

Privacy in Peril: Cannabis at the Border

It's been one year since Bill C-45, the *Cannabis Act*, received Royal Assent in Canada, providing a legal and regulatory framework for the production, sale, and consumption of cannabis.¹ An important question to ask, one year into legalization, is if Canadians can still face criminal consequences as a result of their legal purchase and use of cannabis? Strangely, the answer could be yes. Cannabis continues to be prohibited by the United States federal government. If you admit to a U.S. border agent that you have used cannabis, legally or otherwise, you could face legal consequences as severe as a lifetime entry ban. So, how can you reduce your chance of being found criminally inadmissible at the border? It's tempting to think the solution could be as easy as not dressing (or smelling) like a stoner. Unfortunately, it's not as simple as all that- you could face a finding of inadmissibility based on the collection and dissemination of your personal consumer data to unfriendly sources, such as the United States Customs and Border Protection Agency. How does the United States access your private information, and what does it mean for you if they do? This article will answer these questions by first looking at if your data can be stored in the U.S. and if so, can the U.S. government access it? Secondly, how does this create a legal issue for you if they do, and lastly, what you can do to protect yourself from a charge of criminal inadmissibility?

If I purchase legal cannabis, is my data being shared and stored in the United States?

In Manitoba, private retailers manage the sale and distribution of cannabis products. In reviewing the terms and conditions listed on the websites of four of the largest retailers in the Province, each store acknowledges, to varying degrees, that there is a possibility your data could be collected and viewed by U.S. law enforcement.² The starkest language alluding to this possibility is found on Tweed's website, where it states that as a result of your use of their platform,

"...your personal information may be collected, used, processed, stored or disclosed in the United States and may potentially be accessible to law enforcement and national security authorities of that jurisdiction."³

Even if you are an exceptionally conscientious consumer who actually reads the terms and conditions before completing a purchase, there are other ways that your data could still be accessed by a government authority that are not always so obvious. For example, the Delta 9 website specifies that their "store is hosted on Shopify Inc."⁴ This is also the platform the Government of Ontario uses for its e-commerce cannabis sales. Shopify's terms and conditions detail that they not only collect and store personal data in the United States and Canada but also may share the information with unnamed third parties for purposes not detailed to the public.⁵

¹ *Cannabis Act*, 2018, SC 2018, c 16 <<https://perma.cc/BTH7-MTTU>>.

² For further reading, see Meta Cannabis: "... we may share your personal information from time to time with our third-party information technology and data processing service providers so that we may operate our business. As a result, your personal information may potentially be collected, used, processed, stored or disclosed in the United States <<https://perma.cc/6FM8-45H8>> or Tokyo Smoke: "your information, including personal information, may be transferred across national borders and stored or processed in any country in the world." <<https://perma.cc/8WSF-MPEV>>.

³ Tweed, *Privacy Policy*, <<https://perma.cc/27PQ-3THF>>.

⁴ Delta 9, *Terms of Service*, <<https://perma.cc/PTJ8-6VS5>>.

⁵ Shopify, *Privacy Policy*, <<https://perma.cc/HG3U-F6PQ>>.

Can the United States government access my personal consumer data?

Canadians' personal data is protected by privacy legislation, most notably the *Personal Information Protection and Electronic Documents Act* (PIPEDA). However, PIPEDA permits the disclosure of personal data without your knowledge or consent in certain circumstances. This includes when an organization is required to comply with a court order or request from a government institution.⁶ In a 2005 decision, the Federal Privacy Commissioner disclosed that data stored in the U.S., such as credit card records, could be accessed by the U.S. government under the powers of the *Patriot Act*.⁷

Are there criminal consequences if data on my cannabis purchases is accessed by the U.S. government?

After all, these purchases were made legally, so what would be the trouble? Even within the U.S., many states have enacted legislation for the legalization of cannabis to varying degrees. State laws are not relevant here as at the federal level, cannabis is still an illegal substance as prohibited by the *Controlled Substances Act*. And few areas in Canada-US relations affect the daily lives of Canadians more than border crossings and U.S. border regulations, which are also governed under Federal jurisdiction.

If you admit to using cannabis, either 'pre' or 'post' legalization, you could be banned from entry. Based on suspicion or evidence furnished by purchase records, for example, a US border agent has the authority to question any individual about their cannabis use, other than under a medical prescription. According to a senior official with U.S. Customs and Border Protection, "if someone admits to smoking frequently in Canada, then that will play into the officer's admissibility decision about whether they think, on this specific trip, they are also likely to engage in smoking marijuana in the United States as well."⁸ Admitting to using legal cannabis while in Canada cannot result in being barred from entry under U.S. criminal law. Nevertheless, other grounds can be used to refuse your admission, including a bar for mental defect, or as a drug or substance abuser.⁹ If you have admitted to past cannabis use, border agents are imbued with a discretionary power to send you to a medical review panel to determine if your rate of cannabis consumption qualifies as an addiction or abuse. The concept of "'abuse' refers to any level of use, regardless of legality

⁶ *Personal Information Protection and Electronic Documents Act, 2000*, SC 2000, c 5, ss 7(3)(c), 7(3)(c.1), <<https://perma.cc/SF5N-ERE7>>.

⁷ PIPEDA, "Bank's notification to customers triggers PATRIOT Act concerns." Case Summary #2005-313 <<https://perma.cc/XD5N-F83G>>.

⁸ Patrick Cain, *Legal cannabis use could still get you banned at the border, U.S. confirms* (January 2019), online: Global News <<https://perma.cc/P7EN-WA2U>>.

⁹ Talia Huculak and Lauren Weaver, *Cannabis Legalization at the Frontier* (August 2019), online: McGill Law Journal Podcast <<https://perma.cc/2Y3B-6PA4>>.

where it took place."¹⁰ According to a U.S.-based immigration lawyer, "under current technical instructions, use in the last year would qualify as a drug abuser..."¹¹

To recap, admitting to using legal cannabis in Canada still has the potential to result in a finding of criminal inadmissibility to the United States, with the potential for a lifetime entry ban because it is still a prohibited substance under federal U.S. law. Yet surprisingly, it is possible for people convicted of serious criminal offences to cross the U.S. border with no issues. According to a Global News report, a conviction for an impaired driving offence does not pose a problem for entry at the border. One lawyer quoted in the story even discussed three of his clients who can freely cross the U.S. border despite having convictions for the dangerous operation of a motor vehicle causing death.¹² Surely a criminal conviction would be more concerning to U.S. officials than admitting to a legal purchase or even to trying pot way back when you were in college? And yet, even absent any criminal convictions, and lacking any evidence you did not use cannabis per Canadian law, you could still be detained and found inadmissible.

How can I protect myself from a charge of criminal inadmissibility?

If you admit to prior cannabis use, you could be found inadmissible as an addict or drug abuser, even if you only use occasionally. And if you lie about previous use to a U.S. border agent, and they find out, you could face a lifetime entry ban. So what is the solution?

Per most legal experts, the best option, if asked about any past cannabis use, is to refuse to answer based on the irrelevancy of the question.¹³ While this will not get you past the border, it will also not result in a charge of inadmissibility if you do not admit to anything. This is not really a solution for getting through the border that day, but it does delay any ruling on your possible inadmissibility until you can find proper legal representation.

¹⁰ Cain, *How a weed conviction at 18 got a man banned at the U.S. border - 37 years later* (June 2019), online: Global News <<https://perma.cc/36H4-HWYG>>.

¹¹ Cain, *Your legal pot buying data could get you banned from the U.S., lawyers warn* (October 2018), online: Global News <<https://perma.cc/K9MM-K6UK>>.

¹² Cain, *supra* note 10.

¹³ Huculak, *supra* note 9.