

THE DEVELOPMENT OF MEDICAL MARIHUANA LAW IN CANADA AND ITS EFFECT ON MICHIGAN MARIHUANA STATUTES

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I. INTRODUCTION

The cannabis plant has been utilized as a resource by civilizations throughout the world over thousands of years.² Cannabis has been used as medicine, fuel, food, clothing, and as a means of intoxication.³ In depth studies have been conducted to determine the physical and psychological effects of “mari[h]uana (the dried bud of the female plant).”⁴ These studies have found a few minor risks, but overall have discovered a multitude of benefits that can be derived from the use of marihuana.⁵ In fact, it has been stated that “the single greatest risk encountered by the user of marihuana in any state in this country [the United States] is that of being apprehended as a common criminal,

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2. Leah Spicer, *Historical and Cultural Uses of Cannabis and the Canadian “Marijuana Clash,”* PARLIAMENT CAN., L. & GOV’T DIV. (Apr. 12, 2002), <http://www.parl.gc.ca/Content/SEN/Committee/371/ille/library/Spicer-e.htm>.

3. *Id.*

4. Carolyn Conron, *Canada’s Marihuana Medical Access Regulations: Up in Smoke*, 6 ALB. GOV’T L. REV. 259, 261 (2013).

5. *Id.*

incarcerated, and subjected to untold damage to his social life and career.”⁶

Recreational use of marihuana has been criminalized in both Canada and the United States for decades. However, the medical use of marihuana has been decriminalized in Canada since 2001, defensible in areas of the United States beginning in 1996, and defensible in Michigan following the passing of a voter initiative in 2008.⁷ Due to the close proximity and inevitable social comingling of Canada and Michigan, the evolution of Canadian medical and recreational marihuana regulations may impact parallel statutes in Michigan specifically, as well as the United States generally. Similarly, the accessibility of Canadians to Michigan and Michiganders to Canada creates an undeniable relationship between marihuana regulations in either location and marihuana consumption in the other. The question remains, will Canada’s medical marihuana reforms and movement towards federal decriminalization shift Michigan’s regulations along with the United States’ federal statutes in a similar direction?

II. THE LAW

A. Canada

The recreational use of marihuana is not permitted in Canada; however, residents are permitted to use cannabis for medical purposes.⁸ Cannabis is prescribed in Canada “for conditions such as cancer, multiple sclerosis, spinal cord injury, hepatitis, and arthritis . . . [as well as] anxiety, stress, depression, and pain.”⁹

6. Ruth C. Stern & J. Herbie DiFonzo, *The End of the Red Queen’s Race: Medical Marijuana in the New Century*, 27 QUINNIPIAC L. REV. 673, 687 (2009) (quoting Lester Grinspoon, Associate Professor Emeritus in Psychiatry at Harvard Medical School).

7. Marihuana Medical Access Regulations, SOR/2001-227 (Can.); 28 *Legal Medical Marijuana States and DC*, PROCON, <http://medicalmarijuana.procon.org/view.resource.php?resourceID=000881> (last updated Nov. 9, 2016, 11:49 AM); Michigan Medical Marihuana Act (MMA), MICH. COMP. LAWS Ch. 333 (2008).

8. *Legal Medical Cannabis Use in Canada*, MARIJUANALAWS.CA, <http://www.marijuanalaws.ca/legal-laws.html> (last visited Mar. 24, 2017).

9. *Id.*

1. *Criminalization of Marihuana*

In 1923, the Canadian Parliament amended the Opium and Narcotic Drug Act to include cannabis as a federally-prohibited narcotic.¹⁰ The current Canadian legislation barring marihuana is the Controlled Drugs and Substances Act (CDSA), which was passed in 1996.¹¹ The CDSA prohibits, as a federal offense, the possession, trafficking, importation or exportation or production of any scheduled substances.¹² Schedule II substances include,

Cannabis, its preparations and derivatives, including[;] (1) Cannabis resin, (2) Cannabis (marihuana), (3) Cannabidiol . . . (4) Cannabinol . . . (7) Tetrahydrocannabinol . . . *but not including* (8) Non-viable Cannabis seed, with the exception of its derivatives, (9) Mature Cannabis stalks that do not include leaves, flowers, seeds or branches; and fiber derived from such stalks.¹³

If a person is found possessing, selling, producing, or importing/exporting cannabis, under the CDSA they may be incarcerated for up to five years.¹⁴ Furthermore, if a defendant is found guilty of trafficking cannabis they may receive a penalty of life in prison.¹⁵ Under the CDSA, “[t]rafficking is a ‘designated substance offense,’ which is proven once a person is found to have given or delivered a drug to another.”¹⁶ Moreover, trafficking may be established for minor behaviors such as handing a small amount of marihuana to a person.¹⁷ Although, a transformation in public opinion of marihuana began in the 1960s when its use increased, and numerous young people were being subjected to drug investigations, criminal charges and arrests continue to persist.¹⁸

10. Diane Riley, *Drugs and Drug Policy in Canada: A Brief Review & Commentary*, CANADIAN FOUNDATION FOR DRUG POLICY & INTERNATIONAL HARM REDUCTION ASSOCIATION, Prepared for the Senate of Canada (Nov. 1998).

11. *See generally* Controlled Drugs and Substances Act, S.C. 1996, c 19 (Can.).

12. *Id.* pt. 1; Conron, *supra* note 4, at 263.

13. Controlled Drugs and Substances Act, sched.. II, § 1(9) (emphasis added).

14. *Id.* pt. I, § 4, sched. VIII.

15. *Id.* pt. I, §5(3).

16. Conron, *supra* note 4, at 264 (quoting *R. v. Larson* (1972), 6 C.C.C. 2d 145 (Can. B.C. C.A.)).

17. *Id.* (citing *R. v. Lauze* (1980), 17 C.R. 3d 90 (Can. Que.)).

18. *Id.* at 263.

2. *The Beginning of Reform*

In 1997, Terrance Parker, a Canadian citizen, was charged with possession of marihuana following a doctor's prescription of marihuana as medicine for Parker's epilepsy.¹⁹ Parker was forced to grow his own medical marihuana when he was unable to find the medicine any other way and was subsequently caught with the "contraband."²⁰ Parker appealed the charge, claiming that it violated his rights under the Canadian Charter of Rights and Freedoms (the Charter).²¹ Section 7 of the Charter guarantees every person "the right to life, liberty and security of the person and the right not to be deprived of those rights except in accordance with the principles of fundamental justice."²²

Parker had severe epilepsy and had suffered from the disease for close to forty years at the time he was arrested.²³ Parker tried to control his seizures with surgeries and other forms of medicine; however, these treatments were only moderately successful at alleviating his symptoms.²⁴ Smoking marihuana "substantially reduce[d] the incidence of [Mr. Parker's] seizures."²⁵ The medicinal value of marihuana was known at this time, yet there was no legal way to obtain the drug.²⁶ A company could have applied for a license to sell versions of marihuana components, such as Canabidiol (CBD), but aside from a synthetic version of tetrahydrocannabinol (THC), no company had done so at that time.²⁷ Consequently, Parker began growing the life-changing medicine himself and was subsequently arrested for violating the Narcotics Control Act, and later the Controlled Drugs and Substances Act.²⁸

Parker fought the charges, and the Ontario Court of Justice found that in fact, Parker did need the marihuana to manage his epilepsy and that his rights had been violated under section 7 of the Charter.²⁹ Moreover,

19. *Regina v. Parker* (1997), 49 O.R. 3d 481, 490 (Can. Ont. C.A.).

20. *Id.* at 487.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Parker*, 49 O.R. 3d at 490.

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.* at 488.

to protect Parker and others like him who need marihuana as medicine, “the trial judge read into the legislation an exemption for persons possessing or cultivating marijuana for their ‘personal medically approved use.’”³⁰ The Court of Appeals of Ontario upheld this decision in 2000 and “concluded that the prohibition on the cultivation and possession of marijuana is unconstitutional” in Canada.³¹

Nonetheless, the Court of Appeals of Ontario stated that the new legislation should be established by the Parliament, not the court, and provided one year for Parliament to amend the current statute so as not to be in violation of the Charter.³² Parliament’s response came in the form of the Marihuana Medical Access Regulations.³³

B. Marihuana Medical Access Regulations (MMAR)

The Marihuana Medical Access Regulations (MMAR) were originally enacted in July 2001.³⁴ The Marihuana Medical Access Regulations authorized possession of dried marihuana, “for the medical purpose of the holder.”³⁵ The permitted medical conditions enumerated in these regulations include cancer, AIDS/HIV, multiple sclerosis, spinal cord injury or disease, epilepsy, and severe forms of arthritis.³⁶ MMAR also allows for the use of medical marihuana to treat symptoms caused by these specified medical conditions.³⁷ A Canadian resident over the age of 18 may possess medical marihuana once they have received an authorization from the Minister, and may manufacture marihuana if they have a license to produce.³⁸

30. *Id.* at 481.

31. *Parker*, 49 O.R. 3d at 489.

32. *Id.*

33. *See* Marihuana Medical Access Regulations, SOR/2001-227, § 2 (Can.) [hereinafter MMAR].

34. *Id.* pt. 4, § 73.

35. *Id.* pt. 1, § 2.

36. *Id.* sched. [1].

37. *Id.*

38. *Id.* pt. 2, § 35(a).

1. Possession of Medical Marihuana

In order to be eligible to possess marihuana under the MMAR, a person must ordinarily reside in Canada and obtain authorization to possess by the Canadian government through an application sent to the Minister.³⁹ The application for authorization must include “a declaration of the applicant . . . a medical declaration made by the medical practitioner treating the applicant; and . . . two copies of a current photograph of the applicant.”⁴⁰ The declaration must certify that the applicant is aware that no notice has been issued “concerning the safety and effectiveness of marihuana as a drug.”⁴¹ The applicant must also certify that they: (1) have “discussed the potential risks” and benefits of marihuana use with their medical professional; (2) are aware these risks are not fully understood or identified; and (3) accept these risks.⁴² Finally, the applicant must assert, “that [the] marihuana will be used only for the treatment of the symptom stated for the applicant.”⁴³

The medical declaration is fairly detailed and must include itemized information about the applicant’s medical condition.⁴⁴ The medical professional must explain the applicant’s medical condition; the symptom(s) the condition or treatment causes; the maximum amount of marihuana authorized; the daily amount of marihuana and the method of use the applicant intends to use; and the “anticipated period of usage, if less than 12 months.”⁴⁵ Additionally, the medical professional must affirm that the applicant has tried the conventional methods of treatment and they are either “ineffective or medically inappropriate for . . . the applicant.”⁴⁶

39. MMAR, pt. 1, §§ 3-4.

40. *Id.* pt. 1, § 4(2)(a)-(c).

41. *Id.* pt. 1, § 5(1)(f).

42. *Id.* pt. 1, § 5(1)(f), (i).

43. *Id.* pt. 1, § 5(1)(j).

44. *See id.* pt. 1, §§ 6, 8.

45. MMAR, pt. 1, § 6(1)(b)-(d).

46. *Id.* pt. 1, § 6(2)(b)(v).

2. *Production of Medical Marihuana*

A person may produce marihuana for their own medical purposes once he or she has obtained a personal-use production license.⁴⁷ In order to obtain this license, an individual must ordinarily reside in Canada and be over the age of 18.⁴⁸ An individual with a personal-use production license may produce marihuana in his or her ordinary place of residence, or at a site that is not his or her ordinary residence if he or she has a signed declaration from the owner consenting to the production.⁴⁹ A personal-use producer may produce marihuana indoors or outdoors; however, if the production is partly outdoors then “the production site [may] not [be] adjacent to a school, public playground, day care facility or other public place frequented mainly by persons under 18 years of age.”⁵⁰

Once an individual is granted a personal-use production license, the number of marihuana plants and amount of dried marihuana he or she is allowed to produce is determined by a formula that takes into account whether the marihuana is grown indoors, outdoors, or partially both.⁵¹ Ultimately, these formulas are complex and can be confusing for personal-use producers, and could result in unintentional violations of the law.⁵²

47. *Id.* pt. 2, § 24.

48. *Id.* pt. 2, § 25(1).

49. *Id.* pt. 2, § 27(1)–(2).

50. *Id.* pt. 2, § 28(1)(g).

51. MMAR, pt. 2, § 30.

52. For purposes of the following formulas, A stands for “the daily amount of dried marihuana [permitted], in grams,” B is the expected yield of each plant, and C is “the growth cycle of a marihuana plant from seeding to harvesting;” C is a constant that is always 1. The formulas are broken down based on the growth cycle of the plant, the expected yield per plant, and whether the plants are grown inside, outside, or a combination of both. *Id.* “If the production area is entirely indoors,” the expected yield of each plant (B) is 30 grams, and the formula is: The maximum number of plants = $[A \times 365] \div [(B \times 3C)] \times 1.2$. *Id.* pt. 2, § 30(2)(a). If the production is entirely outdoors, B is equal to 250 grams, the formula is: “ $D = [(A \times 365) \div (B \times C)] \times 1.3$.” *Id.* pt. 2, § 30(2)(b). Where production occurs “pt.ly indoors and partly outdoors,” the formula “for the indoor period” is: $D = [(A \times 182.5) \div (B \times 2C)] \times 1.2$ where 30 grams is the expected yield, and the outdoor portion follows the formula: $D = [(A \times 182.5) \div (B \times C)] \times 1.3$ where the expected yield is 250 grams. *Id.* pt. 2, § 30(2)(c). Where the formula produces a fraction, the number is to be rounded up. *Id.* pt. 2, § 30(4).

A person may obtain a designated-person production license to produce marihuana for the medical use by another person.⁵³ An individual is eligible for this type of license as long as they have never “been found guilty, as an adult, within the 10 years preceding the application, of . . . a designated drug offence, or” an offense that would have been a drug offense in Canada.⁵⁴ A Designated-Person Production License permits an individual to transport marihuana from the site of production directly to the residence of the licensed individual.⁵⁵ The Designated-Person must not send more than the maximum quantity granted in the right to possess, and the dried marihuana must be securely packaged in a way that it is indistinguishable, and will not be opened without breaking a seal.⁵⁶

3. *Role of Law Enforcement in the Regulations*

Generally, an officer may demand a holder of a license to possess, or a license to produce, to display their license at any time.⁵⁷ However, the Marihuana Medical Access Regulations do not specifically provide defenses or prohibitions on arrest or prosecution of authorized users or producers of medical marihuana.⁵⁸ In 2013, the Canadian Parliament passed a new set of medical marihuana regulations, the Marihuana for Medical Purposes Regulations, which significantly altered the ways in which a person may obtain medical marihuana.⁵⁹

C. Marihuana for Medical Purposes Regulations (MMPR)

The Marihuana for Medical Purposes Regulations (MMPR) were adopted on June 6, 2013 as an annex to the Controlled Drugs and Substance Act.⁶⁰ The new Marihuana for Medical Purposes Regulations

53. MMAR, pt. 2, § 34(1)(a).

54. *Id.* pt. 2, § 35(b).

55. *Id.* pt. 2, § 34(1)(d).

56. *Id.* pt. 2, § 34.

57. *Id.* pt. 3, § 58.

58. *See generally* MMAR.

59. *See generally* Marihuana for Medical Purposes Regulations, SOR/2013-119 (Can.) [hereinafter MMPR].

60. Access to Cannabis for Medical Purposes Regulations, SOR/2016-230 (Can.).

effectively terminated the previous Marihuana Medical Access Regulations.⁶¹ These new medical marihuana protocols shift production away from personal home growing and toward corporate industrial production of medical marihuana.⁶²

1. *Possession of Medical Marihuana*

Similar to the MMAR, the MMPR permits a person to possess dried marihuana if they have “obtained the dried marihuana for their own medical purposes or for those of another person for whom they are responsible.”⁶³ This dried marihuana may be purchased “from a licensed producer, in accordance with a medical document . . . from a health care practitioner in the course of treatment for a medical condition, or . . . from a hospital.”⁶⁴ Dried marihuana is vaguely defined as, “harvested marihuana that has been subjected to any drying process.”⁶⁵

The MMPR also permits a person to possess dried marihuana if he or she is a healthcare practitioner, a hospital employee, or a licensed producer using it in the course of his or her profession or employment.⁶⁶ Moreover, an individual may possess a portion of a patient’s dried marihuana, not exceeding the daily quantity of dried marihuana the patient is authorized to possess, if he or she is providing assistance in the administration of the marihuana as medicine.⁶⁷

Possession of cannabis is also permitted under certain circumstances.⁶⁸ The MMPR adopted the Controlled Drug and Substances Act’s classification of cannabis as; “Cannabis, its preparations and derivatives including Cannabis resin, Cannabis (marihuana), Cannabidiol . . . *but not including* Non-viable Cannabis seed, with the exception of its derivatives[,] Mature Cannabis stalks that

61. *Id.*

62. *See generally id.*; *see infra* § II(3)(b) Production of Medical Marihuana.

63. MMPR, § 3(2)(a).

64. *Id.*

65. *Id.* pt. 1, § 1(1).

66. *Id.* pt. 1, § 3(2)(b), (c).

67. *Id.* pt. 1, § 3(6).

68. *Id.* pt. 1, § 4(1), (2).

do not include leaves, flowers, seeds or branches; and fiber derived from such stalks.”⁶⁹

a. Possession Limitations

The MMPR limits the quantity of dried marihuana an individual may possess to no more than thirty times their daily dose, as determined by a health care practitioner or hospital, which may not exceed 150 grams.⁷⁰

2. Production of Medical Marihuana

A large portion of the MMPR focuses on licensed producers.⁷¹ A licensed producer of marihuana has the ability to “possess, produce, sell, provide, ship, deliver, transport and destroy marihuana.”⁷² They also have permission to possess and produce cannabis, that is not marihuana, for the purposes of testing and may then “sell, provide, ship, deliver, transport and destroy [that] cannabis . . . [which] was obtained or produced solely for” the testing.⁷³

A licensed producer is permitted to “sell or provide dried marihuana to” clients or their caregiver, hospital staff for use within their employment, or any person the Minister permits due to medical or scientific need.⁷⁴ However, none of these transactions may occur within a dwelling, and must occur in the place specified on the producer’s license.⁷⁵ In order to be eligible to apply for a producer’s license, a person must be “an adult who ordinarily resides in Canada; [or] . . . a corporation that has its head office in Canada or operates a branch office in Canada and whose officers and directors are all adults.”⁷⁶

The application for a producer’s license must be submitted to the Minister.⁷⁷ The application is extensive and includes general identifying

69. Controlled Drugs and Substances Act, S.C. 1996, c 19, sched. II (Can.) (emphasis added).

70. MMPR, § 5; *id.* pt. 5, § 129.

71. *See generally id.* pt. 1.

72. *Id.* pt. 1, § 12(1)(a).

73. *Id.* pt. 1, div. 1, § 12(1)(c).

74. *Id.* pt. 1, div. 1, § 12(4)(a).

75. *Id.* pt. 1, div. 1, § 13.

76. MMPR, pt. 1, div. 2, § 21.

77. *Id.* pt. 1, div. 2, § 23(1).

information of the individual or company, the “name, date of birth and gender of . . . the proposed senior person in charge, . . . [and] the proposed responsible person in charge,” along with the “name and gender of each of the persons authorized” to order cannabis for the applicant.⁷⁸ In addition, the application also requires a considerable amount of more detailed information including, “the proposed activities that are to be conducted at each building . . . a detailed description of the security measures . . . [and] a detailed description of the methods that the applicant proposes to use for keeping records,” along with an agreement to give the Minister access to the site.⁷⁹ Applicants must also provide the maximum quantity (in kilograms) of dried marihuana they plan to produce under the license, their production period, and “the maximum quantity (. . . in kilograms) of dried marihuana to be sold or provided by the applicant under the licence.”⁸⁰ If the applicant for a producer’s license intends to have more than one site, he or she must complete a separate application for each proposed site.⁸¹ Finally, the applicant must attach multiple signed documents including, among other things, an affirmation from the senior person in charge stating they claim responsibility; copies of any document filed with the province in which they plan to have a site; a declaration that the senior person owns the entire proposed site or a declaration signed by the owner consenting to the proposed use; a declaration that the site is not a “dwelling place;” a declaration stating that notices to local authorities have been provided specifying the names of the officials and dates they were contacted; and floor plans for the proposed site.⁸²

Once a person or corporation has been approved as a licensed producer, they must designate one senior person to have responsibility for the activities carried out by the producer.⁸³ In addition, the licensed producer must designate a person, physically present, at the site of production, to be in charge and have responsibility for their activities, ensuring they comply with their license and the Food and Drugs Act.⁸⁴

78. *Id.* pt. 1, div. 2, § 23(1)(d)–(e).

79. *Id.* pt. 1, div. 2, § 23(1)(g)–(i).

80. *Id.* pt. 1, div. 2, § 23(1)(k).

81. *Id.* pt. 1, div. 2, § 23(2).

82. MMPR, pt. 1, div. 2, § 23(4).

83. *Id.* pt. 1, div. 2, §§ 21, 22(1)(a).

84. *Id.* pt. 1, div. 2, § 22(1)(b).

These designated persons, as well as the individual or officers and directors of the corporation, must hold a security clearance with the Canadian government.⁸⁵

After an applicant has submitted a complete producer's license application, "the Minister *must*, after examining the information and documents required . . . and after all of the security clearances required . . . have been granted . . . issue to the applicant a producer's licence."⁸⁶ The producer's license may be effective for no more than three years before an individual or corporation must renew.⁸⁷ However, the Minister *must refuse* issue or renewal of a producer's license if the applicant is not a resident of Canada, the applicant did not comply with the requirements before submitting the application, or the issue or renewal would "likely create a risk to public health, safety or security, including the risk of cannabis being diverted to an illicit market or use."⁸⁸ The Minister is permitted to request additional information before granting or denying a producer's license or renewal.⁸⁹

a. Security of the Production Site

A licensed producer's site must be designed in a way that prevents unauthorized access.⁹⁰ The site "must be visually monitored at all times by visual recording devices[;]"⁹¹ in addition, "[t]he perimeter of the licensed producer's site must be secured by an intrusion detection system that operates at all times and that allows for the detection of any attempted or actual unauthorized access" and must be monitored at all times by personnel.⁹² Records must be kept of any unauthorized access and how the licensed producer responded to these incidents.⁹³

Only those employees whose work responsibilities require them to be present are allowed in areas where cannabis is present, and the

85. *Id.* pt. 1, div. 2, § 24.

86. *Id.* pt. 1, div. 2, § 25 (emphasis added).

87. *See id.*

88. MMPR, pt. 1, div. 2, §26(h).

89. *Id.*

90. *See id.* pt. 1, div. 3, § 41.

91. *Id.* pt. 1, div. 3, §43(1).

92. *Id.* pt. 1, div. 3, §§ 43, 44, 45(1).

93. *Id.* pt. 1, div. 3, § 45(2).

responsible person in charge must accompany those employees.⁹⁴ Additionally, areas with cannabis present must keep record of every person entering and exiting the area, have physical barriers preventing access, and monitor “visual recording . . . to detect illicit conduct.”⁹⁵

b. Clients

A licensed producer is able to sell dried marihuana to an unlimited number of clients; however, their clients must “ordinarily reside in Canada.”⁹⁶ Before an individual may become a client, they, or an individual responsible for them, must submit an application to the *licensed producer*.⁹⁷ The application must include the applicant’s general identifying information, the address at which they ordinarily reside in Canada—or the name of the place they receive “food, lodging or other social services” if they do not have a residence—and a shipping address if it is different.⁹⁸ The applicant, or the person responsible for them, must also include their medical document and a signature affirming,

the applicant is ordinarily [a] resident in Canada; [] the information in the application and the medical document is correct and complete; [] the medical document is not being used to seek or obtain dried marihuana from another source; [] the original of the medical document accompanies the application; and [] the applicant will use dried marihuana only for their own medical purposes.⁹⁹

The licensed producer must ensure the authenticity of the medical document and verify it was “provided by a health care practitioner to a person who is under their professional treatment.”¹⁰⁰ The medical practitioner must indicate, their general information,

the province in which the practitioner is authorized to practise[,] their profession and the[ir authorization] number . . . the [applicant client’s]

94. MMPR, pt. 1, div. 3, § 46(1)–(2).

95. *Id.* pt. 1, div. 3, §§ 46(3), 47, 48(1).

96. *Id.* pt. 2, § 107.

97. *Id.* pt. 2, § 108(1).

98. *Id.* pt. 2, § 108(1).

99. *Id.* pt. 2, § 108(3).

100. MMPR, pt. 4, § 129(1).

given name, surname and date of birth; [] the address of the . . . consult[ation] with the practitioner; [] the daily quantity of dried marihuana to be used by the person, expressed in grams; and [] the period of use.¹⁰¹

A client is required to provide a new medical document to the licensed producer every year.¹⁰²

Once the information in the medical document and on the client application is confirmed, the licensed producer may register the individual as a client.¹⁰³ The licensed producer must then send the client a registration document with the name of the producer, the client's general information, and a "unique identifier for the purpose of ordering dried marihuana."¹⁰⁴ Conversely, the licensed producer *must terminate* the registration of a client in the following circumstances: the client, or someone responsible for them, tells the producer to cancel the registration; "the client dies, ceases to be ordinarily [a] resident in Canada or ceases to have a shipping address in Canada; [] the licensed producer has reasonable grounds to believe" the application was made using false or misleading information; or "the health care practitioner who provided the medical document to the client is named in a notice issued under . . . the *Narcotics Control Regulations*" that prohibits dried marihuana from being shipped to them.¹⁰⁵

c. Processing Orders

Prior to fulfilling an order for a client, a licensed producer must first receive a dated order, in writing, for dried marihuana that provides the client's and the person making the order's name, date of birth, the shipping address, and the client's unique identifier, along with "the quantity and the brand name of the dried marihuana being ordered."¹⁰⁶ When fulfilling the order, a licensed producer may only provide the dried

101. *Id.*

102. *Id.* pt. 4, § 129(2)–(3).

103. *Id.* pt. 2, § 111(1).

104. *Id.* pt. 2, § 111(2).

105. *Id.* pt. 2, § 117(1); *Narcotics Control Regulations*, C.R.C., c 1041 (Can.).

106. *MMPR*, pt. 2, § 121(2).

marihuana by shipping it to the client's address.¹⁰⁷ A client may only seek and obtain dried marihuana from one source at a time.¹⁰⁸ The regulations also limit the ways in which dried marihuana may be sold.¹⁰⁹ The sale of dried marihuana is prohibited "in any dosage form, such as in a roll or capsule."¹¹⁰

Further, the licensed producer must adhere to a multitude of packaging requirements when shipping dried marihuana.¹¹¹ For example, the packaging must be "in direct contact with the dried marihuana . . . keep[] the [] marihuana dry and free from contamination," provide security from being opened in transit, be child resistant, and hold no more than 30 grams of marihuana.¹¹² The package must also have a label with several required specific identifiers, including: the name of the licensed producer; the marihuana brand name; lot number; net weight; percentage of cannabinoids; recommended storage conditions; packaging date; the symbol "N"; the words "Dried marihuana/ Marihuana séchée;" warnings to keep away from children; and instructions to consult the Health Canada document.¹¹³

3. *Violations of the MMPR*

The MMPR provides immunity for the licensed producers and patients who are medically prescribed marihuana.¹¹⁴ The CDSA creates exceptions where the Minister is able to exempt any controlled substance under the Act if "the exemption is necessary for a medical or scientific purpose or is otherwise in the public interest."¹¹⁵ In accordance with this allowance, medical marihuana is exempt from the CDSA's prohibition of the use of marihuana in non-medical situations.¹¹⁶ However, stringent regulations have been instituted in order to ensure strict adherence to the MMPR regulations, and producers are regularly inspected by Health

107. *Id.* pt. 2, § 122.

108. *Id.* pt. 3, § 126.

109. *See Id.* § 6(1).

110. *Id.* § 6(1)(b).

111. *See id.* pt. 1, div. 5.

112. MMPR, pt. 1, div. 5, § 64.

113. *Id.* pt. 2, div. 5, §66.

114. *See generally* MMPR.

115. Controlled Drugs and Substances Act, S.C. 1996, c. 19, § 56(1) (Can.).

116. *Id.*

Canada.¹¹⁷ Furthermore, if a patient is found to possess more marihuana than the 150 gram maximum, they may be charged with possession of cannabis under the Controlled Drugs and Substances Act.¹¹⁸

As a result of these new regulations the medical industry in Canada has experienced a shift towards a commercial paradigm that is regulated much like the current practice with prescription drug retailers.¹¹⁹ Consequently, the price and daily dose of marihuana are both anticipated to rise dramatically in adaptation of the new regulations.¹²⁰ For example, the recommended average daily dose may increase in order for consumers to maintain a supply to last them longer than the allowed 30 days.¹²¹ Furthermore, there have been changes made to the MMPR, Canadian case law, and the Canadian Government that have created an unwillingness of law enforcement to prosecute marihuana possession.

a. Judicial Changes in the MMPR

In 2015, the Supreme Court of Canada found that the allowance for medical marihuana patients to possess and use only dried marihuana, with the continued prohibition of all other forms of marihuana, was against the Charter of Rights.¹²² In *R. v. Smith*, the defendant, Owen Edward Smith, was employed by Cannabis Buyers Club (The Club), which sold marihuana and cannabis products to members of The Club.¹²³ In order to become a member, a person was required to show The Club that they had a bona fide medical condition qualifying them for use of medical marihuana, as indicated by a physician.¹²⁴ The Club sold dried marihuana along with edible products, “cookies, gel capsules, rubbing oil, topical patches, butters and lip balms[,]” along with “recipe books for how to make . . . products by extracting the active compounds from dried

117. *Archived-Accessing Marijuana for Medical Purposes- Information Bulletin*, HEALTH CAN., <http://www.hc-sc.gc.ca/dhp-mps/marihuana/info/licencedproducer-producteurautorise/access-usage-eng.php> (last visited Apr. 24, 2017).

118. *Possession of Marihuana*, CAN. B. ASS'N, <http://www.cbabc.org/For-the-Public/Dial-A-Law/Scripts/Criminal-Law/201> (last visited Mar. 31, 2017).

119. Conron, *supra* note 4, at 287.

120. *Id.*

121. *Id.*

122. *R. v. Smith*, [2015] 2 S.C.R. 602 (Can.).

123. *Id.* at 607.

124. *Id.*

marihuana.”¹²⁵ Smith’s job was to extract chemicals from the cannabis plant in order to produce the edibles and other cannabis derivatives sold by The Club.¹²⁶ Smith was not a medical marihuana user and the Club was not licensed to produce under the MMAR.¹²⁷

A complaint was made to police regarding an “offensive smell,” and upon investigation, police discovered cookies, dried marihuana, and liquids labeled as “massage oil” and “lip balm”.¹²⁸ Testing showed the seized evidence contained THC, which was not protected under the MMAR.¹²⁹ Smith was charged with “possession of THC for the purpose of trafficking . . . and possession of cannabis.”¹³⁰

Smith challenged the charges against him claiming the permission to use only dried marihuana medicinally was a violation of the Charter.¹³¹ The trial court held, “The active compounds of the cannabis plant, such as THC and cannabidiol [CBD], have established medical benefits and their therapeutic effect is generally accepted, although the precise basis for the benefits has not yet been established.”¹³² The trial court further explained:

Different methods of administering marihuana offer different medical benefits. For example, oral ingestion of the active compounds, whether by way of products baked with THC-infused oil or butter, or gel capsules filled with the active compounds, may aid gastro-intestinal conditions by direct delivery to the site of the pathology. Further, oral administration results in a slower build-up and longer retention of active compounds in the system than inhaling, allowing the medical benefits to continue over a longer period of time, including while the patient is asleep. It is therefore more appropriate for chronic conditions.¹³³

125. *Id.*

126. *Id.*

127. *Id.* at 607–08.

128. *Smith*, 2 S.C.R. at 608.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.* at 609.

In addition, the trial court noted the negative effects of inhaling marihuana smoke, such as the introduction of carcinogens.¹³⁴ The trial judge held the prohibition against the medicinal use of marihuana in any form other than dried was a violation of the medical marihuana user's liberty.¹³⁵ Moreover, he held that "limiting the medical exemption to dried marihuana does little or nothing to enhance the state's interest in preventing diversion of illegal drugs or in controlling false and misleading claims of medical benefit."¹³⁶ Therefore the prohibition was unjustified under the Charter.¹³⁷

The Court of Appeals upheld the trial court's decision.¹³⁸ The Supreme Court of Canada found that the restriction of medicinal use to dried marihuana only limited Canadian citizens' rights in multiple ways.¹³⁹ The Court held that, "by forcing a person to choose between a legal but inadequate treatment and an illegal but more effective choice, the law also infringes [on the] security of the person."¹⁴⁰

It appears that the Supreme Court of Canada's decision in *R. v. Smith* has paved the way for more extensive reform of marihuana use in Canada.

D. Proposed Decriminalization of Marihuana in Canada

As of April 2016, Prime Minister Justin Trudeau promised that his government would legalize recreational marihuana use in Canada.¹⁴¹ Jane Philpott, the Canadian Health Minister, has stated that Canada's government "will introduce legislation to decriminalise and regulate recreational marijuana in spring 2017."¹⁴² Though there appears to be a shift towards decriminalization of recreational marihuana, only time will

134. *Smith*, 2 S.C.R. at 609.

135. *Id.*

136. *Id.* (internal quotations omitted).

137. *Id.* at 610.

138. *Id.*

139. *Id.* at 612.

140. *Smith*, 2 S.C.R. at 613.

141. Reuters in Toronto, *Canada to Introduce Legislation to Decriminalize Recreational Cannabis*, THE GUARDIAN (Apr. 20, 2016, 12:38pm), <https://www.theguardian.com/world/2016/apr/20/canada-legislation-decriminalize-recreational-cannabis-weed-marijuana>.

142. *Id.*

show if and how recreational marihuana may be legally consumed in Canada.

E. The United States

1. *Federal Criminalization of Marihuana*

In the early 1900s marihuana was not prevalent in the United States, nor was its existence popularly known.¹⁴³ Around that time, Mexican workers were bringing over marihuana into Texas and California.¹⁴⁴ Once cannabis was introduced to these states its use spread amongst minorities and across multiple states.¹⁴⁵ It is suspected that the fear of migrant workers led to a ban on marihuana, the migrants' choice relaxation aide.¹⁴⁶ Initially, cannabis was banned in El Paso, Texas in 1914.¹⁴⁷ By 1930, the distribution of cannabis was banned in twenty-four states, but the medicinal use of the plant was still permitted.¹⁴⁸ It was not until 1920 when marihuana took the hardest hit in the United States.¹⁴⁹ "In 1920, Dr. Oscar Dowling of the Louisiana Board of Health warned the governor and, subsequently, the U.S. Surgeon General about the powerful narcotic that caused exhilaration, intoxication [and] delirious hallucinations."¹⁵⁰ In the early 1930s physicians began publishing articles describing the use of marihuana as a prelude to violence and criminal acts, paving the way for Federal illegality.¹⁵¹ First, The Marihuana Tax Act of 1937 was passed, which essentially banned the use and sale of marijuana.¹⁵² This Act was ultimately found unconstitutional and replaced with the Controlled Substances Act in 1970, which prohibited

143. Stern & DiFonzo, *supra* note 6, at 680.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. *Id.*

149. Stern & DiFonzo, *supra* note 6, at 680.

150. *Id.* (internal quotations omitted).

151. *Id.* at 681–82.

152. David Solomon, *The Marihuana Tax Act of 1937*, <http://www.druglibrary.org/schaffer/hemp/taxact/mjtaxact.htm> (last visited Apr. 25, 2017).

the use of substances based on schedules.¹⁵³ This Act categorized cannabis as a Schedule I drug, which was reserved for the most dangerous and potentially addictive substances with no accepted medical use.¹⁵⁴ Originally, cannabis was only labeled a schedule I substance until a report on its potential for danger could be compiled.¹⁵⁵ However, even after a recommendation that marijuana was not an illicit substance and should not be a Schedule I drug, it remains in this category.¹⁵⁶

2. *The Michigan Medical Marihuana Act (MMMA)*

Like the Federal Controlled Substance Act, the State of Michigan categorizes Cannabis as a schedule I substance and prohibits the manufacture, delivery, and possession of marijuana.¹⁵⁷ In 2008, per a voter referendum, the State of Michigan created a criminal defense for the medical use of marijuana.¹⁵⁸ Based on findings that marihuana does in fact provide significant medicinal benefits to patients, the state of Michigan now permits the use of marihuana to treat specified medical ailments, such as “[c]ancer, glaucoma, [HIV], acquired immune deficiency syndrome, hepatitis C, amyotrophic lateral sclerosis, Crohn’s disease, agitation of Alzheimer’s disease, nail patella, or the treatment of these conditions.”¹⁵⁹ The MMMA relies on modern medical research and the scientifically proven medicinal benefits of marihuana and the active compounds found within it.¹⁶⁰ The MMMA’s primary focus is on the immunities and defenses provided for individuals who are licensed to possess and produce marihuana for medical purposes.¹⁶¹

Outright, the MMMA addresses the potential conflict between the State of Michigan’s defense for marihuana use and the United States’

153. Malik Burnett & Amanda Reiman, *How Did Marijuana Become Illegal in the First Place?* (Oct. 9, 2014), <http://www.drugpolicy.org/blog/how-did-marijuana-become-illegal-first-place>.

154. *Id.*

155. *Id.*

156. *Id.*

157. MICH. COMP. LAWS §§ 333.7212, 333.7401 (2008).

158. *See* Michigan Medical Marihuana Act, MICH. COMP. LAWS § 333.26421 (2008) [hereinafter MMMA].

159. *Id.* § 333.26423(b)(1).

160. *Id.* § 333.26422(a).

161. *See generally id.* § 333.26421.

federal prohibition against any marihuana use. Specifically the MMMA states, “[a]lthough federal law currently prohibits any use of marihuana except under very limited circumstances, states are not required to enforce federal law or prosecute people for engaging in activities prohibited by federal law.”¹⁶² Furthermore, the MMMA explains that statistics show that the majority of marihuana arrests are made under state statutes rather than federal laws.¹⁶³ The MMMA goes on to reiterate that, “[t]he laws of Alaska, California, Colorado, Hawaii, Maine, Montana, Nevada, New Mexico, Oregon, Vermont, Rhode Island, and Washington do not penalize the medical use and cultivation of marihuana. Michigan joins in this effort for the health and welfare of its citizens.”¹⁶⁴

a. Permission to Possess Marihuana Under the MMMA

The MMMA allows for a *qualifying patient*, who has been licensed and registered under the Act, to possess up to 2.5 ounces of *usable* marihuana, up to twelve *marihuana plants*, if they have not designated a primary caregiver, and any amount of stalks, seeds or unusable roots.¹⁶⁵ Each patient may designate a caregiver to provide medical marihuana for him— or herself if they choose not to grow their own.¹⁶⁶ However, if a patient designates a caregiver they are then unable to cultivate their own plants.¹⁶⁷ All marihuana plants must be in an enclosed, locked, facility at all times.¹⁶⁸

Though the MMMA is not entirely specific or lengthy, it does provide several definitions to clarify some of the key terms used throughout the Act. For instance, the definition of marihuana is taken directly from the Michigan Public Health Code and defined as, “all parts of the plant *Cannabis sativa* L., growing or not; the seeds of that plant; the resin extracted from any part of the plant; and every compound, manufacture, salt, derivative, mixture, or preparation of the plant or its seeds or

162. *Id.* § 333.26422(c).

163. *Id.* § 333.26422(b).

164. MMMA, § 333.26422(c).

165. *Id.* § 333.26424(a).

166. *Id.*

167. *See id.*

168. *Id.*

resin.”¹⁶⁹ In contrast, usable marihuana is defined as, “the dried leaves [and] flowers . . . of the marihuana plant, [and any mixture or preparation thereof,] *but does not include* the seeds, stalks, and roots of the plant.”¹⁷⁰ The aforementioned enclosed locked facility “means a closet, room, or other comparable, stationary, and fully enclosed area equipped with secured locks or other functioning security devices that permit access only by a registered primary caregiver or registered qualifying patient.”¹⁷¹ A qualifying patient is, “a person who has been diagnosed by a physician as having a debilitating medical condition.”¹⁷²

In order to become licensed as a patient under the MMMA, a person must provide to the Department of Licensing and Regulatory Affairs (LARA): “(1) [a] written certification; (2) Application or renewal fee; (3) Name, address [unless homeless], and date of birth of the qualifying patient, . . . (4)” general contact information for the patient’s physician; (5) general information for the planned caregiver (if any), including proof that the person is allowed to possess the marihuana for medical use, and (6) “[p]roof of Michigan residency.”¹⁷³ The written certification is,

a document signed by a physician, stating all of the following:

- (1) The patient’s debilitating medical condition.
- (2) The physician has completed a full assessment of the patient’s medical history and current medical condition, including a relevant, in-person, medical evaluation.
- (3) In the physician’s professional opinion, the patient is likely to receive therapeutic or palliative benefit from the medical use of marihuana to treat or alleviate the patient’s debilitating medical condition or symptoms associated with the debilitating medical condition.¹⁷⁴

169. MICH. COMP. LAWS § 333.7106(4) (2015).

170. MMMA, § 333.26423(n) (emphasis added).

171. *Id.* § 333.26423(d).

172. *Id.* § 333.26423(l).

173. *Id.* § 333.26426(a).

174. *Id.* § 333.26423(q).

In addition, the individual must be over 18 years of age, with an exception for patients whose parents have fulfilled additional requirements.¹⁷⁵ Once an individual has submitted their application, accurately, and in accordance with the department's requirements, they must then be issued a patient identification card within five days of approval.¹⁷⁶ An application may be denied only if the applicant failed to provide all the required portions of the application, or provided false information.¹⁷⁷ If an applicant specified a caregiver at the time of their application, a caregiver identification card will also be issued for their caregiver.¹⁷⁸ The MMMA requires that a caregiver be at least 21 years of age, have no felony convictions within ten years of the application, and no convictions of an illegal drug or assaultive felony.¹⁷⁹ Each licensed caregiver is permitted to care for up to five patients, and may possess 2.5 ounces of usable marihuana and 12 plants per patient.¹⁸⁰

b. Immunity & Defenses Provided Under the MMMA

Section 4 of the MMMA states,

A qualifying patient who has been issued and possesses a registry identification card is not subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to, civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for the medical use of marihuana in accordance with this act.¹⁸¹

However, in order to receive this immunity from arrest, a patient must have “both his or her registry identification card *and* a valid driver[‘s] license or government-issued identification card” with their image to show to the officer.¹⁸² Furthermore, if the patient possesses in excess of

175. *Id.* § 333.26426(b).

176. MMMA, § 333.26426(e).

177. *Id.* § 333.26426(c).

178. *Id.* § 333.26426(d).

179. *Id.* § 333.26423(k).

180. *Id.* § 333.26424.

181. *Id.* § 333.26424(a).

182. MMMA, § 333.26424(a) (emphasis added).

his or her allowable 2.5 ounces or 12 plants, they are not permitted this immunity.¹⁸³ Similarly,

A primary caregiver who has been issued and possesses a registry identification card is not subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for assisting a qualifying patient to whom he or she is connected through the department's registration process with the medical use of marihuana in accordance with this act.¹⁸⁴

Likewise, the caregiver must also have their registration card and photo ID, and be in strict compliance with the amount of usable marihuana and number of plants in their possession.¹⁸⁵ Further, Section 4 provides a presumption that a patient or caregiver is in possession of marihuana for medical purposes as long as they have their registration card and do not exceed their permitted amount of marihuana.¹⁸⁶ However, this presumption may be rebutted by evidence showing otherwise.¹⁸⁷ It is also important to note that section 4 of the MMMA provides an immunity for a person who "provid[es] a registered qualifying patient or . . . primary caregiver with marihuana paraphernalia for purposes of a qualifying patient's medical use of marihuana,"¹⁸⁸ as well as a person who is "in the presence or vicinity of the medical use of marihuana . . . or for assisting . . . with using or administering [medical] marihuana."¹⁸⁹

Though Section 4 affords immunities for the medical provision of marihuana, it also specifies consequences for those who disregard the limitations of the MMMA.¹⁹⁰ As such, if a registered patient or caregiver sells marihuana to a person for the purposes of recreational marihuana use, their registration may be revoked and they may be "guilty of a

183. *See id.*

184. *Id.*

185. *Id.* § 333.26424(b).

186. *Id.* § 333.26424(e).

187. *Id.*

188. MMMA, § 333.26424(h).

189. *Id.* § 333.26424(j).

190. *Id.* § 333.26424(l),

felony punishable by imprisonment for not more than 2 years or a fine of not more than \$2,000.00, or both, in addition to any other penalties for the distribution of marihuana.”¹⁹¹ In the event a licensed patient, caregiver, or unlicensed individual is not in compliance with section 4 of the MMMA, but does not explicitly disregard the Act, they may still be provided a defense under Section 8 of the Act.¹⁹²

Section 8 of the MMMA states:

a patient and a patient’s primary caregiver, if any, may assert the medical purpose for using marihuana as a defense to any prosecution involving marihuana, and this defense shall be presumed valid where the evidence shows that:

(1) *A physician has stated* that, . . . after having completed a full assessment of the patient’s medical history and current medical condition made in the course of a bona fide physician-patient relationship, *the patient is likely to receive therapeutic or palliative benefit from the medical use of marihuana* to treat or alleviate the patient’s serious or debilitating medical condition or symptoms of . . . ;

(2) The patient and the patient’s primary caregiver, if any, were collectively in possession of a quantity of marihuana that was *not more than was reasonably necessary to ensure the uninterrupted availability of marihuana* for the purpose of treating or alleviating the patient’s serious or debilitating medical condition or symptoms of the patient’s . . . condition; and

(3) The patient and the patient’s primary caregiver, if any, were engaged in the acquisition, possession, cultivation, manufacture, use, delivery, transfer, or transportation of marihuana . . . [for medical use only].¹⁹³

An individual may assert this defense and is entitled to have the charges dropped after showing the above elements at an evidentiary hearing.¹⁹⁴ In other words, Section 8 provides a defense for individuals who can show the amount of marihuana they possessed was *reasonable*,

191. *Id.*

192. *Id.* § 333.26428

193. *Id.* § 333.26428 (emphasis added).

194. MMMA, § 333.26428.

only for medical use, and that a physician, through a bona fide patient relationship, believed they would receive therapeutic or palliative effects from medical marihuana use.¹⁹⁵

The MMMA further addresses the potential federal preemption issue in Section 7(e) where it states, “[a]ll other acts and parts of acts inconsistent with this act do not apply to the medical use of marihuana as provided for by this act.”¹⁹⁶ Section 3(f) further defines “medical use” to include “the acquisition, possession . . . *transfer, or transportation* of marihuana.”¹⁹⁷

c. Judicial Interpretation

The Michigan Medical Marihuana Act is not a lengthy Act, and consequently defendants have often had to rely on judicial interpretation to determine their fate. In the short time the MMMA has been in effect, several cases have been in front of Michigan Judiciaries for clarification.

In *Ter Beek v. City of Wyoming*, the Michigan Supreme Court held that the Federal Controlled Substances Act (CSA) did not preempt the Michigan Medical Marihuana Act.¹⁹⁸ Further, the Court held that the City of Wyoming’s local ordinance prohibiting the use of land for any purpose “contrary to federal law” was in direct conflict with and preempted by the MMMA.¹⁹⁹

Initially, the prosecutorial interpretation of the MMMA laws believed there could be no affirmative defense of compliance with Section 8 unless the elements of Section 4 were satisfied.²⁰⁰ Luckily, the Michigan Supreme Court fixed this discrepancy with *People v. Kolanek*.²⁰¹ The Court in *Kolanek* held that, when a defendant asserts their Section 8

195. *Id.*

196. *Id.* § 333.26427(e).

197. *Id.* § 333.26423(f) (emphasis added).

198. *Ter Beek v. City of Wyoming*, 846 N.W.2d 531, 534 (Mich. 2014).

199. *Id.*

200. *People v. Redden*, 799 N.W.2d 184, 192–93 (Mich. Ct. App. 2010) (“Nevertheless, the prosecution argues that the affirmative defense under § 8 is unavailable to defendants because they did not possess valid registry identification cards at the time of the offense, in violation of § 4.”).

201. *People v. Kolanek*, 817 N.W.2d 528, 540–41 (Mich. 2012).

defense, the defendant has a right to an evidentiary hearing on said Section 8 defense.²⁰² In order

to establish the elements of the affirmative defense in § 8, a defendant need not establish the elements of § 4. Any defendant, regardless of registration status, who possesses more than 2.5 ounces of usable marijuana or 12 plants not kept in an enclosed, locked facility may satisfy the affirmative defense under § 8. As long as the defendant can establish the elements of the § 8 defense and none of the circumstances in § 7(b) exists, that defendant is entitled to the dismissal of criminal charges.²⁰³

Kolanek provided a step in the right direction for the clarification of the Act's intent to protect all who are medical marijuana users, not *just* those who are registered with LARA. As the Court stated, "The stricter requirements of § 4 are intended to encourage patients to register with the state and comply with the act in order to avoid arrest and the initiation of charges and obtain protection for other rights and privileges."²⁰⁴ Though, if an individual does not register or is not in strict compliance with Section 4, they are still entitled to a defense.²⁰⁵

Individuals who are not eligible for Section 4 defenses are entitled to an affirmative defense under Section 8 of the MMMA.²⁰⁶ In *People v. Hartwick*, the Michigan Court of Appeals concluded that a Section 8 defense "specifies three elements that an MMMA defendant must demonstrate before he can assert this defense."²⁰⁷ The three elements that a defendant must demonstrate are: (1) proof of a bona fide physician-patient relationship under § 8(a)(1); (2) proof of the caregiver's awareness of the quantity of marijuana the patient is supposed to receive and for what period of time the patient should be prescribed marijuana; and lastly (3) whether or not the marijuana that is provided by the caregiver is "actually being used by the patient for medical reasons."²⁰⁸

202. *Id.* at 546.

203. *Id.* at 540–41.

204. *Id.* at 540.

205. *Id.*

206. *See People v. Hartwick*, 842 N.W.2d 545, 547 (Mich. Ct. App. 2013).

207. *Id.* at 552.

208. *Id.* at 553.

The bona fide physician-patient relationship would be proved by presenting evidence that a

physician has stated that, in the physician's professional opinion, after having completed a full assessment of the patient's medical history and current medical condition made in the course of a bona fide physician-patient relationship, the patient is likely to receive therapeutic or palliative benefit from the medical use of marihuana to treat or alleviate the patient's serious or debilitating medical condition or symptoms of the patient's serious or debilitating medical condition.²⁰⁹

The court detailed the boundaries of what a bona fide physician-patient relationship would entail and reasoned that the "mere possession of a patient's or caregiver's identification card does not satisfy the first element of a § 8(a)'s affirmative defense."²¹⁰ The second element of the Section 8 affirmative defense requires that the patient and the patient's primary caregiver are not collectively in possession of a quantity of marihuana that is more than reasonably necessary for the patient's treatment.²¹¹ A defendant must prove that he is "intimately aware of exactly how much marijuana is required to treat a patient's condition, which he learns from a doctor with whom the patient has an ongoing relationship."²¹² The court held that "the amounts permitted in § 4 do not define what is 'reasonably necessary' to establish the § 8 defense."²¹³ The third and final element a defendant must prove for an affirmative defense under Section 8 would be a presentation of evidence that the patient actually used marihuana in a medical fashion prescribed under the MMMA; a mere state-issued registry identification card would not prove that the holder of the card subsequently "used" marihuana for medical purposes.²¹⁴ Although exacting, the court's decision in *Hartwick* proved to be a definitive guide as to what situations would give rise to a successful affirmative defense under Section 8 of the MMMA.

209. *Id.*

210. *Id.* at 555.

211. *Id.*

212. *Hartwick*, 842 N.W.2d at 556.

213. *Id.*

214. *Id.* at 557.

Even though the MMMA allows for caregivers to supply their patients with medical marihuana through transfer or sale, the Michigan Supreme Court held in *State v. McQueen* that “§4 of the MMMA, MCL 333.26424, does not permit a registered qualifying patient to transfer marijuana for another registered qualifying patient’s medical use.”²¹⁵ In *McQueen*, the defendants had a business that facilitated patient-to-patient sales of marihuana.²¹⁶ Although the defendants intended to “benefit the transferee patient’s debilitating medical condition or symptoms,”²¹⁷ the Court found that the transfers did not qualify for immunity under Section 4 of the MMMA because “they encompass marijuana-related conduct that is not for the purpose of alleviating the *transferor’s* debilitating medical condition or its symptoms.”²¹⁸ The Court interpreted that “using or administering marijuana” under Section 4(i) would permit a “spouse of a registered qualifying patient to assist the patient in ingesting marijuana,”²¹⁹ however it would not permit the assistance the defendants have provided to patients in acquiring marihuana in this case.²²⁰ The narrow interpretation of the Court’s decision with regards to “using marijuana” was later broadened in the iconic case of *People v. Mazur*.²²¹

In *People v. Mazur*, the defendant Cynthia Mazur helped her husband David, who was both a registered qualifying patient and primary caregiver for two medical marijuana patients, by “writing the date of harvest for marijuana plants on several sticky notes.”²²² The Court focused on the definition of “paraphernalia” based on the legislation behind the MMMA and came to the conclusion that paraphernalia encompassed both items specifically designed for marihuana use and items actually used in the course of ingesting marihuana.²²³ Thus, anything that was actually used to aid “a qualifying patient’s transfer, delivery, acquisition, or cultivation of marijuana is a medical use according to a plain-language reading of the statute” and is also

215. *State v. McQueen*, 828 N.W.2d 644, 657 (Mich. 2013).

216. *Id.* at 646.

217. *Id.* at 655.

218. *Id.*

219. *Id.* at 656.

220. *Id.*

221. *People v. Mazur*, 872 N.W.2d 201 (Mich. 2015).

222. *Id.* at 203.

223. *Id.* at 208.

paraphernalia.²²⁴ Mazur's sticky notes were considered "marihuana paraphernalia" because "the objects were actually used in the cultivation or manufacture of marijuana" by detailing which plants would be harvested at what time.²²⁵ The Court held that the sticky notes fell within the scope of § 4(g) of the MMMA and the prosecution was "prohibited from introducing or otherwise relying on the evidence relating to [the] defendant's provision of marijuana paraphernalia . . . as a basis for the criminal charges against [the] defendant."²²⁶ Section 4(g) of the MMMA states that

A person shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, for providing a registered qualifying patient or a registered primary caregiver with marihuana paraphernalia for purposes of a qualifying patient's medical use of marihuana.²²⁷

The effect of this holding demonstrates that the Court has understood this provision of the MMMA to be broadly construed in favor of a patient's or caregiver's medical use of marihuana.

Another controverted portion of the MMMA centers on the ways in which a medical marihuana patient must ingest their medicine, and in which consumable forms the marihuana is permitted. In *Carruthers*, a medical marihuana patient, and caregiver, was found with brownies containing THC in his possession and subsequently was charged and convicted of possession with intent to deliver marijuana.²²⁸ The defendant appealed this conviction.²²⁹ In their original analysis of whether those brownies were considered marihuana, The Michigan Court of Appeals noted,

The definition [of marihuana under the MMMA] specifically excludes the 'mature stalks' of the plant 'except the resin extracted therefrom.'

224. *Id.*

225. *Id.* at 209.

226. *Id.*

227. MICH. COMP. LAWS §333.26424(g) (2008).

228. *See People v. Carruthers*, 837 N.W.2d 16, 19 (Mich. Ct. App. 2013).

229. *Id.* at 20.

By virtue of that exception, therefore, resin extracted from mature stalks is also expressly included within the definition of ‘marihuana.’ There is no dispute that both the raw marijuana and the brownies found in defendant’s possession constitute marijuana under the MMMA.²³⁰

However, the Court of Appeals then discussed the MMMA’s definition of usable marihuana, which does not include all parts of the plant.²³¹ Specifically, under the MMMA’s definition of usable marihuana, the resin of the plant is not included, nor is every mixture or preparation.²³² Thus, the Court of Appeals held that in order to “constitute usable marijuana under the MMMA, any mixture or preparation must be of the dried leaves or flowers of the marijuana plant.”²³³ The Court of Appeals relied on statutory interpretation and failed to take into account the fact that the MMMA was created by a voter referendum, with the purpose of “allow[ing] under state law the medical use of marihuana; [and] to provide protections for the medical use of marihuana.”²³⁴ The sole purpose of the act was to permit the use of medical marihuana, not to create a confusing regulation designed to trap medical patients in technicalities and accidental violations. Ultimately, the defendant in *Carruthers* was not afforded a protection under the MMMA because the marihuana he possessed within the brownies was not considered usable marihuana based on the court’s analysis.²³⁵

d. Newly Enacted Legislation to the Michigan Medical Marihuana Act

The Michigan legislature has passed a package of bills in an effort to reform the current medical marihuana laws. Enrolled House Bill No. 4209, also known as the “Medical Marihuana Facilities Licensing Act” was approved by the governor of Michigan, Rick Snyder, on September 21, 2016 and sets up a new scheme legalizing, licensing, and regulating commercial medical marihuana growing, commercial medical marihuana

230. *Id.* at 22 (internal citations omitted).

231. *Id.*

232. *Id.*

233. *Id.* at 23. (internal quotations omitted).

234. MICH. COMP. LAWS §333.26424 (2008), Refs & Annos.

235. *Carruthers*, 837 N.W.2d at 18–19.

processing (creating edibles, oils, and other medical marihuana infused products), medical marihuana provisioning centers (otherwise known as dispensaries), safety compliance facilities, and secured transporters for the transportation of the medical marihuana or associated products.²³⁶ This would create a very highly regulated scheme that would not directly affect the Michigan Medical Marihuana Act; however, it would have far reaching consequences on the state's medical marijuana producers and users.

The Act creates a system of checks and balances to ensure safe consumption of medical marihuana, from seed to sale. First, a medical marihuana licensing board of bi-partisan members appointed by the governor will be created to ensure the Act is implemented effectively, with the board members' responsibilities consisting of licensing, regulating, and enforcing the regulations throughout the state.²³⁷ Other duties of the board include: providing oversight of a marihuana facility; implementing and collecting the application fees, taxes and regulatory assessments for licensees; and ensuring compliance by licensees in accordance with health and safety standards involved with marihuana-infused products.²³⁸ An advisory panel, consisting of seventeen members from different occupations in relation to medical marihuana or law enforcement, will be formed to recommend rules regarding the administration, implementation, and enforcement of the act to the board.²³⁹

A licensee under the Act must apply for a growing license, secured transport license, processing license, safety compliance license, or provision center license.²⁴⁰ A growing license comes in three different classes, each prescribing a maximum number of plants that can be grown in a growing facility.²⁴¹ A safety compliance facility will test marihuana to ensure the patients of Michigan receive unadulterated and chemical-free medical marihuana.²⁴² The secured transporter license "authorizes the licensee to store and transport marihuana and money associated with"

236. 2016 Mich. Pub. Acts 281.

237. *Id.* § 302.

238. *Id.* § 302(e)–(h).

239. *Id.* § 801.

240. *Id.* § 201.

241. *Id.* § 501(1).

242. 2016 Mich. Pub. Acts 281, § 505.

all of the different licensed entities among the Act.²⁴³ Through a secured transport, the grower and the other different inter-connected entities of marihuana facilities may transfer marihuana or seeds amongst each other, but must comply with the rules set forth in the Act.²⁴⁴ A processing center extracts resin from marihuana provided by a grower and creates marihuana-infused products in compliance with the Act.²⁴⁵ A provisioning center is similar to medical marihuana “dispensaries” located throughout the state; except the provisioning center is *statutorily* allowed to sell to both registered qualifying caregivers and patients.²⁴⁶ This facility can sell *both* marihuana and marihuana-infused products, which were previously held to not qualify as “usable marihuana.”²⁴⁷ This new legislation provides for a bountiful source of revenue in the form of application fees, regulatory assessments, local and state licensing fees, and taxes.²⁴⁸ A new tax will be imposed on the provisioning centers throughout the state at the rate of three percent of gross retail receipts.²⁴⁹ These new sources of revenue will go towards municipalities and counties in which a marihuana facility is located, the state treasury, the Worker’s Disability Compensation Act of 1969, and law enforcement agencies.²⁵⁰

Enrolled House Bill No. 4210 was passed by the Michigan Senate on September 8, 2016, signed by the governor on September 21, and will be effective on December 20, 2016.²⁵¹ The bill will amend the Michigan Medical Marihuana Act and allow for marihuana infused products to fall within the definition of usable marihuana under the Michigan Medical Marihuana Act and therefore receive immunity protections under the Act.²⁵² It would also expand the definition of medical use in order to cover actions consistent with extracting and processing the marihuana

243. *Id.* § 503(1).

244. *Id.*

245. *Id.* § 502.

246. *Id.* § 504.

247. *See* *People v. Carruthers*, 837 N.W.2d 16, 26 (Mich. Ct. App. 2013).

248. 2016 Mich. Pub. Acts 281 §§ 601–02.

249. *Id.* § 601.

250. *Id.* § 602.

251. House Bill 4210 (2015) History, MICHIGAN LEGISLATURE, [http://www.legislature.mi.gov/\(S\(y1ro2pulgrh21ybnuocb2bpt\)\)/mileg.aspx?page=GetObject&objectname=2015-HB-4210](http://www.legislature.mi.gov/(S(y1ro2pulgrh21ybnuocb2bpt))/mileg.aspx?page=GetObject&objectname=2015-HB-4210) (last visited Apr. 4, 2017).

252. *See* 2016 Mich. Pub. Acts 283.

plant.²⁵³ The Act also allows for a person under the age of eighteen who has a debilitating condition to be a registered qualifying patient as long as their parent or legal guardian, submits a written certification from two physicians; consents in writing to “allow the . . . patient’s medical use of marihuana; [s]erve[s] as the qualifying patient’s primary caregiver[,] and[;] [c]ontrol[s] the acquisition of the marihuana, the dosage, and the frequency of the medical use of marihuana by the qualifying patient.”²⁵⁴ The intent of the legislature is to streamline the industry with acceptable standards to benefit anyone who needs to use medical marihuana, while also limiting the risk involved with the abuse of medicinal marihuana. For example, similar to alcohol and tobacco regulations, the new act will establish restrictions on: marihuana-infused products that are shaped to appeal to minors, daily purchasing limits, marketing and advertising, and maximum tetrahydrocannabinol (THC) levels for marihuana-infused products.²⁵⁵

Finally, Michigan House Bill 4827²⁵⁶ passed by the Michigan Senate on September 8, 2016, will require all licensees under Senate Bill 4209 to use an approved software for the seed to sale tracking of all marijuana and marijuana related products of any kind.²⁵⁷ In order to comply with the rules promulgated by Senate Bill 4209 a licensee would have to comply with rules promulgated in House Bill 4287.²⁵⁸

This Act, also known as the “Marihuana Tracking Act,” will monitor the medical use of marihuana more efficiently. The Marihuana Tracking Act will ensure that the state has access to all of the medical marihuana being grown, transported, processed, rejected, sold and consumed by implementing a statewide “integrated marihuana tracking, inventory, and verification system.”²⁵⁹ This system will allow law enforcement agencies and authorized state departments and agencies to “verify[] registry identification cards,” track the transfer and transportation of marihuana

253. *Id.* § 3(h).

254. *Id.* § 6(b).

255. 2016 Mich. Pub. Acts 281 § 206(o)–(q), (s).

256. 2016 Mich. Pub. Acts 282.

257. *See id.*; *see also* House Bill 4827 History, MICHIGAN LEGISLATURE, [http://www.legislature.mi.gov/\(S\(iu52yi4ct2egvnxjtj5aq12er\)\)/mileg.aspx?page=GetObject&objectname=2015-HB-4827](http://www.legislature.mi.gov/(S(iu52yi4ct2egvnxjtj5aq12er))/mileg.aspx?page=GetObject&objectname=2015-HB-4827) (last visited Apr. 3, 2017).

258. *See* 2016 Mich. Pub. Acts 282.

259. *Id.* § 3(1).

between licensees, and verify that transfers will not exceed the limit a registered patient or caregiver is authorized to receive under Section 4 of the MMMA.²⁶⁰ The system will provide real-time updates which would show that a patient's or primary caregiver's registry card is valid or invalid, which has been a concern of law enforcement agencies and those who must medically use marihuana since the beginning of the MMMA's enactment.²⁶¹

Most importantly, the system will provide data regarding the "date, time, quantity, and price of each sale or transfer of marihuana to a registered qualifying patient or registered primary caregiver," and "[e]ffective monitoring of marihuana seed-to-sale transfers."²⁶² The aim of this system is to fight fraudulent and black-market transactions from occurring due to the abuse or reckless disregard for the newly-enacted act.

A safeguard of privacy aimed to enshroud any participant's involvement of the system is enabled in Section 4 of the Act. It protects the participant's privacy by exempting information in the system from disclosure under the Freedom of Information Act.²⁶³ However, the information is not *completely* confidential. The act continues, stating "[i]nformation in the system may be disclosed for purposes of enforcing this act; the Michigan medical marihuana act . . . and the medical marihuana facilities licensing act."²⁶⁴

The Act took effect on December 20, 2016.²⁶⁵ It is the Michigan legislature's response to the issues regarding the vagueness and obscurities with the MMMA and its modern application, specifically to "provide immunity from prosecution for marihuana-related offenses for persons engaging in marihuana-related activities in compliance with this act."²⁶⁶ The people of Michigan have seen the ways in which the initial MMMA laws have been interpreted adversely to patient's and caregivers' needs, such as in the case of *People v. Carruthers*.²⁶⁷ This

260. *Id.* § 2(g).

261. *Id.* § 3(2)(a).

262. *Id.* § 3(2)(b), (d).

263. *Id.* § 4.

264. 2016 Mich. Pub. Acts 282, § 4.

265. *See generally id.*

266. 2016 Mich. Pub. Acts 281.

267. *People v. Carruthers*, 837 N.W.2d 16, 16 (Mich. Ct. App. 2013).

new Act will improve Michigan's medical marihuana industry, illuminating the dark crevice of ambiguous judicial interpretation that has harmed the legislative intent of the MMMA and the patients it heals.

e. Proposed Decriminalization of Marihuana in Michigan

MILegalize, an organization which plans to introduce legislation in Michigan that would effectively legalize marihuana and its various uses, has recently been campaigning to decriminalize marihuana.²⁶⁸ Specifically, the aim of the legislation is to:

legalize and regulate marihuana and hemp cultivation, production, testing, sale, distribution, possession, and use for medical and nonmedical purposes; to provide for licensing of certain marihuana establishments; to provide certain rights to persons with a doctor's recommendation for the use of marihuana; to authorize collection of fees; to allow an excise tax on marihuana transfers at the point of sale; to provide for the powers and duties of certain state and local governmental officers and agencies; to authorize local units of government to adopt limited regulation of marihuana facilities and stores; and to require the promulgation of rules.²⁶⁹

Some details regarding the scope of the act involve: setting the minimum age of consumption to twenty-one (unless medically prescribed); defining medical marihuana as not only the bud of the flower but also in the form of oils, wax, tinctures, etc.; allowing the cultivation of marihuana plants; enacting a tax on marihuana sales, and; licensing marihuana stores and similar facilities.²⁷⁰

III. THE RELATIONSHIP BETWEEN CANADA AND MICHIGAN

Though the Marihuana for Medical Purposes Regulations and the Michigan Medical Marihuana Act have distinctly different concentrations in their written regulations, both Canada and Michigan share an understanding of the benefits its' residents can receive from the

268. *Read the Initiative!*, MILEGALIZE, http://www.milegalize.com/read_the (last visited Apr. 3, 2017).

269. *Id.*

270. *Id.*

facilitation of medical marijuana use. In enacting the Marijuana Medical Access Regulations, Canada benefited its citizens by permitting them to use marijuana medically; aiding its citizens who were dealing with serious diseases such as cancer, multiple sclerosis, spinal cord injury, hepatitis, arthritis, as well as, anxiety, stress, depression, and pain.²⁷¹ Michigan has almost identically understood and recognized the benefits its' citizens would receive from using medical marijuana by enacting the MMMA, which allows patients to use medical marijuana for treating medical ailments such as “[c]ancer, glaucoma, [HIV], acquired immune deficiency syndrome, hepatitis C, amyotrophic lateral sclerosis, Crohn’s disease, agitation of Alzheimer’s disease, nail patella, or the treatment of these conditions.”²⁷²

Under Canada’s MMAR and Michigan’s MMMA, widely differing systems of regulation are utilized, with Canada reducing rights for home grows and focusing on commercial distribution and Michigan focusing on small production for a limited number of patients.²⁷³ In Canada, the cultivators must go through the process of obtaining a “Designated-Person Production License” and in Michigan the cultivators are either patients or go through the process of becoming a “caregiver.”²⁷⁴ Although the terminology and initial licensing procedures may be different, the relationships between the cultivators and patients are very much the same, taking into consideration that there are many limits under both laws, such as limiting the number of plants to be cultivated to an apportioned amount, and specifics regarding the maximum amount of usable medical marijuana to be possessed by the cultivator at any given time.²⁷⁵

With recent changes in Canada’s medical marijuana legislation came the Marijuana for Medical Purposes Reform, which did not change many aspects about the previous law except for the cultivation requirements and allocations.²⁷⁶ It shifted the “Designated Person Production License” procedures to a more stable and regulated “licensed producers,” who had to undergo more extensive licensing procedures and

271. Legal Medical Cannabis Use in Canada, *supra* note 8.

272. MICH. COMP. LAWS §§ 333.26422(a) (2016).

273. *See* MMAR; *see* MMMA § 333.26424.

274. *See* MMAR, §38; *see* MMMA § 333.26424(a), (b).

275. *See* MMAR, §34; *see* MMMA § 333.26424(a), (b).

276. MMPR, SOR/2013-119 (Can.).

who would be under stricter guidelines than the previous “designated person production license” holders.²⁷⁷ These guidelines include securing and enclosing a marihuana cultivation facility by means of video surveillance, gates and locks, and employing personnel to monitor the premises constantly.²⁷⁸ Under the MMMA, a caregiver who cultivates marihuana plants must keep them in an “enclosed, locked facility” and must not allow anyone other than himself or a registered qualifying patient to have unauthorized access to the enclosure.²⁷⁹ These two laws intend for the cultivation of medical marihuana to be in the control of those who are licensed as producers or caregivers, for practical reasons.

Lastly, Michigan case law had previously determined that “edibles” and other marihuana-infused products for consumption are prohibited and not recognized under the MMMA as marihuana intended for “medical use.”²⁸⁰ In Canada, *R. v. Smith* the Supreme Court of Canada paved the way with ruling that the prohibition of the consumption of marihuana-infused products was disadvantageous to its’ intentions of allowing its citizens to benefit from the uses of *all* medical marihuana consumption.²⁸¹ Although there are many similarities between Michigan’s and Canada’s medical marihuana laws, this difference between “usable marihuana” is a crucial tilting point that has recently pushed state senators to amend Michigan’s current MMMA laws with a further-reaching application of medical marihuana uses which now include marihuana-infused products for consumption and regulating state-wide sales of medical marihuana.²⁸²

IV. CONCLUSION

It seems that the new set of bills in Michigan will, in many ways, imitate the commercial medical marihuana scheme set up in Canada

277. *Id.* pt. 1, div. 1, §12; *Id.* pt. 2, §34(1)(a).

278. *Id.* pt. 2, div. 3, §§ 41–48.

279. MICH. COMP. LAWS § 333.26424(a) (2016).

280. *People v. Carruthers*, 837 N.W.2d 16, 19 (Mich. Ct. App. 2013).

281. *R. v. Smith*, [2015] 2 S.C.R. 602 (Can.).

282. Michael Gerstein, *Michigan Senate OKs Medical Marijuana Reform Bills*, DETROIT NEWS (Sept. 8, 2016, 6:30 PM), <http://www.detroitnews.com/story/news/local/michigan/2016/09/08/medical-marijuana/90003264/>.

under the Marijuana for Medical Purposes Reform. If Michigan wants to follow in the footsteps of Canada it is important that they also learn from the mistakes that Canada has made. Canada now appears to be moving in the direction of full recreational legalization of marijuana throughout the country under the policies of new Prime Minister Justin Trudeau. Michigan should watch Canada closely as ballot initiatives like MIlegalize are likely to legalize recreational cannabis use in Michigan in the near future. Canada's recreational legalization should be looked at as an experiment for Michigan to learn from. Michigan does not have to copy Canada blindly, but rather should reject the policies that have failed so as to not make the same mistakes.

