

No Tokin' Change: Legalization of Marijuana and Potential Impacts for Municipalities

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The information presented is for general discussion purposes only and does not constitute legal advice for any specific situation. Please contact any of the presenters if you have need for any specific legal advice.

NO TOKIN CHANGE: THE ROADMAP

- 1) Evolution of the Law: How did we get where we are?
- 2) What's the Law: What's Legal and What's Not NOW?
- 3) What's Coming: What Changes are on the Horizons?
- 4) Potential Impacts:
 - a) Zoning and Licencing
 - b) Enforcement Issues
 - c) Increased Consumption



NO TOKIN CHANGE: 1) EVOLUTION OF THE LAW

- 1923 – an Act to Prohibit the Improper Use of Opium and other Drugs
- 1961 – UN Single Convention of Narcotics Drugs
 - Led to the enactment of the *Narcotics Control Act* in Canada
 - Marijuana on par with heroine and other narcotics
 - No “carve out” for medicinal use or possession
- 1997 – *Controlled Drugs and Substances Act*
 - Replaced the *Narcotics Control Act*
 - Marijuana listed as a Schedule II narcotic
 - Implication is lesser maximum penalties compared to Schedule I narcotics



NO TOKIN CHANGE: 1) EVOLUTION OF THE LAW

- R v. Parker 2000 CarswellOnt 2627 (C.A.)
 - Parker suffered from severe epilepsy and used marijuana for same
 - Court found that recourse to marijuana was reasonable as Parker:
 - Had suffered from epilepsy for many years
 - Tried to treat his illness through a highly invasive procedure
 - Continued to take conventional epilepsy medications
 - Court found that blanket prohibition on possession of marijuana violated the accused Section 7 rights to liberty and security of the person
 - On Liberty: marijuana laws exposed the accused to imprisonment and, in his case, serious illness and/death if denied access to marijuana while in prison
 - On Security of the Person: forced to choose between committing a crime to obtain effective treatment or to use ineffective treatment.
 - In Result: Court struck down Section 4 of the Controlled Drugs and Substances Act



NO TOKIN CHANGE: 1) EVOLUTION OF THE LAW

“The regulation of marijuana has a very short history in Canada and lacks a significant foundation in our legal tradition. It is, in fact, an embarrassing history based upon misinformation and racism. While the marijuana prohibition is not firmly rooted in Canada, there is a well-established history of regulation of drugs in this country. However, of all of the drugs with potential therapeutic effects, marijuana stands out because it is subject to a complete prohibition. This prohibition results in a web of legislation that makes it impossible as a practical matter for a physician to prescribe marijuana and, therefore, for a patient to legally possess it pursuant to a prescription.”



NO TOKIN CHANGE: 1) EVOLUTION OF THE LAW

- Marihuana Medical Access Regulations (“MMAR”)
 - Licensing Scheme: Authorization to Possess (“ATP”)
 - Three Options for ATP holders to obtain:
 - 1) Personal Use Production License (“PPL”)
 - 2) Designated Person Production License (“DPL”)
 - 3) Purchase from Health Canada’s contracted suppliers.
 - Abuses: production above personal use limits, theft of personal supplies, lack of limitations on the locations.
- Marihuana for Medical Purpose Regulations (“MMPR”)
 - Licensed Producers (“LP”)



NO TOKIN CHANGE: 1) EVOLUTION OF THE LAW

- Allard v. Canada 2014 Carswell Nat 1277 (F.C.) upheld 2014 CarswellNat 5126 (F.C.A.)
 - Injunction in response to the pending MMPR regulation
 - Allard (Chronic Fatigue), Beemish (Diabetes) and Davey (Chronic Pain)
 - Court found that Plaintiffs demonstrated that they would be unable to afford marijuana produced by LPs under the MMPR regulation and that this would endanger their health, liberty or severely impoverish them.



NO TOKIN CHANGE: 2) What is the law now?

Access to Cannabis for Medical Purposes Regulations Can. Reg 2015-230

- August 24, 2016
- Hybrid of MMPR and MMAR
 - LPs maintained
 - Home grow/designated grow re-introduced
- Further restrictions on home growers:
 - Follow a formula for the max number of plants
 - Stricter requirements for growth outdoors
 - No requirement to inform the municipality



IN SUMMARY

- Prohibited good on Schedule II of the CDSA
- Courts acknowledge therapeutic benefits
- Court acknowledge links to Charter rights of liberty and security of the person for medicinal use



NO TOKIN CHANGE: What's Changing

- Bill C-45: An Act Respecting Cannabis and the amend the Controlled Drugs and Substances Act, the Criminal Code and other Acts
 - i.e. Cannabis Act
- Bill C-46: An Act to Amend the Criminal Code



Bill C-45: An Act Respecting Cannabis and to Amend the Controlled Drug and Substances Act, the Criminal Code and other Acts

- JULY 1, 2018
- Minimum Age: 18 - Province can increase (will be 19 in Ontario)
- 30 grams
 - Personal limit of 30 grams - 18 + CANNOT produce or distribute more
- Four Plants
 - Cannot “cultivate, propagate or harvest” more than four plants
 - Each “dwelling house” limited to four plants at maximum of 100 cm high



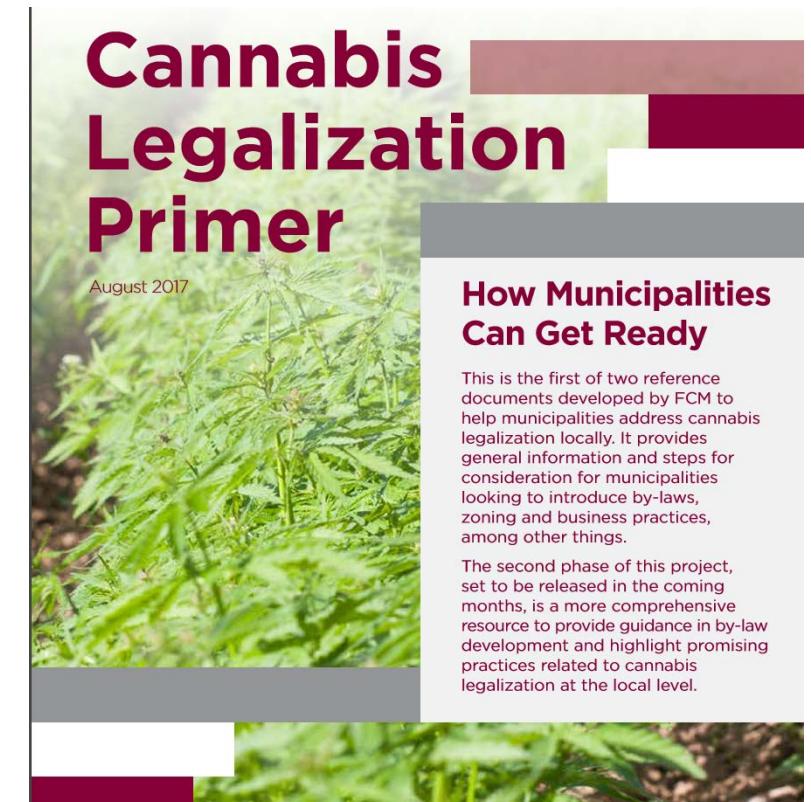
Bill C-45: An Act Respecting Cannabis and to Amend the Controlled Drug and Substances Act, the Criminal Code and other Acts

- What can 18+ (19 in Ontario) do under Bill C-45:
 - Possess up to 30 grams of legal dried cannabis or equivalent in non dried
 - Share up to 30 grams of legal cannabis with other adults
 - Purchase dried or fresh cannabis and cannabis oil
 - Grow up to 4 cannabis plants PER DWELLING PLACE up to a maximum height of 100 cm



4) NO TOKIN' CHANGE: Municipal Impacts

- “boots on the ground”
- Federation of Canadian Municipalities
 - Cannabis Legalization Primer
 - Checklist
 - ✓ Assemble a municipal working group
 - ✓ Engage with your province or territory early
 - ✓ Seek legal advice
 - ✓ Seek appropriate municipal approvals
 - ✓ Establish a timeline and work plan
 - ✓ Engage the public and other key stakeholders
 - ✓ Assess which by-laws and programs require adjustment
 - ✓



Source: (https://fcm.ca/documents/issues/Cannabis_Legislation_Primer_EN.pdf)



ZONING, LAND USE and BUSINESS LICENCES

- Illegal Dispensaries
- Provinces will set the regulation on sales
- **Abbotsford v. Mary Jane's Glass and Gifts (2017) CarswellBC 237 (B.C.S.C) (Chambers)**
 - Illegal dispensary selling marijuana
 - Business Licence set parameter of business “retail sale of glass products”
 - Zoning prohibited cultivation, growing...of marijuana



Abbotsford v. Mary Jane's Glass and Gifts (2017) CarswellBC 237 (B.C.S.C) (Chambers)

The mere existence of federal legislation in a given field does not oust provincial or municipal authority to regulate the same subject matter. It is no longer correct to ask whether a federal regulatory regime “occupies the field.” Instead the correct course is to look at the precise provisions and the way they operate in the precise case, and ask: Can they coexist in this particular case in their operation? If so, they should be allowed to co-exist....

- RESULT: pith and substance of the zoning by-law governs land use and regulation



NO TOKIN' CHANGE: Enforcement

Canada's FAQ

*[Source:https://www.canada.ca/en/services/health/campaigns/introduction-cannabis-act-questions-answers.html#a7](https://www.canada.ca/en/services/health/campaigns/introduction-cannabis-act-questions-answers.html#a7)

Will municipal governments have a role to play in the system proposed under the Cannabis Act?

- Yes, municipalities will be key partners in supporting the implementation of the proposed legislation. It is anticipated that municipalities will work closely with their respective provincial or territorial governments to support the oversight and regulation of cannabis distribution and sales once the Cannabis Act comes into force.
- It is also anticipated that municipalities will play an important role in enforcing local zoning and density bylaws, building standards, and matters related to the minimum age of purchase, personal cultivation, personal possession limits, smoking restrictions, and public nuisance complaints. These will be enforced through municipal by-law, health and safety inspectors and police.



NO TOKIN' CHANGE: Enforcement

- 4 plants @ 100 cm tall
 - Denver Post: 1 in 10 homes
 - Source: <http://www.denverpost.com/2017/07/31/marijuana-leaving-colorado-homes-mold/>
 - Who's preventing that fifth plant?
 - Canadian Association of Chief of Police – zero chance
 - Source: <https://www.thestar.com/news/canada/2017/09/12/police-ask-feds-to-postpone-date-for-legal-pot-say-theres-zero-chance-they-will-be-ready.html>
- Property and Standards By-laws
 - Rausch v. Pickering



NO TOKIN' CHANGE: Enforcement

WARNING: The following contains graphic content which may be disturbing to some. Viewer Discretion is advised.



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NO TOKIN' CHANGE: Enforcement



NO TOKIN' CHANGE: Enforcement

Section 447.2 of the Municipal Act, 2001:

447.2 (1) If the clerk of a local municipality is notified in writing by a police force that a building located on land in the local municipality contained a marijuana grow operation, the local municipality shall ensure that an inspection of the building is conducted within a reasonable time after the clerk has been notified. 2006, c. 32, Sched. A, s. 184.

Persons who may conduct inspection

- (2) An inspection referred to in subsection (1) may be conducted by,
- (a) a by-law enforcement officer of any municipality or of any local board of any municipality; or
 - (b) an officer, employee or agent of any municipality or of any local board of any municipality whose responsibilities include the enforcement of a by-law, an Act or a regulation under an Act. 2006, c. 32, Sched. A, s. 184.



NO TOKIN' CHANGE: Increased Consumption

- August, 2017 Denver Post
 - NHTSA - from 2013 – 2016:
 - 145% jump in MVA's involving driver's testing positive for weed
 - 40% increase in fatal crashed overall
 - 20% drug positive in fatal crashes (up from 10% in 2013)
 - Source: <http://www.denverpost.com/2017/08/25/colorado-marijuana-traffic-fatalities/>
- Bill C-46: An Act to Amend the Criminal Code
 - 1) new investigative powers
 - a. NOW marijuana impairment: 12 Step Drug Evaluation Test then sample
 - b. CHANGE: reasonable grounds = sample can be demanded
 - 2) “Per se” marijuana limits
 - a. 2 nanograms/ml – 5 nanograms/ml = summary offence
 - b. Higher than 5 nanograms = hybrid offence (possible indictable offence)



12 Step Drug Recognition Expert Process

12 Step DRE

- 1. *Breath Alcohol Test*
- 2. *Interview of the Arresting Officer*
- 3. *Preliminary Examination and First Pulse*
- 4. *Eye Examination*
- 5. *Divided Attention Psychophysical Tests*
- 6. *Vital Signs and Second Pulse*
- 7. *Dark Room Examinations*
- 8. *Examination for Muscle Tone*
- 9. *Check for Injection Sites and Third Pulse*
- 10. *Subject's Statements and Other Observations*
- 11. *Analysis and Opinions of the Evaluator*
- 12. *Toxicological Examination*



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NO TOKIN' CHANGE: Increased Consumption

JURISDICTION	REQUIREMENT
Colorado	5 ng/ml – trier of fact may infer impairment but not required to do so
Washington State	5 ng/ml prohibited while driving
Montana	5 ng/ml is presumed to be impaired
Nevada	2 ng/ml in blood and 10 ng/ml in urine with requirement on prosecution to prove that driver was under the influence
California	5 ng/ml but must be corroborating evidence of impairment



NO TOKIN' CHANGE: Conclusion

- No Tokin' Changes
- Challenges to Municipalities:
 - enforcement of the new provisions
 - impact on existing by-laws
- Impaired Driving



No Tokin Change: The End



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