

Into The Weeds: The Insurance and Legal Implications of Cannabis In the United States and Canada

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PART I: CANNABIS IN THE UNITED STATES (2019)

I. The Legal Framework

The use of cannabis for medical purposes is legal in 33 states, plus the territories of Guam, Puerto Rico, and the Northern Mariana Islands, and the District of Columbia. Eleven states have legalized adult recreational use of marijuana.

There is considerable variation in medical cannabis laws from state to state, including how it is prescribed, produced and distributed, how it can be consumed, and what medical conditions it can be used to treat.

Nonetheless, there exists a fundamental legal conflict between the states statutes and federal law with regard to the legal use of marijuana. While many states are legalizing marijuana for a multitude of reasons, it remains classified as a Schedule I drug under the Controlled Substances Act of 1970 and therefore federally illegal.

A. Federal Law

1. The Controlled Substances Act of 1970

The Controlled Substances Act (“CSA”), Title II of the Comprehensive Drug Abuse Prevention and Control Act of 1970, regulates the manufacture, importation, possession and distribution of controlled substances in the United States. The Food and Drug Administration must approve any substance before it may be prescribed or sold in the United States. The CSA also confers regulatory authority over “controlled substances” to the DEA. Marijuana (or cannabis) is defined as a Schedule I controlled substance, which makes it a federal crime to possess, distribute, or dispense marijuana. The DEA has the authority to reclassify a controlled substance if new evidence becomes available justifying the change.

2. 2018 Farm Bill

The Agriculture Improvement Act of 2018, or Farm Bill, was signed into law on December 20, 2018. This law amended the CSA to remove the Schedule I classification of industrial hemp plants containing no more than 0.3 percent THC. Under the Farm Bill’s provisions, any part of the hemp plant, from its seeds to its extracts, acids, salts, and isomers are now fully legal as an ordinary agricultural commodity.

3. Rohrabacher-Blumenauer Amendment

While marijuana remains a Schedule I controlled substance, the Department of Justice is prohibited from using federal funds to prevent the States of Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Hawaii, Illinois, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, Oregon, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Washington, and Wisconsin from implementing their own states laws that authorize the use, distribution, possession, or cultivation of medical marijuana.

This amendment was originally introduced by Rep. Maurice Hinchey (D-NY) in 2001, but was not passed by the house until 2014 (when it was known as the Rohrabacher-Farr amendment due to the retirement of its original sponsor. It is required to be renewed annually by Congress and has been renewed every year since 2014. Nonetheless, the Department of Justice continued to prosecute individuals and non-State entities (interpreting the amendment as only applying to the prosecution of state officials). Because state officials were not prosecuted prior to its passage, it essentially had no effect. However, in 2015, the United States District Court for the Northern District of California in *US v. Marin Alliance for Medical Marijuana*, 139 F.Supp.3d 1039 (2015), lifted an injunction against a California dispensary so long as it continued to operate in accordance with California's laws, consistent with a plain reading of the amendment. In 2016, the DOJ's interpretation was again rejected by the Ninth Circuit Court of Appeals in a case consolidating the appeals involving 10 medical cannabis providers in California and Washington. *US v. Macintosh*, 833 F.3d 1163 (9th Cir. 2016).

4. The STATES Act

In June 2018, Senator Elizabeth Warren (D-MA), Cory Gardner (R-CO) and six other co-sponsors introduced legislation known as the Strengthening the Tenth Amendment Through Entrusting States (STATES) Act (<https://www.congress.gov/bill/115th-congress/senate-bill/3032/text>). Rep. David Joyce (R-OH) introduced companion legislation in the House (<https://www.congress.gov/bill/115th-congress/house-bill/6043/text>). The STATES Act would amend the CSA to except from federal enforcement individuals or corporations in states who are in compliance with local laws (whether it be State, U.S. territory, District of Columbia, or tribal law) on cannabis. The bill also contains restrictions with regard to the employment or hiring of any individual under 18 years old to manufacture, produce, distribute, dispense, administer, or deliver marijuana.

5. The Secure And Fair Enforcement Banking Act of 2019

Widely considered the most important piece of legislation enacted this year, the Secure And Fair Enforcement Banking Act of 2019 (The SAFE Banking Act) prohibits a federal banking regulator from: (1) terminating or limiting the deposit insurance or share insurance of a depository institution solely because the institution provides financial services to a legitimate marijuana-related business; (2) prohibiting or otherwise discouraging a depository institution from offering financial services to such a business; (3) recommending, incentivizing, or encouraging a depository institution not to offer financial services to an account holder solely because the account holder is affiliated with such a business; or (4) taking any adverse or corrective supervisory action on a loan made to a person solely because the person either owns such a business or owns real estate or equipment leased or sold to such a business.

It should be noted that the bill also includes protection for insurers doing business with state legal cannabis related entities:

(c) PROTECTIONS FOR INSURERS.—With respect to engaging in the business of insurance within a State, political subdivision of a State, or Indian country that allows the cultivation, production, manufacture, sale, transportation, display, dispensing, distribution, or purchase of cannabis pursuant to a law or regulation of such State, political subdivision, or Indian Tribe that has jurisdiction over the Indian country, as applicable, an insurer that engages in the business of insurance with a cannabis-related legitimate business or service provider or who otherwise engages with a person in a transaction permissible under State law related to cannabis, and the officers, directors, and employees of that insurer may not be held liable pursuant to any Federal law or regulation—

- (1) solely for engaging in the business of insurance; or
- (2) for further investing any income derived from the business of insurance

The bill also includes protections for ancillary businesses as well:

SEC. 3. PROTECTIONS FOR ANCILLARY BUSINESSES. For the purposes of sections 1956 and 1957 of title 18, United States Code, and all other provisions of Federal law, the proceeds from a transaction involving activities of a cannabis-related legitimate business or service provider shall not be considered proceeds from an unlawful activity solely because -

- (1) the transaction involves proceeds from a cannabis-related legitimate business or service provider; or
- (2) the transaction involves proceeds from—
 - (A) cannabis-related activities described in section 14(4)(B) conducted by a cannabis-related legitimate business; or

The bill was passed in the U.S. House of Representatives on September 25, 2019 and is now pending in the U.S. Senate. If approved by the Senate, the bill would go to the president for signature and enactment into law.

6. Spending Bill of 2019

The U.S. Senate on October 31, 2019 approved a spending bill that includes a provision that would continue to protect state-legal medical marijuana programs from U.S. Department of Justice interference.

The provision, which is good for a year, was included in the House fiscal year 2020 Commerce-Justice-Science bill.

The Senate passed the spending bill with the medical marijuana protections by an 84-9 vote. The measure specifically prohibits the Justice Department from using any funds to prevent states from implementing medical marijuana laws.

It doesn't protect recreational marijuana programs, however:

SEC. 531. None of the funds made available under this Act to the Department of Justice may be used, with respect to any of the States of Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming, or with respect to the District of Columbia, the Commonwealth of the Northern Mariana Islands, Guam, or Puerto Rico, to prevent any of them from implementing their own laws that authorize the use, distribution, possession, or cultivation of medical marijuana.

7. The Marijuana Opportunity Reinvestment and Expungement (MORE) ACT

This legislation would federally deschedule cannabis, expunge the records of those with prior marijuana convictions and impose a five percent tax on sales, revenue from which would be reinvested in communities most impacted by the drug war.

It would also create a pathway for resentencing for those incarcerated for marijuana offenses, as well as protect immigrants from being denied citizenship over cannabis and prevent federal agencies from denying public benefits or security clearance due to its use.

The House Judiciary Committee passed the MORE Act in a 24-10 vote on November 21, 2019, and is now pending for a full floor vote in the U.S. House of Representatives.

8. Washington v. Whitaker

The most important pending federal case is *Washington v. Whitaker*¹ (*Sessions*), which is pending before the United States Court of Appeals for the Second Circuit. This lawsuit was filed on behalf of several plaintiffs challenging the constitutionality of the Controlled Substances Act Schedule I classification of marijuana.

While the appellate court agreed that plaintiffs' claims were barred due to the issue of procedural exhaustion, the court took the unusual step of retaining jurisdiction of the matter. In a 30+ page decision, the U.S. Court of Appeals held:

"We are troubled by the Drug Enforcement Administration (DEA)'s history of dilatory proceedings," U.S. Circuit Judge Guido Calabresi wrote for the majority. "Accordingly, while we concur with the District Court's ruling, we do not dismiss the case, but rather hold it in abeyance and retain jurisdiction in this panel to take whatever action might become appropriate if the DEA does not act with adequate dispatch."

¹ Docket No. 18-859-cv

In essence, the court is putting the federal government on notice that it must promptly make a decision on marijuana rescheduling so that those who rely on its medical benefits don't unduly suffer.

“Taking the facts as alleged, and, accordingly, taking the supposed benefits some Plaintiffs have experienced from marijuana as true as well, we—like the District Court below—are struck by the transformative effects this drug has assertedly had on some Plaintiffs' lives. As a result, we are troubled by the uncertainty under which Plaintiffs must currently live....It is conceivable that, in response to a petition from Plaintiffs along the lines advanced before us now, the DEA would reschedule marijuana, rendering the current case moot,” the opinion says. “And if the DEA did not, the administrative process would generate a comprehensive record that would aid in eventual judicial review.”

B. State Law

1. Medical and Recreational Use

As of November 2018, the use of cannabis for medical purposes is legal in 33 states, plus the territories of Guam, Puerto Rico, and the Northern Mariana Islands, and the District of Columbia. There is considerable variation in medical cannabis laws from state to state, including how it is prescribed, produced and distributed, how it can be consumed, what medical conditions it can be used to treat, and important for this discussion, how it must be paid for.

Eleven states and the District of Columbia now have legalized small amounts of marijuana for adult recreational use. These states include Alaska, California, Colorado, Maine, Massachusetts, Michigan, Nevada, Oregon, Vermont, Washington and Illinois. States that are leaning towards legalizing adult recreational marijuana use in 2019 include New York, New Jersey and Illinois.

2. Use in Workers' Compensation

The controversy and debate surrounding the use of medical marijuana has now entered the workers compensation arena, with New York, New Jersey and New Mexico leading the charge. In all three states, workers compensation judges and appellate courts have rendered decisions approving the use of medical marijuana for injured workers and have mandated that insurance carriers reimburse the injured worker for same.

In 2007, New Mexico became the 12th state in America to legalize medical marijuana through passage of the Lynn and Erin Compassionate Use Act. In 2010, New Jersey passed the Compassionate Use Medical Marijuana Act. In 2014, New York passed the Compassionate Care Act. While not all states use the term “compassionate” in the names of their legislation, it has become widely recognized in this context.

3. New Mexico

The Court of Appeals has on three separate decisions², held that a patient in the state's medical marijuana program who was injured on the job must be reimbursed by an employer for the expense of marijuana used for treatment.

In fact, the New Mexico Workers' Compensation Administration states on its website: "New Mexico allows an injured worker the use of medical marijuana when deemed "reasonable and necessary care" under the Workers' Compensation Act. The injured worker must pay out of pocket, and is reimbursed per fee schedule for the cost of medical cannabis deemed necessary in the workers' compensation claim."

New Mexico is the only state which has an actual fee schedule for reimbursement of medicinal marijuana in workers' compensation.

4. New York

In February 2018, the New York Workers Compensation Board (NYWCB) in *Matter of WFD, Inc.* 2017 NY Wrk Comp G1403803, upheld a lower court decision directing the workers compensation carrier to reimburse the claimant for the medical marijuana prescription on the grounds that medical marijuana is legal in New York. The NYWCB reasoned that The Public Health Law permits marijuana to be prescribed to treat chronic pain (see 10 NYCRR 1004.2[a][8][xi]). The NYWCB further reasoned that neither the federal courts in the 2nd Circuit nor the New York Court of Appeals have found the Public Health Law invalid under federal preemption. Therefore, absent a directive by controlling authority, the Board Panel found that Title V-A of the Public Health Law is valid and applicable law.

Matter of Kluge v Town of Tonawanda - In the most recent appeal involving marijuana, the Appellate Division, Third Department reviewed a NYWCB decision which granted the injured worker's request for medical marijuana. Unfortunately, the Appellate Division did not address the burden of proof issue nor the Schedule I argument. Rather, it remanded the case back to the WCB to decide on whether the claimant's prospective MMJ use was medically appropriate.

On the heels of these decisions, the New York legislature recently introduced a bill that would categorize medical marijuana just like any other prescription drug and must be covered by workers' compensation insurance. Assembly Bill A11390 is sponsored by Assemblyman Richard Gottfried, D-Manhattan, who has advocated for other medical marijuana legislation in recent years. The bill stipulates that public insurance programs, including Medicaid and workers' compensation, would have to pay for medical marijuana if prescribed in accordance with state regulations. This Bill is pending for the 2019 legislative session.

5. New Jersey

Citing a need to stop "killing people" by forcing injured people to take opioids for their pain, a New Jersey Workers' Compensation Judge ordered Freehold Township (Monmouth County) to pay for a municipal employee's medical marijuana. In *McNeary v. Freehold Township*, Claim Petition No. 2007-10498 (argued June 28, 2018), an injured worker filed an application to compel the employer to pay for medical marijuana used to treat his muscular spasticity. At issue,

² See *Viapando v. Ben's Automotive Services*, Opinion No. 2014-NMCA-084; *Lewis v. American General Media*, Opinion No. 33,236; *Maez v. Riley Industrial*, Opinion No. 33.154

however, was whether marijuana' illegality under the federal Controlled Substance Act precluded the court from using New Jersey's Medical Marijuana Act as a predicate for compelling Freehold to pay for the injured worker's medical marijuana. Judge Lionel Simon, a former prosecutor, stated that while he is in full support of federal and state narcotics laws he didn't believe "in [his] heart of hearts" that an employer or its insurer who reimburses an employee for medical marijuana "is in any way complicit with the distribution of illicit narcotics." Judge Simon also noted that the employee had "a documented medical need" for medical marijuana and expressed concern that he might become addicted to opioids if he did not received medical marijuana.

Watson v. 84 Lumbar - In mandating the carrier reimburse the injured worker for the cost of medical marijuana, Administrative Law Judge Ingrid L. French opined that "the effects of the marijuana, in many ways, are not as debilitating as the effects of the Percocet. The pharmacy records show that, ultimately (Watson) was able to reduce his use of oral narcotic medication."

Judge French further opined that "As a result of his improved pain management, he has achieved a greater level of functionality," according to the judge, calling "his approach to his pain management needs is cautious, mature and overall he is exceptionally conscientious in managing his pain."

Judge French held that "The evidence presented in these proceedings show that the petitioner's 'trial' use of medicinal marijuana has been successful". Judge French went on to write: "While the court is sensitive to the controversy surrounding the medicinal use of marijuana, whether or not it should be prescribed for a patient in a state where it is legal to prescribe it is a medical decision that is within the boundaries of the laws in the state."

Subsequent to these decisions, a New Jersey lawmaker filed a bill that would require workers compensation carriers to pay for medical marijuana. A.B. 4505, introduced by Assemblyman John J. Burzichelli, D- Cumberland/Gloucester/Salem, would amend the state's medical marijuana statute, affecting how the drug is covered under liability stemming from personal-injury protection insurance policies and workers compensation. The proposal provides that "automobile insurance benefits and workers' compensation benefits must include coverage for costs associated with the medical use of marijuana provided that the insured or the employee is a qualifying patient authorized for medical marijuana pursuant to the Compassionate Use Medical Marijuana Act". The bill clarifies the requirement that "at least one other medication or treatment has been attempted and found to be unsuccessful in treating the debilitating medical condition that qualified the patient for the medical use of marijuana."

6. Maine

On the opposite side of the spectrum, Maine has been resistant to this growing legal use of medical marijuana, with its state Supreme Court ruling that An employer cannot be ordered to reimburse an injured worker for medical marijuana, because such a payment would be "aiding and abetting" a violation of federal law. *See Bourgin v. Twin Rivers Paper Company*, 2018 ME 77.

7. New Hampshire

In *Matter of Panaggio*, the New Hampshire Supreme Court held that its medical marijuana law does not prohibit a workers' compensation carrier from reimbursing a claimant for the cost of

reasonable and related medical marijuana. However, it remains unsettled law in New Hampshire whether a workers' compensation carrier reimbursing a claimant for the cost of state allowed medical marijuana violates federal law and therefore would be illegal.

States with Pending Legislation requiring carriers to reimburse include Vermont, New Jersey, New York, Maryland and Hawaii.

II. Medical Benefits of Cannabis and CBD Oil in Treating Injured Workers

Notwithstanding the legality of cannabis products, including hemp and marijuana, for medical purposes, there is a debate as to the medical efficacy of these products. There is a growing opinion that Cannabidiol (CBD) oil, which can be extracted from hemp, can treat various ailments, including chronic pain, anxiety, depression, stress, insomnia, muscle inflammation, joint pain and arthritis. CBD oil is legal in 30 states where medicinal and/or recreational marijuana is legal. 17 other states have CBD-specific laws on the books.

With regard to the flower itself, it has been approved by states to treat a range of serious medical conditions, including cancer, HIV/AIDS, ALS, Parkinson's or Hunting's Disease, MS, epilepsy, PTSD, neuropathy, and chronic pain, among others. It has also been identified as an alternative to prescription opioid medication in the treatment of chronic pain. However, the Schedule I classification of cannabis has prevented the efficacy of cannabis for treating these conditions from being evaluated sufficiently.

III. Reimbursement Issues in Workers' Compensation.

Putting the legality issues aside, the modality for reimbursing the injured worker for medical marijuana should also be carefully considered with a keen effort to be as transparent as possible. The options that currently exist are (1) reimbursing the claimant directly, (2) depositing the reimbursement into the claimant's attorney's trust account (3) creating a medical trust or (4) processing the prescriptions through a Pharmacy Benefits Manager who is able to adjudicate the prescriptions on a real time platform so as to allow prior authorization utilization.

IV. The Cannabis Industry

The marijuana industry has developed into an economic force to be reckoned with. Wall Street analyst have predicted the legal marijuana industry to be a \$5 billion dollar a year industry in the United States. According to a newly released report from the Bank of Montreal, the global cannabis market could be worth \$194 billion in seven years.

Retail dispensaries have opened throughout the nation, each with different brands and strains of medical marijuana including different types of delivery devices such as vape pens, capsules and edible food products. Different types of strains of marijuana are alleged to treat different types of diseases and conditions.

V. The FDA and CBD

The 2018 Farm Bill explicitly preserved FDA's authority to regulate products containing cannabis or cannabis-derived compounds under the Food, Drug & Cosmetics Act. To date, the agency has not approved a marketing application for cannabis for the treatment of any disease or

conditions. The FDA has, however, approved one cannabis-derived and three cannabis-related drug products. These approved products are only available with a prescription:

1. Epidiolex
2. Marinol
3. Syndros

CBD cannot be marketed as a dietary supplement or as having any therapeutic value. Even if a CBD product meets the definition of "hemp" under the 2018 Farm Bill it still must comply with all other applicable laws, including the FD&C Act.

VI. The Efficacy and Dosing Issue

There still exists a medical debate as to the efficacy of medical marijuana and whether it is truly an alternative to treating injured workers. While there is a growing medical opinion that medical marijuana can be used for a variety of medical conditions including chronic pain, neuropathic pain, and anxiety, there still exists a question in the overall medical community as to the true efficacy of medical marijuana. Thus, there remains the need and calling for further medical studies.

Furthermore, there are several issues which remain largely unanswered with regard to accepting medical marijuana as a legitimate form of treatment, among them:

- Whether employers are mandated to pay for medical marijuana to treat an injured worker varies significantly from state to state.
- Still a Schedule I drug under the federal Controlled Substances Act.
- No dosing schedule or guidelines.
- Not incorporated into any state medical treatment guidelines.
- Limited clinical trials and medical research to determine efficacy.
- No Average Wholesale Price, National Drug Code (NDC) or fee schedule.
- New Mexico is the only state to have a state fee schedule as to dosage and cost for marijuana on which reimbursement is based.

VII. Using Medical Marijuana as a tool for claims resolution

Requests for medical marijuana can also be used strategically to help resolve workers compensation claims since physicians are prescribing medical marijuana in lieu of opioids for chronic pain and in some cases, psychotherapeutic medications. This could effectively alter the prescription regimen and thereby lower the cost of Medicare Set Asides and making the settlement more cost effective. Therefore, settlement of the claim should be always be explored when a requests is received for medical marijuana.

PART 2: CANNABIS IN CANADA (2019)

I. The Legal Framework

On October 17, 2018, the *Cannabis Act*, S.C. 2018, c. 16 came into force and effect in Canada, thereby legalizing the use of recreational cannabis nationwide. On that day, Canada became the second country in the world to legalize the use of recreational cannabis, as well as the first G7 and G20 country to do so.

However, the national push towards legalization dates back to the 1969 LeDain Royal Commission of Inquiry in the Non-Medical Use of Drugs, which produced its final report in 1973. The Report recommended repealing criminal laws prohibiting the possession of cannabis.³ A minority opinion recommended the legalization and regulation of cannabis. Legalization was also a popular subject in political discourse and public policy debate for several years, with very little progress made in actuality.

However, after the Liberal party won the federal election, the federal government convened a Task Force on Cannabis Legalization and Regulation in 2015 to analyze the issue of legalization. The Task Force met with officials from Uruguay and various U.S. jurisdictions where legalization was in effect. The task force also interviewed various members of Canada's public, including parents, practitioners, patients, politicians, the police, indigenous leaders, stakeholders and the media. The subsequent report, issued in December 2016, has been described as a truly national collaboration and indicated a predominant national desire to move away from a culture of fear and stigma surrounding cannabis to recognizing the historical social and medical benefits of the plant. There was also a general national consensus that the government's response and attempts at controlling cannabis use and distribution to date had failed. Specifically, the approaches to date had allowed criminal and organized crimes to profit, while failing to keep cannabis out of the hands of the Canadian youth.

On April 13, 2017, Bill C-45 was introduced in the House of Parliament and, for the first time in Canadian history, the federal government acknowledged the benefits of legalizing the recreational use of cannabis under the control of a strict legal framework, with the following core objectives in mind:

1. Restrict youth access;
2. Displace the illicit market;
3. Reduce the burden on the criminal justice system;
4. Provide access to a quality-controlled supply of cannabis; and,
5. Protect public health and safety.

The *Cannabis Act* creates a strict legal framework to control the production, distribution, sale and possession of cannabis in Canada. It requires licenses and permits for the importation, exportation, production, testing, packaging, labelling, sending, delivery, transportation, sale, possession, cultivation, disposal, processing and research of cannabis and related products. The Alcohol and Gaming Commission of Ontario is the licensing authority for retail stores. Health Canada issues federal licenses for the cultivation, processing and sale of cannabis, requiring the

³ Russell Bennett, *Canada's Cannabis Act: Annotation & Commentary, 2019/2020 Edition* (Toronto: Lexis Nexis Canada Inc., 2019)

use of cannabis seeds and plants solely from authorized provincial and territorial retailers. The Canada Revenue Agency oversees licenses related to the packaging and distribution of cannabis products.

Subject to provincial or territorial restrictions, the *Cannabis Act* allows adults to purchase fresh cannabis, dried cannabis, cannabis oil, cannabis seeds or cannabis plants from authorized retailers; consume cannabis in locations authorized by local jurisdiction; possess up to 30 grams of dried legal cannabis or equivalent in non-dried form in public; share up to 30 grams of dried legal cannabis with other adults; grow up to four cannabis plants per household for personal use, from licensed seeds or seedlings from a licensed supplier; and, make legal cannabis-containing products at home (e.g. food and drinks), provided that no dangerous / prohibited solvents are used.

The Act, for the first time, makes it a specific criminal offence to sell or promote cannabis to a minor and creates significant penalties for those who attempt to do so. The Act also continues to prohibit the importation or exportation of cannabis into / from Canada without a valid permit or exemption issued by Health Canada and makes it a serious offence to do so. Furthermore, after the Act came into effect, the laws around alcohol and drug-impaired driving were toughened, with new offences added to the *Criminal Code of Canada*, RSC 1985, c C-46, to enforce a zero tolerance approach for driving under the influence of cannabis and other drugs.

II. The Prior Legal Framework

Prior to October 17, 2018, cannabis (in its various forms) was classified as an illegal drug under the Schedules of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19. Production of any form of cannabis was an indictable offence, liable to imprisonment for a term of not more than 3 - 14 years (depending on the form of the product), with a minimum punishment of six months. The distribution, production or sale of cannabis, as well as any related instruments or literature, also attracted criminal penalties under the *Criminal Code of Canada*, RSC 1985, c C-46 and other acts.

The sole exception was carved out for users of medical marijuana. Specifically, the regulations for medical access to marijuana initially came into force in 2001. After a few revisions, the current version of the regulation, the *Access to Cannabis for Medical Purposes Regulations*, SOR/2016-230, came into effect in 2016. The regulations allowed patients to register with Health Canada in order to produce their own medical marijuana in limited quantities or to designate a person to do the same for them. The sale or distribution of medical marijuana was prohibited. Also, production was restricted to strains of the cannabis seed / plant obtained from a licensed producer with Health Canada.

III. Growing Pains

While this has been a very exciting time to be affiliated, directly or indirectly, with the cannabis industry in Canada, the creation of the legal cannabis market has not proceeded without problems.

Namely, the legal cannabis market was created on top of an existing and robust illicit industry, which has resulted in a dichotomy and schism. A Health Canada survey conducted in the second quarter of 2019 indicates that only 29% of all cannabis users obtain their cannabis

from a legal source, such that 71% of users continue to access either the illicit market, solely, or a mix of both the legal and illegal sources.⁴ Since the illicit market is robust and well-established, it will require the long-term coordination of regulation, criminal enforcement and an effectively run legal market to truly displace the illicit market.

At present, the leading factor causing issues in the legal market is the inadequate supply of cannabis products to respond to the demand for cannabis. A study by Deloitte estimated the value of the current Canadian retail market (legal and illicit) to be valued between \$4.9 billion and \$8.7 billion per year. However, the legal economic activity requires three stages of the supply chain to be efficient – production, distribution and retail sales. Since legalization, there have been issues with all three of these stages. The federal government’s online store frequently runs out of product. Provincial retailers have been slow to open storefronts and the government has been slow at issuing licenses. Companies like Canopy Growth are experiencing significant economic losses due to weak sales, declining revenues, falling prices and inventory pile-up, thereby calling for the government to open more stores and provide more supply.

As a result of these issues, cannabis users are turning / returning to the illicit market for supply. As well, the retail price of legal cannabis has to remain competitive with prices in the illicit market, which is proving to be difficult considering the issues of taxation, production costs, distribution costs, retail overhead and profit margins at all stages of the legal market.

Despite these initial setbacks and unforeseen factors, the general national mood continues to be one of optimism. The legal market is boosted by the fact that most Canadians would prefer a safer and more reliable method of obtaining cannabis. As well, the legal market has the potential to cater to consumer preferences, through creating edibles or craft products, thereby encouraging a partiality towards the legal market.⁵ Economic savants continue to impress that the cannabis sector offers many opportunities for economic development, tax revenues and innovation. There is also a general consensus that legalization will ultimately meet the initial objectives it set out to accomplish, specifically, the goals of decreasing youth access, displacing the illegal market, increasing public awareness and guaranteeing a quality product for consumption.

PART 3: INSURANCE IMPLICATIONS (2019)

I. The Really Big Problem

The fact that accepting money from a known cannabis business can possibly be construed as money laundering has resulted in the insurance industry being very cautious about entering this market. The vast majority of standard (“admitted”) insurers simply aren’t willing to do business in the cannabis space because of the legal conflict between the federal government and the individual state laws. Insurers fear the money laundering allegation, and, in general running afoul of federal law. As a result, insurance availability is a huge problem for the cannabis industry, while standard insurers are cautiously waiting in the wings to enter the cannabis insurance market.

⁴ Health Canada - National Cannabis Survey, second quarter 2019 - <https://www150.statcan.gc.ca/n1/daily-quotidien/190815/dq190815a-eng.html>

⁵ “Legalizing & Regulating Cannabis in Saskatchewan”, Jonson Shoyama Graduate School of Public Policy, University of Regina (November 2017)

II. Underwriting Problems

A major problem for insurers operating in the cannabis space is that legal cannabis is so new we do not have accurate and reliable data on risk exposures, usage, losses, etc. Knowledge of how much people really use cannabis is very limited. Many cannabis users still hide the fact that they are using it for fear of legal or employment consequences. Thus, the insurance underwriter still does not have a clear and consistent profile of what a cannabis user looks like, nor does the underwriter know with certainty what losses (if any) are exacerbated by cannabis use. This is a critical impediment to accurate pricing of coverages that include homeowners insurance, auto insurance, and workers compensation coverage.

III. Claims Handling Problems

Insurance claims adjusters are caught between a proverbial rock and a hard place. Federal law says cannabis is contraband, and thus insurance should never cover it. State laws that have legalized cannabis effectively (and in some cases, explicitly) state that it is not contraband. It is also not otherwise excluded from coverage in standard policy forms, which leads us to conclude that it is covered by existing insurance coverage forms. The concentration of values is another complicating factor—in some states that amount of cannabis that one person is legally allowed to possess can have a dollar value of well over \$10,000.

Another problem is that so much of the cannabis market still consists of black market (illegal) operations, making establishing standard values for cannabis virtually impossible. Seriously--what valuation service can a claims adjuster use when cannabis is involved?⁶

The courts have had mixed rulings on whether or not cannabis is covered by insurance. In *Tracy v. USAA*,⁷ the Hawaiian court was clear: cannabis is illegal at the federal level and is thus contraband that is not covered by insurance. However, in *Green Earth Wellness v. Atain*⁸ the court said (among other things) that insurance is a state-level contract that must follow state laws, and thus, cannabis is covered.

IV. Reputational Problems

Perhaps of greatest concern to today's insurers are the reputational risks of entering the cannabis coverage market. While poll after poll shows a majority of those surveyed approve of legalized cannabis, there is still a significant percentage of the population that opposes it. Insurers must worry about the damage that may be done to their reputations if they become affiliated with cannabis, especially before it is legal at the federal level.

⁶ The only publicly available valuation service the authors know of is www.priceofweed.com.

⁷ *Tracy v. USAA Cas. Ins. Co.*, CIVIL NO. 11-00487 LEK-KSC

⁸ *Green Earth Wellness Ctr. LLC v. Atain Specialty Ins. Co.*, Civil Action No. 1:13-CV-03452-MSK-BNB (D. Colo. Jul. 18, 2014)