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Criminal

It’s a start, but bills C-45 and C-46 need more work

By **Melanie Webb**

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(April 19, 2017, 10:21 AM EDT) -- With the number of issues that have been highlighted in the days immediately following the tabling of the proposed new marijuana legislation, there is little doubt that the wording of both bills will undergo some evolution before they are ever passed into law.

Bill C-45 (the proposed *Cannabis Act*)

Bill C-45 leaves it up to the provinces to establish their own legislative measures to authorize the sale of cannabis. However, persons authorized to sell cannabis are strictly prohibited from selling to young persons. Persons not authorized to sell cannabis face criminal prosecution. One issue that has already attracted public scrutiny is the imposition of a *maximum sentence of 14 years* on adult individuals for certain offences, when the Crown proceeds by indictment, such as:

- unauthorized selling of any quantity of cannabis to anyone (under or over 18);
- unauthorized distribution of over 30 g of dried cannabis (or the equivalent) to an adult;
- unauthorized distribution of any quantity of cannabis to a person under 18;
- importing/exporting;
- production;
- use of a person under 18 in any of the above.

On the other hand, the Crown may elect to proceed summarily, which carries a lesser penalty (fine and/or shorter period of imprisonment). Some discretion is permitted, so that police may simply issue a ticket for cannabis offences that fall below a certain limit and do not involve minors: that being 50 g of dried cannabis for possession, distribution, selling and production, and one or two more plants than permitted by law. The penalty then becomes a modest fine. If the person voluntarily pays it in the time allotted (without a trial) a conviction would be entered, but the judicial record would be kept separate and apart from other judicial records.

It is unclear how the U.S., for example, might view such a conviction for the purposes of permitting entry, should such information be provided. For distributing or selling cannabis to a minor, there is no minimum amount before it becomes a criminal offence. Some commentators have seized upon the fact that a 14-year sentence could — in theory — be applied to an 18-year-old “passing a joint” to a younger teen. One would presume that the Crown would reasonably elect summarily in such instance, if they chose to pursue a prosecution at all, and that no court would ever impose such a sentence on this type of offender even if the Crown did proceed by indictment.

However, of greater import, the proposed maximum sentences could have drastic immigration consequences. For example, any permanent resident or foreign national convicted of an offence that carries a maximum term of “at least 10 years” — *even for hybrid offences, irrespective of whether the Crown proceeds summarily or by indictment* — would be deemed inadmissible on the basis of “serious criminality” and subject to a removal order. Protected persons would also be deemed inadmissible and could be deported if deemed a danger to the public, and refugee claimants would be deemed inadmissible, with no right of appeal, and any refugee claim terminated.

One questions why Parliament should impose a 14-year maximum sentence for any of these offences. To put this in perspective, current examples of offences with lower maximum sentences include:

- various firearm offences (five or 10 years, depending on the provision);
- sexual exploitation of a person with a disability (five years);
- possessing or accessing child pornography (10 years);
- obtaining sexual services for consideration from persons under 18 (10 years);
- trafficking LSD, psilocybin ("mushrooms") (10 years);
- trafficking barbiturates, benzodiazepines (three years).

Currently, the maximum sentence for trafficking cannabis or possession for the purpose is five years less a day if the amount is 3 kg or less. Over 3 kg, the maximum sentence is life imprisonment.

What the government has not yet addressed:

1. Guidance as to how to handle matters that are already "in the system."

Questions remain as to what to do with charges laid from the time of the government's confirmation of its intention to decriminalize marijuana, and after the legislation now tabled, up until the passing of the bill into law. It would seem to make little sense to continue prosecutions involving small amounts which would no longer be criminal offences under the proposed legislation.

2. How to treat those who currently have a criminal record for minor cannabis offences.

Having a criminal record can cause issues for employment. Further, any kind of finding of guilt for a drug offence presents an immediate problem for people seeking to enter the U.S. Recent pronouncements from the federal Public Safety minister indicate that the public should not expect any "blanket pardon" to be implemented, pointing to the record suspension ("pardon") process already in place. This ignores the reality of the lengthy and tedious application process: a person must wait five years to apply for summary offences (which would include simple possession of cannabis under 30 g), and 10 years for indictable offences, after all fines, surcharges, costs, restitution and compensation orders are paid and after all periods of imprisonment, conditional sentences and probation are over. Then the length of time awaiting the decision on the application can take up to a year or more. It also does not alleviate the border-crossing issue: record suspensions are not recognized by the U.S. Canadians would still need to go through the process of applying for an entry waiver.

Bill C-46

In the meantime, Bill C-46 both creates new offences and brings changes to provisions surrounding drug-impaired and alcohol-impaired operation of a motor vehicle, vessel, aircraft, or railway equipment (termed a "conveyance") which invite constitutional challenge, should the bill be passed into law. Without identifying every issue, which could stretch well beyond the space allotted for this article, it is fair to say that defence lawyers may view many of these proposed changes as a way of implementing evidentiary shortcuts and curtailing currently available defences, while at the same time infringing individual Charter rights.

For example, one area of concern is the proposed implementation of mandatory breath testing, a matter that has come up before in the House of Commons. Under the proposed legislation, police would have the ability to demand a breath sample from any driver they stop, without needing reasonable suspicion that the person has alcohol in his or her body.

Another issue of hot contention is roadside testing for drug impairment. This now promises to open up a whole new area of litigation surrounding the accuracy and reliability of measurements of THC levels — an interesting prospect, considering that we still await a standardized saliva-based roadside device.

Melanie Webb practises primarily criminal law at the trial and appellate levels. She also represents clients on regulatory and disciplinary matters.
