



From Toques to Tokes: Two challenges facing nationwide legalization of cannabis in Canada



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ABSTRACT

Background: In 2015, a new Liberal Government came to power in Canada, elected on a platform that included legalization and regulation of cannabis for recreational purposes. Their legislation, based on recommendations from a Federal Task Force on Marijuana Legalization and Regulation, is due in early April 2017.

Methods: This commentary utilizes Canadian Federal policy papers, previous literature, and internal and international agreements to examine two key areas critical to the development of a nationwide regulated market for cannabis in Canada; the need to overcome restrictions to legalizing cannabis in United Nations' drug control treaties, and the unique challenges that non-medical cannabis creates for navigating interprovincial trade policies in Canada.

Results: Irrespective of UN conventions that appear to prohibit legalization of cannabis the Government is preparing to bring forward legislation as this article goes to print. At the same time significant squabbles impede the selling of even beer and wine inter-provincially in Canada. This paper identifies the challenges facing Canadian legalization efforts, but also shows how the legalization legislation may provide opportunities to engender significant change beyond the simple legalization of a specific drug.

Conclusion: This commentary does not argue for any specific course of action for Canada, but rather explores the nuance of legalization absent from the declaration in the Liberal party platform. The paper argues that Canada's efforts may hasten the dismantling of the UN drug control structure, and provide renewed opportunities for inter-provincial trade in Canada.

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Introduction

On October, 2015 the Liberal Party, led by Justin Trudeau, swept to power with a surprise win in the Canadian federal election. The Liberal party platform comprised a number of progressive policies, including a commitment to legalize cannabis across Canada.¹ "To ensure that we keep marijuana out of the hands of children, and the profits out of the hands of criminals, we will legalize, regulate, and restrict access to marijuana." (*Liberal Party, 2015, p. 55*). The Liberal Government appointed former Toronto Police Chief Bill Blair, now a Liberal Member of Parliament, to lead the development of a coherent plan for North America's first nationwide non-medical cannabis market. A Task

Force on Marijuana Legalization and Regulation, headed by former Minister of Justice Anne McLellan delivered recommendations to Parliament in December 2016. Given the apparent restrictions to legalizing cannabis in United Nations' (UN) drug control treaties, and the interprovincial trade and regulatory issues that have plagued Canada since confederation in 1867, setting up a nationwide regulated cannabis market is no easy task. This commentary explores these two issues and examines opportunities to turn challenges into positive outcomes for the legalization process, both domestically and internationally. We provide further insights for Canadian policymakers and an account of the legalization challenges for future states intent on non-medical cannabis legalization and regulation.

Any discussion of national drug law reform must take in to account a state's international obligations under the UN treaties controlling drugs. These treaties were at the forefront of discussion during the Special Session of the UN General Assembly on the World Drug Problem (UNGASS) in April 2016. During UNGASS, Canada's Health Minister, Dr. Jane Philpott, addressed the assembly and made clear the Government's intention to legalize cannabis

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¹ The New Democratic Party had only promoted cannabis decriminalization in their platform, and the Conservative platform called for increased efforts to root out drug dealers through tougher enforcement and the introduction of mandatory minimum sentences for drug distribution.

(CBC, 2016). One of Minister Philpott's deputies had previously told the Commission on Narcotic Drugs that, "[Canada] will seek to align its objectives for a new marijuana regime with the objectives of the international drug-control framework and the spirit of the conventions." (Geller, 2016, p. 7). The implication was that Canada intended to move forward with cannabis legalization despite what many would argue are clear prohibitions contained in the UN Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances 1988 (UN, 1988). These international issues are well known, and while some have cited an inherent, if underappreciated, flexibility within the three major UN drug control treaties (Collins, 2015), others have argued such flexibility is a myth propagated as "legally fallacious—but politically potent" (TNI, 2016, p. 7) by countries dissatisfied with the state of drugs policy regulation as it relates to cannabis.

While many people have chimed in on the validity of cannabis legalization efforts without changes to the UN drug control treaties (Bewley-Taylor & Jelsma, 2012; Caulkins, 2016; Collins, 2017; Graham, 2015; Hoffman & Habibi, 2016), a far less appreciated issue threatens to derail Canadian efforts to legalize cannabis. Historically, trade between the provinces in Canada has required intensive negotiation and internal treaties in order to flow smoothly as each province wields significant power to control and protect its industries. While every US state has its own criminal code (in addition to US Federal criminal laws) Canada has a unified criminal code. The duties of the Federal government in Canada are broadly restricted to issues, including but not limited to national defense, criminal law, banking, foreign affairs, postal duties, aboriginal rights, and fisheries. Canada's long running inter-provincial trade troubles are perhaps most visible in the burgeoning wine sectors in both Ontario and British Columbia. In both provinces, retail distribution of wine is controlled by government run stores, and in each province it remains difficult to obtain wine from the other, though recent initiatives have made it possible to order wine online between the two provinces. This difficulty springs from Importation of Intoxicating Liquors Act 1985 which largely prevents shipment of alcohol between provinces unless done so by an agency vested by a particular province to sell alcohol. In addition, each Canadian province has different restrictions on the retail distribution of alcohol, and all provinces, except Alberta, rely on a largely monopolistic structure controlled by government-run retail stores.

The external controls and internal conflict present significant hurdles to overcome beyond the more traditional legalization questions of distribution models, minimum age requirements, and concerns over impaired driving. This piece will examine the two issues in greater depth and suggest that addressing each challenge might be an opportunity to engender significant and much needed change.

Evidence

The internal Canadian conundrum

Internal trade in Canada is marred by overly complex and diverging regulations, and contested policies despite internal agreements (WTO, 2011). Such is the complexity of this component of the legalization question that the current Government's first discussion paper on the subject omitted any significant discussion of interprovincial variation in distribution models (Government of Canada, 2016b). Even the Task Force report in December 2016 stayed relatively clear of the topic, suggesting that provinces have control over wholesale distribution and retail sales, while also seeming to suggest a national regulatory framework similar to the *Tobacco Act 1997* in areas of advertising, access, and regulation of product standards.

Section 121 of the Canadian Constitution Act requires that, "All Articles of the Growth, Produce, or Manufacture of any one of the Provinces shall, from and after the Union, be admitted free into each of the other Provinces." (Constitution Act, 1867). This would seem to set a fairly clear standard for interprovincial trade, but until recently the courts established that such language only bars taxation, duties, or customs from being levied on interprovincial goods. Provinces were allowed to set different regulatory standards, ban shipment of alcohol, set quotas, or engage in other non-tariff type impositions on free trade (Crowley, Knox, & Robson, 2010). The recent case of *R. v. Comeau*, where a New Brunswick man was arrested after trying to transport beer into his home province from neighboring Quebec, undermined that position. The courts ruled that Section 121 should be interpreted as requiring barrier free trade across provinces, and this may have significant impact on future liquor laws.

At one point the inter-provincial trade situation had become so difficult that in 1995 the Agreement on Internal Trade (AIT) was negotiated and signed by the federal government, all 10 provinces and two of the three territories.² The AIT aimed to end many of the impediments on interprovincial trade, and potentially act as a unifying force for a country beset with language and cultural differences (Lee, 2002). The AIT ensured uniform labelling, reduced differences in packaging, and generally supported easier transfer of goods and services between provinces (Canada, 1995). However, the AIT states that when a province has a 'legitimate objective', "such as the protection of health or safety or the protection of the environment . . ." (Canada, 1995, p. 129) it can ignore provisions in the AIT and restrict that good or service. While cannabis is not mentioned in the document and chapter 10 is solely concerned with alcoholic beverages, we may use that as a facsimile for what might occur with a new legalized drug. In the AIT, provinces agreed to reciprocal non-discrimination in regards to access at points of sale, pricing, and listing of alcohol, though some exceptions were maintained. Nova Scotia was allowed to maintain differential pricing for beer brewed outside of the province, and both British Columbia and Ontario (the two biggest wine producing provinces) could positively discriminate for their own wines in the small number of privately run wine shops (Canada, 1995, p. 124). The AIT establishes two key precedents that might constrict a nationwide regulated non-medical cannabis market. First, exceptions about almost every aspect of the internal trade pact can be renegotiated in regards to intoxicating substances. Second, any claim that a province is acting for the safety, health, or wellbeing of its inhabitants can void requirements in the AIT. The structure of this internal trade agreement, and the many smaller agreements existing between individual provinces, threatens to create a situation whereby there are at least 13 different forms of cannabis legalization, including some that are so restrictive as to nearly maintain prohibition. This of course may be a good thing for drug policy scholars interested in comparing outcomes in 13 simultaneous experiments, but would undermine efforts at eliminating the black market for cannabis.

Fortunately there is already a model of cannabis distribution within Canada that may help provide guidance on future cannabis legalization. Since 1999 Canada has provided access to cannabis for medical purposes. Unlike many American states that have medical cannabis systems, Canada limited distribution to a mail order system by licensed producers. Though this system has undergone several changes over the years, the current iteration was developed after a February 2016 court decision struck down the Marijuana for Medical Purposes Regulations (MMPR) in *Allard v. Canada*. The court ruled that Canadians were being denied reasonable access to

² Nunavut is not a signatory to this treaty but has observer status.

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