

Cannabis in the Criminal Context

Presented By:

Darren Kraushaar, McDougall Gauley LLP



**Law Society
of Saskatchewan**



Agenda

1. Introduction to the New Regime
 - a. The Federal Act → the *Cannabis Act*, SC 2018, c 16;
 - b. Provincial Legislation → The Provincial Act → The Cannabis Control (Saskatchewan) Act, SS 2018, c C-2.111.
2. Jurisprudence: Trends in the Criminal Context
 1. Driving Offences
 2. Possession
 3. Trafficking





The Federal Regime

The Cannabis Act



LEGALIZED RECREATIONAL MARIJUANA IN CANADA

Recreational Marijuana legalized as of October 17, 2018

Federal Government introduced two Bills:

- **Bill C-45 Cannabis Act** (amended Controlled Drugs and Substances Act, Criminal Code and related Acts)
- **Bill C-46** (amended Criminal Code)



Bill C-45

Among other things, the bill:

- enacts a new Act entitled the *Cannabis Act*;
- permits some cannabis-related activities that had previously been prohibited
- prohibits some cannabis-related activities
- lists prohibited activities in relation to cannabis for which a ticket can be issued (as opposed to prosecution for an indictable or a summary conviction offence);
- provides a framework in relation to permitted and prohibited promotion and sponsorship of cannabis and cannabis accessories; and
- establishes a statutory basis on which the designated minister can issue licenses and permits for authorized cannabis-related activities.





The Provincial Regime

The Cannabis Control (Saskatchewan) Act



The Cannabis Control (Saskatchewan Act)

- Contains laws respecting the possession, distribution and consumption of cannabis in Saskatchewan, as well as the provincial cannabis retail system.
- The Saskatchewan Liquor and Gaming Authority (SLGA) is the designate provincial Cannabis Authority
- Only authorized permittees are able to sell or distribute cannabis products in physical storefronts, online, or through delivery.
 - Cannabis permittees are required to comply with all of the rules, terms and conditions that are established by this Act, the regulations, and SLGA.



Additional Resources

- *The Cannabis Control (Saskatchewan) Regulations* → provides clarifications regarding the retail permit system (establishment of fees, rules for delivery of cannabis by retail permittees, types of permits, etc.) and other matters respecting provincial cannabis laws
- *The Summary Offences Procedure Regulations, 1991* → sets out the fine amounts for ticketable offences regarding cannabis, which range from \$200 to \$2,250
- *Saskatchewan Liquor and Gaming Authority (SGLA)* → includes a list of all permitted cannabis retailers in Saskatchewan





Cannabis in the Criminal Context

Possession



Possession – Legislation

- The Federal Act → the *Cannabis Act*, SC 2018, c 16
- The Provincial Act → *The Cannabis Control (Saskatchewan) Act*, SS 2018, c C-2.111.
 - The Acts mirror themselves fairly well
 - The more restrictive standard is the standard imposed
- The Federal Act sets the age limit at 18 years old, but the Saskatchewan Act raises this age limit to 19 years old
 - It is illegal to sell to a minor, and there are various offences for minors in possession or attempting to get possession
 - A minor possessing less than 5 grams is a provincial offence, more than 5 grams is a federal offence

What Can I Possess in Saskatchewan?

- It is illegal to possess any illicit cannabis
 - “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.”
- Public Possession: limited to possession 30 grams of dried Cannabis
- You can only possess 4 plants in public, unless they are budding or flowering at which point you can only possess 1
- Organizations cannot possess any cannabis

Class of Cannabis Quantity that is equivalent to 1 gram of dried cannabis	
dried cannabis	1 g
fresh cannabis	5 g
solids containing cannabis	15 g
non-solids containing cannabis	70 g
cannabis plant seeds	1 seed
cannabis concentrates	0.25 g

What Can I Possess in Saskatchewan? Continued...

- It is illegal to consume cannabis in a **public place**.
 - Especially at a school or daycare (s. 2-16)
- No explicit restriction on how much cannabis (excluding plants) that you can possess in your **private home**
- You can grow up to **4 plants** (from licensed seeds) per ***household*** for personal use
 - Under s. 22.1 of the *Residential Tenancies Act, 2006*, SS 2006, c R-22.0001 landlords can impose reasonable rules prohibiting the possession, use, growth and sale of cannabis in a rental unit if they are made known to the tenant and in writing.
 - Condominium boards also have the ability to pass bylaws respecting the possession, cultivation, and use of cannabis in their complexes, including within private units.

Possession – Forms

- In Saskatchewan, a permittee may sell
 - dried cannabis
 - cannabis oil
 - fresh cannabis
 - cannabis plants
 - cannabis plant seeds
 - edible cannabis
 - cannabis extracts
 - cannabis topicals

But, a permittee cannot sell to you if you are intoxicated (s. 3-8)



- You **can make cannabis products**, such as food and drinks, at home as long as organic solvents are not used to create concentrated products
 - **Organic solvent** includes any organic compound that is explosive or highly or extremely flammable, including petroleum naphtha and compressed liquid hydrocarbons such as butane, isobutane, propane and propylene.

Punishment for Violation – Federal

Possession over the limit	Tickets for small amounts Up to 5 years less a day in jail
Producing cannabis beyond personal cultivation limits or with combustible solvents	Tickets for small amounts Up to 14 years in jail
Taking cannabis across international borders	Up to 14 years in jail
Giving or selling cannabis to a person under 18	Up to 14 years in jail
Using a youth to commit a cannabis-related offence	Up to 14 years in jail

- There is a **specific sentencing provision** for violations of the federal act that direct courts to consider whether the offender:
 - carried, used or threatened to use a weapon,
 - used or threatened to use violence, or
 - sold or distributed cannabis or possessed it for the purpose of sale or distribution, in or near a school, on or near school grounds or in or near any other public place usually frequented by young persons; and
 - prior convictions

Medical Emergencies

- There are **medical emergency exceptions** that prevent the police from charging you in situations where you are experiencing or you are assisting someone experiencing a medical emergency.
 - This includes breaches of other court orders
 - This applies in both the Federal and Provincial Acts





New Public Policy Directive: Prosecution of Simple Possession

- 5.13 Prosecution of Possession of Controlled Substances
Contrary to s. 4(1) of the *Controlled Drugs and Substances Act*
 - A guideline to prosecutors in determining the appropriate approach to the prosecution of the possession of a controlled substance contrary to s. 4(1) of the CDSA
- Context →
 - “The approach set out in this guideline directs prosecutors to focus upon the most serious cases raising public safety concerns for prosecution and to otherwise pursue suitable alternative measures and diversion from the criminal justice system for simple possession cases.”
 - reflects three realities: (i) substance use has a significant health component; (ii) in addition to the personal health component, substance use may be associated with conduct that poses separate serious public safety concerns requiring a criminal enforcement component; and, (iii) simple possession may result in a criminal record as well as a fine or a short period of incarceration



New Public Policy Directive: Prosecution of Simple Possession, Continued...

- Prosecutors will be guided by the following principles:
 1. Resort to a criminal prosecution of the possession of a controlled substance contrary to s. 4(1) CDSA should generally be reserved for the most serious manifestations of the offence
 2. In all instances, alternatives to prosecution should be considered unless they are inadequate to address the concerns related to the conduct...
 3. Criminal prosecution is justified in the most serious manifestations of harm, such as:
 1. Conduct that poses a risk to the safety of children;
 2. Conduct that puts the health or safety of others at risk;
 3. Conduct that poses a heightened risk to a community's efforts to address consumption of controlled substances (mostly concerned with isolated or remote communities);
 4. Etc.

Canadian Jurisprudence on Possession after the *Cannabis Act*

- *R v Keough, 2018 NLPC*
 - "I suggest that the imposition of discharges for the offence of possession of Cannabis (marihuana), contrary to section 4(1) of the *Controlled Drugs and Substances Act*, should be the rule, rather than the exception, pending the enactment of the *Cannabis Act*."
- *R v Marsden, 2019 ONCJ*
 - "Clearly, with respect to marijuana offences, sentencing in this area is still evolving, and additional to societal attitudes, there may be other developments, such that the unregulated possession or trafficking in marijuana may become less connected to ancillary criminal activities and organizations, or it may not. Time will tell."
- *R v Coffey, 2020 BCCA*
 - "...the penalties for possessing large quantities of marihuana for the purpose of trafficking and illicitly producing marihuana have not significantly changed since the enactment of the *Cannabis Act*. ..."



Cannabis in the Criminal Context

Trafficking



Trafficking

- It is illegal to sell or distribute illicit cannabis
 - 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.
- It is illegal to transport cannabis across Canada's border



Federal Penalties

- Punishment – s. 9(5) & s. 10(5)
 - Indictable
 - Adults – imprisonment for a term of not more than 14 years
 - Minors – a youth sentence
 - Organizations – a fine in an amount left to the discretion of the court
 - Summary Conviction
 - Adult Offences that do not involve minors:
 - a fine up to \$5,000 or imprisonment up to 6 months
 - Adult Offences involving minors:
 - a fine up to \$15,000 or imprisonment up to 18 months
 - Youth Offences
 - A youth sentence
 - Organization Offences
 - A fine of not more than \$100,000

Provincial Penalties

- **5-2(1) Offences**
 - a **fine** up to **\$25,000** for an individual
 - A **fine** up to **\$100,000** for a corporation;
 - **imprisonment** up to 6 months; or
 - **both** the fine and imprisonment.
- If an offence against this Act or the regulations or a breach of a term or condition of a cannabis permit is committed or continued on more than 1 day, it constitutes a **separate offence for each day** on which it is committed or continued.
- **No proceeding** for a contravention mentioned in subsection (1) **shall be commenced more than 3 years after** the day on which the offence was, or is alleged to have been, committed.



Canadian Jurisprudence on Trafficking after the *Cannabis Act*

- *R v Fitzpatrick*, 2019 NLPC
 - “Last year, up to the passage of the *Cannabis Act*, sales of cannabis were restricted to “medical marijuana”. Since then, cannabis may be sold by government-approved businesses, which then remit a sales tax on the cannabis to government. In this regard, Justice Burrage is correct: the times have changed in relation to the law(s) applicable to cannabis.”
 - “Having legalized the trade in cannabis, there is a strong argument that the focus of sentence for cannabis-related offences has moved from one of protection of the public to one of revenue gathering for the government. This makes the sale of marijuana comparable to the sale of tobacco. As long as it is not sold to minors, and as long as the government gets the duties and taxes charged on the sale, the government now sees nothing wrong in the sale of cannabis to the public. That being the case, sentences of imprisonment of first offender low level cannabis dealers are no longer appropriate.”
- *R v Krzyz*, 2018 BCSC
 - “Simply put, the new regime does not detract from the seriousness of possessing marijuana for the purpose of trafficking . I note the purposes of the Cannabis Act, S.C. 2018, c. 16, include deterring the illicit distribution of marijuana which remains prohibited, and an indictable offence punishable by imprisonment up to 14 years. Clearly deterrence and denunciation continue to be very important sentencing objectives for this offence.”
- *R v Riley*, 2020 ONSC
 - “Given the significant loosening of the prohibitions on the possession and distribution of marijuana, as well as the small amount possessed by Mr. Riley, it would not be contrary to the public interest to impose a conditional discharge for this offence.”





Cannabis in the Criminal Context

Driving under the Influence





SASKATCHEWAN CANNABIS FRAMEWORK - OVERVIEW

- The minimum age for legal non-medicinal cannabis consumption is 19 years of age
- It continues to be illegal to drive while impaired – whether by drugs or alcohol. This has not changed now that cannabis use is legal
- Zero Tolerance for any new drivers – for any level of THC

Prohibited Levels

- There are two prohibited levels for THC, the primary psychoactive component of cannabis:
 - It is a less serious offence to have between **2 nanograms (ng) and 5 ng of THC per ml of blood.**
 - It is a more serious offence to have **5 ng of THC or more per ml of blood.**
- The prohibited levels of alcohol and cannabis, when found in combination, is **50mg or more of alcohol per 100ml blood [.05] and 2.5 ng or more of THC per ml of blood.**
- All of these are **within two hours** of operating a vehicle unless:
 - The Driver consumed the drug after ceasing to operate the vehicle; AND
 - The Driver had no reasonable expectation they would have to provide a sample
 - This is meant to prevent the intervening use defense



Penalties

Penalties			
Charge	1 st offence	2 nd offence	3 rd offence
<ul style="list-style-type: none"> Alcohol-impaired driving Having a Blood Alcohol Concentration (BAC) at or over 80mg per 100ml of blood within 2 hours of driving 			
<ul style="list-style-type: none"> Drug-impaired driving Having 5ng or more of THC per ml of blood within 2 hours of driving Any detectable level of LSD, psilocybin, psilocin, ketamine, PCP, cocaine, methamphetamine, 6-mam within 2 hours of driving Having 5mg or more of GHB per 1 litre of blood within 2 hours of driving 	Mandatory minimum: \$1000 fine Maximum: 10 years imprisonment	Mandatory minimum: 30 days imprisonment Maximum: 10 years imprisonment	Mandatory minimum: 120 days imprisonment Maximum: 10 years imprisonment
Combination <ul style="list-style-type: none"> Having a BAC of 50mg per 100ml of blood + 2.5ng or more of THC per 1ml of blood within 2 hours of driving 			
Refusal to comply with demand for sample	Minimum: \$2000 fine		
Drug-impaired driving - Summary conviction <ul style="list-style-type: none"> Having over 2ng but less than 5ng of THC per ml of blood within 2 hours of driving 	Maximum \$1000 fine		
Impaired driving causing bodily harm	<ul style="list-style-type: none"> Summary conviction: Maximum 2 years imprisonment less a day Indictment: Maximum 14 years imprisonment 		
Impaired driving causing death	<ul style="list-style-type: none"> Indictment: Maximum life imprisonment 		
First offence + BAC of 80-119mg	Mandatory minimum \$1000 fine		
First offence + BAC of 120-159mg	Mandatory minimum \$1500 fine		
First offence + BAC of 160mg or more	Mandatory minimum \$2000 fine		



New Driver Penalties

- Police will suspend your driver's license immediately at the roadside. The length of your suspension depends on how many previous offences you've had in the last 10 years:

Number of Priors	Length of Suspension
1st offence:	60 days
2nd offence:	120 days
3rd offence & subsequent:	18 months

- Police will impound your vehicle, the length will depend on whether you have passengers under age 16 in the car

Number of Priors	Length of Suspension	If transporting someone under the age of 16
1st offence:	3 days	7 days
2nd offence:	7 days	30 days
3rd offence & subsequent:	14 days	60 days

- You also have to complete different programs depending on whether it's a first, second, or third offence
- For a second offence you can voluntarily sign up for ignition interlock to get your license back sooner (60 rather than 120 days), for a third offence its mandatory for 365 days

Experienced Driver Penalties

- If the police catch you with any drugs in your system they will immediately suspend your licence. The length of the suspension depends on previous offences in the last 10 years and whether you were transporting someone under the age of 16:

Number of Priors	Length of Suspension	If transporting someone under the age of 16
1st offence:	3 days	7 days
2nd offence:	21 days	30 days
3rd offence & subsequent:	90 days	120 days

- Police will also impound your vehicle:

Number of Priors	Length of Suspension	If transporting someone under the age of 16
1st offence:	3 days	7 days
2nd offence:	7 days	30 days
3rd offence & subsequent:	14 days	60 days

- You also have to complete different programs depending on whether it's a first, second, or third offence
- If you've had 3 or more immediate roadside suspensions within the last 10 years, then before you can get your full driver's licence back, you have to:
 - Take the addiction assessment program, and
 - Install the mandatory ignition interlock device for 365 days.

Canadian Jurisprudence on Driving Under the Influence after the *Cannabis Act*

■ *R v Burke*, 2020 ONCJ

“During legislative debate leading up to the passage into law of the Cannabis Control Act, in response to a question about what the government is doing to ensure road safety, then Ontario Minister of Transportation John Yakabuski said:

We also launched a very comprehensive public education campaign so that we can educate the public on the dangers of driving while under the influence of cannabis. One thing we want to make absolutely clear to the people out there — there are misconceptions, but we want to make one thing absolutely clear: Impaired is impaired, whether it's alcohol or drugs. Our ministry is making sure that we have educated the people with a two pronged approach because we want our highways to be safe. It's our number one priority.

The Minister's comments that it does not matter how you became impaired is reinforced by the legislation's mimicry of the language found in the Liquor License Act...

This reflects a legislative intent that the restrictions with respect to cannabis are the same as those for alcohol, while operating or having care or control of a motor vehicle. It is also consistent with the Minister's comments regarding impaired driving.”



Q & A

