Young Lawyer's Interest Network: Canada's Legalization of Cannabis and the Impact on the American Border

Denise Calle
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I. Introduction

On June 19, 2018, the Canadian Senate passed the Cannabis Act (the Act), making Canada the first G7 country to legalize the use and sale of cannabis for recreational purposes and the second country overall after Uruguay. The Act became effective on October 17, 2018, after numerous amendments were made and apprehensions were voiced by Conservative Canadian senators, including concerns of slower US border crossings. Although Canada and a majority of the United States have legalized the use of cannabis in some form, the US federal prohibition is still effective and supersedes state law. Now that the largest bordering neighbor has legalized the recreational use of cannabis nationwide, the US border states are seeing increased movement of cannabis and drug paraphernalia across border lines in violation of the federal prohibition. Since the Act came into force, US Customs and Border Protection (CBP) has seized cannabis and drug paraphernalia from travelers and from packages mailed across the border.

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7. Legal Notice, supra note 6, at 151, 238; CBP Addresses Border Crossing, supra note 6.
II. The Cannabis Act

The Act regulates the growth, distribution, sale, and possession of cannabis across Canada.\(^8\) It was drafted with the intent to protect public health and public safety. The federal government continues to regulate the production of cannabis. The Act permits individuals eighteen years of age or older to possess up to thirty grams of cannabis in public (this amount is also permitted to be shared with other adults); buy cannabis and cannabis oil from a provincially licensed retailer (if there is no retail framework established in the province, purchases of cannabis can be made online from federally licensed producers); grow up to four cannabis plants per residence for personal use; and make edible cannabis products at home with controlled concentration levels (retailers are prohibited from selling edible products for the first year).\(^9\)

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9. Id.
III. The Impact on the American Border

The US legal cannabis industry generated approximately $11 billion in sales in 2018. The industry currently employs more than 200,000 workers. Ten states and Washington, D.C., have legalized recreational use of cannabis, while thirty-three states have legalized medicinal cannabis. A 2017 Gallup poll showed that 64% of Americans favor legalization. Nevertheless, until the federal government removes tetrahydrocannabinols from the controlled substance list, cannabis remains illegal.

Generally, importing or exporting cannabis to and from Canada is illegal. Travelers are prohibited from transporting cannabis across the international border, even if the bordering state permits the use of cannabis. Anyone attempting to export cannabis from Canada is subject to criminal charges in Canada; in the United States, one may face criminal charges, seizure, fines, arrest, and denial of admission. CBP has warned that persons traveling to the United States for reasons related to the cannabis industry may be deemed inadmissible and denied entry during future travels. Interestingly, CBP has also routinely seized drug paraphernalia, including grinders, rolling paper, pipes, and vapes despite the paraphernalia being imported into a state that has legalized the use of cannabis.

CBS’s presence at the Canadian-US border is stronger than ever and ensures that Canadian cannabis and drug paraphernalia do not enter US territory. As an “enforcement agency,” CBP has statutory authority to

11. Id.
15. Quinn, supra note 4.
18. Id.
conduct administrative proceedings (i.e., seizures) and issue penalties.\textsuperscript{21} CBP has the express power to authorize or deny any merchandise that comes into
the United States.\textsuperscript{22} Thus, CBP can detain and seize items it deems drug paraphernalia, leaving an importer to argue it intends to use the product for a legitimate tobacco use.\textsuperscript{23}

According to Chief CBP Officer Aaron Bowker, “[CBP’s] primary mission is terrorism and interdicting terrorists, but second to that has always been narcotics.”\textsuperscript{24} In 2017, CBP seized 361,564 pounds of cannabis.\textsuperscript{25} The city of Port Huron, Michigan, seized over 1,650 pounds of marijuana days before the Act was enacted.\textsuperscript{26} Ports at the border have reported seizures of packages mailed from Canada containing cannabis. At Port Champlain, New York, there were approximately 108 cannabis seizures just in October 2018—a whopping 140% increase from the previous year.\textsuperscript{27} A majority of the seized cannabis is found in packages, but CBP has seized product from travelers attempting to cross the border carrying twenty or twenty-five grams. These individuals are subject to seizures, fines, and arrests.\textsuperscript{28}

IV. The Impact of a National Security Regulator for Canada in a Global Economy\textsuperscript{29}

What is one financial factor that sets Canada apart from its peers in the G20? Prior to November 2018, Canada was the only nation in the G20 that did not have a national securities regulator.\textsuperscript{30} This unique circumstance resulted from the Canadian Constitution, which grants provinces jurisdiction over the conduct of trade and commerce within their respective provinces.\textsuperscript{31} The seminal case of\textit{Lymburn v. Mayland}, decided by the

\textsuperscript{22} See id.
\textsuperscript{23} 19 U.S.C. § 1595(a); 21 U.S.C. § 863.
\textsuperscript{27} Haight, supra note 24.
\textsuperscript{28} CBP Statement, supra note 17.
\textsuperscript{29} Anumeet (Anu) Toor recently graduated from the Dual J.D. program between the University of Windsor and University of Detroit Mercy, where she focused on cross-border trade and international law. Anu attended the 2018 Annual International Monetary Fund and World Bank Meetings in Bali, Indonesia, as a member of the Young Diplomats of Canada.
\textsuperscript{31} Constitution Act, 1867, 30 & 31 Vict., c. 3, s. 91(2) (U.K.).
Supreme Court of Canada in 1932, gave rise to the jurisdictional division of securities regulation throughout Canada.\textsuperscript{32} The Lymburn ruling caused a deeper division among Canadian provinces as trade continued to globalize. In 2011, the province of Ontario advocated for a united regulatory body that would provide conformed regulatory standards throughout the nation.\textsuperscript{33} The Supreme Court of Canada ruled in favor of maintaining the provincial jurisdiction for the regulation of securities.\textsuperscript{34} Nevertheless, the motivation to unite Canada under a cohesive regulatory scheme remained and was presented again by Ontario, British Columbia, Saskatchewan, New Brunswick, Prince Edward Island, and Yukon to the Supreme Court in 2018.\textsuperscript{35}

The impact of these continuing efforts actualized on November 9, 2018, when the Supreme Court amended the previous ruling to allow provinces the option of joining regulatory agreements.\textsuperscript{36} The Court ultimately stated that “[e]ven though a statute’s subject matter may fall within the jurisdiction of the enacting legislature, that statute may still contravene the rule against legislative delegation if it purports to transfer primary legislative authority to the other level of government.”\textsuperscript{37} This ruling was welcomed by many provinces, as it allowed them to appeal to international investors reaching global markets.\textsuperscript{38}

Prior to this decision, the need for compatible global regulatory measures was discussed at the 2018 International Monetary Fund and World Bank Meetings.\textsuperscript{39} In October 2018, the Future of Finance panel at the Meetings explained that the global integration of finance will require international cooperation to ensure that incompatibility between systems does not arise.\textsuperscript{40} In the same month, seven global banks also collectively signed a Memorandum of Understanding, known as the Trade Information Network, with the goal of developing a digital network for trade finance that would operate on a global scale.\textsuperscript{41} With these upcoming changes, this ruling by the Supreme Court of Canada is a fundamental step toward helping Canadians

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34. Id. at 838, 840.
35. Reference re Pan-Canadian Sec. Regulation, 2018 S.C.C. 48 (Can.).
36. Id.
37. Id. at 125.
40. Id.
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engage in a global marketplace. The youth of Canada will have the benefit of being able to engage in trade with international actors as the outcome from this ruling takes effect.