



THE CANADIAN  
BAR ASSOCIATION  
L'ASSOCIATION DU  
BARREAU CANADIEN

May 1, 2018

Via email: [soci@sen.parl.gc.ca](mailto:soci@sen.parl.gc.ca)

The Honourable Art Eggleton, P.C.  
Chair, Standing Senate Committee on  
Social Affairs, Science and Technology  
The Senate of Canada  
Ottawa, (Ontario) K1A 0A4

Dear Senator Eggleton:

Re: **Bill C-45, *Cannabis Act***

The Criminal Justice Section of the Canadian Bar Association (CBA Section) is pleased to comment on Bill C-45, *Cannabis Act*. We attach the September 2017 submission sent to the House of Commons Committee during its deliberations, and in this letter we address changes that have since been made to the Bill. Unfortunately, the limited time for hearings by that Committee meant that the CBA Section was unable to appear at that time.

The CBA is a national association of 36,000 members, including lawyers, notaries, academics and students across Canada, with a mandate to seek improvements in the law and the administration of justice. The CBA Section consists of a balance of prosecutors and defence lawyers from across Canada.

The CBA Section outlined serious concerns about the Bill in our September 2017 submission, and we continue to have most of those concerns. However, we generally support the amendments adopted by the House, as many would bring much needed clarification and important protections. As one specific example, the CBA Section supports removing the height restriction for marijuana plants cultivated in one's own dwelling house (clause 12(6)). The previous limit was inconsistent with the stated objectives of the Bill and would have led to enforcement problems for private residences.

The current version of the Bill also limits the use of any judicial record created under the ticketing regime (clauses 51 and 58). Not only must the record be kept separate from other judicial records, it cannot be used for any purpose that would identify the convicted person. This is important to minimize stigma on people for possessing small amounts of marijuana.

We support \$200 as the maximum fine (versus the mandatory fine for the ticketing regime in clause 53). This would give judges more flexibility to respond to the individual circumstances of those ticketed. Likewise, specifying that probation is not to be imposed is a clarification we support.

Clause 151.1 would now provide for mandatory review of the Act after three years. We suggest that review should be coordinated with review of other recently proposed amendments to the *Criminal Code* for drug-impaired driving in Bill C-46.<sup>1</sup> The science in the area of drug detection and understanding of the impact of THC levels on impairment is continually developing.

The CBA Section also supports the addition of certain immunities from prosecution for possession offences in the context of medical emergencies in clause 8.1. Likewise, adding cannabis edibles and concentrates to the list of regulated substances would reduce the impetus for a black market for these products.

Recently tabled Bill C-75, *Criminal Code* amendments, *Youth Criminal Justice Act* amendments, and consequential amendments to other Acts contain several measures aimed at addressing court delay. In our submission on Bill C-45, the CBA Section expressed serious concern about the number of offences in the Bill that carry a maximum sentence of 14 years, for which conditional sentences and discharges would be unavailable in many cases. If reducing court delay is a government priority, we suggest those sentences be set at a level consistent with sentences for tobacco and alcohol. We also suggest encouraging use of judicial discretion which leads to earlier resolution of cases, removing them from the justice system before trial dates are even set.

Bill C-45 continues to omit any legal market for youth to obtain marijuana, and includes stiff penalties for offences involving youth. If the goal is to diminish the black market for marijuana, this decision is likely to encourage illicit production and distribution of unregulated product to youth.

Regulations for cannabis production and distribution have yet to be finalized, making it difficult to comment at this stage. Breach of the regulations may result in charges under the Act. It will be necessary to see the interplay between the regulations and the Act to determine whether the policy objectives underlying Bill C-45 are likely to be met in practice.

The CBA Section appreciates the opportunity to comment on Bill C-45. We trust that our comments will be helpful and would be pleased to provide further clarification.

Yours truly,

*(original letter signed by Gaylene Schellenberg for Loreley Berra)*

Loreley Berra  
Chair, CBA Criminal Justice Section

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<sup>1</sup> Bill C-46, *Impaired Driving* (Ottawa: CBA, 2017).



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## **Bill C-45 – *Cannabis Act***

**CANADIAN BAR ASSOCIATION  
CRIMINAL JUSTICE SECTION**

**September 2017**

## **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 Criminal Justice Section, 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 Section.

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# Bill C-45 – *Cannabis Act*

## I. INTRODUCTION

The Canadian Bar Association Criminal Justice Section (CBA Section) welcomes the opportunity to comment on Bill C-45, the *Cannabis Act*. The Bill proposes comprehensive legislation that would combine a regulatory framework for cannabis possession, production and distribution with provisions for public safety and product quality. The Bill would continue to impose significant criminal penalties for possession, distribution, cultivation and importing or exporting outside of the regulatory framework. The Bill is lengthy and complex, and the CBA Section has focused on those aspects related to criminal law.

The process for consultations and submissions around Bill C-45 has not to date facilitated full participation of key stakeholders. Bill C-45 was referred to the House of Commons Health Committee for study after second reading in June 2017. Before the summer recess, the Committee limited written submissions to five pages or less, and to submissions received by August 18. According to the Committee's website, only eleven submissions were received by that date. Then, just four days of hearings were scheduled in the week before Parliament resumed in September, each dealing with particular aspects of the Bill. Written submissions were accepted only from witnesses appearing on one of the four days. Other interested organizations, including the CBA, were informed that it was too late to comment in writing during the Committee's deliberations. This approach seems inconsistent with an open and transparent democratic process, especially for such an important legislative change.

We recognize the legitimate health care concerns around cannabis, particularly the effect of cannabis on youth, as well as the damage that has occurred from an overly punitive regime, relying heavily on incarceration and long criminal records that impede offenders' future life prospects. We acknowledge the potential danger from drivers impaired by cannabis who operate motor vehicles or other means of mechanized transport, and we have contributed to Parliament's consideration of Bill C-46, *Impaired Driving Act*.<sup>1</sup>

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<sup>1</sup> Criminal Justice Section, *Bill C-46, Impaired Driving Act* (Ottawa: CBA, 2017).

## II. CBA PERSPECTIVE

The CBA has a long history of support for legislative change to Canada's approach to 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* (NCA) to the *Food and Drug Act*. In 1994, we said that Bill C-7, *Controlled Drugs and Substances Act* (CDSA) should not be enacted as it would further "a model of dealing with drugs through criminalization and incarceration that has been proven ineffective and counterproductive". 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>2</sup> Last year, a group of CBA Sections responded to the current government's *Discussion Paper* which suggested that cannabis possession, distribution and production should be regulated in a manner like other non-criminal, regulated substances.<sup>3</sup>

Legalization would represent a fundamental change in the federal government's approach to cannabis, and one that the CBA supports. The *Discussion Paper* and government statements since its release have acknowledged that any harms from cannabis are comparable to the harms of other legal but regulated substances, notably alcohol and tobacco. Simple analogies with how Canada currently manages those substances offer good guidance when thinking about regulation of cannabis, though there are certainly important distinctions.

In fact, cigarette smoking among adults remains the single largest preventable cause of death and disease in the United States. Tobacco is highly addictive and the only known consumer product that kills one-half of its long term users when used as intended.<sup>4</sup> Overall, smoking causes approximately 30% of cancer deaths in Canada.<sup>5</sup> Its use costs Canada billions of health care dollars each year and those costs have increased steadily since 1966.<sup>6</sup> On the other hand,

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<sup>2</sup> See, Resolution 78-06-A; *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.

<sup>3</sup> CBA Response to Discussion Paper on the *Legalization, Regulation and Restriction of Access to Marijuana* (Ottawa: CBA, 2016).

<sup>4</sup> <http://ow.ly/fqSx30fr67r>. See also, FDA News Release, "FDA announces comprehensive regulatory plan to shift trajectory of tobacco-related disease, death" (July 28 2017).

<sup>5</sup> <http://ow.ly/JWvW30fr69h>

<sup>6</sup> <http://ow.ly/4avv30fr6bC>

longitudinal studies of cannabis smoking have determined that it does not cause either emphysema or cancer.<sup>7</sup>

Similarly, the dangers associated with alcohol consumption are well known. Drinking alcohol was the third highest risk factor for global disease burden in 2010, moving up from sixth in 1990. It was also the top risk factor for poor health in people ages 15 to 49 years. Globally, alcohol was linked to over 3 million deaths per year in 2012, slightly more than lung cancer and HIV/AIDS combined.<sup>8</sup> Alcohol affects a wide variety of biological systems in a dose-dependent manner, affecting health, well-being and behaviour over the short and long term.<sup>9</sup>

Deaths as a result of opiate use are at crisis levels in several parts of Canada. There is now evidence that, rather than a 'gateway' to harder drugs as once claimed, former opiate dependent patients have found cannabis effective in stopping their use of opiates and moving toward a more productive life.<sup>10</sup> This means a significant cost reduction to users and to the medical system as a whole. In addition, a recent National Academy of Science, Engineering and Medicine (2017) report reviewed some 10,700 studies of cannabis as medicine (out of 24,000 available on PubMed) and found conclusive evidence of its efficacy in treating chronic pain.<sup>11</sup>

In spite of proven health risks and few, if any, health benefits, tobacco and alcohol are legal and there are few limits on possession or regulations on production for personal use. 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.

Years of study of cannabis have offered no clear justification for a more punitive regime for it than for alcohol and tobacco. In our view, a regulatory scheme should cover the possession, distribution and production of cannabis. Just as the *Excise Tax Act* does with tobacco, a scheme could include offences with appropriate fines, penalties or other sanctions for those who operate outside the regime. The criminal law should not be engaged for cannabis possession, distribution and production when a regulatory approach is adequate and appropriate.

Certainly, Bill C-45 is a step in the right direction, but its limited approach to 'legalization' would continue to rely heavily on the criminal law for conduct falling outside the ticketing

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<sup>7</sup> <http://ow.ly/400m30fr6dc>

<sup>8</sup> <http://ow.ly/YtG130fr6gl>

<sup>9</sup> *Ibid.*

<sup>10</sup> <http://ow.ly/Qc9g30fr6jf>

<sup>11</sup> <http://ow.ly/jHbp30fr6lZ>

scheme. A comparison between the relative health risks and benefits of cannabis compared to alcohol and tobacco suggests that the continued use of the criminal law for cannabis is inconsistent with the regulatory model that the federal government is currently pursuing.

### **III. PROHIBITIONS, OBLIGATIONS, AND OFFENCES**

In 2016, the CBA Sections agreed with core principles expressed in the federal government's *Discussion Paper*, but commented that it lacked a plan for removing cannabis as a scheduled substance from the *CDSA*. Instead, the *Discussion Paper* suggested that the criminal law would continue to be engaged for licensing, production, possession limits and the minimum age for legally using cannabis. Our response noted that the suggested approach might be better described as a step toward 'decriminalization' but could not accurately be referred to as 'legalization' as has been suggested to Canadians. We called again for a non-criminal, regulatory approach to the possession, distribution and production of cannabis.<sup>12</sup>

Bill C-45 would too often result in people moving from lawful activity to serious crimes with severe penalties with little factual difference between their respective situations. If Parliament's intent is to treat cannabis as a regulated substance, consideration should be given to the everyday examples in this submission to ensure that the new regulatory regime does not again criminalize cannabis users unnecessarily.

#### **A. Possession**

In 2012, the federal government amended the *CDSA*, which had replaced the *NCA* in 1996. The amendments left maximum sentences of life imprisonment intact for trafficking or possession for the purpose of trafficking in a schedule II drug (including cannabis). They increased penalties for the production of cannabis from seven to 14 years imprisonment on indictment, and imposed specific mandatory minimum penalties for producing cannabis, ranging from six months to two years imprisonment, depending on the number of plants. Mandatory minimum penalties were added for trafficking and possession for the purposes of trafficking with certain aggravating factors.

For simple possession of cannabis, the 2012 amendments set a maximum of five years less a day imprisonment on indictment, with the option to proceed summarily if the amount were under 30 grams. A person charged with simple possession of more than 30 grams and

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<sup>12</sup> *Supra*, note 2.

prosecuted by way of indictment does not have the right to trial by jury, as the *Charter* limits that right to where the maximum punishment is imprisonment of five years or more.<sup>13</sup>

The 2012 amendments also changed conditional sentences of imprisonment (CSOs) in section 742 of the *Criminal Code*. Those sentences enable a court imposing a sentence of less than two years to allow the offender to serve the sentence in the community, subject to conditions, where the offender does not pose a danger to the community.<sup>14</sup> After the amendments, section 742.1 made a CSO unavailable when an offence carries a mandatory minimum term of imprisonment, or the offence is prosecuted by indictment and the maximum term is imprisonment for 14 years or life.

The proposal is now to eliminate mandatory minimum sentences for cannabis offences, which we support. However, we believe that other limits on judges' ability to impose a CSO where a sentence of two years or less is fit should also be removed. CSOs should be available for cannabis offences, regardless of the maximum penalty available on indictment or the Crown's election as to how to proceed.<sup>15</sup>

Section 8(1)(a) and (b) would allow people 18 years of age or over to possess up to 30 grams of dried cannabis or equivalents in a public place. Not every member of the public needs to have access to a place to make it 'public' under the definition of these sections of the *Criminal Code*. Considering how widely public places are defined,<sup>16</sup> people could violate this section if they have a larger quantity of cannabis in their vehicle, even if the cannabis is sealed, hidden, not used while driving, and not near a child. If adults live communally and share a common kitchen or recreational facility, or use a common area in an apartment or condominium building, and friends or acquaintances drop by, a person could be exposed to criminal liability. Section 8(1)(b) also prohibits possession of any 'illicit cannabis', defined as "cannabis that is or was sold, produced or distributed by a person prohibited from doing so under this Act or any provincial Act or that was imported by a person prohibited from doing so under this Act".

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<sup>13</sup> See *Charter* section 11(f). We note that for a schedule I offence (an opiate, cocaine or amphetamines) the maximum is seven years imprisonment, so the right to a jury trial remains. This discrepancy precludes a jury from deciding a serious case involving cannabis possession.

<sup>14</sup> *Criminal Code* section 742.1(a).

<sup>15</sup> The Supreme Court of Canada, in *R. v. Nur*, [2015] 1 SCR 773, said that we cannot rely on Crown discretion to elect down to ensure that sentences will not be disproportionate.

<sup>16</sup> See the definition in section 213(2), the soliciting section of the *Code*.

People transporting even one budding or flowering cannabis plant in their own vehicle to their own residence could violate this provision. Similarly, a person with five small plants could face prosecution, even though they are unlikely to produce any notable quantity of cannabis. These examples are not far-fetched. While legislation must set criteria for determining unacceptable conduct, the definitions must be workable and not expose people to prosecution for conduct incidental to lawful activity. There is a saving provision that qualifies possession as a criminal activity “unless authorized under this Act” but it is unclear what may be authorized. This may be intended to address people working in retail stores who would possess larger quantities of cannabis than would otherwise be permitted, contrary to (1).

Large commercial producers of cannabis are likely to find it reasonably easy to comply with statutory or regulatory regimes, given the scale on which they operate, but less sophisticated individuals also need to know the law in advance and understand it. Although ignorance of the law is not an excuse, ordinary people should be able to easily understand any legislative limits given the complexities of the new legislative regime.

Section 8(1) of Bill C-45 would allow 12 to 17 year olds (‘young persons’ under sections 8, 9, and 12) to possess up to five grams of dried cannabis or equivalents anywhere. While the intent of the lower permissible limit for young people seems to be to discourage their cannabis use, they may well continue to use cannabis if they have done so in the past. If anything, use by young people could increase as they assume that cannabis is now legal and the law is relaxed. We suggest that alternatives to court proceedings be sought for young people whenever possible.

## **B. Distribution, Selling, Importing and Exporting**

Bill C-45 distinguishes between ‘distribution’ and ‘selling’ cannabis. Under section 9(1), it is illegal to distribute over 30 grams of dried cannabis, one or more plants that are budding or flowering, or four plants not in that state. The definition of ‘distribute’ is wide, reflecting the current definition of ‘traffic’ in the CDSA. There need be no commercial aspect to distribution. In addition to the distribution offence, section 9(2) makes a distinct offence of possession for the purpose of distribution under (1).

Section 9 also makes it an offence to distribute to anyone under 18 or to an organization and to distribute any ‘illicit cannabis’. A young person can distribute up to five grams without committing an offence (so long as it is not to an organization), recognizing that young people are likely to possess and share with other young people and should not unnecessarily be drawn

into the criminal justice system. However, there would be no legal supply of cannabis for young people, as no one can legally distribute or sell to anyone under 18 years.

If young people have no access to a legal supply of cannabis, it seems likely that they will continue to look to illegal sources, creating or leaving intact the black market that Bill C-45 aims to eliminate. Young people should not be driven to an illicit market for their supply. Any adult who supplies young people with cannabis faces a maximum penalty on indictment of 14 years imprisonment. It would be a defence for an adult to distribute to a person under 18 years if they took reasonable steps to ascertain the individual's age.

A person who transports over 30 grams of cannabis to share with other consenting adults, over any period of time, is guilty of a serious offence. People living in rural or remote areas where they cannot easily acquire cannabis may be tempted to obtain larger amounts while visiting the city, planning to use it over an extended period.<sup>17</sup> Similar limitations and offences do not exist for alcohol and tobacco, which can be purchased in whatever quantity and transported home or elsewhere. Again, it may be easy in urban parts of Canada to go to a licensed distributor or order cannabis through a courier service. People in remote or rural regions will have fewer options, and could turn to unlicensed, low level commercial distributors or markets outside the regulatory scheme. In a small community, if a person prefers to hide their use from family or friends, they may avoid public outlets and not wish to grow cannabis at home either. Those people may also look for other sources, which would be criminalized by the sales prohibition.

Extinguishing the black market in cannabis requires making the product affordable and easily available. These sections of Bill C-45 seem designed to remove any commercial incentive for the black market to deal in cannabis while creating a lawful way for adults to obtain cannabis from a licensed distributor. Unfortunately, there is no guarantee that the legal cannabis market will provide enough product to prevent what the Bill would deem unlawful sales.

In creating provincial and territorial regulatory frameworks, care must be taken to avoid taxing legal cannabis to the extent that it recreates a black market, as has been recently identified as problematic in California.<sup>18</sup> To halt black market sales and stop larger illicit grow operations and the dangers associated with them, we suggest a more flexible approach to the sale of small amounts of cannabis to adults. Casual cannabis users wanting to buy small amounts of cannabis

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<sup>17</sup> For additional considerations for First Nations, see: <http://ow.ly/7pCB30fr6po>.

<sup>18</sup> Mike McPhate, "California Today: What if Legal Pot costs more than Black-Market Pot?" September 19 2017 *New York Times* <http://ow.ly/KC8730fr6sf>.

in ways unlikely to involve any risks to their communities should not be the subject of criminal law. The amount a distributor can have for sale at any time or in any transaction could still be regulated to avoid making the distributor a target for criminal elements or the production risks of grow operations. Again, larger distributors will have no problems complying with a regulatory regime, but the proposed new regime should avoid criminalizing distribution of small amounts of cannabis by ordinary people in a everyday situations.

### **C. Production**

Production is governed by section 12(1)-(3), and is distinct from cultivation under section 12(4)-(8). 'Production' refers to obtaining or offering to obtain cannabis by any method or process, including by manufacturing, by synthesis or altering the chemical and physical properties. Section (2) appears to allow this to be done by individuals if they lawfully possess the cannabis to be altered, but alteration by an 'organic solvent' is prohibited by section (3).

The prohibition on cultivation under section 12 includes any cultivating, propagating or harvesting from a seed or plant material known to be from illicit cannabis, or cultivating, propagating or harvesting more than four cannabis plants at any one time in a dwelling house. The 'dwelling house' limitation seems to apply regardless of how many people 18 years of age or older live in a particular dwelling.

We appreciate that Bill C-45 aims at limiting cultivation to amounts in keeping with personal use, but imposing the same limit no matter how many people live in a dwelling house seems illogical. Specific provision needs to be made for apartments, university residences or rooming houses, where several people live in one place. Consideration should be given to allowing cultivation of more than four plants where multiple people are ordinarily resident in the same place.<sup>19</sup> An absolute limit on the number of plants may still be appropriate, depending on the nature of the dwelling house. This should be left to provincial and territorial legislation and regulations enabling landlords and property owners, with local governments, to reasonably regulate and employ means other than prohibition to allow people to produce cannabis, for example, in a 'community garden' or some other reasonable alternative.

The height of plants that may be grown in a dwelling house would be limited to 100 cms. A person can have four plants each of that height, but growing a plant beyond that height is an

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<sup>19</sup> It would be a factual issue as to whether a person actually lives at the place (using evidence like government issued identification, mail addressed to the person at that location, the person being observed in activities consistent with a resident or absence of evidence indicating another residence.)

offence. Again, this seems inconsistent with the stated goals of Bill C-45 and should be reconsidered.

We see no need to impose the four plant limit or the height restriction, as attempts to enforce those limits have the potential to create an impractical situation for law enforcement and the potential for abuse if law enforcement must enter homes to check on the number or height of plants. Individuals should be able to produce cannabis as they can with alcohol and tobacco, relying on local government regulations to ensure that growing is done safely and without negative impacts on neighbours or the community.

Home growing with a robust regulated industry able to produce cannabis in quantities to meet demand could eliminate the black market. It would also address any temptation for home growers to over produce and for organized crime to become reinvolved.

#### **D. Sentencing**

The CBA Section supports legislative reform in this area, but we believe some of the sentencing proposals in Bill C-45 require further consideration. At present, sentences for cannabis offences are not near the length proposed in Bill C-45, as even large scale operations do not generally attract 14 year sentences. While some criminal sanctions might be appropriate for an offender distributing a large quantity of illicit cannabis, that will be the exception in a legalization regime. If cannabis is to be treated like tobacco or alcohol, penalties available should reflect those regimes.

Regulatory offences often attract significant fines. For example, the fines imposed for breaches of health and safety legislation, usually imposed on corporate entities, are high to protect worker safety and to stress that worker safety must be prioritized in any operation. With Bill C-45, the federal government has followed through on its intent to legalize and regulate the recreational use of cannabis, and to “reduce the burden on the criminal justice system in relation to cannabis.”<sup>20</sup> Penalties in the Bill should be consistent with this stated intent.

The federal *Tobacco Act* appears to be a model for the *Cannabis Act*, but that legislation focuses on taking profits away from the black market, rather than using imprisonment and its harsh, long term impacts, with substantial costs to taxpayers. It relies on more constructive sentencing options directed at the specific mischief. While most of the maximum penalties are

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<sup>20</sup> Bill C-45, section 7.

substantial fines, including cases that proceed by indictment, the maximum periods of potential incarceration are only two years. The maximum penalties for furnishing tobacco to a young person include substantial fines with no provision for imprisonment (section 45).

Alcohol is governed federally by the *Excise Act*, with penalties generally in the three to six month range, including mandatory minimums of three months up to three years for removing goods seized. The court can add up to two years imprisonment and not less than one month in certain circumstances. In cases of default of payment of the substantial fines available, the maximum penalty is three months, with a minimum of one month incarceration.

For tobacco, section 220 allows a person to grow up to 15 kg of tobacco for personal use, with the same allowance for other adults on the farm or premises. Selling without a license brings a fine and, for default in paying the fine, up to twelve months imprisonment. The same is true for violating section 220. Offences for selling without paying duties carry penalties on indictment of up to five years and on summary conviction up to two years. The maximum in default of payment of a fine is five years imprisonment on indictment and two years imprisonment on summary conviction.

In contrast, the offences in Bill C-45 may be prosecuted by indictment or summary procedure but if on indictment, sentences of up to 14 years are available:

- Possession: potential maximum penalties in Bill C-45 are out of line with the gravity of the offence, compared with the alcohol and tobacco regimes. Bill C-45 proposes penalties on indictment for possession beyond the 30 grams limit for adults of up to five years less a day.<sup>21</sup> For amounts below 50 grams, police officers may allow an adult to proceed by way of a ticketing scheme with a maximum penalty of \$200, plus a victim surcharge. Crowns may also proceed by summary conviction instead of indictment, with a maximum fine of \$5000 or six months imprisonment, or both. Proceedings would remain in provincial or territorial courts, without the option of being tried by a higher court or by judge and jury.
- Distribution: a distribution offence may proceed by indictment or summarily, again subject to the ticketing scheme for amounts less than 50 grams. The penalty for violating that section is a maximum of 14 years imprisonment for adults, a sentence under the *Youth Criminal Justice Act* for those under 18 and a fine at the discretion of the court if an 'organization' is involved. If the Crown proceeds summarily, penalties are between \$5000 and \$15,000, and for organizations, the maximum fine is \$100,000.

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<sup>21</sup> For a 'young person', the penalty for possession would be in accordance with the YCJA.

- Sale: Section 10 would prohibit the sale of any cannabis unless permitted under the *Act*, making it unlawful to sell other cannabis or any substance represented or held out to be cannabis to someone over 18, under 18 or to an organization, or to possess cannabis for the purpose of selling it. The offence is hybrid, with a maximum of 14 years imprisonment on indictment, and fines of \$5000-\$15,000 or imprisonment up to six months if the person sells to another adult, and 18 months if the person sells to a young person.
- Importing and Exporting: ‘Importing and exporting’ and ‘possession for the purpose of exporting’ is governed by section 11. It is again hybrid, with a maximum of 14 years imprisonment on indictment and for offences proceeding summarily, a \$5000 fine or up to six months imprisonment for an individual and \$100,000 maximum for an organization. Consider a person who crosses the border with a joint in a backpack for an evening party.<sup>22</sup> In our view, the potential penalty in this case does not accord with the gravity of the offence.
- Cultivation: The offence for cultivation is also hybrid, allowing the Crown to proceed summarily or by indictment if the conduct does not fall within the ticketing scheme seemingly intended for the production of just a few more than four plants or perhaps slightly taller plants up to 150 cm. As with the other offences described above, on indictment the maximum penalty would be 14 years imprisonment and on summary conviction, there is a fine up to \$5000 or six months imprisonment or both. In the case of an organization, the fine is up to \$100,000.

Under Bill C-45, young people will also be subject to prosecution either on indictment or summarily, but their sentencing will occur under the *Youth Criminal Justice Act*. The CBA Section commends the decision to incorporate YCJA principles and its framework for dealing with cannabis offences committed by young people, which would allow consideration of factors like diminished moral blameworthiness, parental notification, a greater range of sentencing options and sealing youth records.

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The CBA Section supports judicial discretion in sentencing. Simply allowing the option of a 14 year maximum sentence means there would be no possibility of discharges or conditional sentences.<sup>23</sup> We believe a judge should be able to determine an appropriate sentence, especially in situations that could easily arise after passage of Bill C-45.

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<sup>22</sup> See the Supreme Court of Canada decision in *R. v. Smith*, [2015] 2 SCR 602.

<sup>23</sup> See section 742.1(b) and (c).

We question why 14 year penalties on indictment are required in the context of a 'legalization scheme', for a substance less harmful to both individuals and society than tobacco, alcohol and several other drugs. Even if an indictable scheme is necessary, 14 years seems excessive and disproportionate, and could be subject to constitutional challenge. Just having it available removes a court's ability to impose a CSO where the court believes that a penalty of up to two years imprisonment is warranted but could be served in the community. Yet that option is available for offences involving tobacco, alcohol and other drugs. In 1972 – 45 years ago – the Ledain Commission recommended that the offence of trafficking be hybridized and that the maximum penalty on indictment be five years.<sup>24</sup>

One stated objectives of Bill C-45 is to “reduce the burden on the criminal justice system in relation to cannabis.” With these lengthy available sentences, we anticipate significant ongoing litigation, including *Charter* litigation. Given current concerns about court delays and avoiding stays of serious criminal charges following the Supreme Court of Canada decision in *R. v. Jordan*,<sup>25</sup> Bill C-45 should be amended to allow discharges and conditional sentences.

## RECOMMENDATION

- 1. The CBA Section recommends that indictable offences in Bill C-45 be significantly reduced, and that any legislative impediments to the use of non-custodial options (discharges and CSOs) for cannabis offences be removed.**

## E. Interim Measures

Section 204 of Bill C-45 would repeal item 1 in schedule II to remove cannabis from the CDSA. Section 197(2) would repeal section 7(2)(b) of the CDSA which applies specifically to cannabis and imposes mandatory minimum sentences introduced with the 2012 amendments. While we support these changes, they are unlikely to occur until July 1, 2018 or after. We suggest that interim measures be taken to avoid over criminalizing conduct that will soon be legal.

Until Bill C-45 is passed into law, we suggest that federal prosecutors be encouraged to use their discretion to avoid imprisonment in other than the most serious cases. Non-custodial sentences can include up to three years probation with conditions similar to those for CSOs.

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<sup>24</sup> Gerald LeDain, et al, *LeDain Commission of Inquiry into the Non-Medical Use of Drugs* (Ottawa: Information Canada, 1972).

<sup>25</sup> [2016] 1 SCR 631.

Alternatively, section 742.1 of the *Criminal Code* could be amended to make CSOs available even where there are mandatory minimums or the maximum is 14 years to life. Legalization sends a signal to the courts that there should be more lenient treatment of cannabis cases and non-custodial options should be considered where appropriate.

#### **RECOMMENDATION**

- 2. The CBA Section recommends that until cannabis is legalized, interim measures be taken to avoid incarceration for conduct that will soon be legal. For example, federal prosecutors should be encouraged to seek non-custodial sentences except in the most serious cases, avoid using existing power under section 8 of the CDSA, avoid seeking mandatory minimum penalties, and to withdraw any notices that have been given.**

#### **IV. TICKETABLE OFFENCES**

We suggest an expanded range of ticketable offences to include minor offences such as possessing a small amount of illicit cannabis (such as under 30 grams) or for importing small amounts of cannabis.

This would be consistent with the goals of Bill C-45, as expressed in the preamble. In addition to treating cannabis similarly to alcohol and tobacco, it would also help to achieve reduced demands on the criminal justice system and to avoid additional violations of the *Jordan* framework. We suggest that the language in Bill C-45 be strengthened so that a police officer *must* (rather than *may*) first consider ticketing before laying a charge – a similar process as that used for the bail ladder provisions.

#### **RECOMMENDATION**

- 3. The CBA Section recommends that the language in section 51 of Bill C-45 be strengthened to require that a police officer *must* (rather than *may*) first consider ticketing before laying a charge.**

In addition, we note that training and careful monitoring will be required to ensure the ticketing scheme is used in an even handed way, and that racialized communities have equal access to this option to avoid more serious penalties.

## V. LICENCES AND PERMITS

The CBA Section suggests relaxing the parameters of who can sell cannabis and under what circumstances. A selling offence in many ways needlessly duplicates the distribution offence. Selling over 30 grams will be an offence, and selling less than that amount should not be a major concern. A more flexible approach to selling properly belongs in the licencing section but we question why a license must be required, especially for people who sell only small amounts.

## VI. AUTHORIZATIONS AND DISPOSITION OF SEIZED THINGS

The actions taken to administer a regulatory regime must conform with the *Charter* and aspects of Bill C-45 relating to search warrants and inspections should be carefully scrutinized.

For example, section 90(4) would authorize a judge to limit how lawful owners can use their property after the time for detaining the property for investigation has ended, and without proceedings being instituted. Sections 489.1 – 490 of the *Criminal Code* apply to this section and deal with continued detention of seized property for investigating criminal activity. The *Code* does authorize additional detention during an ongoing investigation. If proceedings begin and the subject property is required as evidence, then the property can be detained until the matter ends. If neither of these situations apply, then the property is no longer legally detained and must be returned without conditions.

Section 90(4) of Bill C-45 would instead authorize a judge to impose conditions on lawfully owned property that is neither evidence of, or required for a criminal prosecution. The section would authorize restrictions on a person for taking possession of their own property. There is no time limit proposed, and the recognizance could be indefinite. This could raise *Charter* considerations under section 7.

## VII. MEDICAL MARIJUANA REGULATIONS

We applaud the government's decision to maintain a program for medically approved patients distinct from that for recreational users of cannabis. This is in keeping with courts' recognition that a "lack of reasonable access" by medically approved patients violates their constitutional rights under section 7 of the *Charter*.<sup>26</sup>

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<sup>26</sup> *Allard v. Canada*, [2016] 3 FCR 303, 2016 FC 236 (CanLII).

We understand that the current *Access to Cannabis for Medical Purposes regulations* (ACMPR) under the CDSA will become regulations under the new *Cannabis Act*, subject to a review after five years. Patients and their doctors will determine how many cannabis plants the patient can grow or a designated grower can grow for them.

Medically approved patients cannot be subjected to an arbitrary number of plants and require larger amounts than recreational users given their condition. We suggest amending those regulations so other healthcare practitioners may also make these determinations, either alone or in conjunction with members of the medical profession. This could be accomplished by reintroducing a definition of a ‘practitioner’ to include other healthcare professionals in section 53 of the *Narcotic Control Regulations*, as amended and modifying the sections pertaining to cannabis by substituting ‘practitioner’ for ‘Doctor.’

## **VIII. INTER-GOVERNMENTAL CONSIDERATIONS**

There is an urgent need for provinces and territories to draft regulations for compassion clubs or medical dispensaries, and retail storefronts, so patients and recreational users will have easy access to cannabis directly rather than having to grow their own, having somebody grow it for them, or waiting for a supply in the mail. Much work and collaboration is needed between the federal and provincial governments to make the regulatory regime workable across the country. As an early example, Ontario announced its plans to use the Liquor Control Board of Ontario as a vehicle for cannabis sales. However, the number of outlets planned is significantly less than the number of outlets for alcohol.<sup>27</sup>

## **IX. CONCLUSION**

The CBA Section supports legislation to make cannabis and cannabis products widely available to adults, and to ensure that organized crime and other criminals do not continue to be involved with cannabis due to lack of profits. As with alcohol and tobacco, there should be no incentive for individuals to engage in home growing with intent to sell to an illicit market. More needs to be done in this complex area to ensure that the government’s goals are achieved, and the blunt instrument of the criminal law is removed from the regulation of cannabis.

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<sup>27</sup> <http://ow.ly/4T6v30fr6yR>