

# Travelers in a Dangerous Time: The Do's and Don'ts of Crossing the United States Border in the Cannabis Age

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Canada's nascent cannabis industry has experienced revolutionary growth over the past two years, as dozens of licensed producers have begun growing and cultivating cannabis in anticipation of the Canadian recreational or other adult-use cannabis market. Many of these licensed producers, along with countless companies supporting the cannabis ecosystem, have listed their shares on Canadian stock exchanges, raising billions of dollars in equity and creating a frenzy in the Canadian capital markets as investors clamor for more.

However, as Canada draws ever closer to October 17, 2018 – the date on which the Cannabis Act comes into force and recreational or other adult-use cannabis is set to be unveiled across Canada – complex regulatory issues continue to cloud the celebrations.

The latest headache involves traveling from Canada to the United States. Anecdotal reports of individuals working or investing in the Canadian cannabis sector being turned back at the U.S. border – or worse, being handed a lifetime ban from entering the United States – have become more commonplace over the past year. These stories have some Canadians justifiably worried. A spokesman at the U.S. Customs and Border Protection (CBP) office in Buffalo, New York, recently fanned the flames by remarking, “Working or having involvement in the legal cannabis industry in U.S. states where it is deemed legal or Canada may affect an individual’s admissibility to the U.S.”

At the heart of the issue is the anomalous regulatory environment governing cannabis in the United States. Although an increasing number of states – more than two dozen – have regulated cannabis for medical or unqualified adult use, cannabis remains a Schedule I controlled substance and illegal under U.S. federal law. The U.S. government had previously indicated that it would forebear from prosecuting federal drug-related offences involving cannabis for activities that are carried out in compliance with applicable state laws. However, this position was reversed by the present administration, which has taken a retrograde stance on cannabis in the United States, with Attorney

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General Jeff Sessions advising that federal prosecutors once again have the unfettered discretion to prosecute cannabis-related offenses. This situation has produced considerable confusion and uncertainty among Canadian industry participants.

What is clear, however, is that Canadians with any involvement in the cannabis sector, whether as a cannabis company director, employee, financier or investor, should exercise caution when attempting to cross the border into the United States.

## **When am I inadmissible?**

The criteria for inadmissibility to the United States are laid out in Section 212 of the U.S. Immigration and Nationality Act of 1952, which prohibits the issuance of visas and renders individuals ineligible for admittance into the United States when an individual “is determined to be a drug abuser or addict” who has assisted in trafficking or obtained financial benefit from the activity. CBP maintains the position that cannabis is not recognized as a legal business in the United States, regardless of whether the business activities are performed in the United States, Canada or elsewhere. The uncertainty created due to ineligibility for those who have derived a “financial benefit” from cannabis places numerous Canadian citizens and industries at risk.

Interpreted literally, this means that anyone whose industry has engaged in any business with the cannabis industry is potentially at risk to have entry into the United States denied (for example, underwriters who have written insurance policies for cannabis companies, banks that have lent money to the landlord of any facility that houses cannabis entities, plumbers who have installed the piping for grow houses). Also, there is the remote but real possibility, given directives by the U.S. Department of Homeland Security (DHS) regarding interagency information-sharing, that financial services regulators may share securities holdings reports (Form 4, 13F, 13G, etc.). This process may identify the shareholders of U.S. publicly traded cannabis companies and potentially serve as a basis for automatic denial of entry into the United States.

## **How do I answer questions at the border?**

CBP officials engage in an interrogation process with individuals who seek entry into the United States. For example, if the officer smells cannabis emanating from a vehicle, this could lead to questioning regarding the entrant’s drug use. Applicants at the U.S. border are required to answer all questions asked by CBP officials truthfully or risk a lifetime ban on entry into the United States. Persons employed in the cannabis sector should be truthful, yet delicate and general, in their responses to questions regarding employment and their business ventures. For example, those involved with the cultivation, manufacture and sale of medical cannabis might trigger difficult questions by providing detailed information as opposed to simply stating that they work in the health care industry when questioned about their occupation. Those in businesses ancillary to the cannabis industry, such as financial and professional services, equipment manufacturers and technology providers, should similarly describe their role and employment in a truthful yet general manner.

While an individual seeking entry into the United States is required to provide truthful answers to questions asked by CBP officials, this does not mean that one must answer every question asked. If difficult questions are asked and there is no urgency to the entry into the United States, one may consider refusing to answer and seeking to have the application for entry withdrawn. Doing so may ensure the opportunity to seek entry into the United States at a later date without facing the risk of a lifetime ban. It is important to note, however, that withdrawal of a request for admission may be approved on a discretionary basis by CBP. If the CBP official has reason to suspect the applicant of

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some involvement in drug trafficking, the official has discretion to refuse a request to withdraw the application, and the applicant may nevertheless be detained. Seeking withdrawal of an application for entry must therefore be exercised with caution.

## **How can I prepare for a border crossing?**

The burden is on the individual seeking entry into the United States to convince the officer of eligibility for entry. Under the U.S. Freedom of Information Act (FOIA), any individual may request a copy of any information CBP has on file pertaining to the individual. For those with connections to the cannabis industry who are concerned with the consequences of seeking entry to the United States, obtaining this information in advance may be particularly useful. For example, a shareholder of a cannabis company listed on a Canadian exchange may be able to determine ahead of time whether he or she has been flagged by CBP. This information may assist the individual in deciding whether to apply for a waiver prior to seeking entry. FOIA requests may take several months, and responsive documents are often redacted, but going through the process may prove helpful. Starting the conversation on a level playing field with the CBP official puts the applicant at an advantage when it comes to anticipating questions and avoiding the risks of a lifetime ban.

Individuals seeking entry into the United States must be wary of the broad powers afforded to CBP officials. The U.S. Constitution's Fourth Amendment protections against unreasonable search and seizure are lessened at the borders. For example, CBP officials have the authority to search an individual's electronic device for a brief, reasonable period of time to perform a thorough border search. Whether the person seeking entry is required to disclose his or her password, or whether Fifth Amendment protections against self-incrimination may be invoked have not yet been addressed by a court. Realistically, however, failure to comply with the requests of the CBP official will likely result in denial of entry. The decision to travel without a smart phone or other device should be considered carefully. Although CBP officials cannot search a device that is not present, traveling without any device may raise red flags for the CBP officials. Barinder Rasode, the CEO of the National Institute for Cannabis Health and Education (NICHE) in Vancouver, Canada, says fears of a lifetime ban are leading some business people working in the cannabis sector to take extreme measures such as "wiping their phone clean or only communicating in certain apps so they can delete the app, or even shipping their phone ahead to their destination."

## **Can I call a lawyer?**

Travelers into the United States do not have the right to an attorney during detention for questioning by CBP. If an applicant is taken into custody for a civil or criminal violation, an attorney may be able to see the client within one to two days after processing.

## **What other remedies do I have?**

Canadians who wish to take steps to avoid possible detention at the U.S. border may seek a Temporary Waiver of Inadmissibility by submitting Form I-192 to the U.S. Citizenship and Immigration Services (USCIS). This process is quite complex and will require the assistance of skilled U.S. immigration counsel. Canadian residents who wish to seek a waiver under I-192 must obtain verification of their criminal record or evidence of a lack thereof from the Royal Canadian Mounted Police (RCMP) by submitting fingerprints on Form C216C. The returned Civil Product and any accompanying records must be dated and endorsed by the RCMP within 15 months of submission of Form I-192. At present, the I-192 process takes between three and six months to complete.

Consultation with immigration counsel is recommended before making the decision to seek a waiver. The I-192 process is typically used for minor civil violations, and is not regularly used for civil or criminal drug violations, such that the process may be better suited for those with only an ancillary non-“plant touching” connection with the cannabis industry. The risk of seeking relief through Form I-192 is that there is no guarantee of approval, and denial of relief may well lead to an outright ban on entry to the United States.

## Summary

The recent CBP pronouncements of interest to those involved in the cannabis industry with Canadian companies appear to have been issued without much thought to the legal cannabis industry worldwide. Entrepreneurs and those who work with them ? not only in Canada but also in Europe, Israel and elsewhere ? face similar treatment. Individuals who believe they may be subject to scrutiny by CBP should remain aware of their limited constitutional rights, the ability to seek a temporary inadmissibility waiver and the risks of truthfulness versus misleading the CBP. The solution ultimately lies with the U.S. Congress. Until then, vigilance is required.

*Coauthored with the Cannabis Law Team at Canadian firm Borden Ladner Gervais LLP*

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