

**The proposed Canadian Federal Cannabis Act – Offences, Sentencing and Punishments
by John W. Conroy QC, April 17, 2017**

The “ Legalization ” model that the Canadian government has chosen is essentially to continue the use of the federal criminal law power constitutionally by taking “cannabis” out of the Controlled Drugs and Substances Act and making it subject to its own statute, the “Cannabis Act ” , providing for certain reasonably small personal exemptions from the Act for which there is no penalty in relation to possession, sharing and cultivation/production while reserving to the Minister, yet to be designated, the power to issue licenses and permits that authorize the importation, exportation, production, testing, packaging, labeling, sending, delivery, transportation, sale, possession, or disposal of cannabis or any class cannabis and enabling the provinces by a Provincial Act that contains certain mandated legislative measures, to authorize persons to possess, sell or distribute cannabis in that province. In the absence of provincial legislation in a province or territory the federal legislation will apply. Licenses and permits authorizing the importation or exportation of cannabis are limited to medical or scientific purposes or in respect of industrial hemp. The mandatory minimum penalties provided for in the current Controlled Drugs and Substances Act with respect cannabis offenses are to be repealed by s.197 of this Act that contains its own offences and punishment regime.

An Applicant for a federal permit or license cannot be a “young person” (under 18 years of age purposes of this section) or a person who is not ordinarily resident in Canada or an organization that was incorporated, formed or otherwise organized outside of Canada. The applicant must not have had an application for a security clearance refused or canceled and must not have contravened the Controlled Drugs and Substances Act or the Food and Drugs Act or any regulation under those Acts in the past 10 years. Further, there must not exist reasonable grounds to believe that the applicant has contravened in the last 10 years any order made under the Controlled Drugs and Substances Act or the Food and Drugs Act, or this Act or a condition of another license or permit issued under this or other related Acts. The Minister must be of the opinion that it is in the public interest to issue the permit and that to do so is not likely to create a risk to public health and public safety including a risk of cannabis being diverted into an illicit market or activity.

No doubt the regulations that will be promulgated under this Act will provide greater details with respect to the requirements to become a federally licensed producer of cannabis and provisions with respect to taxation etc. Hopefully the regulations will be such that small craft growers and cooperatives will be permitted.

An Applicant for a Provincial authorization, subject to whatever will be required by the provinces in the Provincial Act, and any regulations thereunder, must also comply with certain federal mandated legislative measures such as, only selling cannabis that has been produced by a person authorized under the federal Cannabis Act to produce for commercial purposes, must not sell cannabis to “young persons” (under 18 years of age), must keep certain records and take adequate measures to reduce the risk of the cannabis being diverted into an illicit market or activity. Presumably the provincial act and regulations will also provide details with respect to retail stores, clubs and vapor lounges, and provincial taxation etc.

The proposed federal Cannabis Act sets out certain prohibitions with respect to the promotion of Cannabis or a Cannabis accessory or service and exemptions, and subject to further regulations with respect to informational promotion, promotion at points of sale, branding, false promotion, the use of certain terms, promotion using foreign media, the use of sponsorships, the name of the production facility, publishing and broadcasting prohibitions and exceptions and inducements. The Act goes on to impose specific requirements as to packaging and labeling, display, selling and distributing, inspection of locations and the exemptions for corporate officers, employees, mandataries and their liabilities.

Clearly, what is contemplated is a Canadian Cannabis market whereby producers are licensed federally and with distribution and sales taking place provincially, in accordance with this Act, and any regulations and respective Provincial Acts and any regulations that in turn will define the role of local governments, who will clearly play a role with respect to zoning and perhaps other issues, including additional licenses and inspections and local taxation.

Subject to the detailed summary below, it would appear that an individual over the age of 18 years will be able to grow up to 4 plants no more than 100 cm tall in or at their dwelling house premises with no limit on how much they can store or otherwise possess, unless they are in a public place in which case they cannot possess more than 30 g. Alternatively, that person will be able to go to a provincially licensed distribution facility or store and be able to purchase 30 g. Because they can only possess 30 g while in a public place, they will have to make several trips to the store or have a number of friends do so if planning to have a private party at home where the 30 g limit would not apply. There does not appear to be any limit on the amount that can be stored in the dwelling house. Licensed Producers and distributors will always be exempt from the 30 g limit and presumably regulations will deal with the club or vapor lounge situation with respect to consumption in such places. While cannabis cannot be sold or distributed to someone under the age of 18 years, it appears that those between 12 and 17 years will be able to possess up to 5 g and share up to 5 g cannabis without committing an offense.

A ticketing scheme is created for minor breaches, such as possessing up to 50 g, growing plants up to 150cm tall or growing 5 or 6 plants instead of the maximum 4. Convictions under the ticketing scheme are not to form part of one's regular criminal record. Violations by those under 18 years of age are generally to be processed pursuant to the Youth Criminal Justice Act at least in so far as sentence is concerned, thereby limiting the likelihood of imprisonment and limiting publication of any record of conviction or sentence.

Disappointingly, proceedings by way of summary conviction (less serious breaches) and by way of indictment (serious breaches) continue to provide imprisonment of up to 6 months or 18 months of summary conviction proceedings and up to 14 years on matters proceeded with by way of indictment. Mandatory minimums should be repealed immediately not a year from now and the availability of a 'conditional sentence order' that enables sentences of imprisonment to be served in the community should be restored to at least prevent the serving of actual sentences of imprisonment pending legalization and all indictable offenses should be abolished, leaving only summary conviction offenses and a maximum of 2 years less a day imprisonment for serious matters until legalization. Thereafter, there should be no imprisonment available for cannabis offenses and the focus should be on monetary penalties for infractions and violations.

Here are the greater details :

s.8 deals with 'possession' and like many sections commences with the words - "Unless authorized by this Act..." and goes on to prohibit an individual 18 years and older from possessing more than 30 g of dried cannabis or equivalents in a public place. It does not say that they cannot possess more when not in a "public place". A "young person" (defined to be 12 to 17 years of age for this section) must not possess more than 5 g of dried cannabis or equivalents anywhere. A person 18 years of age or older must not possess illicit cannabis or, in a public place, one or more cannabis plants that are budding or flowering and no more than four cannabis plants anywhere that are not budding or flowering. An "organization" (broadly defined) cannot possess cannabis.

The penalties set out for possessing or possessing more than allowed are "subject to section 51" that in turn sets out a ticketing scheme for certain relatively minor breaches, such as possessing 50 g or possessing illicit cannabis or 5 or 6 plants. The maximum penalty for breaches proceeded by way of a ticket is a \$200 fine and a victim surcharge. More significant breaches are by way of hybrid options where the Crown can elect to proceed by indictment and in that case, a person 18 years of age or older is subject to a maximum of 5 years less a day imprisonment, or by way of summary conviction, where the maximum fine for an organization is \$100,000 and for a person over the age of 18 years, not more than \$5000 or imprisonment for a term of not more than 6 months or to both. A young person is subject to a sentence under the Youth Criminal Justice Act, and an organization to a fine in the discretion of the court.

With respect to s.9 "distribution", similarly, "Unless authorized under this Act..." the person over the age of 18 years is prohibited from distributing more than 30 g, of dried cannabis or its equivalents and it is prohibited to distribute to those under 18 years of age and to an organization and to distribute illicit cannabis. A young person (12 to 17-year-old) is prevented from distributing more than 5 g and from distributing to an organization. An

individual is prohibited from distributing one or more cannabis plants that are budding or flowering or distributing more than 4 cannabis plants that are not budding or flowering. An Organization is prohibited from distributing cannabis. It remains an offence to possess cannabis for the purpose of distribution as well.

Punishment for “distribution” is also “subject to section 51” (the ticket option) with a maximum \$200 fine, if you distribute more than 30 g and up to 50g or to an organization or distribute illicit cannabis or grow 5 or 6 plants instead of 4. Otherwise if the Crown proceeds by indictment, the maximum term of imprisonment for someone over 18 years of age is 14 years imprisonment, whereas young persons are again subject to the Youth Criminal Justice Act and an organization to a fine in the discretion of the court. If the crown opts to proceed summarily the maximum penalty is a fine of not more than \$5000 or imprisonment for not more than 6 months or both, unless the distribution is to a young person in which case the maximum fine is \$15,000 or imprisonment of not more than 18 months or both. The maximum fine for an organization is \$100,000. Young persons are again dealt with under the Youth Criminal Justice Act.

“Selling” and “possession for the purpose of selling” are governed by section 10 and “Unless authorized under this Act...” selling to someone over 18 years of age or under 18 years of age or to an organization is prohibited. Again, “subject to section 51” (the ticketing scheme with a maximum \$200 fine) for selling or possessing for that purpose, more than 50 g , but otherwise, the maximum penalty on indictment is 14 years imprisonment and on summary conviction fine of not more than \$5000 or imprisonment for not more than 6 months or both, unless selling to a young person where the fine is \$15,000 or imprisonment for months or both. The maximum fine for an organization is \$100,000. Interestingly, there is no specific provision made for “young persons” and the Youth Criminal Justice Act in regards to selling or possessing for the purpose of selling.

Similarly, by section 11, importing and exporting “unless authorized under this Act” are prohibited, as is possession for that purpose, and the maximum penalty on indictment is again a maximum of 14 years imprisonment whereas on summary conviction the maximum is a \$5000 fine or imprisonment for 6 months or both. If an organization, then, once again, the maximum is a fine of not more than \$100,000. Again, no specific provision is made for a young person (under 18 years of age) doing this or being subject to the Youth Criminal Justice Act.

With respect to “production”, s.12 provides “Unless authorized under this Act...” it is prohibited to obtain cannabis by altering the chemical or physical properties by any means or by offering to do such alterations to any cannabis using an organic solvent, unless it is cannabis that you are lawfully entitled to possess.

With respect to “cultivation”, also governed by s.12, if you are 18 years of age or older, unless authorized under this Act, one is prohibited from cultivating, propagating or harvesting or offering to do so from a seed, or plant that is known to be from illicit cannabis or more than 4 cannabis plants at any one time in their “dwelling house”, that is defined as the place where the individual is ordinarily resident and includes the land adjacent to it and any building on that land. If 2 or more people over the age of 18 years live in the dwelling house, they can still only cultivate up to 4 plants. Presumably if there are 2 dwelling houses on the property with ordinarily resident persons in them, then possibly up to 8 plants could be grown on that property. The plants grown cannot be more than 100 cm in height and that calculation does not include any part of the plant that is not normally exposed to the air. Cultivating, propagating or harvesting at a place that is not one’s dwelling house, or to offer to do so is prohibited as is cultivating propagating or harvesting any living thing other than a cannabis plant from which cannabis may be extracted or otherwise obtained or to offer to do so. Young persons (12 to 17 years old) or organizations are prohibited from doing any of these things.

Again, “subject to section 51” (the ticket offense for growing 5 or 6 plants instead of 4) the maximum punishment on indictment is 14 years imprisonment and on summary conviction is a fine of not more than \$5000 or imprisonment for a term of 6 months or both and in the case of an organization to a fine of not more than \$100,000. Young persons (12 to 17-year-olds for the purposes of this section) are subject to being proceeded with by way of indictment or summary conviction, but the sentence to which they are liable are once again only one available under the Youth Criminal Justice Act.

Further, it is an offense under section 13 to possess, produce, sell, distribute, or import anything used to produce, sell or distribute illicit cannabis and the penalty on indictment is 7 years imprisonment and on summary conviction again a fine of not more than \$5000 or 6 months imprisonment or both, and in the case of an organization a fine of not more than \$100,000.

Section 14 makes it an offense to use the services of or to involve a young person in the commission of an offense under various subsections of sections 9 through 13 and the penalty for doing so on indictment is a maximum of 14 years imprisonment and on summary conviction is a fine of not more than \$15,000 or up 18 months imprisonment or to both. An organization is again subject to a fine of not more than \$100,000.

While each of these prohibitions, “unless authorized by this Act” regarding possession, distribution, sale and production by way of cultivation or manufacturing have their own punishment sections with sentences of imprisonment if the proceedings are by “indictment” (like a felony) or imprisonment and/or substantial fines if the proceedings are by “summary conviction” (like a misdemeanor), young persons are primarily dealt with under the Youth Criminal Justice Act (that has been very successful in keeping young people out of prison and reducing incarceration rates), but importantly, the punishment provisions are nearly all “subject to section 51” which sets out a ticketing scheme as an optional way of proceeding in certain specified circumstances, such as possessing 50 g instead of 30 g or cultivating 5 or 6 plants instead of 4 or growing plants 150cm tall instead of 100cm. The proceeding to which the ticketing scheme is applicable, are set out in 51 (2). The maximum penalties, if proceeded by way of a ticket appears to be in the area of the \$200 fine plus a victim surcharge.

However, the maximums on indictment are 5 years less a day (possession – therefore no constitutional right to a jury trial); 14 years (if you distribute more than allowed or possess such for the purpose of distribution); 14 years (for selling or possessing for the purpose of selling); 14 years for importing or exporting or possessing for that purpose); and 14 years (overproduction); and, interestingly 7 years (if you possess, produce, sell, distribute or import anything with the intention that will be used to produce, sell or distribute illicit cannabis). There will no longer be any “mandatory minimums” unlike the CDSA but those offences carrying a maximum penalty of 14 years on indictment (using the services of a young person, overproduction and manufacturing, importing or exporting, and selling or distributing) preclude the imposition of a “conditional sentence order” (s.742.1(c) of the Criminal Code) that otherwise enables the term of imprisonment to be served in the community under house arrest, subject to conditions, as a last resort before actual imprisonment.

In my opinion, the Cannabis Act is defective in failing immediately provide for the repeal of all mandatory minimum sentences for cannabis offenses and by continuing to provide for federal sentences of imprisonment (2 years and up) as opposed to limiting sentences imprisonment, if any, to provincial limits of two-year less one day, and ensuring the availability of “conditional sentence” for those sentences so that there will be no need for actual imprisonment for cannabis offenses pending legalization or thereafter. ‘No prison for pot!’

We await the details in the Federal regulations with respect to widespread availability of licenses to produce and how the medical regime will continue as per the ACMPR model and the details in the Provincial Acts and regulations with respect, retail stores, clubs, vapour lounges or their equivalents.

John W. Conroy QC
Mission BC
Canada
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