations for personal production. Sale and distribution are subject to government controls. Rules and regulations apply uniformly and allow producers and distributors to do business, without involvement of the criminal law.

A regulatory scheme should cover the use, distribution and production of marijuana going forward. Just as the *Excise Tax Act* with tobacco, a scheme could include offences carrying appropriate fines and penalties, or other sanctions for those who choose to operate outside the regime.

The Discussion Paper does not offer research or data to suggest that marijuana should be handled differently because it poses more serious risks than other regulated, non-criminal substances. Health Canada's own publication with information to healthcare practitioners confirms the longstanding evidence that marijuana has no lethal dose.<sup>6</sup> The CBA's view is that the criminal law should not be engaged for marijuana production, use and distribution when a non-criminal law regulatory approach is adequate and appropriate.

As details about the government's plan for legalization have yet to be released, our remaining comments will offer some general concerns and highlight additional issues that are important for further consideration.

## **II. MINIMIZING HARM AND PROTECTING CHILDREN AND YOUTH**

The Discussion Paper tends to confound and conflate two separate issues relating to marijuana that distinguish it from other psychoactive substances, such as alcohol, tobacco, khat and others. Marijuana is both a recreational and medicinal substance, and the two uses need to be clearly disentangled and addressed differently.

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<sup>6</sup> Health Canada, *Information for Health Care Professionals*, section 8: [www.hc-sc.gc.ca/dhp-mps/marihuana/med/infoprof-eng.php](http://www.hc-sc.gc.ca/dhp-mps/marihuana/med/infoprof-eng.php)

During Prohibition in the 1920s, one could obtain a “prescription” for alcohol, but this was often used for severe alcoholics when sudden cessation could be problematic.<sup>7</sup> By magnitudes, alcohol has been and remains a substance for recreational use. In contrast, there is a long history of marijuana being legitimately used for pain and other non-recreational purposes considered to have health applications.<sup>8</sup>

Health risks associated with marijuana can be well-controlled, particularly around dosage and dispensing. A related issue will be how many plants patients are allowed for personal medicinal use, as they look to save money when health insurance steps in only after an income-related annual deductible. Others may simply prefer to grow their own to better control the product they consume. In the recent *Allard* decision,<sup>9</sup> the Federal Court required the government to ensure ‘reasonable access’ to patients, so issues such as dosage or home production limits should be governed by the patient with that patient’s healthcare practitioners.

However, recreational use will have the most impact on variety of products available, economic benefits to users, reducing the illicit market and its enormous costs, and contributing to harm reduction. Much can be learned from the lessons of Prohibition.<sup>10</sup> Canada’s experience with marijuana, which was only outlawed in 1923, has reproduced many of the same social and criminal problems from that earlier era. Like alcohol then, marijuana has often provided an income alternative from those outside the mainstream economy and a major source of revenue for the black market. This parallel economy has grown to the extent that the GNP of the BC marijuana trade has been called equivalent to that of some developing countries.<sup>11</sup>

A ‘4:20’ culture has also developed a cachet among youth that can be compared to the pre-‘cancer-causing’ era of the cigarette industry, which was promoted in movies, on tv and radio, and even by the medical profession of the time.<sup>12</sup> While youth may tend toward risk-related behaviours and seeking altered states of consciousness or self-medication, being an illegal

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<sup>7</sup> <https://melnickmedicalmuseum.com/2010/04/07/medicinal-alcohol-and-prohibition>

<sup>8</sup> See, KPMG Paper produced for the Pharmacists of Canada: [www.pharmacists.ca/cpha-ca/assets/File/cpha-on-the-issues/March2016\\_Improving\\_Medical\\_Marijuana\\_Management\\_in\\_Canada\\_vf.pdf](http://www.pharmacists.ca/cpha-ca/assets/File/cpha-on-the-issues/March2016_Improving_Medical_Marijuana_Management_in_Canada_vf.pdf)

<sup>9</sup> *Allard v. Canada*, 2016 FC 236.

<sup>10</sup> See, for example, [www.cedro-uva.org/lib/levine.alcohol.html](http://www.cedro-uva.org/lib/levine.alcohol.html)

<sup>11</sup> Stephen Easton, *Marijuana Growth in BC* (Vancouver: Fraser Institute, 2014) [www.cfdp.ca/mj\\_bc\\_04.pdf](http://www.cfdp.ca/mj_bc_04.pdf)

<sup>12</sup> Dr. Robert N. Proctor, “The history of the discovery of the cigarette–lung cancer link: evidentiary traditions, corporate denial, global toll” (Stanford: Stanford University, 2011).



substance only compounds marijuana's attractiveness. The reality is that young people will continue to access marijuana, with or without legalization. What this underscores is the importance of avoiding the use of the criminal law, as it has saddled too many young people with criminal records and prejudiced their lives.<sup>13</sup>

Prohibition moved alcohol from a psychoactive substance toward licensing and stand-alone outlets. Marketed foods containing alcohol are rare and most contain minute quantities, more for flavor than anything else. This is not an issue with marijuana, where the THC (or CBD) is the issue rather than the flavor. The question is control and licensing of producers and standardization of doses. This has been addressed in other jurisdictions, where consumables such as chocolate-infused marijuana are packaged in specific standardized dosages that are not individually toxic.

The move to legalization will also require consideration of employment, business and educational options for those unemployed as the black market declines. The CBA also recommends expanded use of pardons,<sup>14</sup> and even blanket amnesties for those convicted under previous legislation. People in that situation continue to experience barriers, for example in gaining employment and being part of the legitimate economy because of their criminal records.<sup>15</sup>

The Discussion Paper acknowledges that there is no greater harm to the public from marijuana than from other regulated substances that may be considered mind-altering. There are countless examples of people becoming violent and engaging in violent crime when under the influence of excessive alcohol. There are many alcohol-related deaths every year in Canada, including by direct alcohol poisoning. The effects of long term overuse of alcohol and tobacco put a tremendous strain on Canada's public health system every year.

In contrast, neither short- nor long-term use of marijuana is associated with violence, real physical or emotional dependence or addiction, and there is no threat of fatal overdose from marijuana itself.<sup>16</sup>

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<sup>13</sup> Ken McQueen, "Why it's time to legalize marijuana" (2013) *Macleans* [www.macleans.ca/news/canada/why-its-time-to-legalize-marijuana/](http://www.macleans.ca/news/canada/why-its-time-to-legalize-marijuana/)

<sup>14</sup> CBA Resolution 16-08-A.

<sup>15</sup> *Collateral Consequences*, *supra* note 3.

<sup>16</sup> Health Canada, *supra* note 6.

In Canada, people can grow their own food and provide some to neighbors, or sell it by the road or in a farmers' market, without having it tested or labelled. Health Canada and other regulatory bodies oversee the distribution of foods and herbal substances and the seeds used to produce those substances in personal production, to ensure the public is safe from unhealthy foods and substances. But this is appropriately handled under a regulatory power, rather than the criminal law.

### **MINIMUM AGE**

For the medical use of marijuana, age is not an issue – any benefits from marijuana for health reasons should be available for those under the age of majority as are offered to older patients, again, in consultation with the involved healthcare professionals.

There is evidence that brain development of young people may be adversely affected by marijuana use, and there is other evidence to the contrary.<sup>17</sup> Minors may not be competent to make choices about marijuana use, or its short- and long-term impact on their mental functioning. This supports a minimum age for distribution of marijuana for recreational purposes, as there is with alcohol.

Establishing an age threshold should not impact the rules for personal production. To compare to current regulations for alcohol, people can home-brew alcohol, but cannot share the alcohol with minors. Or, as another example, under the *Excise Act*, people can grow up to 15 kg of tobacco for personal use or for anybody over the age of 18 years.<sup>18</sup>

Marijuana has been illegal since 1923 and part of the illicit economy and culture since the 1960's, yet it is often easier for minors to obtain than alcohol. While the easy choice could be a legal age equivalent to that for liquor (18 or 19, depending on the jurisdiction), the limit is somewhat arbitrary and should be carefully considered.

About 25% of those arrested for marijuana offences are aged 15 to 19, so any age threshold should consider that reality.<sup>19</sup> Whatever threshold is chosen, the most important consideration is to avoid using the criminal law against young users of marijuana.

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<sup>17</sup> Barbara J. Weiland, et al, "Daily Marijuana use is not associated with Brain Morphometric Measures in adolescents or adults" (January 28, 2015) 3594 *The Journal of Neuroscience* 15905 -1512.

<sup>18</sup> <http://laws-lois.justice.gc.ca/eng/acts/e-14/>

<sup>19</sup> McQueen, *supra* note 13.

### III. SAFE AND RESPONSIBLE PRODUCTION

In the 2016 decision of *Allard v. Canada*, the Federal Court examined the system of production and distribution established through the *Marijuana for Medical Purposes Regulations* (MMPR), and found it both inadequate and unconstitutional, as it inhibited and limited reasonable access to marijuana by medically approved patients. The MMPR were found to violate *Charter* section 7 for those patients. The Court examined problems associated more with home cultivation and found that they largely apply to earlier problems with the black market industry, rather than legal medical home growers currently. The MMAR regime began in 2001 and by 2014 had 38,000 patients registered. To date, Health Canada has no records or data about negative incidents arising in this period.<sup>20</sup> The Court held that remaining current problems can be reasonably mitigated in a legal regime.

The current government has indicated support for reasonable access to marijuana for adults more generally, but the conclusions in *Allard* remain helpful in the current context. The MMPR scheme was rejected as only licensed producers designated by the government could produce and distribute marijuana, which actually impedes the public from obtaining safe marijuana, again fuelling a black market in the substance. Consider the cycle if marijuana is removed from the CDSA to enable access through a regulatory scheme, but then that scheme (like the MMPR) impedes access to such an extent that the black market is reinvigorated, requiring a response under the CDSA. The MMPR scheme was also shown in *Allard* to have resulted in other problems, including low-grade or unusable marijuana, production contracts offered to unqualified producers, and issues around product delivered through the mail with its own possession and mailing limits.

Returning to the analogy with alcohol, a wide-ranging but strictly regulated licensing regime could permit anyone wishing to acquire a license to distribute or produce to obtain one if they met standards imposed by the regulatory authority. This would be more prudent than the MMPR scheme, which allowed only designated producers to cultivate and distribute, possibly providing both more opportunities for corruption and inadequate supply to the public.

Like the current regulations for alcohol, those involved in commercial production, distribution and sale of marijuana would have to obtain licenses after meeting and maintaining standards

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<sup>20</sup> See *Allard v. Canada*, *supra* note 9, at para [25] re numbers of patients involved. See the affidavit of Director Janine Ritchot re Health Canada inspections and problems [32], lack of data[33], and at [101] – [130] on any risks of cultivation.

aimed at protecting the public. Breweries or distilleries are subject to standards, pubs that sell alcohol meet licensing requirements, and products sold in stores or pubs must meet quality controls, knowing that a liquor control licensing inspection could occur anytime. A similar regime could apply to the sale and distribution of marijuana to ensure the product is safe and of predictable potency and quality. Craft growers could be allowed just like craft brewers of beer are.

Commercial production of marijuana will also have similarities with growing tobacco, such as needing to abide by agricultural standards, including use of chemicals. However, marijuana growing differs in important ways from tobacco or alcohol production. Any new large scale commercial cultivation of marijuana could present new security challenges that should be factored into cost to users, rather than being placed on taxpayers generally.

All levels of government will need to collaborate on marijuana production. The federal government can set baseline standards, such as acceptable amounts for personal production,<sup>21</sup> but then work with the provinces and territories to determine a regulatory scheme that mitigates risks to health and safety while permitting home production. Fire and building code standards at the federal, provincial and territorial levels will need to be reviewed to ensure they respond to safety concerns with production using flammable and combustible processes. Canada may learn from the experience in Colorado and Washington to identify risks and hazards and implement any necessary changes.<sup>22</sup> This regulatory scheme should include guidelines on proper equipment and safe practices as required, a licensing permit scheme and compliance with building bylaws. By developing this in collaboration with all levels of government, consistency can be achieved and tools and resources identified and provided at the local level.

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<sup>21</sup> This has been done for tobacco at section 25 of the *Excise Act, 2001*.

<sup>22</sup> For reference:

- [www.fireengineering.com/articles/print/volume-168/issue-2/features/fire-codes-and-standards-denver-s-legalized-marijuana-industry-and-the-fire-code.html](http://www.fireengineering.com/articles/print/volume-168/issue-2/features/fire-codes-and-standards-denver-s-legalized-marijuana-industry-and-the-fire-code.html),
- [www.robsonforensic.com/articles/codes-standards-hazards-marijuana-grow-facility-expert-witness](http://www.robsonforensic.com/articles/codes-standards-hazards-marijuana-grow-facility-expert-witness),
- [www.dmms2016.com/wp-content/uploads/2015/11/5-Fire-Prevention-Permitting-Safety.pdf](http://www.dmms2016.com/wp-content/uploads/2015/11/5-Fire-Prevention-Permitting-Safety.pdf),
- [www.leafly.com/news/politics/in-a-cannabis-grow-blaze-firefighters-worry-about-a-lot-more-than](http://www.leafly.com/news/politics/in-a-cannabis-grow-blaze-firefighters-worry-about-a-lot-more-than).

Personal production of marijuana should be permitted similar to home production of alcohol, such as beer and wine. Personal production has advantages to ensure individuals who want marijuana can afford and have easy access to it.

Currently, it is legal to produce alcoholic products at home for personal use, but not to distribute or sell them without a license, nor provide them to minors. The safety of homemade product is left to the individual decisions of those involved. The same approach could be suitable for home production and use of marijuana. Adults who possess would have to exercise the same cautions to protect children as with liquor and prescribed drug cabinets to ensure minors could not access supply.

Current concerns about marijuana grow-operations (fire, mould, electricity and other issues around home production) may not apply to the same extent for legal consumption for personal use.<sup>23</sup> People will tend to avoid what might jeopardize their own or their family's safety, or their property value. That said, the production of marijuana differs in important ways from home production of alcohol and may call for regulatory oversight. Unlike home-brewing, which can include small-scale fermentation in the corner of a garage, cannabis can be grown in an outdoor garden or greenhouse. Indoors, sophisticated hydroponic electronics and other equipment (including air conditioners and other devices to regulate air quality and humidity may be involved to avoid toxic mould. There can be issues with smell in residential areas, and security issues distinct from normal valuables kept at home. If a person plans to make modifications to a residence or outbuilding that affects the electrical system or might impact neighbors, they can be required to obtain permits from local government to ensure compliance with electrical and safety standards.

A permit scheme could protect against safety issues in residential neighborhoods without impeding personal access to marijuana. The scheme could require proof that hydroponic gardens meet electrical code, security measures are in place and outdoor gardens are effectively secured. It could impose caps on amounts that can be stored or the number of plants that can be grown to ensure growth does not approach an industrial scale in residential areas.

The demand for marijuana after legalization and regulation could overwhelm the present approved production sources. Necessary and reasonable measures must be administered in a manner that does not deny most people who wish to produce at home the opportunity to do so. In *Allard*, the Court heard testimony that legal growers have security systems and call the

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<sup>23</sup> *Allard*, *supra* note 9.

police if they are invaded. Illegal growers do not call police as they are implicated in illegal activity. One valuable objective of legalization is to eliminate the illicit market so there is no profit to be made illegally.

#### **IV. DISTRIBUTION MODELS**

The threshold issue in developing an appropriate distribution model will be the role of all levels of government. It may be safest to assume that the provinces and territories would regulate marijuana distribution with minimum standards under federal legislation, much like standards in the *Tobacco Act*. Currently the criminal law power gives control of marijuana to the federal government. With legalization and without that control, the federal government could still maintain baseline regulation as it does for tobacco regulations. Provinces, territories and municipalities will then proceed as they and their constituents see fit. The federal government will remain responsible for international law issues and export, as for tobacco control production generally, by way of licensing.

It is important that the federal government prioritize the goals it wishes to achieve and problems it wishes to address through legalization of marijuana. As the Discussion Paper mentions, some aspects of marijuana regulation may mirror the tobacco model, others the alcohol model, or a hybrid of both models may be appropriate. In articulating those goals, the extent to which the federal government wants to emphasize harm reduction over ease of access may dictate appropriate restrictions for distribution.

Treating distribution of marijuana like the sale of tobacco might lead to more restrictive measures than treating it like the sale of alcohol. However, the main point is that any restrictions must not be so severe that they encourage development of another black market for marijuana. As one of the major advantages to legalization, this should be the bottom line that governs any restrictions.

For tobacco, distribution models include storefronts that exclusively sell tobacco products or mixed retail stores that sell tobacco in accordance with strict guidelines that include concealing the product from plain view. The storefront distribution model would ease accessibility. Some legislation, where safeguards are in place, allows tobacconists to permit smoking on the premises to sample product. Provinces and territories have also legislated against smoking

tobacco in public places with a few exceptions.<sup>24</sup> Saskatchewan, for example, bans smoking in enclosed public places (including bus shelters, public transit vehicles, common areas of multi-unit residential buildings, private clubs, and public buildings rented out for private events), cars with passengers under age 16, doorways, windows and air intakes of public buildings, and school grounds.<sup>25</sup> Tobacco legislation varies from province to province to territory, and from municipality to municipality.

However, to distribute marijuana products in the same way as tobacco, in stores that sell other products, ignores the intoxication factor not present for tobacco, and may subject young people to the risks inherent in more casual exposure to substances. For prescribed drugs, parents are simply advised by a Health Canada poster displayed by pharmacists to lock their cabinets, throw out old drugs and take precautions.

If the federal government were to adopt a model like that used for tobacco or a combined alcohol and tobacco model, smoking or sampling marijuana and its derivatives may, by analogy, be permissible. As with the harms of second-hand smoke, similar cannabis derivatives presenting risks should be considered, as noted in the Discussion Paper in about the Colorado experience (at p14).

For a model closer to the current one for alcohol distribution, questions include whether marijuana which is not smoked might be available for consumption as alcohol would be at establishments like licensed restaurants. Marketing and distribution to consumers could follow alcohol and wine models in various jurisdictions, as is under consideration in Ontario. Depending on how the federal government addresses the goal of harm reduction, some may disapprove of a scheme where marijuana is sold in conjunction with alcohol. This has already been proposed by some governments who see existing liquor commissions as best equipped to sell marijuana.

That could raise its own challenges, if, for example, marijuana users avoid entering liquor stores because of alcohol dependency, or if the age limit for marijuana is different than that for alcohol.

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<sup>24</sup> See for instance the *Non-Smokers Health Protection Act* <http://web2.gov.mb.ca/laws/statutes/ccsm/n092e.php>.

<sup>25</sup> See [www.saskatchewan.ca/residents/health/wellness-and-prevention/tobacco/tobacco-legislation#tobacco-and-my-business](http://www.saskatchewan.ca/residents/health/wellness-and-prevention/tobacco/tobacco-legislation#tobacco-and-my-business))

For municipal examples, bylaws are different between Saskatoon and Regina (see <http://thestarphoenix.com/news/local-news/outdoor-smoking-ban-starts-friday-in-saskatoon> and [www.cbc.ca/news/canada/saskatchewan/some-regina-bars-moving-to-smoke-free-patios-1.3607836](http://www.cbc.ca/news/canada/saskatchewan/some-regina-bars-moving-to-smoke-free-patios-1.3607836)).

Regardless of the distribution method, ensuring a reasonably consistent national scheme for distribution will entail challenges. Despite these challenges, after approximately 20 years of experience with Compassion Clubs and dispensaries in Canada, no specific problems involving children or others have been identified as warranting particular concern. Acknowledging the existing market, legalization might start by regulating existing industries or outlets. For example, rather than consuming alcohol on the streets, people are permitted to drink in bars. The equivalent for marijuana smokers could be legalized vapor lounges.

In Ontario, marijuana products are already produced in some centres, and some that have revived local economies. Repurposing factories in towns that have lost other industries seems an obvious choice for the production and distribution through licensing marijuana products.<sup>26</sup> Further, legalized marijuana producers should include craft producers, like craft breweries, either in alliance with or independent from large producers.

Using solely a mail distribution system could delay obtaining a lawful product and would be different than alcohol or tobacco that do not require purchase by mail. There is no legitimate reason to require this model for marijuana when it is legal and acknowledged as no more harmful than alcohol and tobacco. Allowing for both mail and storefront delivery model may work best. Larger economic centres could rely mainly on storefronts, while rural locations might rely more heavily on mail. In *Allard*, the Court heard evidence that mail order is insufficient and patients generally went to dispensaries instead. At the same time, online dispensaries are important to serve those in outlying areas where there are no dispensaries. Both should be permitted to meet market demand.

The concern with leaving matters solely at the discretion of the provinces and territories is the likely inequities across borders, which could lead to black markets in jurisdictions with more restrictive measures. Recent challenges to provincial liquor control legislation demonstrate that importation restrictions on liquor produced in one province and imported to another violate section 121 of the *Constitution Act, 1867*.<sup>27</sup> A consistent regulatory scheme across all jurisdictions is ideal. Following discussions at the Premiers' Conference in Whitehorse this July,

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<sup>26</sup> <http://business.financialpost.com/news/agriculture/welcome-to-smiths-falls-the-future-chocolate-pot-capital-of-canada>

<sup>27</sup> See *R v Comeau*, 2016 NBPC 3  
[www.canlii.org/en/nb/nbpc/doc/2016/2016nbpc3/2016nbpc3.html?resultIndex=16](http://www.canlii.org/en/nb/nbpc/doc/2016/2016nbpc3/2016nbpc3.html?resultIndex=16)



a new Canadian agreement on free trade may liberalize cross-border trade in alcoholic beverages.<sup>28</sup>

The ability of provincial, territorial and municipal bodies to enforce regulations should be examined. While simple possession charges would decrease or end, new regulations will place new demands on those entrusted to enforce the rules and should be as consistent and coherent across the country as possible.

Finally, international issues involving reciprocity between visiting medical patients and visitors from other countries need to be addressed, including the portability of personal medicine across borders.

## **V. ENFORCING PUBLIC SAFETY AND PROTECTION**

In addition to our comments opposing ongoing reliance on the CDSA and criminal law, setting up a system where marijuana is partly regulated by a new regulatory regime and partly criminalized under the CDSA would be confusing and challenging. It again raises questions as to which level of government would regulate, and who should enforce and prosecute those regulations. In a legal market, the need for any offenses is questionable, especially as marijuana is not addictive in the scientific meaning of that word.<sup>29</sup> These issues should be carefully considered before proceeding.

If the intent is to continue to criminalize trafficking and production of marijuana outside the new regulatory regime, criminal legislation would have to address a wide range of culpable conduct that could fall under the provisions. The sentencing regime must reflect this and allow substantial judicial discretion in imposing a fit sentence.

Mandatory minimum sentences are ill-advised as are restrictions on the availability of dispositions such as conditional sentencing orders, or absolute or conditional discharges. Criminal conduct could range from the adult who buys a small quantity of marijuana for teenagers outside a licensed store (analogous to an adult who buys a bottle of alcohol for teenagers) to the spouse of a medical marijuana user who grows marijuana for that person's medical needs getting involved in contraband trafficking. Judges must be able to take the

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<sup>28</sup> <http://news.gc.ca/web/article-en.do?nid=1103489>

<sup>29</sup> See *R v Malmo-Levine*; *R v Caine* [2003] 3 S.C.R. 571, 2003 SCC 74 for the finding of fact and *R v PHS*, 2011 SCC 44, [2011] 3 SCR 134, for agreed definition of 'addiction' by all parties, including Canada. There is some evidence that cannabis is an effective exit strategy drug for opiate addiction.

seriousness of the offence and the circumstances of the offender into account when fashioning a fit sentence and 'safety valve mechanisms' are appropriate until mandatory minimum sentences are repealed.<sup>30</sup>

Recognizing that marijuana use can be linked to dependencies and other health issues (e.g. pain relief), creating or expanding other means to divert accused out of the criminal justice system would be appropriate. When possible, diversions are the most appropriate forum for most marijuana offences.

The amounts that could constitute possession for the purpose of trafficking (if this offence is maintained) would need to be clear. Previous case law will no longer be relevant under a new regime. How much can someone carry for personal use? What factors go into determining this? Again, judges need discretion to conduct a fact-specific analysis. The merits of any bright-line rules would need to be debated. And again, we question whether any limits make sense in a legal market, as people are not currently limited in the amount of alcohol or tobacco they can legally possess.

Before acting on marijuana impaired driving, the government should have a conclusive evidence base for making decisions and include a mandatory review mechanism as the research evolves. This is especially important given developing science in this field. THC and other metabolites can last in a person's system long after impairment (depending how quickly an individual's system processes them). As such, they are not an accurate measure of impairment. Marijuana can also be consumed in ways that may not show up on a mouth screening. This will also avoid the inevitable battle of the experts that is often seen in impaired driving cases, resulting in longer and more complicated court proceedings and worsening delays in the criminal justice system.<sup>31</sup> Canada should encourage further research in this area through federal health research agencies.

The role of roadside testing ought to be clarified. Is it only to establish reasonable and probable grounds to make an arrest or can it be used to prove the substantive offence? There is an analogy to roadside screening devices for alcohol. If they are only to be used to make an arrest, what further steps can the police take to assess impairment and what limits should be placed on them? Sobriety tests are problematic, with implications for the *Charter* right

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<sup>30</sup> See Supreme Court of Canada discussion in *R. v Lloyd*, 2016 SCC 13 regarding legislation to address unique circumstances that may arise.

<sup>31</sup> On court delays for criminal justice, see the Interim report of the Senate Committee on Legal and Constitutional Affairs, *Delaying Justice is Denying Justice* (August 2016).

against self-incrimination. The presence of cannabis in a person's system does not equate with being impaired. Chronic medical users may register well over any assigned limits without impairment of their ability to drive. Roadside sobriety tests by drug recognition experts should take advantage of police car video capabilities to record evidence of impairment, to reduce or eliminate factual disputes associated with a finding of impairment.

If a person is convicted of a marijuana driving offence, then provisions must be developed for alternative sanctions commonly used with alcohol ('Stream A and Stream B'). For example, interlock devices are commonly used to monitor alcohol. The accused and their family can be affected by the loss of a driver's licence for even a brief period of time. Options ought to be developed to provide a means to get licences back expeditiously and through early resolution (such as interlock), balancing the need for monitoring and public safety.

Geographic limitations on consumption around minors ought to be approached with caution, as it can be difficult to know exactly who is around you and whether a minor is present. Likewise, someone unfamiliar with an area may not know whether a school is close by.

## **VI. APPROPRIATE ACCESS FOR MEDICALLY AUTHORIZED PERSONS**

The constitutional issue has now been decided, and medically approved patients must have reasonable access to marijuana, as determined by them with their doctors. The *Access to Cannabis for Medical Purposes Regulations* (ACMPR) came into place on August 24, 2016, largely restoring the situation prior to the introduction of the MMPR. The federal government should allow time to see how the ACMPR will work and then assess the degree to which there is effective access to medical cannabis for patients compared to the *Medical Marijuana Access Regulations* (MMAR).<sup>32</sup> The ACMPR is effectively a merger of the MMAR and MMPR, and provides only a temporary response to the *Allard* decision. Further modifications are expected with the legalized model.

While the issue of whether cannabis will be removed from the CDSA has been previously discussed and is currently unclear, access to medical marijuana remains strictly a health issue. Licenses and authorizations should be in place for those who wish to produce medicine affordably at home. Again, we suggest that time be allowed to see whether the ACMPR succeed at appropriately regulating home production and providing unimpeded access to medicine for strictly medical marijuana users. Some 28,000 patients' status was preserved by the *Allard*

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<sup>32</sup> With some exceptions, as considered by the Supreme Court of Canada in *R. v Smith*, [2015] 1 SCR 34.

injunction in 2014 so they were able to produce cannabis for themselves, often at home. This occurred in compliance with local bylaws and without significant problems.

The ability of medical marijuana dispensaries to provide product to patients must also be considered. Regardless of whether cannabis is removed from the CDSA or if and how marijuana as a whole is legalized, some medical marijuana patients may not be able to find a designated producer or grow it themselves. There may be many reasons, such as cost, or a person may use medical marijuana in such limited quantities or for such short duration that it does not warrant personal production. These patients should be able to obtain cannabis from what are now known as dispensaries when, as the Court found in *Allard*, the licensed producer scheme is not workable for that individual. Due to the deficiencies in the previous system, many patients moved to dispensaries and consumer demand has resulted in a significant increase in their numbers.

While some dispensaries are effectively allowed to operate in some places in Canada, only a limited number are legally permitted to do so, and those operate in a grey area subject to police policy changes. To fill the gaps for patients who cannot produce for themselves nor obtain access to designated producers, a regulatory scheme could allow dispensaries to provide product to patients and produce product for that purpose. Regulations should be open-ended and variable enough to provide broad access to medical marijuana for patients. Patient growers should be able to offer their excess to those dispensaries. The BC Compassion Club Society has existed for nearly 20 years and is favorably referred to in the 2002 Senate Report (*Nolin Report*). The city of Vancouver has, in a general manner, identified it as a permissible “conditional use” in certain commercial zones (subject to compliance with regulations).

For those returning from active military duty with PTSD, other victims of trauma, and others who obtain relief (whether emotional, physical or somatic) from medical marijuana, the more healthcare providers who can easily prescribe medicinal marijuana the better.<sup>33</sup> We suggest that providers be encouraged to consider its benefits and further medical research be supported in this area. Medical professionals like naturopaths, herbalists and doctors of traditional Chinese medicine could also be allowed to prescribe marijuana for medical purposes.

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<sup>33</sup> See KPMG paper, *supra* note 8, especially the comments in Part One.

## **VII. CONCLUSION**

With legalization of marijuana, Canada will replace an enormous underground illicit industry with a new legal regime. Security and regulatory enforcement, as well as ensuring sufficient legal production for what could be significant demand, will be a challenge.

Municipal governments will need tools and resources to appropriately ensure health and safety for residents in advancing the legalization of marijuana. Many of the fundamental aspects of enforcement, regulation and licensing for marijuana production, distribution and consumption will fall to local governments to maintain and oversee. The federal government should engage with municipal governments to achieve consistency and to mitigate any negative impacts.

Legalizing marijuana means allowing people to possess and consume it in private and in places with the consent of others around them. While people should be able to grow their own marijuana subject to local government rules and regulations, most people will likely prefer to purchase a supply from the store. Wholesale and retail producers need to be regulated, federally and also by provinces, territories and local governments. This requires having products tested and the results included on labels and packages before distribution to the public. Online stores should be permitted and regulated. Producers should include the small craft growers individually or in cooperatives or other business organizations that should be appropriately regulated.

The medical market must continue to exist and reasonable access must continue to be provided to patients.

Legalization requires the federal government to withdraw from exercising its criminal law power over cannabis generally and in all its forms, and it should be removed from Schedule II to the CDSA. The challenge will be to regulate the market to introduce standards and conformity while being cautious not to force existing or new markets out of business, and by doing so, recreate the illicit markets that have generated many problems at great expense.