

Canada first G7 country to legalize retail cannabis

DECEMBER 18, 2018 9 MIN READ

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Rare is the moment when new legislation captures the attention of the political and business world, the public and the media alike. Such a moment occurred on October 17, 2018 as the world watched Canada become the first G7 nation to legalize recreational or adult-use cannabis. Those who want to capitalize on this new market must be prepared to navigate a complex legislative and regulatory regime with oversight from federal, provincial and municipal governments. Participants in the legal Canadian market will also have to be mindful of the implications for their cross-border activities in other jurisdictions – for example, in the United States where adult-use cannabis remains illegal at the federal level and in most states.

The Cannabis Act

On October 17, 2018, the *Cannabis Act* (the Act) came into effect. The Act regulates retail cannabis for adult use, medical cannabis and industrial hemp in Canada. On the same date, cannabis was removed as a controlled substance from the *Controlled Drugs and Substances Act* and the *Access to Cannabis for Medical Purposes Regulations* (ACMPR) were repealed. There are two regulations under the Act: (i) the *Cannabis Regulations* and (ii) the *Industrial Hemp Regulations*.

Part of the rationale for the Canadian government's decision to legalize the adult-use market for cannabis in Canada is that cannabis revenue will be diverted from illegal to legal sources. The stated objectives of the Act are to prevent young persons from accessing cannabis; to protect public health and public safety by establishing strict product safety and quality requirements; to deter criminal activity by imposing serious criminal penalties for those operating outside the legal framework; and to reduce the burden on the criminal justice system in relation to cannabis. To further these objectives, the Act regulates matters such as cannabis licensing, possession, production, distribution, sale, import and export. Other matters, such as cannabis retail models, are regulated by the provincial and municipal governments.

Six licence classes apply under the Act

Licences that had been issued under the former ACMPR automatically transitioned into one or more licences under the *Cannabis Regulations*. The *Cannabis Regulations* establish six classes of licences: (1) cultivation licences; (2) processing licences; (3) analytical testing licences; (4) sales for medical purposes licences; (5) research licences; and (6) cannabis drug licences. Other than for cannabis drugs that have been approved by Health Canada (sold as prescription drugs pursuant to cannabis drug licences), no health claims, treatment claims, prevention claims or other drug type claims may be made in relation to cannabis (even when cannabis is intended for medical use).

The *Cannabis Regulations* also create subclasses for cultivation (standard cultivation, micro-cultivation and nursery) and processing licences (standard processing and micro-processing). The different licences and each subclass carry differing rules, requirements and permitted activities. For further detail regarding the licence classes and the conversion of previously issued licences under the ACMPR, please see our previous Osler Update, "[New cannabis licence regime and transition of existing cannabis licences](#)."

Medical cannabis rules are essentially unchanged

The legal framework for medical cannabis remains substantively the same under the *Cannabis Regulations* as it existed under the ACMPR with adjustments to create consistency with rules for non-medical use, to improve patient access and to reduce the risk of abuse within the medical access system.

CBD and THC are both subject to the Act

There is a misconception that the Act does not apply to products containing only cannabidiol (CBD). CBD does not produce a "high" or intoxication and is being studied for its possible therapeutic uses. Phytocannabinoids, including both THC and CBD, are defined as "cannabis" under the Act, which includes any cannabis plant (i.e., the Act applies to both *cannabis sativa* and *cannabis indica*).

All phytocannabinoids, including CBD and THC, are treated similarly under the Act. Accordingly, regardless of the plant source, both THC-containing products and CBD-containing products can only be supplied in accordance with rules contained in the Act. As such, no health claims, treatment claims, prevention claims or other drug type claims may be made in relation to CBD, unless such claims are made in reference to a drug containing CBD that has been approved by Health Canada.

Advertising and promotion restrictions apply

The promotion of cannabis, cannabis accessories or services related to cannabis is subject to regulation, including a prohibition on communication of price or distribution information. In addition, it is prohibited to promote cannabis in a way that is appealing to young persons or that utilizes testimonials or endorsements, depicts a person, character or animal (real or fictional) or uses "lifestyle" marketing. There are also prohibitions relating to false promotion, use of certain terms, sponsorship, inducements and promotion using foreign media.

The Act provides limited exceptions, including for informational promotion and brand-preference promotion, promotion at the point of sale and the use of brand elements on things that are not cannabis or a cannabis accessory. For further detail on advertising and promotion restrictions, please see our previous Osler Update: "[FAQ regarding cannabis promotional materials](#)."

Packaging and labelling restrictions in the Act mandate plain packaging, health warnings, display of a cannabis symbol and certain prescribed product information. Logos, colours and branding are strictly regulated.

Provincial oversight and cannabis retail models differ across

Canada

Although criminal law lies within the jurisdiction of the federal government pursuant to the division of powers set out in the *Constitution Act 1867*, other matters (such as property and civil rights) are within the jurisdiction of the provincial governments. Accordingly, the Act affords provinces and territories the authority to regulate certain aspects of adult-use cannabis (similar to the model for the regulation of liquor and tobacco products), such as retail sale and distribution, minimum age requirements, places where cannabis can be consumed, and a range of other matters.

Some provinces and territories have opted for exclusively government-operated retail stores while others have opted for a privately operated retail model or even a hybrid model, permitting both government and privately operated retail stores. A summary of the retail models adopted in each province and territory is set out below.

| Government-operated | Privately operated | Hybrid |
|--|--|---|
| Québec, New Brunswick, Nova Scotia, Prince Edward Island, Yukon. | Alberta, Saskatchewan, Manitoba, Ontario, Newfoundland & Labrador. | British Columbia, Northwest Territories, Nunavut. |

Figure 1: Retail models across Canadian jurisdictions.

Provinces and territories have also taken different approaches to online sales, distribution and wholesale, market regulation, “grow your own” restrictions and rules around consumption. For example, Manitoba and Saskatchewan are the only two jurisdictions to opt for privately operated online sales. Distribution and wholesale, meanwhile, will be government-operated across Canada with the exception of Saskatchewan, which allows for private participants. Other provinces have introduced concepts of market regulation such as concentration caps on retail stores in Ontario and Saskatchewan, or restrictions on retail ownership applicable to federally licensed producers in British Columbia, Alberta and Ontario.

Consumption regulations vary across Canada as well. On one hand, certain provinces, such as Ontario, permit consumption of cannabis wherever tobacco consumption is permitted. On the other end of the spectrum, provinces such as New Brunswick allow consumption only in private residences.

Import and export is regulated

It is only permissible to import or export cannabis that is used for medical or scientific purposes. Although there have been issues with lack of supply following the legalization of the adult-use market, given the relatively small size of the Canadian market, as the market matures and supply catches up with the initial demand, export opportunities will be important if licensed producers intend to expand their operations. Many Canadian licensed producers are currently focused on export opportunities to the European market. Exporting to a European country requires certification under the European Medical Agency’s Good Manufacturing Practices Standards in addition to obtaining specific export permits from Canada and import permits from the applicable country.

United States presents challenges and opportunities

Although cannabis is legal in 10 states, including California, “marijuana” (also known as cannabis) remains an illegal narcotic under Schedule 1 of the *Controlled Substances Act* in the U.S. As a result, there are concerns that conducting cannabis-related business activities with cannabis companies operating in the U.S. could give rise to aiding and abetting violations of the *Controlled Substances Act*, or money laundering offences through receipt of the proceeds of criminal activity.

Despite cannabis being an illegal narcotic in the U.S., some Canadian cannabis companies have succeeded in becoming listed on U.S. stock exchanges: see “markets.” In order for a company to list on the New York Stock Exchange, the NASDAQ, the Toronto Stock Exchange or the TSX Venture Exchange, a cannabis company must be in compliance with U.S. law, which generally means that it does not conduct cannabis-related activities in the U.S. Some exchanges, such as the Canadian Securities Exchange, are more permissive and permit listings from companies operating or conducting cannabis-related activities in the U.S.

Potential aiding and abetting or money laundering violations, together with concerns relating to the U.S. Customs and Border Protection (the U.S. CBP) refusing entry, and even barring for life individuals associated with the cannabis industry, present risks for industry participants doing business on both sides of the border. Many industry stakeholders, including suppliers and professional service providers (e.g. lawyers, investment banks and accountants) have focused on ensuring that they do not conduct business with companies operating offside U.S. federal legislation.

In September, 2018, the U.S. CBP released an updated statement, indicating that a Canadian citizen working in or facilitating the proliferation of the legal cannabis industry in Canada who comes to the U.S. for reasons unrelated to the cannabis industry will generally be admissible to the U.S. However, if a traveller is found to be coming to the U.S. for reasons related to the cannabis industry, they may be deemed inadmissible.

There has been no guidance issued by the U.S. CBP as to whether Canadians who have consumed cannabis will be denied entry to the U.S. As a result, there is a heightened sensitivity by cannabis consumers in respect of the privacy of their personal information. This sensitivity has likely been exacerbated by a Canada Post privacy breach in which consumer data obtained from orders from the Ontario Cannabis Store was disclosed shortly after legalization.

Looking forward

The regulatory landscape continues to evolve in Canada. Key issues to look forward to or to monitor in 2019 and beyond include:

- The enactment of federal and provincial legislation permitting the sale of edible or consumable cannabis products in Canada is expected on or before Oct. 17, 2019. In anticipation of the legalization, several alliances have already been made and solidified between cannabis companies and beverage companies in 2018.
- It remains to be seen how the regulatory and licensing regime will be enforced at federal, provincial and municipal levels.
- The impact of the legal retail model on the illicit sales of cannabis and how these two markets will interact is uncertain as it is not expected that the legal adult-use market will

completely displace all illegal sales.

- It is unclear whether the same price compression after legalization that occurred in jurisdictions such as California, Washington and Colorado will occur in Canada and how market forces will allocate profits amongst licensed producers, government distributors and retail operators.
- We expect an enhanced focus on privacy issues relating to cannabis use, especially in light of the Canada Post privacy breach in 2018 and the class action lawsuit in the Federal Court of Canada against Health Canada in respect of Health Canada's alleged unauthorized disclosure of approximately 40,000 medical marijuana users' personal information under the ACMPR. Additional regulatory guidance and policies (such as the guidance "Protecting Personal Information: Cannabis Transactions" issued by the Office of the Information and Privacy Commissioner for British Columbia) are likely to be forthcoming.