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Legalized Marijuana – Lessons From the U.S. Experience

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In December 2015, the Government of Canada announced in its Speech from the Throne that it would begin the process of legalizing and regulating recreational access to marijuana. Though the possession and selling of marijuana remains a criminal offence until a full legislative and regulatory regime is in place, a Task Force on Marijuana Legalization and Regulation has been assembled. This Task Force is to submit a report in November 2016 proposing a legal framework for the Cabinet to consider. The Government intends to introduce the new legislation in the spring of 2017.

In September 2016, two of Canada's major banks announced that they would no longer be servicing cannabis-related companies. Scotiabank and RBC have officially begun closing accounts of customers that generate income from marijuana-related sources - including head shops that do not actually sell cannabis and companies that sell medical marijuana.

Both Scotiabank and RBC released statements attributing the policy shift to risk management in their business decision-making. Scotiabank did state that it would continue to monitor the situation, and could potentially change its position in the future. The other three major Canadian banks - TD, CIBC, and BMO - have yet to publicly take an affirmative stance in either direction.

The press has reported frequently on the U.S. experience, especially the seemingly unsettled legal status. The question often arises in our practice whether we will face similar issues in Canada. The short answer is that it appears that we will be able to avoid the U.S. experience although the issue is not free from doubt.

One reason why the situation is significantly different in the two countries stems in part from the fact that in the U.S. criminal law is a state matter while drug law is a federal matter. So while certain states have removed marijuana possession and its production, processing and sale from the criminal code, the U.S. Federal Government continues to prohibit marijuana under the *Controlled Substances Act* ("**CSA**"). In order to change the law, Congress would have to act, which is where the problem lies. Congress has not been able to act on this issue. Until it does, the response to the state initiatives has been one of enforcement. The U.S. Federal Department of Justice ("**DOJ**") has taken the approach of issuing guidelines for federal prosecutors to use their "...limited investigative and prosecutorial resources to address the most significant threats..." on certain "enforcement" priorities. At the very top of that list is preventing the distribution of marijuana to minors and preventing revenue going to criminal enterprises, gangs and cartels. Also included is the prevention of allowing the product to move across state lines. These guidelines have been issued by DOJ and then updated four (4) times: 2009, 2011, 2013 and 2014. The issues addressed in these updates: firstly: medical



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marijuana; second: commercial marijuana; and thirdly: financial crimes and marijuana. This article focuses on the last issue: financial crimes.

The federal financial statutes in question are the money laundering statutes, the unlicensed money remitter statute and the *Bank Secrecy Act* (“**BSA**”). The 2014 guidelines confirm that financial transactions involving proceeds generated by marijuana-related conduct can form the basis for prosecution under all three sets of statutes because proceeds from marijuana may be viewed as proceeds of a “specified unlawful activity” being in violation of the CSA. Nevertheless, the guidelines also reiterate the enforcement priorities in exercising “prosecutorial discretion” so that federal prosecutors should exercise their discretion by only processing those crimes that offend the enumerated enforcement priorities. On the same date as the DOJ 2014 guidelines were issued, the U.S. Department of the Treasury (“**DOT**”) issued similar guidelines. Although taking the same approach as the DOJ (listing enforcement guidelines) it goes on to place considerable due diligence requirements on financial institutions that have customers engaged in the marijuana business. Financial institutions must report any “suspicious activity” that include any violation of the enumerated “enforcement priorities”. The DOT guidelines caution against willful blindness to such activity by failing to conduct appropriate due diligence of a customer’s activities. The response from many financial institutions is to simply discontinue servicing such customers as the best mitigator of any risk of prosecution.

What about Canada?

As noted above, Canada does not appear to be in danger of going through the U.S. experience primarily because the main regulator is the federal government. Both countries are federations with two levels of government but while the U.S. experience is state driven (and the federal law is difficult to change), in Canada the proposal is from the federal government and the main legislative responsibilities are federal (i.e. criminal law and drug law). Although provinces will have some jurisdiction, it appears unlikely that we will find ourselves in the sort of legal no-man’s land that the U.S. finds itself.

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