



Cannabis

2022

Doing Business in Canada

AIRD BERLIS

airdberlis.com

CANNABIS LAWS BEFORE LEGISLATION

Prior to 1999, the *Controlled Drugs and Substances Act* (“**CDSA**”) effectively imposed a blanket prohibition on all cannabis in Canada. In 1999, legal access to dried marijuana for medical purposes was first introduced as an exception under the CDSA. The legalization of medical marijuana in Canada was then driven primarily by decisions of the Ontario Court of Appeal, the Federal Court of Canada and the Supreme Court of Canada, where the courts ruled that access to cannabis as a medicine is a constitutional right and compelled the federal government to implement a regulatory framework for the production and supply of medicinal cannabis products to patients across the country.

CANNABIS FOR MEDICAL PURPOSES

Prior to the implementation of the *Cannabis Act* in 2018, cannabis for medical purposes was permitted pursuant to exceptions created under the *Narcotic Control Regulations* (“**NCR**”) and the *Access to Cannabis for Medical Purposes Regulations* (“**ACMPR**”).

The NCR provided “licensed dealers,” such as testing laboratories, with legal exemptions from the CDSA, permitting them to possess, produce, sell, import, export, transport and deliver cannabis. The ACMPR provided individuals, licensed cannabis producers and “designated persons” with legal exemptions from the CDSA prohibitions, such that licensed cannabis producers could grow and sell, and medical patients were able to purchase, possess and consume, medical marijuana each without risk of criminal prosecution.

On October 17, 2018, the *Cannabis Act* (and under it, certain regulations including the *Cannabis Regulations*) came into force, at which time, licences that were issued under the NCR or the former ACMPR were automatically deemed to be licences issued under the *Cannabis Act*.

Cannabis regulated under the *Cannabis Act* includes any phytocannabinoids contained in the plant (whether originating in the plant or produced synthetically), such as THC or CBD, whether together or alone.

Part 14 of the *Cannabis Act* substantially recreates the ACMPR and permits individuals with a qualifying “medical document” to lawfully possess up to 30 times their daily prescribed amount of medical cannabis for their own medical purposes, to a maximum of 150 grams of dried cannabis.

Individuals can also register under the *Cannabis Act* for authorization to produce cannabis for their own medical purposes. This authorization can be exercised personally or can be delegated to a “designated person” who acts on their behalf.

CANNABIS FOR RECREATIONAL PURPOSES

Since the enactment of the *Cannabis Act* in October 2018, Canadian adults have been permitted to possess up to 30 grams of dried cannabis (or equivalent) per person in public spaces and, subject to provincial restrictions, cultivate up to four cannabis plants per dwelling.

Commercial production of cannabis – whether for medical or recreational purposes – remains the purview of businesses licensed by Health Canada under the *Cannabis Act*.

The *Cannabis Act* provides for six classes of cannabis licence: (i) cultivation; (ii) processing; (iii) analytical testing; (iv) research; (v) sale for medical purposes; and (vi) cannabis drugs. Each class of licence has different licensing requirements and permits different activities. Of particular importance are the cultivation and processing licence classes, each of which have “standard” and “micro” licence subclasses.

Cultivation licences authorize the growing and harvesting of cannabis, and ancillary activities such as trimming and milling. The regulations permit various methods of growth, including aeroponics, hydroponics, traditional soil, aquaponic, vertical and stacked vertical, but all finished product must pass analytical testing for chemical residues (including pesticides) and microbial contaminants. Regardless of the cultivation method, compliance with Good Production Practices, as set out in the regulations, is mandatory.

A processing licence is required for the production of cannabis products, other than by means of cultivation. On October 17, 2019, three new classes of cannabis (edibles, topicals and extracts) were legalized in addition to the initial five permitted forms: dried flower; fresh flower; oil; plants; and seeds. A processing licence is required in order to manufacture these new classes.

Both cultivation and processing licences allow for the bulk sale of cannabis to other industry participants if applicable requirements are met and, once all licence conditions have been removed, the sale of retail-packaged recreational cannabis

products to provincial wholesale agents (discussed further below). Cultivation and processing licence holders can sell directly to medical patients if they also hold a licence for medical sale. Analytical testing licences do not allow for any sale activities, while research licence holders are permitted limited bulk sale activities.

Becoming a licence holder under the *Cannabis Act* is a lengthy process with significant initial and continuing regulatory obligations. For example, all licence holders must be ordinarily resident, have a head office or operate a branch office in Canada. Multiple individuals must pass rigorous security checks and applicants must have a fully-built production facility that complies with rigorous building and security requirements. Once a licence is issued, licence holders must comply with a complex set of regulations under the *Cannabis Act* to maintain their licence, including production, shipping, labelling, storage, destruction of product, inspection and record keeping requirements.

Health Canada publishes a useful licensing guide which can be found [here](#).

PROVINCIAL REGULATION OF RECREATIONAL CANNABIS

The *Cannabis Act* delegates authority to the provinces to regulate the distribution and sale of recreational cannabis within each province. Accordingly, the provinces play a significant role in regulating recreational cannabis, and businesses seeking to carry on a cannabis-related business in Canada will need to consider the impact of both federal and applicable provincial legislation.

Six provinces/territories, including Quebec, New Brunswick, Nova Scotia, Prince Edward Island, Northwest Territories and Nunavut, have government-only retail distribution – for both physical and online retail. Five jurisdictions, including Alberta, British Columbia, Newfoundland & Labrador, Ontario and Yukon, have implemented a hybrid system in which the government alone is authorized to make online sales of recreational cannabis products and privately-owned retailers are licensed (by the applicable provincial regulatory agency) to sell recreational cannabis from bricks-and-mortar locations. Manitoba and Saskatchewan are the only two provinces that have stayed out of retail sale entirely and instead elected to allow private licensed retailers to operate both online and physical sale of cannabis to recreational users in the province.

CANNABIDIOL (CBD) AND INDUSTRIAL HEMP

Industrial hemp is a cannabis plant that contains only negligible THC, but may contain significant concentration of CBD – one of the cannabis plant's non-intoxicating cannabinoids. Interest in industrial hemp has grown in parallel with the interest in CBD-only cannabis products, as well as 2019's passage of the *Agriculture Improvement Act of 2018* (known as the "Farm Bill") in the United States. The Farm Bill legalizes the commercial production, distribution and sale of industrial hemp and derivative products, including CBD concentrate. (It is notable, however, that there are still U.S. Food & Drug Administration roadblocks to the legal sale of CBD products on a federal basis in the United States.) In Canada, though the cultivation of industrial hemp (and certain other hemp-related activities) requires only an Industrial Hemp Licence, any extraction activity to derive CBD concentrates can only be done with a *Cannabis Act* processing licence. For the purposes of the *Cannabis Act*, CBD and THC (and any other cannabinoid) are treated in identical fashion – other than in connection with product composition rules.

ADDITIONAL BUSINESS CONSIDERATIONS

Regulatory

The regulations under the *Cannabis Act* and provincial legislation detail the basic cannabis legalization framework, covering matters including criminal prohibitions, licensing, packaging and labelling rules, strict cannabis promotion rules, cannabis tracking through its lifecycle, and many other areas. Licence holders and prospective licensees face the challenge of navigating a regulatory regime that is characterized by broadly-drafted legislative prohibitions in an environment currently lacking in interpretive regulatory guidance or case law.

Cannabis licence applicants that plan to carry on cultivation, production or packaging of cannabis products will also be required to obtain a cannabis licence from the Canada Revenue Agency. More information can be found [here](#).

Access to Capital Markets

Debt financing has been made available in Canada through credit unions, financial institutions and alternative lenders. Additionally, cannabis companies successfully raise capital privately or through listings on the public stock exchanges in Canada, being the TSX, the TSXV, the CSE and the new NEO Exchange. In October 2017, the TSX and

TSXV issued guidance that generally prohibited new listings of companies with any U.S. cannabis market operations and imposed restrictions on its Canadian-listed companies from owning (or having a commercial interest in) U.S.-based cannabis assets or engaging in U.S. cannabis operations. Such companies have generally accessed the Canadian capital markets by listing on the CSE or the NEO Exchange, which allow issuers to participate in the U.S. cannabis industry provided they meet certain risk disclosure requirements. However, there has been at least one acquisition of a U.S. cannabis company by a Canadian cannabis company listed on the TSXV since such guidance was issued, and so the door to cross-border acquisitions may be open – provided deals meet any applicable exchange conditions.

The funding landscape for cannabis companies in Canada has changed dramatically in the last two years. Cannabis companies had historically raised funds by issuing additional equity both privately and on the public markets. Beginning mid-2019, however, such equity fundraising has declined significantly, mirroring general declines and continued volatility in cannabis company valuations, while debt financing has increased. The Canadian cannabis industry is now seeing an uptick in the number of companies seeking creditor protection or being placed into receivership.

LICENSING

To offset brand risk and maximize capacity utilization, many Health Canada licence holders are actively seeking out cannabis brand and product developers with whom they can engage in contract manufacturing, white labelling and similar licensing or joint venture arrangements. Licensing arrangements for new or crossbred genetics are also on the rise between licence holders. More information on acquiring cannabis genetics under the *Cannabis Act* can be found [here](#).

Marketing and Promotion

The *Cannabis Act* includes strict limitations on branding, packaging and promotion of cannabis products (as well as accessories and services related to cannabis), and licence holders are accordingly taking a deliberate and careful approach to marketing and promotion. More information on cannabis promotion rules can be found [here](#).

August 2022

AIRD BERLIS

**We are committed to being the
Canadian gateway for our clients.**



Brookfield Place, 181 Bay Street, Suite 1800
Toronto, Canada M5J 2T9
T 1.416.863.1500 F 1.416.863.1515

Other articles and papers written by our professionals can be viewed at:

airdberlis.com

Doing Business in Canada offers general comments on legal developments of concern to businesses, organizations and individuals, and is not intended to provide legal opinions. Readers should seek professional legal advice on the particular issues that concern them.

© 2022 Aird & Berlis LLP

Parts of this booklet may be reproduced with acknowledgment.
