The Cannabis Acts

Turning over a new leaf.
CDSA Up In Smoke

• October 1, 2018 brought changes to how, when and where cannabis may be obtained, possessed, cultivated, used and transported.

• All offences relating to cannabis under the *Controlled Drugs and Substances Act* were removed in favour of the Federal *Cannabis Act*.

• At the same time the Provincial *Cannabis Control Act, 2017* came into law.
Overview of this Presentation

- Definitions and where to find them
- Federal vs. Provincial Acts – what level does what
- Offences under each Act
- Does the *Charter of Freedoms and Rights* apply?
- Search and Seizure – because every drug case has a Section 8 component
- Ambulat, sicut anatem… (Google Translate)
Definitions – Cannabis Act
Federal Act

• Cannabis means a cannabis plant and anything referred to in Schedule 1 but does not include anything referred to in Schedule 2.
• Cannabis plant means a plant that belongs to the genus Cannabis.
• Dried cannabis means any part of a cannabis plant that has been subject to a drying process, other than seeds.
• Illicit cannabis means cannabis that is or was sold, produced or distributed by a person prohibited from doing so under this Act or any provincial Act or that was imported by a person prohibited from doing so under this Act.
Definitions – *Cannabis Act* continued

Federal Act

- Package means any inner or outer container or covering
- Person means an individual or organization
- Possession has the same meaning as in subsection 4 (3) of the *Criminal Code*
  - 4 (3) of the *Criminal Code*: For the purposes of this Act;
  - (a) a person has anything in possession when he has it in his personal possession or knowingly;
  - (i) has it in the actual possession or custody of another person, or
Definitions – *Cannabis Act* - continued

Federal Act

- (ii) has it in any place, whether or not that place belongs to or is occupied by him, for the use or benefit of himself or of another person; and

- (b) where one of two or more persons, with knowledge and consent of the rest, has anything in his custody or possession, it shall be deemed to be in the custody of each and all of them.

- Public place includes any place to which the public has access as of fright of by invitation, express or implied, and any motor vehicle located in a public place or in any place open to public view.
Definitions – *Cannabis Control Act 2017* Provincial Act

• Boat includes any ship or boat or any other description of a vessel used or designed to be used in the navigation of water.

• Cannabis has the same meaning as in subsection 2 (1) of the *Cannabis Act (Canada)*

• Vehicle means,
  • (a) a motor vehicle defined by the *Highway Traffic Act*,
  • (b) a motorized snow vehicle as defined in the *Motorized Snow Vehicles Act*, and
  • (c) any other vehicle that may be prescribed.
Cannabis Act
Purpose set out in section 7

• The purpose of this Act is to protect public health and public safety and, in particular to
  • (a) protect the health of young persons by restricting their access to cannabis;
  • (b) protect young persons and others from inducements to use cannabis;
  • (c) provide for the licit production of cannabis to reduce illicit activities in relation to cannabis;
  • (d) deter illicit activities in relation to cannabis through appropriate sanctions and enforcement measures
Cannabis Act

Purpose set out in section 7

- (e) reduce the burden on the criminal justice system in relation to cannabis;
- (f) provide access to a quality-controlled supply of cannabis; and
- (g) enhance public awareness of the health risks associated with cannabis use.
Cannabis Control Act 2019

Purpose set out in section 1

The purposes of the Act are:

• (a) to establish prohibitions relating to the sale, distribution, purchase, possession, cultivation, propagation and harvesting of cannabis in order to’
• (i) protect public health and safety,
• (ii) protect youth and restrict their access to cannabis, and
• (iii) ensure the sale of cannabis in accordance with the Ontario Retail Corporation Act, 2017.
8 (1) Unless authorized under this Act, it is prohibited

(a) For an individual who is 18 years of age or older to possess, in a public place, cannabis of one of more classes of cannabis the total amount of which, as determined in accordance with Schedule 3, is equivalent to more than 30g of dried cannabis;

(b) For an individual who is 18 years of age or older to possess any cannabis that they know is illicit cannabis;
(c) For a young person to possess cannabis of one or more classes of cannabis the total amount of which, as determined in accordance with Schedule 3, is equivalent to more than 5g of dried cannabis;

(d) For an individual to possess, in a public place, one or more cannabis plants that are budding or flowering;

(e) For an individual to possess more than four plants that are not budding of flowering; or

(f) For an organization to possess cannabis.
Cannabis Act
Punishment – Section 8 (2)

- All offences under 8 (1) by hybrid offences
- It is the Crown’s option to elect to proceed by Indictment of by Summary Conviction
- Until Crown elects, offences are deemed Indictable
- If Crown elects to proceed by Summary Conviction a paralegal may represent
Cannabis Act
Offences of Related to Trafficking

• The offences of Distribution section 9, Selling section 10, Importing/Exporting section 11 and Production section 11 are all hybrid offences

• Offences that does not involve a young person or four plants or more and upon the Crown electing to proceed by Summary Conviction fall within the scope of permitted practice

• Do not take my word, it is up to you to know what is permitted and what you are competent to practice
The *Cannabis Act* is Federal legislation.

Arrest authorities are found within the *Criminal Code* Part XVI – Compelling Appearance Of Accused Before A Justice And Interim Release

Given all offences under this Act are hybrid, then a police officer may arrest on reasonable grounds to believe
Cannabis Control Act 2017
Common Offences

This is a Provincial Statute, so paralegals can represent on all offences.

6 (1) No person shall sell cannabis, other than the Ontario cannabis retailer.

6 (2) No person shall distribute cannabis that is sold, or that is intended to be sold, other than by an authorized cannabis retailer.

7 (1) No person shall knowingly sell or distribute cannabis to a person under 19 years of age.

8 No person shall knowingly sell or distribute cannabis to a person who is or appears to be intoxicated.
Cannabis Control Act 2017

Common Offences

9 No person shall purchase cannabis except from an authorized cannabis retailer.

10 (1) No person under 19 years of age shall possess, consume, attempt to purchase, purchase or distribute cannabis.

10 (2) No person under the age of 19 years of age shall cultivate, propagate or harvest, or offer to cultivate, propagate or harvest, cannabis.
Cannabis Control Act 2017

Arrest Authorities

• Section 19. If a police officer finds a person apparently in contravention of this Act or apparently in contravention of a prescribed provision of the regulations AND that person refuses to give his or her name and address or the police officer has reasonable grounds to believe that the name or address given is false, the police officer may arrest the person without warrant.

• If an arrest is made, then the Provincial Offences Act Part VIII – Arrest, Bail and Search Warrants applies.
Cannabis Act

Search Authorities

- No authority under this Act to search without a warrant (warrantless search).
- Warrantless searches may be justified under Common Law search authorities.
- Common Law searches can be justified, incident to arrest:
  - Search general area of the arrest
  - Search person under arrest
  - May only search for evidence of offence, assist in escape or risk of harm to person under arrest or others
- Search with a warrant authority may be found under Part 8 of the Act.
Common Elements to ALL Drug Offences

- Every Drug Case (Federal or Provincial) shares these common elements:
  - 1 – a detention of an individual in one form or another
  - 2 – a search of an individual or premises for the suspected drug
  - 3 – a seizure of the suspected drug
The Canadian Charter of Rights and Freedoms
(The Charter)

• The Charter is supreme law in Canada – no other law is above it and Parliament and the Legislator are subordinate to the Charter – section 33.

• 7 – Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

• 8 – Everyone has the right to be secure against unreasonable search or seizure.
The Canadian Charter of Rights and Freedoms
(The Charter)

• 9 – Everyone has the right not to be arbitrarily detained or imprisoned.
• 10 – Everyone has the right on arrest or detention
  • (a) to be informed promptly of the reason therefor;
  • (b) to retain and instruct counsel without delay and to be informed of that right; and
  • (c) to have the validity of the detention determined by way of habeas corpus and to be released if the detention is not lawful.
The Canadian Charter of Rights and Freedoms
(The Charter)

• 24 (1) – Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

• 24 (2) – Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard for all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.
The Canadian Charter of Rights and Freedoms
(The Charter)

- The burden is on the defendant to establish the Charter breach
- When drafting a Charter Application make sure you are seeking the correct remedy/relief.
- Under 11-b your want relieve under 24 (1).
- Under unlawful search you want relieve under 24 (2).
A word from our sponsor!
No stems, No weeds - Acapulco Gold is Bad Ass Weed
Hey! Look at what I found.

Transporting Cannabis

12 (1) No person shall drive or have the care or control of a vehicle or boat, whether or not it is in motion, while any cannabis is contained in the vehicle or boat.

(2) Subsection (1) does not apply with respect to cannabis that,

(a) Is in its original container and has not been opened; or

(b) Is packed in baggage that is fastened closed or is not otherwise readily available to any person in the vehicle or boat.
Transporting Cannabis
Hey! Look at what I found.

12 (3) A police officer who has reasonable grounds to believe that cannabis is being contained in a vehicle or boat in contravention of subsection (1) may at any time, without warrant, enter and search the vehicle and search any person found in it.
Reflections

- Thoughts, questions or comments on the impact of 12 (3)
In R. v. Fearon, [2014] S.C.J. No. 77 at paragraph 103 Karakatsanis J said: “103 An individual's right to a private sphere is a hallmark of our free and democratic society. This Court has recognized that privacy is essential to human dignity, to democracy, and to self-determination. Section 8 of the Canadian Charter of Rights and Freedoms protects the right to be free from unreasonable search and seizure. In defining the contours of a reasonable search, the law balances legitimate state interests, including safety and securing evidence in law enforcement, with the privacy interests of individuals. This balance generally requires judicial pre-authorization for a search, and a warrantless search is prima facie unreasonable.
The Law of Warrantless Searches

- The seminal case on warrantless search is Hunter v. Southham Inc., 2 S.C.R. 145
- It set out the Crown has the burden to establish a warrantless search was necessary and presumed unreasonable unless the Crown can demonstrate it was reasonable under the circumstances. Court must enter into a voir dire.
- This position is similar to any utterances or statements made by a defendant, the Crown has the burden to prove it was voluntary, etc.
- Same burden for warrantless searches.
The Law of Warrantless Searches

- Warrantless searches have limits placed upon them as set out in R. v. Ishmael, 2005 ONCJ 219.
- In Ishmael the Crown tried to rely upon the broad search authority under the *Liquor Licence Act*, which is identical to subsection 12 (3).
- In Ishmael the court limited this authority to where liquor may reasonably be expected to be found – searching a small hand purse was found to be an infringement of section 8 – evidence was excluded.
The Law of Warrantless Searches

• The court **MUST** hold a voir dire on the admissibility of any evidence obtained through a warrantless search, unless the defendant consents.

• It is your obligation to your client to understand the laws of search and seizure so you can quickly detect “the aroma” of an unlawful search.
Ontario Regulation 30/18 gives exceptions to section 12.

Section 5 of this Regulation states: “Subsection 12 (1) of the Act does not apply with respect to cannabis obtained for medical purposes in accordance with Part 14 of the Cannabis Regulations (Canada) or in accordance with a court order if,

(a) The person who is authorized under such authority to possess the cannabis for his or her own medical purposes is a passenger in the vehicle or boat; and

(b) The cannabis is not readily available to the driver of the vehicle or boat.
Exceptions/Limits on 12 (1) & (3)

Section 5.1 of the Regulation protects motor vehicles or boat being used as residences:

1. A motor vehicle as defined in the *Highway Traffic Act* that is equipped with permanent sleeping accommodations and permanent cooking facilities, while it is parked in a place that is not a highway or a King’s Highway within the meaning of the Act and is being used as a residence.

2. A boat with permanent sleeping accommodations and permanent cooking and sanitary facilities, other than a boat used to carry passengers for hire, while the boat is at anchor or is secured to a dock or land and is being used as a residence.
Established Legal Concept of: “Ambulat, sicut anatem”
Mary Jane or Oregano?

• Under the *Cannabis Act* the drug must be submitted for analysis.
• There is no such provision under the *Cannabis Control Act 2017*.
• Under each Act the Crown/Prosecution must prove the drug is cannabis as defined.
• The *Cannabis Control Act 2017* relies on the definition of cannabis as found within subsection 2 (1) of the *Cannabis Act*. 
To Be Clear!

• In all cases in Ontario regardless of the Act cannabis is:

Section 2 of the *Cannabis Act*:

“cannabis means a cannabis plant and anything referred to in Schedule 1, but does not include anything referred to in Schedule 2.”

Q: Officer, please tell me if the plant material you found and suspect to be cannabis is described under Schedule 1 or Schedule 2 of the *Cannabis Act*?

A: Let the tap dancing begin!!!!!!
Is It or Isn’t It

Schedule 1 under the *Cannabis Act*

Subsections 2 (1) and 151 (1)

1 – any part of a cannabis plant, including the phytocannabiniods produced by, or found in, such plant, regardless of whether that part has been process or not, other than a part of the plant in Schedule 2

2 – Any substance or mixture of substance that contains or has on it any part of such plant

3 – Any substance that is identical to any phytocannabiniod produce by, or found in, such a plant, regardless of how the substance was obtained.
Is It or Isn’t It

Schedule 2
Subsections 2 (1) and 151 (1) and Schedule 1
1 – a non-viable seed of the cannabis plant
2 – a mature stalk, without any leaf, flower, seed or branch, of such plant
3 – Fibre derived from a stalk referred to in item 2
4 – The root or any part of the root of such plant
Is It or Isn’t It

So, once again:

**Q:** Officer, please tell me if the plant material you found and suspect to be cannabis is described under Schedule 1 or Schedule 2 of the *Cannabis Act*?

**A:** Let the tap dancing begin!!!!!!

If the Crown/Prosecutor cannot establish the plant material in question falls under Schedule 1, they cannot prove their case!
Final Thoughts

• Know the Law:
• Statute Law – including related Regulations
• Case Law
• Impact of the Charter – find the breach!
• Make sure your are competent or can become competent to take on a Drug Case
Questions