Blaney McMurtry LLP

PUBLICATION

A Review of U.S. Border Crossing Issues One Month After Cannabis Legalization

Date: November 19, 2018

Original Newsletter(s) this article was published in: Blaneys on Immigration: November 2018

On April 13, 2017, the Canadian Government introduced the *Cannabis Act*[1] in the House of Commons. Its purpose was to legalize marijuana and establish a framework to control its production, distribution, sale, and possession across Canada. The *Cannabis Act* received Royal Assent on June 21, 2018, and came into effect on October 17, 2018.

Unfortunately, many Canadians (and foreign nationals residing in Canada) still do not understand how the *Cannabis Act* interacts with the inadmissibility grounds contained in the U.S. *Immigration and Nationality Act*[2] ("INA"). As we are now at the one-month anniversary of cannabis legalization in Canada, it would be an appropriate time to revisit the issue of U.S. border crossings, in the context of cannabis.

Marijuana Use/Possession After Legalization

Under INA §212(a)(2)(A)(i)(II), individuals who have been convicted of, or who admit to having committed the essential elements of, a controlled substance offense are inadmissible. This ground of inadmissibility results in a permanent bar to the United States.

As of October 17, 2018, marijuana use/possession (in accordance with the *Cannabis Act*) will not be prosecuted as a criminal offence in Canada. However, it is still possible for an individual to be charged with a controlled substance offence even after October 17, 2018. For example, it will be a criminal offence for an individual:

- Who is 18 years of age or older to possess more than 30 grams of dried cannabis (or the equivalent) in a public place;
- Who is 18 years of age or older to possess any cannabis that they know is illicit cannabis (i.e. not obtained through authorized sources);
- To possess one or more cannabis plants, which are budding or flowering, in a public place;
- To possess more than four cannabis plants that are not budding or flowering.[3]

These controlled substance offenses (and others) could still result in a permanent bar to the United States after October 17, 2018.

In addition, a formal conviction is not required for INA §212(a)(2)(A)(i)(II) to apply. Simply making an admission to a United States Customs and Border Protection ("USCBP") officer (or to certain other officials) may result in finding of inadmissibility.

Of course, for an admission to result in inadmissibility under INA §212(a)(2)(A)(i)(II), the act performed must have been considered a crime in the jurisdiction where it was committed, at the time that it was committed. Admitting to lawful marijuana use/possession (in accordance with the *Cannabis Act*), which occurred on or after October 17, 2018, would not be a criminal offence in Canada. Therefore, it should not result in a permanent bar under INA §212(a)(2)(A)(i)(II).

That said, legal use/possession of marijuana (in accordance with the *Cannabis Act*), occurring on or after October 17, 2018, could still result in a bar under one of these other grounds of inadmissibility:

- Under INA §212(a)(1)(A)(iii), an individual is inadmissible if they have been determined to have a physical or mental disorder and a history of behavior associated with the disorder that may pose (or has posed) a threat to the property, safety or welfare of themselves or others. They may also be barred if they previously had such a physical or mental disorder, which is likely to recur or lead to other harmful behavior. As alcoholism can result in a bar under this ground of inadmissibility, marijuana use could also result in a finding of inadmissibility, provided that associated harmful behavior also exists. For example, driving a vehicle while under the influence of marijuana could be considered evidence of associated harmful behavior.
- Under INA §212(a)(1)(A)(iv) a person is inadmissible if they are determined to be a drug abuser or drug addict. Harmful behavior is not a relevant factor in rendering a determination of ineligibility under this ground. There is also no requirement that the use of a particular controlled substance actually be illegal in the jurisdiction where it occurs. However, use of controlled substances for medical purposes is not considered substance abuse. Therefore, medical marijuana users who use/possess marijuana in Canada pursuant to a valid prescription, in accordance with Canadian law[4], would not be considered drug abusers.

For either of the above grounds to apply, a USCBP officer will need to refer the individual to an approved Panel Physician, who will make a medical determination regarding whether that individual has a mental disorder (with associated harmful behavior) or is a drug abuser/addict. If the USCBP officer decides to refer an individual to a Panel Physician, they will be denied entry and instructed not to return until USCBP has received their medical assessment.

An individual who is found to be a drug abuser or addict by an approved Panel Physician will be barred from the United States. However, they will cease to be barred if their drug abuse or addiction is later found to be in remission. In order for a finding of remission to be made, the individual will need to obtain another medical assessment from an approved Panel Physician.

Marijuana Possession Convictions Prior to Legalization

Although it is legal to use/possess marijuana (in accordance with the *Cannabis Act*) as of October 17, 2018, this does not affect prior criminal convictions for marijuana possession. An individual who was convicted of marijuana possession in Canada prior to October 17, 2018, will still be inadmissible under INA §212(a)(2)(A)(i)(II).

The Government of Canada recently announced its plan to offer expedited Pardons (now known as Record Suspensions) to individuals who were previously convicted of simple possession of marijuana in Canada. Unfortunately, Canadian Pardons (i.e. Record Suspensions) are administrative and are not considered Executive Pardons, such as those granted by United States Governors or the President of the United States. As a result, Canadian Pardons do not have the same effect as an Executive Pardon granted in the United States.

According to Subsection 2.3(b) of the *Criminal Records Act*, a Record Suspension requires that the judicial record of the conviction be kept separate and apart from other criminal records and removes any disqualification or obligation to which the applicant is, by reason of the conviction, subject under any Act of Parliament. In other words, a Record Suspension does not erase the fact that an individual was convicted of an offence; it merely seals their criminal record and removes any disqualification that might otherwise be imposed under Canadian federal law.

Even if the Canadian Government proceeds with its plan to address past marijuana convictions by means of an expedited Record Suspension, this will do nothing to address the U.S. inadmissibility of individuals who may have been convicted of simple marijuana possession offences prior to legalization. These individuals will remain permanently barred from the United States.

Admitting to Marijuana Possession/Use Prior to Legalization

Merely admitting to marijuana use/possession, which occurred prior to the effective date of the *Cannabis Act*, should result in a bar under INA §212(a)(2)(A)(i)(II). This is because it would have been considered a criminal offence at the time that it occurred. The bar would apply even if the actual admission was not made to a USCBP officer until after October 17, 2018.

USCBP previously suggested that officers would not ask every traveler whether they previously used marijuana, after it became legal in Canada. However, there have already been several incidents involving Canadians being randomly asked about their prior marijuana use.

Of course, INA §212(a)(2)(A)(i)(II) would not apply to individuals who legally used/possessed marijuana for medical purposes, in accordance with current or prior Canadian laws.[5] This is because lawful medical marijuana use would not have been considered a criminal offence in Canada, even prior to October 17, 2018. In addition, INA §212(a)(1)(A)(iv) would not apply since medical marijuana use is not considered substance abuse. Finally, INA §212(a)(1)(A)(iii) would not apply in the absence of associated harmful behavior.

Unfortunately, admitting to legal use of medicinal marijuana, pursuant to a valid prescription, could prompt a USCBP officer to ask if the individual ever illegally used marijuana before

obtaining the prescription. If they admit to doing so, they can still be barred from the United States under INA §212(a)(2)(A)(i)(II), based on the illegal marijuana use.

Employees and Investors of Legal Cannabis Companies in Canada

There is still a great deal of uncertainty regarding whether employees of Canadian cannabis companies will be permitted to enter the United States for business purposes. Although USCBP has now clarified that these employees may enter for tourism, it is still not clear what business activities will be permitted.

On October 9, 2018, USCBP revised its Policy Statement on Canada's Legalization of Marijuana and Crossing the Border (the "Revised Statement). Prior to this date, USCBP had taken the position that merely being an employee (or an investor) of a legal cannabis business in Canada could result in inadmissibility under INA §212(a)(2)(C).

INA §212(a)(2)(C) permanently bars an individual if a USCBP officer has reason to believe that he or she is an illicit trafficker in a controlled substance, or a knowing assister, abettor, conspirator, or colluder in illicit trafficking. This is the same ground of inadmissibility that would be used to bar individuals such as Pablo Escobar or El Chapo.

Prior to the Revised Statement, there were alreadyreported cases of employees of Canadian cannabis businesses receiving lifetime bans under INA §212(a)(2)(C). Also, in at least one case, an investor in a Canadian cannabis company also received a lifetime ban under INA §212(a)(2)(C). Although these cases appeared to be limited to ports of entry on the West Coast, they demonstrated that employees and investors of Canadian cannabis companies might actually be banned as illicit traffickers.

The risk became even greater when Politico interviewed Todd Owen, Executive Assistant Commissioner for USCBP's Office of Field Operations in September 2018. During this interview, he specifically told Politico that working in the Canadian cannabis industry would be grounds for inadmissibility.

The Revised Statement was considered welcome news for employees and investors of Canadian cannabis companies. The current position taken by USCBP is as follows:

A Canadian citizen working in or facilitating the proliferation of the legal marijuana industry in Canada, coming to the U.S. for reasons unrelated to the marijuana industry will generally be admissible to the U.S. However, if a traveler is found to be coming to the U.S. for reason related to the marijuana industry, they may be deemed inadmissible.

The Revised Statement was significant because it confirmed that employees of Canadian cannabis companies should be admissible if their reasons for coming to the United States are "unrelated to the marijuana industry." This clearly includes travelling purely for tourism (for example, going to Disneyland) and even business visitor activities that are completely unrelated to the marijuana industry (for example, representing a different company that is not involved in the cannabis industry).

Although the Revised Statement does not specifically refer to investors in the Canadian cannabis industry, it clearly includes passive investors who merely purchase a small number of shares in a Canadian cannabis company, since they typically will not be entering the United States in furtherance of the marijuana industry. It may even apply to large investors in Canadian cannabis companies, as long as they are not entering the United States as a representative of that cannabis company (i.e. officer, board member, etc.).

Although the Revised Statement was a step in the right direction, it did not state what activities would be considered "unrelated to the marijuana industry." As I have repeatedly stated, this left open the possibility that someone could be barred merely for attending a marijuana conference in the United States or visiting a U.S. investor in his or her Canadian cannabis company.

On October 25, 2018, the Canadian Press reported that they had received an email from Stephanie Malin, USCBP Branch Chief for Northern/Coastal Regions, which stated the following:

If the purpose of travel is unrelated to the marijuana industry such as a vacation, shopping trip, visit to relatives, they will generally be admissible to the U.S. However, if they are coming for reasons related to the industry, *such as the conference*… they may be found inadmissible.

Chief Malin was referring to a cannabis industry conference in the United States as an example of a reason that could result in a finding of inadmissibility under INA §212(a)(2)(C).

This latest comment from USCBP creates further uncertainty for employees and investors of Canadian cannabis companies, many of who are still required to travel to the United States as business visitors in connection with the Canadian cannabis industry.

Conclusion

Marijuana legalization in Canada has clearly created many unintended U.S. immigration consequences. It is therefore important for Canadians (and foreign nationals residing in Canada) to educate themselves on how marijuana use (both before and after legalization) could affect their ability to enter the United States. Employees of Canadian cannabis companies in particular should be aware of the significant risks associated with entering the United States for reasons related to the marijuana industry.

---

[1] S.C. 2018, c. 16.

[2] Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 USC §§1101–1524).

[3] *Cannabis Act*, s. 8.

[4]See the *Access to Cannabis for Medical Purposes Regulations* (SOR/2016-230).

[5] This would include the *Access to Cannabis for Medical Purposes Regulations* (SOR/2016-230), the *Marihuana for Medical Purposes Regulations* (SOR/2013-119), the *Marihuana Medical Access Regulations* (SOR/2001-227), and the section 56 exemptions under the *Controlled Drugs and Substances Act* (S.C. 1996, c. 19).