



THE CANADIAN  
BAR ASSOCIATION  
L'ASSOCIATION DU  
BARREAU CANADIEN

## **Consultation on Federal Cannabis Regulation**

**ADMINISTRATIVE LAW, BUSINESS LAW, COMMODITY TAX, CUSTOMS & TRADE LAW,  
CONSTITUTIONAL & HUMAN RIGHTS LAW, CRIMINAL JUSTICE, HEALTH LAW,  
LABOUR & EMPLOYMENT LAW SECTIONS AND THE CHILDREN'S LAW COMMITTEE**

**January 2018**

## **PREFACE**

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

This submission was prepared by the CBA's Working Group on Cannabis, whose members represent the Administrative Law, Business Law, Commodity Tax, Customs & Trade Law, Constitutional & Human Rights Law, Criminal Justice, Health Law, and Labour & Employment Law Sections and the Children's Law Committee. The submission has been reviewed by the Law Reform Committee and approved as a public statement of the participating Sections.

# TABLE OF CONTENTS

## Consultation on Federal Cannabis Regulation

<b>I.</b>	<b>INTRODUCTION .....</b>	<b>1</b>
<b>II.</b>	<b>REGULATORY PROCESS .....</b>	<b>2</b>
<b>III.</b>	<b>PROPOSED APPROACH TO THE REGULATION OF CANNABIS .....</b>	<b>2</b>
	Different Types of Proposed Licences .....	2
	Thresholds between micro and standard cultivation/processing ...	3
	Proposed rules and requirements for categories of activity .....	3
	Security Clearances .....	3
	Product Forms .....	7
	THC Limits .....	7
	Packaging and Labelling .....	7
	Cannabis for Medical Purposes.....	8
	Health Products – Veterinary Drugs .....	9
	Additional Comments .....	9
	<b>A. Administrative Due Process .....</b>	<b>9</b>
	Licences, permits and authorizations .....	10
	Security Clearances .....	10
	Cannabis for Medical Purposes.....	10
	Cannabis Products, Packaging and Labelling .....	11
	<b>B. Youth Access to Cannabis .....</b>	<b>11</b>
<b>IV.</b>	<b>CONCLUSION .....</b>	<b>12</b>



# Consultation on Federal Cannabis Regulation

## I. INTRODUCTION

The CBA Working Group on Cannabis (the CBA Working Group) welcomes this opportunity to comment on issues raised in the consultation document, *Proposed Approach to the Regulation of Cannabis*.<sup>1</sup> The current consultation focuses on licences, security clearances, tracking and reporting, products, packaging and labelling, medical use, and health products. We anticipate further consultations on impaired driving, fees, law enforcement, labelling for tax purposes, import and export requirements, and a range of other issues related to this comprehensive undertaking.

The CBA has a long history of urging change to Canada's laws on possession and use of cannabis. In 1978, the CBA 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. The CBA also said that cannabis should be moved from the *Narcotic Control Act* to the *Food and Drug Act*. In 1994, the CBA commented on Bill C-7, *Controlled Drugs and Substances Act* (CDSA), saying it should not be enacted, as it furthered "a model of dealing with drugs through criminalization and incarceration that has been proven ineffective and counterproductive." 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>

More recently, CBA Sections commented on the discussion paper, *Toward the Legalization, Regulation and Restriction of Access to Marijuana*,<sup>3</sup> and made a submission on Bill C-45 to the House of Commons Health Committee.<sup>4</sup> Our comments here are made in the context of those representations.

---

<sup>1</sup> Health Canada, Proposed Approach to the Regulation of Cannabis, [online \(http://bit.ly/2zdRCDi\)](http://bit.ly/2zdRCDi).

<sup>2</sup> See, CBA Resolution 78-06-A; CBA Criminal Justice Section, *Bill C-7, Controlled Drugs and Substances Act* (Ottawa: CBA, 1994) and CBA Resolution [13-01-A](#).

<sup>3</sup> CBA Submission, *Legalization, Regulation and Restriction of Access to Marijuana Response to Discussion Paper*, [online \(http://bit.ly/2EMjZex\)](http://bit.ly/2EMjZex).

<sup>4</sup> CBA Submission on Bill C-45 – Cannabis Act, [online \(http://bit.ly/2DlEp05\)](http://bit.ly/2DlEp05).

---

## II. REGULATORY PROCESS

The consultation document states that the draft regulations will not be pre-published in the *Canada Gazette* due to time pressures arising from the government's plan to have the proposed Act in force by July 2018. (page iv) This is an exception to the normal regulatory process. Pre-publication would give an opportunity for public comment on the draft regulations. The CBA Working Group acknowledges the time pressures. However, we encourage pre-publication of the regulations with a further opportunity for public comment on the actual wording.

We do not believe it is sufficient simply to build on the current regulations for medical cannabis and industrial hemp. The objectives of the proposed Act are distinct. Further, the proposed Act is lengthy and complex. The CBA has commented elsewhere that the process around Bill C-45 has not benefited from the full participation of key stakeholders.<sup>5</sup> Regulations play an important role in completing the scheme envisaged in the proposed Act and we think it is important to get them right. The consultation document has done an admirable job in identifying some key ideas, but inevitably suffers from a vagueness of concepts and lack of detail that can only be remedied by translating ideas into draft regulations. The potential consequences of gaps and ambiguity in the regulations are significant: criminal charges; forfeiture of employment and business interests; confusion; delay in obtaining redress for administrative decisions; and, ultimately, reduced effectiveness in displacing the illicit market.

## III. PROPOSED APPROACH TO THE REGULATION OF CANNABIS

This submission responds to a selection of the questions in Annex 1 of the consultation document. Page numbers in parenthesis refer to the consultation document.

### Different Types of Proposed Licences

*Q1* What do you think about the different types of proposed licences (i.e. cultivation, processing, etc.)? Will they achieve the objective of enabling a diverse, competitive legal industry that is comprised of both large and small players in regions across the country?

The CBA Working Group acknowledges that it may be appropriate to establish multiple categories of licencing (for cultivation, processing, etc.) as well as multiple categories of licencees (i.e. standard or micro cultivators). We encourage Health Canada to adopt a streamlined application form and process that minimizes the regulatory burden on those

---

<sup>5</sup> Note 4 at page 1.

applying. In particular, we agree that applicants should be able to apply for any single activity or combination of activities, by submitting a single application for multiple activities. (page 11).

### **Thresholds between micro and standard cultivation / processing**

*Q2 What do you think would be an appropriate threshold to distinguish between a micro-cultivator and a standard cultivator, taking into account the reduced physical security requirements for a micro-cultivator? Should the threshold be based on the number of plants, size of growing area, total production, gross revenue, or some other criteria? What should the threshold be?*

The CBA Working Group takes no position on the appropriate threshold to distinguish between a micro-cultivator and a standard cultivator. However, we encourage the adoption of flexible or alternate criteria as small-scale cultivation will likely evolve to meet a variety of market needs.

*Q3 What do you think would be an appropriate threshold to distinguish between a micro-processor and a standard processor, taking into account the reduced physical security requirements for a micro-processor? Should the threshold be based on total production, on-site inventory, gross revenue, or some other criteria? What should the threshold be?*

As in Q2 above, the CBA Working Group encourages the adoption of flexible or alternate criteria as small-scale processing will likely evolve to meet a variety of market needs.

### **Proposed rules and requirements for categories of activity**

*Q4 What do you think of the proposed rules and requirements (i.e. physical security, good production practices, etc.) for the different categories of authorized activity? Do you think that the requirements are proportional to the public health and safety risks posed by each category of activity?*

The CBA Working Group encourages a regulatory environment that supports effective and efficient testing for cannabinoid levels and pesticides, together with transparent tracking and reporting, and robust consumer information and education measures. As a matter of consumer protection and public health, good production practices are essential requirements for all cannabis operations, regardless of scale.

### **Security Clearances**

*Q5 What do you think about the proposed requirements for certain individuals associated with a licensed organization to hold a security clearance issued by the Ministry of Health? Do you think the proposal appropriately addresses positions of greatest risk?*

The consultation document indicates that the rationale for personnel security requirements is to mitigate the risk that individuals associated with organized crime infiltrate licensed organizations and use their position to benefit criminal organizations. The CBA Working Group supports this objective, but cautions against over-reach. The consultation document seems to indicate that key positions (the entire management team), corporate directors and officers, large shareholders, and site owners (and if a numbered corporation, the directors and officers), would all require security clearances. (page 25) Given the scale of the projected industry, some of the expertise required, e.g. master grower and quality assurance, will likely be found in persons who do not meet the proposed security clearance criteria.

Security clearance processes are costly, and the proposal indicates that administrative costs will be offset by licensing or other fees, as yet to be determined. (page 6) Security clearance processes are also time-consuming and draw on limited law enforcement resources. A competing objective of the proposed *Cannabis Act* (the proposed Act) is to “enable a robust and responsible legal cannabis industry ... capable of out-competing the entrenched illegal industry.” (page 9) We suggest that a more limited approach would better balance both of these objectives.

*Q6 What do you think of the proposed criteria for determining whether or not an individual is eligible to hold a security clearance? Do you think that the proposed approach should permit individuals with a history of non-violent, lower-risk activity (such as simple possession or small-scale cultivation of cannabis plants) to obtain a security clearance and participate in the legal cannabis industry?*

Section 67 of the proposed Act states, “Subject to the regulations, the Minister may grant or refuse to grant a security clearance or suspend or cancel a security clearance.” The consultation document says the decision to grant a security clearance will be based on acceptable risk to the integrity of the control of the production and distribution of cannabis. (page 35) However, it also indicates that refusals could be based on associations with organized crime or past convictions for or associations with drug trafficking, corruption, or violent offences. (page 36).

The proposed approach is intended to be consistent with the current regime for the licensed production of cannabis for medical purposes. The CBA Working Group believes the criteria for obtaining a security clearance should instead be developed in the context of the proposed Act, particularly as the objective of the proposed Act is to transition an illicit



industry to one that is normalized. The CBA Working Group agrees that each application for a security clearance should be assessed on its own merits. (page 36)

The Working Group supports the participation of individuals with past convictions for low-risk cannabis-related activity. However, the Working Group believes that individuals should not automatically be precluded from clearance by reason of a past conviction for *any* offence. The criminal law is a blunt instrument for achieving public policy, and Canada's criminal justice system is not sufficiently precise to support conclusions about risk from the proposed demarcation. Further, any criminal offence has a range of conduct from minimal to serious. Relying on a conviction does not permit consideration of the facts giving rise to the offence or the personal circumstances of the accused.

We caution that attempts to draw bright lines based on conviction records risks perpetuating disadvantage for individuals and communities already disproportionately affected by the criminal justice system. For example, there is considerable support for the view that Canada's drug policies, and cannabis prohibition in particular, have contributed to a "cascading descent" into the criminal justice system for racialized, poor and Indigenous Canadians.<sup>6</sup>

The CBA Working Group believes there is greater likelihood of undermining the illicit market if opportunities exist to participate in the regulated market. We note the value of the debate around proposals like those in Los Angeles to establish a social equity program that would give priority to applicants with low incomes, those from disadvantaged neighborhoods, or those with cannabis convictions.<sup>7</sup> Canada's approach should also seek to repair the damage done by the criminalization of cannabis. We believe a more inclusive approach to granting security clearances, if necessary with appropriate conditions, tracking, and reporting to prevent diversion, will serve the public interest better than exclusion.

The proposal would allow the Minister to take into account a wide variety of law enforcement information when making decisions about security clearances, including

---

<sup>6</sup> Evan Solomon, A bad trip: Legalizing pot is about race, *Macleans*, April 14, 2017, [on-line \(http://bit.ly/2FIqoZh\)](http://bit.ly/2FIqoZh). *Toronto marijuana arrests reveal 'startling' racial divide*, *thestar.com*, [online \(http://bit.ly/2FK19Ge\)](http://bit.ly/2FK19Ge)

<sup>7</sup> Elizabeth Chou, *LA council votes to legalize the cannabis industry, offers priority to Angelenos affected by 'war on drugs'*, *Los Angeles Daily News*, December 6, 2017, [online \(http://bit.ly/2ENyRIF\)](http://bit.ly/2ENyRIF)  
*Can Los Angeles repair the damage done by the war on marijuana?* *Los Angeles Times*, November 4, 2017, [online \(http://lat.ms/2yL2nBf\)](http://lat.ms/2yL2nBf)

charges, an association with certain offences (drug trafficking, corruption, violent offences), or affiliations or associations with organized crime, *etc.* (emphasis added)

Non-conviction police records are highly prejudicial. They are not subject to the same standard of proof as convictions and can be based on claims that are not thoroughly investigated or are later disproven. In 2014/15 alone, 32% of adult court cases were stayed or withdrawn, while another 4% resulted in acquittals, resulting in over 127,000 non-conviction records in law enforcement databases.<sup>8</sup> The CBA has commented previously:

The [Criminal Records] *Act* currently provides for expungement of absolute and conditional discharges after a year in the case of the former and three from the end of the probationary period in the case of the latter. However, there is no provision for records about stays of proceedings or withdrawal of charges. Section 579(2) of the *Criminal Code* says that if proceedings are not recommenced within a year of a stay of proceedings, “the proceedings shall be deemed never to have been commenced”, but it does not provide for any records to be expunged. In our experience, those records routinely appear as part of criminal records checks.<sup>9</sup>

The CBA has recommended automatic expungement requirements for these records.

Our concerns extend beyond stays of proceedings and withdrawals. The proposal suggests that any police record can be considered in making a security clearance decision, whether or not charges are laid. These records are unverified, often couched in accusatory language, and many individuals are unaware of their existence. We do not believe sufficient justification has been advanced for routine reliance on these records for cannabis security clearance purposes.

Police records about gang affiliation are particularly problematic. One of our members has noted:

... in my practice, one of the perennial issues that comes up for my clients is an allegation of gang affiliation. This has an impact for how they are handled in custody (fewer privileges, different ranges, etc.). However, often a gang designation only comes up because one time ten years ago they were found next to a known gang member. Or they've been "carded" by the police a few times in a high crime neighbourhood. Or even certain uncorroborated allegations were made with no charges or follow-up.

---

<sup>8</sup> Adult criminal court statistics in Canada, 2014/2015, [online](http://bit.ly/2rwjuDk) (<http://bit.ly/2rwjuDk>)

<sup>9</sup> CBA Submission, Criminal Records Act Review Consultations, [online](http://bit.ly/2rbE3EV) (<http://bit.ly/2rbE3EV>)

We encourage greater precision in the criteria related to “affiliation or association with organized crime”, perhaps by using language that more closely reflects the criminal organization provisions in sections 467.1-13 of the *Criminal Code*. In our opinion, the vagueness of criteria such as an “association with” drug trafficking, corruption or violence is unlikely to withstand *Charter* scrutiny.

Finally, the CBA Working Group cautions against criteria that permit indirect consideration of convictions for which a pardon has been granted. The CBA has argued elsewhere:

While the granting of a pardon is not a right, important social objectives are achieved by making pardons both meaningful and accessible to those who fulfill the required criteria. Pardons are an important aspect of sustainable rehabilitation and reintegration. On a practical level, a pardon may be necessary for employment, immigration applications, housing or mobility. For many applicants, it represents the last step in moving beyond a bad mistake, and can be a strong motivator to avoid future criminal activity.<sup>10</sup>

### **Product Forms**

*Q7 What do you think about the proposal not to restrict the types of product forms that industry will be able to manufacture and sell (for example, pre-rolled dried cannabis, or cannabis oil capsules and oral sprays)? Are there any specific product forms that you think should be prohibited?*

The CBA Working Group appreciates that limiting product types may simply drive some products to the illicit market. We recommend measures to reduce the appeal of products to children and to introduce safeguards against accidental access by them.

### **THC Limits**

*Q8 What do you think about the proposed THC limits based on how a product is represented to be consumed (i.e., by inhalation or by ingestion)? What do you think about the proposed limits on a unit or serving basis?*

The CBA Working Group takes no position on proposed THC limits. However, we acknowledge a need for consumer information on the factors influencing how THC levels manifest by product and consumer, particularly if THC levels on packaging are to be meaningful to consumers.

### **Packaging and Labelling**

*Q9 What do you think about the proposed rules for the packaging and labelling of cannabis products? Do you think additional information should be provided on the label?*

---

<sup>10</sup> CBA Submission, Fee Increase For Pardon Applications, [online \(http://bit.ly/2mClVvN\)](http://bit.ly/2mClVvN)

---

See Q8 above. In designing health warnings, attention should be paid to current research on strategies that are effective in educating and deterring consumption by youth.

### **Cannabis for Medical Purposes**

*Q10 What do you think about the proposed approach to providing cannabis for medical purposes? Do you think there should be any specific additional changes?*

The CBA Working Group has supported the government's decision to maintain a separate program for medical use of cannabis, as patients have a right to reasonable access under section 7 of the *Charter*.<sup>11</sup> We encourage expanding the group of medical professionals who can prescribe cannabis to include naturopaths, herbalists and doctors of traditional Chinese medicine.

The CBA Working Group supports measures to improve patient access. We particularly commend changing the period of use to begin on the date of initial registration rather than the date signed by the health care practitioner, as the current system has effectively reduced use periods due to delays in processing applications. We also encourage more flexible renewal processes.

The consultation document gives little detail about import and export requirements for medical or scientific purposes. It states that requirements would be similar to those under current regulations and that permits for a maximum six-month period would be issued on a case-by-case basis. The CBA Working Group encourages greater clarity on the eligibility and requirements for licences to process cannabis for medical purposes and permits for the import and export of cannabis for medical purposes.

The CBA Working Group urges the adoption of an import/export regime that is aligned with Canada's international law obligations on trade and investment, consistent for all cannabis products, and supported by effective and efficient border measures.

The CBA Working Group encourages clear and unambiguous regulatory measures to ensure reciprocity between Canada and other countries. There will likely be national treatment obligations pursuant to WTO and free trade agreements to consider. It is particularly important for individuals who use cannabis for medical purposes to be able to access their medicine while travelling across international borders. Without clear rules, these individuals will be at risk and additional pressures will be placed on limited border resources.

---

<sup>11</sup> Note 4 at page 26.

## Health Products – Veterinary Drugs

*Q11 What do you think about the proposed restrictions on the sale of health products containing cannabis authorized by Health Canada? Do they strike an appropriate balance between facilitating access to safe, effective and high quality health products, and deterring illegal activities and youth access?*

This section and others of the consultation document refer to veterinary drugs.

Veterinarians are still able to assess and treat an animal that appears to be having an adverse reaction to a cannabis product. However, amendments to the *Narcotic Control Regulations* repealed the definition of a “practitioner” that had included veterinarians. In the result, veterinarians continue to be able to prescribe controlled drugs other than cannabis, which under the *Access to Cannabis for Medical Purposes Regulations* can only be prescribed by medical doctors.

The CBA Working Group appreciates that the regulatory environment is in flux. However, we recommend that veterinarians regain the authority to prescribe cannabis products for their patients.

## Additional Comments

*Q12 What do you think about the overall regulatory proposal? Is there any additional feedback that you would like to share on the proposed approach to the regulation of cannabis?*

The CBA Working Group offers additional comments on administrative due process and youth access to cannabis. These are set out in detail below.

### A. Administrative Due Process

The consultation document suggests a regime for the Minister to make administrative decisions for issuing and placing conditions on licences, permits and authorizations. With few exceptions outlined below, it does not identify mechanisms for these decisions to be reconsidered, appealed or reviewed. There is robust jurisprudence in Canada on the requirements of procedural fairness for administrative decisions, which cannot be overlooked. The Supreme Court of Canada has stated that administrative decisions must be made “in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the *Charter*.”<sup>12</sup> Indeed, the duty to act fairly is the minimum requirement under *Charter* section 7 principles of fundamental justice. Ensuring

---

<sup>12</sup> Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 SCR 817, 1999 CanLII 699 (SCC), [online \(http://bit.ly/2B4UrqN\)](http://bit.ly/2B4UrqN)

---

procedural fairness in the regulations is an essential part of the government's responsibility to address *Charter* compliance.<sup>13</sup>

Further, we believe there is merit in creating a centralized mechanism, e.g. an administrative tribunal, for reviews and appeals of administrative decisions on cannabis-related matters.

In summary, the CBA Working Group believes there are significant gaps in the procedural fairness protections for administrative decisions made in the proposed regime. We note below the exceptions to the general absence of due process.

### **Licences, permits and authorizations**

The Minister will issue licences for standard and micro cultivation, standard and micro-processing, industrial hemp, nurseries, sale for medical and non-medical purposes. Subsection 62(7) of the proposed Act sets out the grounds on which the Minister may refuse a licence or permit. The consultation document proposes to add, by regulation, the ground of failing to obtain or maintain other required federal licences or authorizations. (page 34) Subsection 62(8) of the proposed Act requires the Minister to give notice in writing with reasons of a refusal to issue, renew or amend a licence or permit. There are no provisions for recourse in the proposed Act.

If the Minister unilaterally amends a licence or permit (s. 63), suspends a licence or permit (s. 64), or revokes a licence or permit (s. 65), the proposed Act specifies that the Minister must give notice in writing with reasons and an opportunity to be heard. In the case of suspension, the onus will be on the holder to demonstrate that a suspension was unfounded (ss. 64(4)).

### **Security Clearances**

Section 67 of the proposed Act states, "Subject to the regulations, the Minister may grant or refuse to grant a security clearance or suspend or cancel a security clearance." The proposal indicates the regulations would require the Minister to give notice in writing setting out the basis for the decision to refuse or suspend a security clearance, and the applicant would have a reasonable time to make written representations in response.

### **Cannabis for Medical Purposes**

Individuals can currently register to produce cannabis for their own medical purposes or have a designate do so for them, and this will continue under the proposed regime. The consultation

---

<sup>13</sup> See, e.g. subsection 3(2) of the *Statutory Instruments Act*, R.S.C., 1985, c. S-22.

document indicates the regulations would establish grounds for cancellation of these registrations, and would require the Minister to give written notice with reasons and an opportunity for the registered person to be heard.

### **Cannabis Products, Packaging and Labelling**

The regulations will establish rules for permitted cannabis products, packaging and labelling. Issues will arise as to whether the product complies with the requirements in the regulations, but there is no mention in the consultation document about an internal mechanism (short of administrative monetary penalties under Part 10 of the proposed Act) to provide rulings or resolve disputes.

The CBA Working Group recommends that a comprehensive administrative review and appeal mechanism be established to ensure procedural fairness, impartial decision-making and appropriate accountability.

## **B. Youth Access to Cannabis**

The CBA Working Group appreciates that the objectives of the proposed Act include restrictions on youth access and protection of youth from promotion or enticement to use cannabis. (page 2) The CBA has repeatedly emphasized:

The reality is that young people will continue to access [cannabis], with or without legalization. What this underscores is the importance of avoiding the use of the criminal law, as it has saddled too many young people with criminal records and prejudiced their lives.<sup>14</sup>

Medical cannabis aside, there is no discussion in the consultation document on the source of cannabis for those 12 to 17 years of age who will be permitted to possess and share amongst them up to 5g without committing an offence. In fact, it is an offence under the proposed Act to provide cannabis to a person under 18 years of age. Youth will have nowhere to turn but the illicit market, where they will be exploited, at risk of criminal involvement, and unprotected by the good production practices in place for adult consumers.

It is an offence to provide tobacco to a young person in a public place or in a place to which the public reasonably has access. Parents are not prohibited from giving tobacco to their children in their own home, preferably to offer guidance and a controlled consumption experience for youth

---

<sup>14</sup> Note 3 at page 5

in the high risk years for experimentation. However, parents will not have even this limited option under the proposed Act.

A “best interests of the child” approach, as mandated by the *United Nations Convention on the Rights of the Child*, requires a resolution of this conundrum.

#### **IV. CONCLUSION**

The CBA Working Group thanks Health Canada for this opportunity to contribute to the development of public policy on cannabis. We encourage careful attention to ensure the new regulatory regime does not unnecessarily criminalize cannabis activity. We urge continued consultation with stakeholders as the draft regulations take shape, and would be pleased to assist in this process.