

# Risk Management in Canadian Health Care

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## • FOCUS ON HEALTH CARE IN ONTARIO'S NEW BUDGET •

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### BACKGROUND

**On** Thursday, April 27, 2017, the Ontario government revealed its new budget. It is the first balanced budget in a decade and health care funding is a major focus.

## RISK MANAGEMENT IN CANADIAN HEALTH CARE

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If the budget is approved, there will be an additional \$11.5 billion utilized towards health care initiatives over the next three years, which is \$7 billion higher than previously planned. Funding will go towards a new pharmacare program, reducing hospital overcrowding, producing shorter wait times, dementia initiatives, as well as implementing new mental health and addiction services, amongst other projects. These funding initiatives are discussed below.

### PHARMACARE PROGRAM

Beginning on January 1, 2018, a new provincial pharmacare program will cover prescription medication for individuals under the age of 25 (“youth”), regardless of family income or private insurance. The program will cost \$465 million per fiscal year.

Upon approval, the new system will give youth access to the 4,400 different drugs that are currently covered under the Ontario Drug Benefit Program for families on social assistance and eligible elderly people. However, parents will not be required to pay the deductibles and co-pay costs that those groups pay.

The program will provide access to common prescriptions (such as antibiotics and asthma inhalers), as well as treatments for cancer and rare diseases. While hospital-based cancer medication is already free under OHIP, the program will cover oral cancer medication and at-home oncology care.

Youth will be able to access medication by merely showing a health card. Ontario will be the first province in Canada to implement a program of this breadth.

### OVERCROWDING OF HOSPITALS

There is a significant overcrowding issue in Ontario hospitals, with occupancy rates reaching over 100 percent across the province. Over the next 10 years, the Ontario government will spend an additional \$9 billion towards constructing new hospitals and renovating existing ones.

As an additional tool to alleviate overcrowding in hospitals, there will be a \$100 million boost towards

home care, in the hopes to encourage those who are able to be cared for at home to take this alternative. Of that amount, \$80 million will be utilized to provide nurses for at home patients, resulting in 350,000 hours of additional nursing care.

The remaining \$20 million will be geared towards respite for unpaid caregivers. The funding will cover approximately 600,000 hours of respite services. Furthermore, the Ontario government announced an emphasis on education and training programs to be offered to unpaid caregivers.

Additionally, the Ontario government announced its plan to implement a program for “alternative-level-of-care” patients. These patients are healthy enough to leave the hospital, but not yet well enough to live independently and do not have other arrangements in place. The “alternative-level-of-care” group is said to make up 15 per cent of the patients in Ontario hospitals. The province will provide these patients with vouchers that will cover the cost of recovering in a private retirement home until they are able to move back home or to a government funded long-term care home. The program will be tested this year and the government will utilize the results to inform future policies in this regard.

#### SHORTER WAIT TIMES

Over the next three years, \$1.3 billion will be targeted towards reducing wait times for patients who require access to medical procedures. Large portions of that amount will be allotted towards the following:

- reduce wait times and improve access to MRIs;
- increase the number of knee and hip replacements;
- increase the number of cataract surgeries;
- increase stroke and chemotherapy services;
- increase availability of cardiac services, complex spine operations and organ/tissue transplants; and
- expand online access to medical services.

Additionally, there will be a focus on inter-professional health care models, which will facilitate greater efficiency when accessing medical services and treatments.

#### DEMENTIA INITIATIVES

It is estimated that approximately 175,000 people in Ontario are living with dementia. The government is proposing to spend \$100 million on dementia initiatives over a three-year period. Programs covered by this investment include: increasing access to adult programs for those suffering from dementia, raising public awareness of the signs, symptoms and risk factors of the disease and improving the coordination of care between caregivers and specialists.

#### MENTAL HEALTH SERVICES

While details on this initiative have not yet been made public, a portion of the budget allotted towards health care will concentrate on mental health and addiction initiatives, including psychotherapy, youth services and supportive housing.

#### OTHER INITIATIVES

Since the April 27th announcement, the government continues to announce new health care programs that will be funded by the Ontario budget.

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**• IT SHOULD BE HAPPY CANADA & CANNABIS DAY 2018, EH — BUT WHAT ABOUT OUR INTERNATIONAL DRUG TREATY OBLIGATIONS? •**

Amanda Branch, Associate, Bereskin & Parr LLP  
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**Amanda Branch**

**It** looks like we may have a Happy Cannabis Day by July 2018.

The federal Liberal government introduced a suite of bills in the House of Commons on April 13, 2017. The proposed legislation, Bill C-45,<sup>1</sup> entitled *An Act respecting cannabis and to amend the Controlled Drugs and Substances Act, the Criminal Code and other Acts* (the “Act”) would legalize recreational marijuana

consumption and sales in Canada. The government hopes to implement the legislation by July 2018.

**ELEMENTS OF BILL C-45**

Under the Act, it will not be an offense for a person over 18 years to possess in a public place up to 30 grams of dried cannabis, or the equivalent in other forms of cannabis. An adult over 18 years old may grow up to four cannabis plants that are not budding or flowering, with the plants not to exceed one metre in height. Sales of cannabis are to be restricted to people aged 18 and older; however, provinces will be permitted to increase the minimum age.

**PROMOTION**

The Act sets out strict rules for promotion. It is prohibited to promote cannabis or cannabis accessories and services by:

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- communicating information about its price or distribution;
  - unless the promotion is at the point of sale and the promotion indicates only its availability and / or its price.
- by appealing to young people;
- by using a testimonial or endorsement;
- by using a mascot, whether real or fictional, person or animal; or
- by presenting it in a way that associates cannabis or your brand with a lifestyle that appears glamorous, risky or exciting.

There are exceptions. Subject to the regulations, you may promote cannabis or any accessories or services related to cannabis, so long as the promotion is:

- addressed and sent to a named individual over 18 years old;
- in a place where young people are not legally allowed to go;
- communicated by telecommunication, so long as reasonable steps are taken to ensure the promotion won't be accessed by a young person; or
- done in a way that is prescribed by the regulations.

Additionally, you may promote cannabis or a cannabis accessory or service by “displaying a brand element” of cannabis on a “thing that is not cannabis” so long as that “thing” is not associated with young people; is not of appeal to young people; and is not associated with a glamorous, risky or exciting lifestyle.

You cannot promote cannabis or cannabis accessories in a way that is false, misleading or deceptive or in a way that is likely to create an incorrect impression about its characteristics (such as strength, potency, purity, safety or health risks). You also may not engage in prohibited promotions outside of Canada.

Finally, subject to the regulations, this prohibition on advertising does not apply to:

- a product placement, so long as no direct or indirect consideration is given (*i.e.*, a “literary, dramatic, musical, cinematographic, scientific, educational or artistic work, production or performance that

uses or depicts cannabis, an accessory or a service, or a brand elements);

- an editorial opinion or commentary work, so long as no direct or indirect compensation is given; or
- business to business promotions — that is, a promotion from one person authorized to produce, sell or distribute directed to another, but not directly or indirectly targeted to consumers.

#### PACKAGING AND LABELLING

You cannot sell cannabis or cannabis accessories in a package or with a label that:

- is appealing to young people;
- uses testimonials or endorsements;
- uses a mascot, whether real or fiction, person or animal;
- associates the cannabis or the brand with a lifestyle that appears glamorous, risky or exciting; or
- contains any information that is false, misleading or deceptive or that is likely to create an incorrect impression about the characteristics of the cannabis or the accessory.

Much of the legislation is specifically targeted at limiting potential exposure to young people. For example, it is prohibited to display cannabis or any cannabis accessory in such a way that may result in the product, package or label being seen by a young person, and you cannot sell cannabis or a cannabis accessory that has an appearance, shape or other sensory attribute or function that could reasonably be believed to be appealing to a young person.

The Act addresses packaging limitations, but does not appear to go so far as to contemplate blanket “plain packaging” akin to what has been discussed for tobacco. Instead, the Act, and presumably the future regulations, seems to be focused on preventing activities or branding that would be appealing to young people.

#### WHAT ABOUT OUR INTERNATIONAL OBLIGATIONS?

Canada's decision to legalize has attracted international attention. The United Nation's (“UN”) International

Narcotics Control Board (“INCB”) in their 2016 Annual Report,<sup>2</sup> released on March 2, 2017, reiterated its position that any such legislation is contrary to the provisions of the international drug control conventions, namely:

- 1) Article 4, paragraph (c) of the 1961 Convention as amended,<sup>3</sup> which requires State parties to “limit exclusively to medical and scientific purposes the product, manufacture, export, import, distribution of, trade in, use and possession of drugs; and
- 2) Article 3, subparagraph 1(a) of the 1988 Convention<sup>4</sup> which obligates each State party to adopt such measures as may be necessary to establish as criminal offences under its domestic law the production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drug contrary to the provisions of the 1961 Convention.

The UN pointed out that Canada is a party to these drug control treaties and the legalization of marijuana would be inconsistent with the requirement that the use of narcotic drugs is limited exclusively to medical and scientific purposes.

In the same report, the UN also condemned Uruguay, who in 2013 became the first country to enact legislation to legalize and regulate cannabis, for their decision to do so; however, the reality is that these treaties lack any real teeth, so the ramifications against Uruguay for failure to comply have been minimal. The report also called out the US states that had legalized or regulated the drug (to date: Alaska, California, Colorado, Maine, Massachusetts, Nevada, Oregon and Washington) as failing to comply with the treaties, although marijuana is still illegal at a federal level.

Canada has been moving towards legalizing marijuana despite our obligations under these treaties. The marijuana task force report<sup>5</sup> does acknowledge the existence of these treaties and offered the opinion that legalization of cannabis did actually meet the objectives of the task force, including protecting vulnerable citizens and implementing evidence-based policies, but

ultimately was of the opinion that suggesting a solution was beyond its mandate.

As we move towards legalization, it will be interesting to see how the government of Canada intends to deal with our international commitments under these treaties. We have some options: we could follow the US model and allow provinces to legalize or regulate while still maintaining a federal ban on cannabis; we could follow Uruguay and legalize unapologetically; or we could withdraw from the treaty on the basis that we cannot comply, with the potential to legalize marijuana and then re-accede. There is precedence for the latter — in 2012, Bolivia withdrew from the international drug treaties because of the traditional practice of chewing cocoa leaf, the raw ingredient for cocaine and a narcotic under the 1961 Convention. The following year, Bolivia was allowed to re-accede with a reservation for chewing coca.

Given that the Canadian legislation is expected to include regulation at both the federal and provincial level, it seems unlikely that we’re following the US model. But will we legalize boldly or withdraw from the treaties entirely? Either way, it looks like Canada will have to blaze its own trail through the legalization of cannabis.

## CONCLUSION

Canadians would be well advised to remember that possessing and selling cannabis for non-medical purposes is still illegal (and punishable) everywhere in Canada. The NDP has called for an immediate decriminalization of marijuana until a new law is passed; however, Prime Minister Justin Trudeau has insisted that Canadians must follow the existing law until has been officially changed. As a result, it is possible that further raids of marijuana dispensaries will continue and police can continue to charge people with possession and trafficking.

Further, despite the fact the Liberals have recognized that the enforcement of cannabis law traps people in the criminal justice system for minor, non-violent offenses, the Government of Canada has been clear that they do not intend to grant blanket pardons for previous convictions of simple possession of cannabis.

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<sup>1</sup> Bill C-45 is available online at [http://www.ourcommons.ca/Content/Bills/421/Government/C-45/C-45\\_1/C-45\\_1.PDF](http://www.ourcommons.ca/Content/Bills/421/Government/C-45/C-45_1/C-45_1.PDF).

<sup>2</sup> The International Narcotics Control Board's 2016 Annual Report is available online at [https://www.incb.org/documents/Publications/AnnualReports/AR2016/English/AR2016\\_E\\_ebook.pdf](https://www.incb.org/documents/Publications/AnnualReports/AR2016/English/AR2016_E_ebook.pdf).

<sup>3</sup> See [https://www.unodc.org/pdf/convention\\_1961\\_en.pdf](https://www.unodc.org/pdf/convention_1961_en.pdf).

<sup>4</sup> See [https://www.unodc.org/pdf/convention\\_1988\\_en.pdf](https://www.unodc.org/pdf/convention_1988_en.pdf).

<sup>5</sup> See [http://healthycanadians.gc.ca/task-force-marijuana-groupe-etude/framework-cadre/index-eng.php?utm\\_source=news.gc&utm\\_medium=related\\_products\\_link\\_en&utm\\_campaign=mj\\_task\\_force\\_16&ga=1.262916108.1001614307.1479480897#a1.3](http://healthycanadians.gc.ca/task-force-marijuana-groupe-etude/framework-cadre/index-eng.php?utm_source=news.gc&utm_medium=related_products_link_en&utm_campaign=mj_task_force_16&ga=1.262916108.1001614307.1479480897#a1.3).

## • MEDICAL ASSISTANCE IN DYING IN CANADA: ONE YEAR LATER •

Melissa Perry, Associate, Norton Rose Fulbright  
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**Melissa Perry**

Since the Canadian federal government introduced legislation governing medical assistance in dying (“MAID”), the provinces and territories, which are responsible for the delivery of health care services in Canada, have adopted a variety of processes and procedures to deal with requests for MAID. However, some questions and issues which have arisen with the legalization of MAID remain outstanding and controversial, including whether individuals suffering from mental illness ought to have access to MAID.

Historically, physician-assisted death was prohibited in Canada pursuant to ss. 14 and 241(b) of the *Criminal Code of Canada* (“*Criminal Code*”). On February 6, 2015, the Supreme Court of Canada in *Carter v. Canada (Attorney General)*, [2015] S.C.J. No. 5, 2015 SCC 5 (“*Carter 2015*”) declared those provisions of the *Criminal Code* prohibiting assisted suicide invalid

to the extent that they prohibit MAID for a competent adult who clearly consents to the termination of his or her life; who has a grievous and irremediable medical condition which is causing the individual enduring, intolerable suffering; and whose suffering cannot be alleviated by any treatment acceptable to him or her.

On June 17, 2016, the federal government responded to the Supreme Court of Canada’s decision in *Carter 2015* when it passed Bill C-14,<sup>1</sup> improving what had formerly been a bumpy road for individual access to MAID in Canada. Prior to the enactment of Bill C-14, pursuant to a 2016 interim decision<sup>2</sup> of the Supreme Court of Canada, individuals who sought access to MAID were required to apply to the superior court in their jurisdiction for judicial authorization.

On April 26, 2017, the federal government issued an Interim update on medical assistance in dying in Canada<sup>3</sup> which indicates that between June 17, 2016 and December 31, 2016, MAID deaths accounted for approximately 0.6 per cent of all deaths in Canada. By way of comparison with other jurisdictions, the proportion of MAID deaths was 3.75 per cent in the Netherlands and 1.83 per cent in Belgium in 2015, and 0.37 per cent in Oregon in 2016. Recent statistics<sup>4</sup> suggest that more than 1,300 MAID deaths have taken place in Canada since it became legally available, the majority of which took place in British Columbia and Ontario.

In British Columbia, in 2016 43.6 per cent of MAID deaths took place at home, 30.3 per cent took place in hospital, 9 per cent took place in hospice care, with the remaining 17 per cent taking place in unspecified settings. Similarly, in Ontario, 58.2 per cent of MAID deaths took place at home and 34.3 per cent took place in hospital. In all reporting jurisdictions except Saskatchewan and the Atlantic provinces, proportionately more women than men received MAID, and the most common underlying medical conditions were (in order of frequency) cancer-related, neuro-degenerative and circulatory/respiratory conditions.

#### MAID AND PSYCHIATRIC ILLNESS: THE DEBATE CONTINUES

The question of whether individuals suffering from psychiatric disorders ought to have access to MAID has remained controversial and largely unanswered by the federal government.

In the interim period before Bill C-14 came into force, the question of whether an individual suffering from a psychiatric disorder could obtain access to MAID came before the courts in Alberta.

E.F. was a 58 year old woman who applied to the Alberta Court of the Queen's Bench in April of 2016 seeking judicial authorization to access MAID. The basis of her request was a medical condition diagnosed as a "severe conversion disorder", a psychiatric condition causing extreme physical pain with no clear physiologic origin, which she claimed caused her to endure chronic and intolerable suffering. While her condition was diagnosed as a psychiatric one, her capacity and cognitive ability to make informed decisions, including the decision to terminate her life, were not at issue.

The Court of the Queen's Bench authorized E.F. to obtain MAID and that authorization was challenged in an appeal to the Alberta Court of Appeal<sup>5</sup> which ultimately upheld the lower court's decision. The Alberta Court of Appeal affirmed that individuals who suffer from psychiatric disorders were not precluded from seeking MAID under the Supreme

Court of Canada's interim criteria, provided they were competent and capable of clearly consenting to end their life. However, since the coming into force of Bill C-14, the legislative criteria for MAID preclude individuals from seeking MAID in those cases where mental illness is the sole underlying medical condition.

The recent death by suicide of Adam Mayer-Clayton, a 27 year old business school graduate and vocal advocate for access to MAID for individuals suffering from psychiatric disorders has again brought attention to this issue. Among other psychiatric disorders, Mr. Mayer-Clayton reportedly suffered from a somatoform disorder similar in nature to the conversion disorder suffered by E.F., which he claimed caused him pain from which he could find no relief. However, he did not meet the criteria to access MAID under the current legislative scheme, and instead took his own life earlier this month.

To date, the Canadian Psychiatric Association<sup>6</sup> has not taken a clear position on MAID for psychiatric patients, and has instead supported the federal government's "more considered and less rushed approach". The American Psychiatric Association<sup>7</sup> has adopted the position that "a psychiatrist should not prescribe or administer any intervention to a non-terminally ill person for the purpose of causing death". However, in those countries where it is permitted, the use of MAID for patients with psychiatric conditions is increasing.<sup>8</sup> In the Netherlands, two people sought and obtained MAID deaths because of mental disorders in 2010; by 2015 that number had grown to 56, which was approximately 1 per cent of the total deaths from MAID. In Belgium, 3.9 per cent of individuals who underwent euthanasia in 2013 did so because of a neuropsychiatric disorder, and a comparable percentage reported that their suffering was exclusively psychological.<sup>9</sup>

The Canadian federal government has asked the Council of Canadian Academies ("CCA"),<sup>10</sup> a federally funded non-profit organization, to report on how the law governing MAID may be extended to include mature minors, advance requests, and requests where mental illness is the sole underlying medical



condition. However, as of late January 2017, the CCA was only in the early stages of its review and its report is not expected until late 2018. Realistically, it may be years before we can expect to see any change to the existing legislative scheme for individuals suffering from mental illness.

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<sup>1</sup> See Bill C-14 at <http://www.parl.ca/DocumentViewer/en/42-1/bill/C-14/first-reading>.

<sup>2</sup> *Carter v. Canada (Attorney General)*, [2016] S.C.J. No. 4, 2016 SCC 4.

<sup>3</sup> See the interim update at <https://www.canada.ca/en/health-canada/services/publications/health-system-services/medical-assistance-dying-interim-report-dec-2016.html>.

<sup>4</sup> See <http://www.cbc.ca/news/health/medically-assisted-dying-canadians-rob-rollins-1.4056700>.

<sup>5</sup> *Canada (Attorney General) v. E.F.*, [2016] A.J. No. 505, 2016 ABCA 155.

<sup>6</sup> See <http://www.cpa-apc.org/psychiatrists-welcome-cautious-approach-to-mental-illness-and-medical-assistance-in-dying/>.

<sup>7</sup> See <https://www.psychiatry.org/File%20Library/About-APA/Organization-Documents-Policies/Policies/Position-2016-Medical-Euthanasia.pdf>.

<sup>8</sup> See <http://ps.psychiatryonline.org/doi/full/10.1176/appi.ps.201700013>.

<sup>9</sup> Paul S. Appelbaum, “Should Mental Disorders Be a Basis for Physician-Assisted Death?” (2017) Volume 68, Issue 4, *Law & Psychiatry*, 315-317, online: [http://ps.psychiatryonline.org/doi/full/10.1176/appi.ps.201700013#\\_i3](http://ps.psychiatryonline.org/doi/full/10.1176/appi.ps.201700013#_i3).

<sup>10</sup> See <http://www.scienceadvice.ca/en/assessments/in-progress/medical-assistance-dying.aspx>.

## • CANADA EXPANDS PROTECTION OF INDIVIDUAL RIGHTS WITH NEW LEGISLATION ON GENETIC TESTING AND PRIVACY •

Nikolas S. Purcell, Associate, DLA Piper  
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**Significant** legislative changes affecting the field of genetic testing were recently implemented with the federal *Act to Prohibit and Prevent Genetic Discrimination* (“*Act*”). The *Act* implements broad protections concerning an individual’s right to access their genetic information, as well as protects individuals from being required to undergo genetic testing or to disclose the results of their genetic tests.

### DATA PRIVACY AND THE RISE OF GENETIC TECHNOLOGY

With advancements in genetic technology and its increasing role in treating and preventing disease, it is not uncommon for genetics to feature in the

healthcare management of many Canadians. Beyond traditional healthcare settings, advancements in genetic testing technology have engendered an entire industry of private genetic testing and analysis services. For a fee, consumers can order a variety of genetic testing services from their own homes. The resulting information may be sought out of personal interest, for example in the case of ancestral research, but can also be influential in the prevention of disease and family planning.

The increased incidence of genetic tests has come with challenges concerning their appropriate use and the management of the information yielded by such tests. The results of a genetic test could provide information such as an individual’s predisposition

to disease and, while innocuous for some, could be highly sensitive for many others, who could be exposed to negative consequences if such results were disclosed. While existing federal and provincial privacy legislation provides some protection over this information in certain circumstances, until the passage of *Act*, there were clear gaps in the protections afforded to an individual's management of their genetic information.

## NEW AND AMENDED LEGISLATION

The principal effect of the *Act* is to prohibit discrimination on the basis of genetics in commercial and employment contexts. In particular, the *Act* preserves the right of the individual to choose whether or not to undergo genetic testing and to protect the results of genetic tests from disclosure. The *Act* has three main legislative effects.

### 1. THE CREATION OF A FREESTANDING GENETIC NON-DISCRIMINATION ACT

The creation of the *Genetic Non-Discrimination Act* (“*GNA*”) is the most significant legislative change. The *GNA* prohibits any person from requiring an individual to undergo a genetic test, to use the results of a genetic test or to consider the individual's refusal to undergo a genetic test, as conditions for entering into the following relationships:

- a. providing goods or services to an individual;
- b. entering into or continuing a contract or agreement with an individual; and
- c. offering or continuing specific terms in a contract or agreement with an individual.

As well, if an individual consents to providing the results of a genetic test, the consent must be provided in writing.

In defining “genetic test”, legislators broadly defined the term to include any “test that analyzes DNA, RNA or chromosomes for purposes such as the prediction of disease or vertical transmission risks, or monitoring, diagnosis or prognosis”. As a result, the application of the *Act* extends to genetic tests

related to diseases or disorders with current physical manifestations, rather than limiting itself to the results of genetic tests which indicate the presence of latent genetic markers which may never have physical manifestations.

### 2. ADDITIONAL PROVISIONS TO THE CANADA LABOUR CODE

The amendments to the *Canada Labour Code* entitle employees to refuse to undergo a genetic test or to disclose the results of a genetic test. Furthermore, employers may not commence disciplinary action against employees who choose to exercise these rights. In the event that the results of a genetic test are provided to an employer, it must be done with the written consent of the employee.

### 3. AMENDMENTS TO THE CANADIAN HUMAN RIGHTS ACT

Finally, amendments to the *Canadian Human Rights Act* (“*CHRA*”) add the use of “genetic characteristics” as prohibited grounds for discriminatory practices. The *CHRA* will also be amended to include the refusal to undergo a genetic test as a deemed basis of discrimination on the basis of genetic characteristics.

## INDUSTRY REACTION AND WHAT TO EXPECT NEXT

There has been much debate both for and against the *Act*. In support, the public clearly stands to benefit from the unimpeded choice of whether or not to access their genetic information without the fear that their decision or the results of such testing may put them at a disadvantage in other endeavours. Criticism of the *Act*, predominantly voiced by those in the insurance industry, is that the *Act* deprives commercial parties from information that may put them in an unfair commercial position. While both sides raise valid concerns, Parliament ultimately sided with the rights of the individual.

Despite having received royal assent, the future of the *Act* remains unsettled. In an interesting development, the federal Liberal government recently indicated its intention to refer the *Act* to the

Supreme Court of Canada. The principle concern, as canvassed during committee hearings, is the authority of Parliament to legislate over subject-matter with strong ties to provincial legislative jurisdiction (*i.e.*, property and civil rights). While constitutional law scholars have supported its validity under the “double aspect” doctrine, the Liberal government has taken a cautious approach in seeking the opinion of the SCC.

The controversy surrounding this type of legislation is not unique to Canada. In implementing broad protections, Parliament diverted from the much narrower approach adopted in the United States with the *Genetic Information Nondiscrimination Act* (“GINA”), enacted in 2008. Although similar in purpose, *GINA* contains various exceptions for

permissible testing and activities; these were largely ignored by Parliament. Interestingly, despite the narrower application of *GINA*, discussion is currently underway to carve out further exceptions to its effects. Given the course of events in both Canada and the United States, further updates on this topic are likely to follow.

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## • PROHIBITION TO GO UP IN SMOKE: GOVERNMENT OF CANADA INTRODUCES LEGISLATION TO LEGALIZE AND REGULATE NON-MEDICAL ACCESS TO CANNABIS •

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**T**oday the government of Canada tabled two sister bills,<sup>1</sup> *An Act respecting cannabis and to amend the Controlled Drugs and Substances Act, the Criminal Code and other Acts*, and *An Act to amend the Criminal Code (offences related to conveyances) and to make consequential amendments to other Acts* (Bill C-45 and Bill C-46, respectively), which, once passed will establish a framework for the production, sale, distribution, and possession of non-medical access to cannabis (marijuana) in Canada and strengthen impaired driving measures.

Under the proposed legislation, which is based largely on the Final Report of the Task Force on Cannabis Legalization and Regulation (the “Report”), adults (aged 18 years and older) are permitted to possess up to 30 grams of dried or fresh cannabis, though provincial and territorial legislatures may set higher age limits.

### CANNABIS DERIVATIVE PRODUCTS

Initially, the sale of cannabis will entail only fresh and dried cannabis, cannabis oils and seeds, and plants for

cultivation. Sales of non-medical cannabis derivative products, such as food and beverages, may become available later, once regulations for production and sale can be developed. However, adults are permitted under the draft legislation to produce non-medical cannabis derivative products, such as food and beverages, for personal use in their homes.

## RESTRICTIONS AND PENALTIES

The proposed legislation provides for ticketing for possession that exceeds the personal limit by small amounts, or up to 14 years in jail for an illegal distribution or sale, and imposes tough new penalties of up to 14 years in jail for giving or selling cannabis to minors.

A new offence with a penalty of up to 14 years in jail will also be created for using a youth to commit a cannabis-related offence. However, youth who are found in possession of up to five grams of cannabis would not be criminally prosecuted.

As part of an overhaul of Canada's impaired driving laws, the proposed legislation makes it illegal to drive within two hours of having an illegal level of drugs in the blood, with penalties ranging from a \$1,000 fine to life imprisonment, depending on the level of drugs in the blood and whether someone was injured or killed as a result of the impairment.

Further, tourists are prohibited from bringing cannabis into Canada, but would be permitted to use cannabis while in Canada (assuming that they are the requisite age). Possession, production and distribution outside the legal system would remain illegal, as would imports or exports without a federal permit. Such permits will cover only limited purposes, such as medical or scientific cannabis and industrial hemp.

Further, there will be regulations introduced to restrict advertising and marketing activities in relation to cannabis. It is currently contemplated that specific rules related to items such as use of colour, labels, celebrity endorsements, and other similar considerations will be brought forward by regulation, which is slated to be effective when the legislation becomes federal law.

## HOME GROWING

The proposed legislation includes the following provisions related to the activity of home-growing cannabis:

- adults aged 18 and older would be permitted to cultivate up to four cannabis plants at home;
- cannabis plants grown in homes could not exceed 100 cm in height (not including any part of the plant that is not normally exposed to the air);
- adults aged 18 and older could also produce derivative cannabis products legally, such as foods and drinks, for personal use;
- only personal production of edible cannabis products will be addressed by this proposed legislation; commercial production of edible cannabis products will not form part of the proposed legislation; and
- the federal government's existing medical cannabis regime will continue to service those in need.

Recently, the Canadian Association of Chiefs of Police argued that allowing the activity of home-growing will increase enforcement costs for law enforcement as they attempt to ensure that Canadians grow the permitted amount and do not profit from the sale of their home grown cannabis.<sup>2</sup> These risks were also a focal point of the Report's discourse, which concluded that the risks of production involved in home grown cannabis would, over time, follow the same trajectory as those of homemade wine and home-grown tobacco in a post-prohibition era.<sup>3</sup>

Other safeguards against such risks were recommended and will form part of the proposed legislation, including a prohibition on dangerous personal manufacturing processes and requiring the implementation of mandatory security measures for home-growers.

## PROVINCIAL AND TERRITORIAL POWERS

Provinces and territories would oversee and approve the sale of cannabis in their respective regions. The powers being granted to the provinces and territories are consistent with the federal-provincial

coordination regarding issues of public health and public safety. The powers granted to the provinces and territories would include items such as setting license conditions, conducting inspections, suspending or amending licenses, and the ability to impose fees or monetary penalties.

The result is that the retail model for cannabis is not prescribed in the tabled legislation, and would largely be left to provincial and territorial legislators to craft, however there are four minimum conditions that provinces and territories would need to meet:

- only cannabis obtained from a federally licensed producer can be sold;
- selling to a person younger than 18 years of age is prohibited;
- the province/territory would need to develop a system that authorizes distributors and retailers, who would be required to keep appropriate records; and
- develop the retail model with a view to public health and public safety, and the prevention of the growth of an illegal cannabis market.

Most notably, the tabled legislation provides for mail order for both non-medical access and medical access. In the event that a province or territory does not have legislation in place by the time the federal law is in place, consumers will be allowed to purchase directly via mail order from federally licensed producers.

#### LICENSING OF PRODUCERS

Under the new regulatory plan for non-medical access to cannabis, all producers from whom consumers can buy from, directly or indirectly, must be federally licensed. The current licensing regime for medical access is being deemed to be a license under the proposed legislation for non-medical access, and will remain in place if the proposed legislation becomes law.

The current medical cannabis regime permits patients to obtain cannabis from a licensed producer, with the licensing process being conducted under the *Access to Cannabis for Medical Purposes Regulations*

(the “ACMPR”). As at the date of this bulletin, there are 43 licensed producers in Canada under the ACMPR. The proposed legislation appears to contemplate that the government will retain the ACMPR for the time being; the Task Force on Cannabis Legalization and Regulation had recommended to keep the ACMPR in place for up to five years and to then conduct a review of the existing regulations. It is likely that the government will conduct such a review in the future to determine whether new regulations would be implemented or if two regimes — a medical regime and a non-medical regime — will continue to operate side by side.

#### INTERNATIONAL TREATIES

Canada is the first country in the G8/G20 to propose legislation on a national, rather than sub-national, basis to legalize and regulate non-medical access to cannabis; the importance of this proposed legislation cannot be overstated. One critical issue Canada must address is how it will comply with its international treaties.

Specifically, Canada’s legalization of cannabis would breach three international treaties to which the country is a party. The treaties in general require the criminalization of the production, sale and possession of cannabis for non-medical and non-scientific purposes and each have their own timeline for withdrawal from the treaty. If Canada chooses to withdraw from these treaties, specific notice provisions must be followed. In the case of the *Single Convention on Narcotic Drugs, 1961, as amended by the 1972 Protocol Amending the Single Convention on Narcotic Drugs, 1961* and the *Convention on Psychotropic Substances, 1971* if Canada provides notice of withdrawal on or before July 1, 2017, it would take effect on January 1, 2018. If notice is provided after July 1, 2017, it would take effect on January 1, 2019. In the case of the *United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988*, withdrawal would take effect one year after the notice is received by the Secretary-General.

If notice of withdrawal is provided in the spring of 2017, the earliest it could take effect for all three treaties would be the spring of 2018. However, if notice is provided after July 1, 2017, the earliest date that Canada could be clear of all three treaties moves to January, 2019.

It is currently uncertain how the government of Canada will proceed in ensuring compliance with international treaties given the timeframe provided for legalization and regulation of cannabis.

## CONCLUSION

The driving factors of the federal government's proposed regime have been stated as being a commitment to legalizing, regulating and restricting access to cannabis to reduce the operation of illicit markets and associated organized crime.<sup>4</sup> However, the complexity of this task, both domestically and internationally, suggests that the legalization and regulation of cannabis in Canada will require extensive coordination with provinces, territories and law enforcement authorities. Provinces and territories in particular will be tasked with navigating some of the most onerous aspects of cannabis legalization, namely how the purchase and sale of the product will be regulated, taxed, managed and how compliance related to purchase and sale will be enforced.

The proposed legislation is the first, but significant, step along the road to legalization of non-medical access to cannabis. There remains uncertainty with respect to how each province and territory will legislate the retail model pursuant to which cannabis can be sold to consumers. Uncertainty also remains as to how Canada will comply with its international obligations once non-medical access to cannabis becomes federal law. Additionally, future bills are expected to be introduced to flesh out the regulatory regime taking place. Notably, the tabled legislation does not contain provisions related to price control or taxation, and it is expected that the Minister of Finance will table a bill in the future to address such issues. While the introduction of legislation to legalize non-medical access to cannabis is a fundamental step

to ending the current prohibition on non-medical cannabis, many more steps must be taken in order to ensure that Canada's non-medical cannabis regime becomes a well-founded and secure regulatory system for all stakeholders.

If Canada is able to succeed with crafting a well-founded and secure regulatory system, then there can be no doubt that Canada will become a world leader, among industrialized nations, in cannabis regulation and commercialization for both medical and non-medical uses.

We will continue issuing bulletins on this matter as developments occur.

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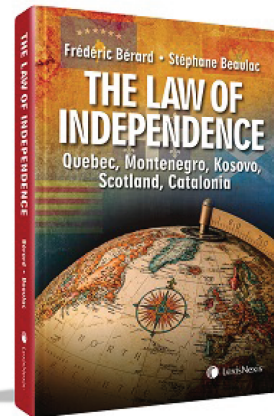
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- <sup>1</sup> This article was originally published on April 14, 2017.
  - <sup>2</sup> Catherine Cullen, "Hold off on homegrown pot, police chiefs urge government", CBC (8 February 2017), online: cbc.ca.
  - <sup>3</sup> A Framework For The Legalization And Regulation Of Cannabis In Canada (Task Force on Cannabis Legalization and Regulation: Government of Canada, 2016) page 37, online: <http://healthycanadians.gc.ca/task-force-marijuana-groupe-etude/framework-cadre/alt/framework-cadre-eng.pdf>.
  - <sup>4</sup> David Cochrane, "Liberals want to move up pot legalization to avoid Canada Day celebrations", CBC (8 April 2017), online: cbc.ca.

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