

Cannabis and the ongoing risks at the border

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October 2018 was an exciting time in Canada's history. As only the second country in the world (and by far the largest) to legalize the recreational use of cannabis, the buzz has been seemingly unending about the personal freedom and business opportunities this move provides to Canadians. However, it is important to realize that real risks still exist for both business people and individuals crossing the border into the U.S., with cannabis remaining on Schedule 1 of the U.S. Controlled Substances Act — which classifies drugs, substances and certain chemicals used to make drugs into five categories/schedules depending upon the drug's acceptable medical use and the drug's abuse or dependency potential in the U.S.

The U.S. views Schedule 1 drugs as “hav[ing] a high potential for abuse and the potential to create severe psychological and/or physical dependence,” according to the United States Drug Enforcement Administration. Other drugs on Schedule 1 include LSD, MDMA (ecstasy), heroin, and other widely acknowledged addictive or harmful substances. This is important to understand, as it frames the mindset with which U.S. Customs and Border Protection (CBP) officers — who adhere to this list to determine which drugs and drug users present the greatest danger to the U.S. and its people — may approach questions about cannabis use or involvement.

While medical and recreational marijuana is legal in some U.S. states, the sale, possession, production and distribution of marijuana remains illegal under U.S. federal law. This has created some confusion for cross-border travellers. The conflict of laws creates the appearance, to some, that there is no harm in admitting past cannabis use or activities relating to the cannabis industry, particularly when entering the U.S. at a port of entry adjacent to one of the states where it is legal. However, the reality is far harsher.

Individuals can still be denied admission or determined to be inadmissible to the U.S. for cannabis-related activities where:

- CBP has reason to believe that an individual is a drug abuser or addict.
- There has been a (past or present) criminal violation of local controlled substances laws.
- The individual is deemed by CBP to be an “illicit trafficker” in cannabis (or is a spouse or child who has benefited from such activity, under certain circumstances).

To provide some clarity, just prior to the Cannabis Act coming into force on Oct. 17, CBP updated its official statement on treatment of those seeking admission to the U.S. following the broad legalization of cannabis in Canada. The revised statement confirmed that U.S. federal law pertaining to the sale, possession, production and distribution of marijuana has not changed. As such, travellers seeking to enter the United States can still be denied admission or subject to seizure, fines or apprehension for illicit or illegal marijuana-related activities, including historical ones. Such activities might include (illegal) past use of cannabis prior to its legalization, including drug abuse or addiction, or a conviction for a cannabis-related crime.

However, the legalization of cannabis for recreational use does not alleviate all risk based on one's use of cannabis

after Oct. 17. Even the legal use of cannabis can result in a finding of inadmissibility.

If a CBP officer has reason to believe that you may be a drug abuser or addict, he or she can refer you to a panel physician — a doctor designated by the U.S. Department of State to provide immigration-related medical examinations — for an examination and recommendation that could result in a determination that you are inadmissible to the U.S. on health-related grounds.

Another area of ongoing concern is the impact the new laws can have on business people, who have — in some instances — been deemed inadmissible for activities that are determined to have aided, abetted or otherwise supported the cannabis industry.

In most circumstances, legal business activity and relationships with cannabis companies only operating in Canada and other jurisdictions where cannabis sale, possession, production and distribution are legal should not trigger inadmissibility to the U.S. However, where the activities for which business people are seeking to enter the U.S. have any nexus to the cannabis industry, individuals run the risk that they might be rendered inadmissible under U.S. drug trafficking regulations.

Importantly, in its published statement, CBP did confirm that working in the legal marijuana industry in Canada generally should not render Canadians inadmissible to the U.S., so long as the individual is entering the U.S. for reasons entirely unrelated to the cannabis industry.

It is unclear which government or other resources CBP officers have access to, but we do know that technology is being used and developed to strategically root out both those who present a risk, and those who might be lying about their past or current drug use or business involvement. Social media, search engines and information on electronic devices you have on your person when crossing the border are all tools CBP is routinely using to determine the truthfulness of statements made regarding an individual's cannabis use.

Where cannabis use or involvement does result in a bar to admission, a waiver of inadmissibility may be available based on the circumstances and the specific grounds on which one was rendered inadmissible.

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