

LEGALIZING CANNABIS: A JOINT EFFORT

NOVEMBER 24, 2017

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I. INTRODUCTION

With the introduction of the *Cannabis Act*, the Federal government is proposing the legalization of the recreational use of cannabis. Local governments must now consider the implementation of a local cannabis regulatory regime in the context of this new federal approach to recreational cannabis, as well as a retail and distribution framework to be determined by the provincial government.

This paper summarizes the proposed *Cannabis Act*, and outlines which level of government will be responsible for what under the new regime. It then discusses the status of the provincial cannabis framework, and highlights how other provinces have responded to the proposed legislation to date. Finally, the jurisdiction of local governments in determining an appropriate regulatory framework is considered, and information on what considerations a local government must take into account under a new cannabis regime is presented.

II. THE PROPOSED *CANNABIS ACT*

With Bill C-45 *Cannabis Act* and C-46 *An Act to amend the Criminal Code* (collectively, the “*Act*”), the Government of Canada has proposed legalizing access to cannabis across the country. With a planned adoption date in July 2018, the *Act* creates a regulatory framework for the production, distribution, sale, and possession of cannabis across Canada with the following objectives:

- Allowing adults to possess and access regulated, quality-controlled, legal cannabis;
- Protecting public health through strict product safety and quality requirements;
- Providing for the legal production of cannabis;
- Restricting and protecting against youth access to cannabis;
- Enhancing public awareness of the health risks associated with cannabis;
- Deterring and reducing criminal activity by imposing serious criminal penalties for those breaking the law; and,
- Reducing the burden on the criminal justice system.

III. HIGHER LEVELS OF GOVERNMENT & THEIR JURISDICTION

A. Federal Authority

Under the *Act*, the Federal government is responsible for establishing and maintaining a comprehensive and consistent national framework for regulating production, setting standards for health and safety, and establishing criminal prohibitions. Specifically, the Federal government is responsible for:

- Individual adult possession of cannabis, including determining the maximum allowable cannabis possession and home cultivation quantities;
- Licensing commercial cannabis production;
- Industry-wide regulations on the quantities, potency, and ingredients in the types of products that will be allowed for sale;
- Promotions and advertising, including regulating how cannabis or cannabis accessories can be promoted, packaged, labelled and displayed;
- Minimum conditions for provincial/territorial distribution and retail sale;
- Allowing for the Federal government to license distribution and sale in any province/territory that does not enact cannabis retail and distribution legislation;
- Registration and tracking of cannabis from seed to sale;
- Law enforcement at the border; and,
- Criminal penalties for those operating outside the legal system.

While the provincial and territorial governments are authorized to establish a cannabis retail and distribution framework for their province, any sale of cannabis is subject to minimum federal conditions. The minimum conditions on the cannabis that may be sold are that it:

- Qualifies as fresh cannabis, cannabis oil, cannabis plants or seeds;
- Is produced by a federally authorized producer;
- Does not contain ingredients such as caffeine, alcohol, or nicotine; and,
- Has not been recalled.

All retailers must be authorized to sell cannabis under the proposed *Act*, or by provincial legislation that meets the minimum federal conditions on retail sale. The minimum conditions on retail sale are that an authorized retailer can only sell cannabis, or cannabis accessories and products:

- To a person older than 18;
- Without an appearance, shape or attribute that could be appealing to a young person;
- With appropriate record-keeping measures in place;
- Under conditions to prevent diversion to an illegal market or activity; and,
- Not through a self-service display or vending machine.

B. Provincial Authority

The *Act* establishes that provinces and territories are to license and oversee the distribution and sale of cannabis, subject to the minimum federal conditions outlined above. If a province elects to not implement a retail framework, however, cannabis will still be available to individuals through a federally authorized online retail system.

Under the *Act*, a province/territory may legislate:

- Licensing of the distribution and retail sale in their respective jurisdictions, and carry out associated compliance and enforcement activities;
- Raising the minimum age above 18 for the purchase or consumption of cannabis;
- Lowering the limit on cannabis cultivation in residential premises to less than 4 plants;
- Lowering the limit on cannabis possession to less than 30g of cannabis;
- Area restrictions for where cannabis may be cultivated;
- Area restrictions for where cannabis may be consumed;
- Provincial zoning rules for cannabis-based businesses; and,
- Provincial traffic and safety laws to address driving while impaired by cannabis.

The Federal government has indicated that provincial and local governments are expected to collaborate in regulating cannabis distribution, retail, and consumption.

IV. THE HAZY STATE OF CANNABIS LEGISLATION IN BC

The Provincial government has indicated it intends to establish legislation to regulate the sale and consumption of cannabis in BC. This legislation will have a significant impact on the ability for local governments to regulate the sale and consumption of cannabis.

As of November 2017, however, the BC Provincial government has not identified the distribution or retail model it intends to implement. The discussion paper produced as part of the Province's stakeholder consultation initiative indicates three distribution models are being considered:

- Government – the Provincial government would be responsible for warehousing and distribution of cannabis. Licensed producers would send cannabis products to a government distributor, which would then fill orders from cannabis retailers;
- Private – One or more businesses would be responsible for the physical warehousing and distribution of cannabis; and,
- Direct – Federally-licensed producers would distribute their own products directly to retailers.

A range of retail models have also been presented as part of the consultation initiative, including:

- A public or private retail system, or a hybrid thereof (similar to the existing alcohol retail framework);
- A requirement that cannabis be sold in dedicated storefronts, or out of businesses such as liquor stores or pharmacies; and,
- A provincial direct-to-consumer mail-order system.

The Provincial government has indicated that the creation of a private retail system may allow for existing illegal dispensaries to transition to the legal system. A public system would not.

A review of publicly available submissions from local governments in this consultation process indicates that local governments are generally supportive of:

- Raising the minimum age for purchase and consumption of cannabis to 19 years;
- Extending the existing restrictions for smoking tobacco to cannabis smoking and vaping; and,

- Authorizing local governments to regulate the retail and public consumption of cannabis in a manner that is similar to local government's authority to regulate the consumption of alcohol (i.e.: section 73 of the *Liquor Control and Licensing Act*).

The report on the provincial public consultation initiative is expected in December 2017. While a Spring 2018 timeline is anticipated for any subsequent legislation, it is unknown when the Provincial government will determine the applicable model for cannabis retail and distribution. It is also unknown whether or how the Provincial government would amend other statutes, such as the *Tobacco and Vapour Products Control Act* or the *Liquor Control and Licensing Act*, to reflect the proposed changes to cannabis regulation.

V. THE ROLL OUT IN OTHER PROVINCES

Other provinces have provided more direction on their proposed cannabis regulation strategy. In Ontario, for example, the province has announced that all cannabis retailing will be done through a provincial regulatory body, to be governed by the current Liquor Control Board of Ontario. Earlier this month, Ontario also proposed a revised *Smoke-Free Places Act*, which will place significant restrictions on the locations in which cannabis can be consumed.

Recently, the New Brunswick provincial government has announced a similar government-operated approach to cannabis retail. In that province, the NB Liquor Authority will operate recreational cannabis retail operations. Through a subsidiary, the Crown corporation will operate recreational cannabis retail operations in stand-alone stores. They will operate under the business rules, terms and conditions established by the Crown corporation mandated to oversee, conduct and manage the retailing of recreational use cannabis in that province.

In Alberta, the province has stated that retailers will be required to receive their cannabis products from a government regulated distributor. The cannabis distribution system is expected to be similar to the system Alberta currently has in place for alcohol. Whether the retail stores will be government-owned and operated, or a system of licensed and regulated private sales is to be determined.

In Manitoba, a public-private cannabis retail model has been proposed. In this model, the provincial Liquor and Gaming Authority would be given an expanded mandate to regulate the purchase, storage, distribution and retail sale of cannabis. The Manitoba Liquor and Lotteries Corporation will secure and track supply of cannabis sold in Manitoba, and be responsible for central administration, supply chain management and order processing. The private sector will operate all retail locations.

Across Canada, it appears that most provinces and territories are currently completing a consultation process on how to regulate cannabis. We expect that many of the provinces and territories will be announcing their respective frameworks in early 2018.

VI. DIFFERENT STRAINS: RECREATIONAL VS MEDICAL CANNABIS

Until the *Act* is passed the laws regarding cannabis have not changed. The Access to Cannabis for Medical Purposes Regulations (ACMPR), released in August 2016, remain the authority for what type of cannabis production and possession is permitted. Currently, medical cannabis may only be grown by licensed producers, unlicensed possession of any cannabis is illegal, and cannabis dispensaries are not authorized businesses under the *ACMPR*.

Although the Federal government has indicated it will revisit the ACMPR regime if/once the *Act* becomes law, the current ACMPR regime would continue under the *Act*. Individuals with a prescription, including those under 18, will continue to be able to access a safe supply of medical cannabis. Medical practitioners may continue to prescribe cannabis for medical purposes. The *Act* also provides that those licenced under the ACMPR for commercial medical cannabis production will continue to be authorized under the *Act*, and be deemed to hold licences for the production of recreational cannabis.

VII. WHAT LOCAL GOVERNMENTS WILL NEED TO HASH OUT

Local governments in BC must now consider the implementation of a local cannabis regulatory regime in the context of this new federal approach to recreational cannabis, as well as any retail and distribution framework determined by the provincial government. However, it is challenging for local governments to determine the most appropriate regulatory framework until a provincial cannabis retail framework is identified, or provincial legislation addressing cannabis is introduced. In this dynamic context, this section provides an overview of the considerations a local government might take into account under a new cannabis regime.

The *Act* will change the *Criminal Code* to allow access to cannabis for recreational purposes. Historically, the recreational use of cannabis has often been perceived in a negative manner, similar to the use of other illicit and illegal drugs. However, it is clear that societal and governmental attitudes are shifting. In the current environment, a regulatory approach that is grounded in moral objections to cannabis is increasingly susceptible to challenge.

Municipalities have been found to be acting beyond their powers when they have refused to issue business licenses or adopted prohibitive regulations based on a moral objection to a type of business, such as an ‘adult boutique’, adult movie theatre, or escort agency, that is not prohibited by the *Criminal Code*. One of the reasons for this is that local governments have no authority to regulate criminal law. The Constitutional division of powers between the Federal and Provincial governments means that provincially-empowered local governments do not have the authority to implement, enhance, or supplement criminal law. Criminal law is essentially an imposition of a prohibition and penalty based on a moral objection, and the Federal government has proposed significant changes to how cannabis may be accessed in Canada. Local governments are not able to regulate the use, cultivation or retail of cannabis on the basis that it is Council’s moral position that such activities are criminal in nature.

At the same time, while a local government cannot decide what should or should not be criminal, a local government does not need to turn a blind eye to illicit activity in regulating local businesses. For example, BC courts have upheld the cancellation of a business license for a motel where the municipality determined that the motel operator's continued poor management raised a concern for public safety and a high demand for police services. These concerns came about due to police investigations of alleged criminal activity by guests and visitors of the property. In that case, rather than determine what is or is not criminal activity, the Court found the local government's decision to revoke the business license was a remedy for a matter of public safety, or sparing the public from a business that had been shown to encourage criminal activity.

In establishing any regulations relating to the consumption, cultivation, or retail sale of cannabis, a local government must consider whether it falls within the authority of the local government. If a local government chooses to regulate cannabis-related businesses, the local government must ensure it is enacting those regulations pursuant to the appropriate authority under the *Community Charter* and the *Local Government Act*. For example, does the bylaw restrict the regulation of cannabis retail businesses to the manner in which they are operated (i.e.: location, security measures as a whole)? Or is it regulating the type of the products being sold at a retail outlet? A positive response to the former question is more likely to fall within a local government's authority than the latter.

Local governments will also need to consider whether the appropriate type of bylaw is being implemented. Depending on how the forthcoming provincial regulations regarding the retail and consumption of cannabis are crafted, a bylaw relating to the location of a cannabis-related business, for example, may need to be adopted through an amendment to zoning bylaws, not business licensing bylaws.

Local governments must also be cautious in establishing business licensing fees for cannabis-related businesses. A local government must ensure that the amount established as the fee relates reasonably to the costs of providing the business regulation and licensing service; the fees collected cannot rise above the costs of providing the service and cannot be re-directed to the local government's general revenues. Local governments should consider the amount of the fee in both the context of the overall business regulation and licensing service and the context of the business regulation and licensing services as it relates to cannabis-related businesses only.

VIII. CONCLUSION

If the *Cannabis Act* is passed in July 2018, the regulatory landscape for recreational cannabis in Canada will change significantly. Local governments should consider whether and how they intend to implement a local regulatory regime in the context of this new approach to recreational cannabis. However, it is a challenge for local governments to determine the most appropriate regulatory framework until a provincial cannabis retail framework is identified, or provincial legislation addressing cannabis is introduced.

In establishing any regulations relating to the consumption, cultivation, or retail of cannabis, a local government must consider the type of regulation being considered, and whether it falls within the authority of the local government. Local governments are not able to regulate cannabis on the basis that it is Council's moral position that its use, cultivation, or retail should remain criminalized. A local government may, however, rely on its statutory powers to regulate matters such as location, business licensing, or zoning and public safety more broadly, which may affect how cannabis is used, cultivated, or sold in a community.

Seeking legal advice on how your local government can prepare to implement a regulatory framework that best fits within local objectives is encouraged.

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