

Sam Kamin, Vicente Sederberg Professor of Marijuana Law and Policy
University of Denver, College of Law

Brief regarding Bill C-45: An Act Respecting Cannabis and to Amend the Controlled Drugs and
Substances Act, the Criminal Code and other Acts

Lessons for Canada from Colorado

Summary

Colorado, the first jurisdiction to tax and regulate marijuana, has perhaps the most robust and successful marijuana regulations in the United States. The state's regulatory experience has provided a number of lessons that can benefit Canadian regulators and lawmakers as they consider the implementation of nation-wide legalization. In particular, policy makers should take away the following from Colorado's experience with marijuana legalization:

- It is easier to regulate the commercial production and sale of marijuana than it is to plug all potential leaks in the supply chain; diversion and criminality in Colorado are mostly attributable not to regulated businesses but to individuals operating outside of the regulated industry.
- While careful monitoring of important metrics is crucial to measuring regulatory success and meeting emerging challenges in regulating cannabis, measurement can be both difficult and contested; changes in enforcement can obscure behaviors rather than illuminating them.
- Cooperation between the federal and provincial governments can produce a range of different regulatory regimes in the provinces; this variation in regulatory approaches will provide a wealth of information about the impact of various regulatory schemes on important policy outcomes.
- Marijuana can generate significant revenue, but filling government coffers is a poor reason to legalize the drug; regulation is expensive and at least initially, it will be important to keep tax rates low enough to push black market providers out of business.
- Flexibility in implementation is crucial; no matter how thoughtfully enacted, any regulatory regime will need to be flexible enough to respond to changing consumer behaviors and other regulatory challenges as they emerge.

Marijuana Law in the United States

Federal law in the United States prohibits marijuana's possession, cultivation, and sale under all circumstances. Despite this fact, twenty-nine states and the District of Columbia have authorized marijuana use by medical patients and eight states plus the District of Columbia have permitted marijuana use by all adults. These jurisdictions have also generally set up regulatory regimes to license, regulate, and, in the case of adult-use, tax marijuana. This has led to an obvious tension as marijuana law reform states struggle to license a substance the federal government continues to prohibit. Although the federal government cannot force the states to criminalize marijuana or to participate in the federal government's prohibition of the drug, federal law prohibiting marijuana remains in effect throughout the country.

Under the Obama Administration, the Justice Department agreed not to prosecute those in strict compliance with robust state marijuana regulations, establishing an uneasy truce between the federal government and law reform states. Although the Trump Administration has expressed disapproval of marijuana law reform, as of late August 2017 it has not yet changed course and sought to enforce the federal prohibition in marijuana law reform states. But this prosecutorial forbearance cannot by itself end the tensions between state and federal law; those who use, produce, or sell marijuana in the states remain subject to arrest, prosecution, and long terms of imprisonment, even if their conduct comports with state law. All that protects them is a decision not to enforce federal law, a decision that can change with the whims of the Justice Department. In addition, those who would use or produce marijuana in compliance with state medical or recreational laws put themselves at risk even absent a meaningful threat of federal law enforcement. Because marijuana remains illegal at the federal level, those using, producing, or selling it in accord with state law risk losing their employment, their housing, the government benefits, or their parental rights for engaging in conduct that is still criminal in the eyes of the law.

Colorado Regulation in a Nutshell

It was against this background of state-federal conflict that Colorado regulated marijuana, first for medical patients in 2010 and then for adult users in 2012. The Colorado Department of Revenue (DOR) issues licenses to produce, manufacture, sell, transport, and test marijuana under regulations set by the legislature and the department itself. Unlike other states that have either competitive or lottery systems for assigning a limited number of licenses, the DOR is obligated to issue licenses to all qualified applicants. With limited exceptions, the state has set no limits on the total number of licenses that would issue or on the total amount of marijuana that could be produced. Market forces are largely the determinant of the amount of marijuana produced and the price charged for the product.

This is not to say, however, that marijuana in Colorado is unregulated; quite the contrary. The state legislature and the DOR have set up extensive regulations governing all aspects of the production and distribution cycle. Plants are individually tracked with RF ID tags and cameras watch and record all stages of the production process. Both owners and employees are subject to extensive background checks and only badged employees have access to restricted areas of licensed premises. Marijuana products are tested by licensed, third-party labs for purity and contaminants and computerized tracking system allows regulators to watch for diversion as well as to order recalls when contaminants are found. Outdoor advertising of marijuana businesses is banned and all advertising in the media and online is also prohibited unless the regulated entity can demonstrate that the overwhelming majority of all those seeing the ad will be of lawful purchasing age. Edible products must be sold in tamper-resistant containers and cannot be of a color and shape that would appeal to small children. Finally, localities have the option to impose additional time, place, and manner restrictions on the licensing of marijuana businesses or may opt to prohibit marijuana businesses within their borders.

Many of these regulations were put in place with a keen eye on federal prohibition. The Obama administration indicated that it was deferring to state regulations of marijuana only to the extent

that the states could meet certain policy goals – the prevention of diversion from the regulated market to the black market; keeping organized crime and other drug distribution out of the industry; preventing the sale of regulated marijuana to minors, and so on. While many of the regulations Colorado put in place were simply good policy, others – such as an initial ban on out-of-state investment or the total ban on outdoor advertising – were likely far more cautious than good governance would require.

The Impact of Colorado Regulations

By and large, Colorado's regulation of marijuana has proven to be a success. While the process is far from over and continues to evolve, Colorado's experience has largely been one of administrative regularity. Marijuana regulations rolled out on time and have produced few of the negative headlines that legalization's opponents had predicted. Governor John Hickenlooper, an early opponent of marijuana legalization, has grudgingly come to terms with legalization's successes, recognizing the benefits of legalization for the state's economy. Colorado is booming economically, and marijuana has either been a contributor to that growth or at the very least has not operated as a significant drag on growth. In July of 2017, the state of Colorado surpassed \$500 million in total revenue from taxing adult-use marijuana.

Furthermore, many important metrics of success support Governor Hickenlooper's change of heart. For example, the Colorado Healthy Kids Survey, the largest of its kind in the state, shows that youth marijuana usage rates have actually dropped since 2009, the year marijuana businesses began opening in large numbers in the state and Colorado's rate of youth marijuana use is now about at the national average. Yet no one would argue that marijuana regulation in Colorado has proceeded without hiccups. The regulatory machinery of Colorado has been in near-constant motion, producing new legislation and regulations in response to policy challenges as they have arisen. For example, it was apparent early on that edible marijuana products had originally been under-regulated. These products, which do not take full effect for hours after they are consumed, were associated with accidental ingestion by children and over-consumption by tourists and neophyte users. Additional rules were put in place to regulate the total amount of THC that could be in a single package of edible products, to clearly identify a single serving, to place limits on the appearance of the products, and to require that marijuana edibles be identifiable as such even once they were out of their packaging.

The diversion of marijuana out of state remains a subject of regulatory concern as well. However, the data seem to indicate that most marijuana that leaves the state does not flow directly from regulated business. Rather diversion seems to be carried out either by those who have purchased it legally in Colorado and taken it out of the state or by entirely unregulated operations hiding in plain sight within Colorado. With regard to the former, initial limits were placed on how much marijuana out-of-state purchasers could acquire at one time and a public information campaign informed purchasers that taking marijuana out of state was a violation of both state and federal law. With regard to the latter, the federal government and state and local law enforcement officials have worked together to wipe out illegal marijuana distributors operating within the state. In this regard, the state's medical marijuana regulations hampered the detection and eradication of illegal marijuana production. Until recently it was possible for a

single individual to grow hundreds of plants for medical patients in a single location. While many medical producers are sincere caregivers assisting those who use marijuana to deal with serious conditions, large, unregulated medical cultivation also provided a persistent loophole in Colorado's regulatory regime. In the Spring of 2017 the legislature severely cut back the number of plants that could be grown outside of the regulated industry in an attempt to make it easier for law enforcement officials to identify illegal production.

Important Takeaways for Canada

As Canada begins planning for the regulation of marijuana, it can take a number of important lessons from the Colorado experience. First, it is important to realize that for any regulatory regime to work, as much marijuana production as possible must be funneled into the licensed and regulated market. This will mean ensuring that those who are able to apply for licenses are encouraged to do so and that those who are unable or unwilling to are forced to stop production. Regulatory regimes are expensive for both the state and licensed businesses. Producers will only be willing to pay those costs if they can be sure that others are doing so as well; cheaters are a threat to regulators and the regulated alike. Thus, one of the ironies of marijuana legalization is that it relies for its success on the ability of law enforcement to detect and stamp out those growing marijuana outside the regulated system.

Relatedly, it is important to recognize the limits of a regulated system to keep marijuana out of the wrong hands. Marijuana can be carefully controlled and accounted for right up until the moment that it is transferred to the consumer. At that point, it can be carried across boundaries, resold to people ineligible to purchase it, or negligently left where it can be consumed by the unaware. These hazards are important targets of public education, law enforcement, and public health officials, but regulation of producers and retailers can be expected to do only so much of that work.

Second, it is important that key metrics for regulation's success be identified and measured *as soon as possible and in any event before legalization goes into effect*. Bill C-45 states that one of its principal goals is to ensure that children do not gain access to marijuana. Canada should also focus on reducing the harms associated with marijuana use such as overuse and abuse, impaired driving, and use among vulnerable communities. Baselines should be established for each of these metrics so that accurate data can be collected both before and after implementation and consistently across various jurisdictions. One thing that must be borne in mind in this regard is that changing enforcement priorities can be expected to impact these metrics in important ways. For example, if patrol officers are trained to identify the effects of marijuana-impaired driving – as they should be – we should expect more arrests for driving under the influence of marijuana *regardless whether there is more such conduct taking place*. What is more, marijuana and alcohol affect the body quite differently. While one testing positive for high levels of blood alcohol is necessarily impaired, the same is not true for marijuana. Because the drug can stay in one's system for several weeks after use, it does not necessarily follow that one testing positive for the drug is impaired by it. This has proven to be one of the thorniest issues in establishing sensible regulations in Colorado.

Third, Canada's provinces will have an opportunity to experiment with various regulatory approaches in a way that American states did not. Principally, the federal prohibition has kept American states from adopting a government-run distribution model. Because all distribution of marijuana remains criminal under federal law, a state-run model in the United States would place state officials in the untenable position of being required by state law to engage in conduct that violates federal law. There may be many policy advantages to a state-run distribution model like the one used in Canada and elsewhere for alcohol. It allows the government to control price, easily identify unlicensed purveyors, reap profits rather than merely taxing revenue, and control the way the product is marketed. While such an approach is unavailable to US jurisdictions, it should be strongly considered in Canada. The more different and innovative approaches the provinces take – from distributing cannabis themselves, to regulating and taxing it, to prohibiting distribution entirely – the more we will learn about the impact of regulatory policy on important outcome metrics.

Fourth, it is important to understand that marijuana regulation will not be a fiscal panacea. It is easy to oversell the fiscal benefits of marijuana legalization, making it appear to be a double financial win for a jurisdiction. Under this theory, less money is spent on marijuana law enforcement while more revenue is generated by taxing a product that had previously existed solely on the black market. Caution is required on both sides of this ledger, however. First, establishing and running a marijuana regulatory regime is expensive. Second, and perhaps more important, regulation is not the end of criminal law enforcement. Marijuana production outside of the licensed system will remain prohibited and resources will need to be expended to ensure that illegal production does not undermine regulation. On the revenue side, tax rates will need to be kept low initially in order to make regulated marijuana competitive with the black market, meaning that the promise of a quick injection of revenue need to be tempered.

Finally, and perhaps most importantly, it will become readily apparent to Canadian regulators that regulating marijuana will be a work in progress for years to come. While C-45 is a thoughtful, sensible approach to the topic, it will only be the first step. The Colorado experience has demonstrated that market and consumer behaviors change quickly and that the conduct of other political entities can have a dramatic effect on one's own regulations. Canada must be willing not just to pass marijuana legalization, but to do the hard, on-going work of making it responsive to the uncertain terrain ahead.