

Taking a hit: Marijuana risks at the U.S. border

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April 11, 2018 | **IMMIGRATION**

Marijuana use does not carry the same stigma that it used to in North America — or at least, not with some. Unfortunately, Canadians and other foreigners entering or living within the U.S. still face significant potential consequences if they admit to having ever possessed marijuana, even if they did so where it was legal based on local laws.

Changing tide, hidden undertow

As Canada moves toward full legalization of marijuana use for medicinal or recreation purposes, this issue is rapidly threatening to become a leading concern for Canadians entering the U.S. in 2018. The confusion about why it is an issue for immigration purposes makes some sense: even within America itself, many states have legalized the use of marijuana in some form. Some states have even decriminalized the possession of small amounts of marijuana. This has likely lowered the inhibitions of at least some foreign nationals, when they arrive at the U.S. border or a preclearance location to answer questions about their admissibility. But under U.S. federal law — which controls immigration — using or possessing marijuana for any purpose will quickly land you in hot water.

Consequences of admitting to an immigration official that you have used or even possessed marijuana can include being denied entry, found inadmissible for future entries and/or having your application for lawful status or even naturalization denied. Some circumstances could even result in a U.S. lawful permanent resident being deported. Foreign nationals do not always realize where federal and state U.S. laws conflict and which set of rules take precedent.

In the United States, federal law always pre-empts (i.e., trumps) state law — and federal law still prohibits the cultivation, distribution and possession of marijuana. In 2013, a memo from the former Department of Justice (DOJ) Deputy Attorney General James Cole seemed to signal a preference to prosecute only the “most significant threats” created by marijuana possession and its use, in light of several states enacting laws legalizing the use of marijuana under certain circumstances.

However, a more recent memo — published in January 2018 — updated the DOJ’s marijuana enforcement policy to “return to the rule of law” and rescind previous guidance documents issued under the Obama administration regarding the DOJ’s stance on enforcement of marijuana laws. Individual foreign nationals with any history of partaking of marijuana in any form can be caught in the net of this policy when entering or remaining in the United States.

A catch-22

This dichotomous position of the U.S. federal and some state laws creates a significant conundrum for impacted Canadians. While it is critical that foreign nationals answer all questions honestly at the border (fraud and misrepresentation can also render you inadmissible and barred from entering the U.S., among other consequences), it is equally important that clients understand before heading to the border what admitting possession or use of marijuana can mean.

Increasingly, immigration professionals are being asked the question: “What should I do?” As a lawyer, one must always remain ethical. Our role is to advise our clients of the risks, guide them on the best course of action where one exists, and — most importantly — arm them with the facts to enable an informed decision.

Avoiding and coping with immigration consequences

Certainly Canadians considering marijuana use in light of the changing cannabis laws (the Cannabis Act) should carefully consider how their choice could impact their ability to cross the U.S. border. While it may seem obvious not to carry marijuana to the border, Canadians should also be sure not to use a car or carry luggage or items tainted by marijuana in any form, including oils, sprays, tinctures or edible marijuana products. If you suspect a friend or child may have used marijuana in your car, for instance, don’t show up at the U.S. border in that car. A plea that “it wasn’t mine” may not get you out of a sticky situation with a border agent.

The U.S. has not sent any signals that it will be loosening its federal laws and policies on marijuana any time soon — or the consequences for others who use or possess it. While going after small-scale U.S. citizen users has thus far not proven to be a strong governmental priority (based on the number of recent federal criminal prosecutions for such conduct), going after foreign nationals who have done so could easily become a tool to serve the welfare, safety or security interests of the United States. The U.S. government is surely closely watching developments north of the border — and it remains to be seen how common the question “have you ever possessed marijuana?” will become at ports of entry.

Where one is inadmissible to the United States due to possession of marijuana, there may be some recourse. Waivers can be granted at the discretion of the U.S. government, under certain conditions. However, an ounce of prevention is worth a pound of cure, as obtaining a waiver can be a lengthy, difficult and expensive process.

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