

# State of Canadian Psychedelic Law 2023 Report

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# What a Long, Strange Trip...

2022 was a monumental year for Canadian psychedelic law. Among numerous major developments occurring at the federal and provincial levels, we saw:

- Amendments to federal Special Access Program (SAP) rules to allow psilocybin and MDMA requests by healthcare professionals;
- An unprecedented province-wide federal exemption that will decriminalize limited possession of certain controlled substances, including MDMA, in British Columbia;
- Alberta's provincial government announcing regulations for the provision of psychedelic-assisted therapy in the province; and
- A historic lawsuit for a constitutional right to individualized psilocybin-assisted therapy access.

In this report, we'll be exploring each of the foregoing in detail. But we would be remiss if we didn't also mention the ongoing legalization successes of our southern neighbours.

In the United States, Colorado passed a ballot measure in November that will decriminalize possession of various psychedelic plants and fungi, and permit the operation of regulated psychedelic-assisted treatment centers (starting in 2024).<sup>1</sup> Meanwhile, Oregon, which passed a ballot measure in 2020 to decriminalize drug possession and establish regulated psilocybin-assisted wellness centers, is reportedly finalizing its program's framework rules and due to begin processing licensing applications next year.<sup>2</sup>

And although psychedelics like cannabis, psilocybin, LSD, DMT, and MDMA remain entirely illegal under US federal law, a Biden administration official's letter to a sitting House Representative indicated that they anticipate "approval by the Food and Drug Administration of [MDMA] for the treatment of Post-Traumatic Stress Disorder and psilocybin for the treatment of depression within approximately 24 months."<sup>3</sup> Members of Congress have also been introducing more cannabis and psychedelics-related bills than ever before (though few so far have passed).<sup>4</sup>

In the late 90s and early 2000s, we likewise saw progressive medical legalization of cannabis in western US states, as well as a Canadian constitution lawsuit for medical cannabis access. We're now rewatching the same movie with psychedelic legalization efforts, but on fast forward.

And in 2023, it shows no sign of slowing down.

## What Is and Isn't Legal in Canada

The legality of psychedelics in Canada is largely governed by three federal laws: the *Cannabis Act*, the *Controlled Drugs and Substances Act* (CDSA), and the *Food and Drugs Act* (FDA).<sup>5</sup> These laws determine which substances are permitted or prohibited for possession, cultivation, distribution, import, and export. However, due to inconsistent enforcement over time and across Canadian jurisdictions, there's a lot of confusion about what the law actually states.<sup>6</sup> For clarity, we've outlined the legal status of some of the more popular psychedelic substances below.

- **Cannabis** is legal for adult recreational use pursuant to the *Cannabis Act* and applicable provincial regulations.
- **Psilocybin** ("magic mushrooms") is illegal under Schedule III of the CDSA, unless permitted by Health Canada via the SAP or pursuant to a s. 56 exemption under the CDSA.
- **LSD** ("acid") and **DMT** (the active psychedelic agent in ayahuasca) are illegal under Schedule III of the CDSA, unless permitted pursuant to a s. 56 exemption under the CDSA.

- **MDMA** (“ecstasy”) is illegal under Schedule III of the CDSA, unless permitted by Health Canada via the SAP or pursuant to a s. 56 exemption under the CDSA. Additionally, personal possession of up to 2.5 grams of MDMA will be decriminalized in British Columbia effective January 31, 2023.<sup>7</sup>
- **Ketamine** is legal and regulated for medical but not recreational use pursuant to Schedule I of the CDSA and applicable regulations.
- **Mescaline** is prohibited under Schedule III of the CDSA, but peyote (which contains mescaline) is legal for personal possession.
- **5-MeO-DMT** (“bufo”), **ibogaine**, and **iboga** (the shrub from which ibogaine is derived) are legal for personal possession. However, distribution and other activities involving these substances are illegal unless specifically authorized under the FDA or permitted via the SAP.

## Special Access Program Requests

On January 5, 2022, Health Canada amended SAP regulations under the CDSA and FDA to permit psilocybin and MDMA requests for qualifying applicants.<sup>8</sup>

The SAP allows healthcare practitioners, acting on behalf of patients, to request drugs not normally permitted for sale in Canada. SAP requests, however, will only be granted for patients with a “serious or life-threatening condition” in cases where other conventional treatments have failed, are unsuitable for the patient, or are not available in Canada. There must also be “sufficient evidence of safety and efficacy for the treatment of [a] patient’s condition” with a requested drug.<sup>9</sup>

The amended regulations allow requests for “restricted drugs”, including psychedelics like psilocybin, LSD, DMT, and MDMA. However, a s. 56 class exemption under the CDSA granted in connection with the SAP regulatory amendments only specified application with respect to psilocybin and MDMA, thereby limiting SAP requests to those two particular “restricted drugs”.<sup>10</sup>

While the SAP regulatory amendments were expected to make psychedelic-assisted therapy *more* accessible, early SAP applications for psilocybin-assisted therapy were uniformly rejected by Health Canada, causing considerable consternation among psychedelic-assisted therapy advocates and supporters.<sup>11</sup> Finally, on March 21, 2022, Health Canada approved six SAP requests for psilocybin-assisted therapy.<sup>12</sup>

Since then, more patients have been approved to use psilocybin via the SAP. Nonetheless, applicants broadly report that the approval process remains exceedingly onerous, opaque, unpredictable, and frustrating. Particularly in the case of patients with terminal illness and limited time to waste.<sup>13</sup>

## Decriminalization in British Columbia

On May 31, 2022, the Canadian federal government announced it would grant a limited version of British Columbia's official request to decriminalize drug possession under s. 56 of the CDSA, which the province submitted to Health Canada on November 1, 2021.<sup>14</sup>

The stated rationale of BC's request for decriminalization was that the criminal prohibition and accompanying stigma attached to various controlled substances causes numerous unnecessary drug-related deaths in the province each year. The provincial government's subject matter research and observation found this to be, in part, due to users' avoidance of medical assistance and/or addiction treatment for fear of interaction with the judicial system and/or drug seizure.<sup>15</sup>

Accordingly, from January 31, 2023 until January 31, 2026, adults in BC will be able to legally possess for personal use up to 2.5 grams of the following drugs under the federal exemption:

- Opioids (including heroin, morphine, and fentanyl);
- Cocaine (including crack and powder cocaine);
- Methamphetamine; and

- MDMA.<sup>16</sup>

The exemption will not affect the prohibition of cultivation, distribution, import, or export of the aforementioned substances.<sup>17</sup>

Though BC's federal exemption is limited in duration (*i.e.*, it only last three years), the Supreme Court of Canada's (SCC) 2011 decision in the *PHS Community Services Society* case suggests the exemption could have larger (and longer) consequences for Canadian drug law than the public currently appreciates.

*PHS Community Services Society's* primary conflict stemmed from the then-in-power federal Conservative government's refusal to renew a s. 56 exemption, initially granted by a federal Liberal government in 2003, which permitted a Vancouver safe injection site's operation.<sup>18</sup>

In the resulting lawsuit, the plaintiffs' (which included PHS Community Services Society, Vancouver Area Network of Drug Users (VANDU), and the Attorney General of British Columbia) evidence clearly demonstrated that the site was preventing numerous unnecessary drug-related deaths. And they were successful in convincing the SCC that the government's policy of refusal was therefore an unjustifiable violation of site users' right to life, liberty, and security of the person under the *Canadian Charter of Rights and Freedoms*. As a result, the SCC determined that *Charter* law required that the Minister of Health renew the site's exemption.<sup>19</sup>

Accordingly, one may reasonably conclude that if a future government chooses not to renew BC's s. 56 decriminalization exemption, a *PHS Community Services Society* successor case could be filed wherein the court orders the province-wide exemption renewed as a matter of *Charter* law, provided evidence supports the thesis of BC's forthcoming experiment.

# Alberta's Psychedelic-Assisted Therapy Regulations

On October 5, 2022, Alberta's provincial government announced amendments to the *Mental Health Services Protection Regulation* that will make the "Texas of the North" Canada's first province to regulate psychedelic drugs for therapeutic purposes.<sup>20</sup>

The regulations, which come into effect on January 16, 2023, will require that:

- Clinics providing psychedelic-assisted treatment be licenced under the *Mental Health Service Protection Act* and appoint a psychiatrist to serve as medical director;
- Only a psychiatrist (or appropriately trained physician in consultation with a psychiatrist) prescribe psychedelic drugs used in treatment; and
- Patients undergoing psychedelic treatments be monitored by designated health professionals during treatment sessions.

The regulations will not legalize or increase the accessibility of psychedelic-assisted therapy in Alberta, as use of controlled substances is a criminal law matter falling under federal jurisdiction per s. 91 of the *Constitution Act, 1867*.<sup>21</sup> However, as provinces generally hold authority over the provision of professional services (including by medical professionals),<sup>22</sup> to the extent that the use of controlled substances may be permitted under federal law, provinces can regulate *how* they are used within the province in the context of therapy.

Alberta's proposed regulations have (like most things involving psychedelics) been controversial. While some regard the province as boldly taking initiative to establish clear rules for psychedelic sector entities looking to operate in Alberta, others regard the forthcoming regulations, namely



regarding *who* can provide psychedelic-assisted therapy services, as overly limiting and detrimental to patients seeking accessible, affordable, and appropriate treatment.<sup>23</sup>

## A *Charter* Right to Psychedelic Therapy?

In July 2022, with the support of the Victoria-based psychedelic therapy advocacy non-profit TheraPsil, a group of patients suffering from illnesses including cluster headaches, opioid use disorder, and terminal cancer filed a lawsuit against the Canadian Government arguing for a constitutional right to individualized psilocybin-assisted therapy access.<sup>24</sup>

The plaintiffs claim this right is supported by s. 7 of the *Canadian Charter of Rights and Freedoms*, which guarantees all persons in Canada a “right to life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.”<sup>25</sup>

While patients can seek access to psilocybin-assisted therapy via the SAP, as noted above, the process is difficult, opaque, and unpredictable. Accordingly, patients represented in the lawsuit argue that a regulated, individualized system of access by means of personal doctor referral is necessitated by *Charter* law:

[P]hysicians are trained in and mandated to provide patient-centered care... When the gatekeeper is the patient’s physician who is applying a patient-centered approach, the patient is empowered and the therapeutic potential of treatment is greater.

Having the Minister as the gatekeeper for psilocybin treatments imposes barriers and delays to access, prolonging the suffering of many Canadians... These barriers are arbitrary given the harm caused by these barriers, and the relative lack of risk associated with psilocybin-assisted treatments.<sup>26</sup>

The patients’ argument is a strong one, clearly echoing that of the successful 2000 *Parker* case. In *Parker*, the Ontario Court of Appeal held that the law broadly prohibiting access to medical cannabis violated the epileptic plaintiff’s *Charter* rights. Notably, the court regarded the possibility

of the plaintiff accessing medical cannabis by means of s. 56 exemption as insufficient to save the government's legal stance. As a remedy, the court mandated that the federal government create Canada's first regulated, individualized medical cannabis regime within a year.<sup>27</sup>

Though common law precedents regarding the subject matter of medical access to controlled substances have evolved since *Parker*, developments have been neither radical nor necessarily adverse to *Parker*'s core determination.<sup>28</sup> Furthermore, the 2015 *Carter* case, which resulted in a constitutional right to medical assistance in dying (MAID), appears to be a particularly dramatic development in favour of the current litigants' position.<sup>29</sup> The argument being: how can *Charter* law tolerate a state of affairs where it's easier to legally kill yourself than do psychedelic mushrooms in Canada?<sup>30</sup>

## Psychedelic Sector Legal Services

Are you operating in or adjacent to Canada's nascent legal psychedelics industry, or thinking about starting a psychedelic enterprise? Green Economy Law Professional Corporation can help ensure your legal bases are covered, from regulatory compliance to incorporation, governance, contracts, IP, and licensing applications. We also offer a flat-fee Psychedelic Integration Coaching Legal Starter package.<sup>31</sup> **For more information regarding legal services, please contact the firm at 647-725-4308 or via email at [info@greeneconomylaw.com](mailto:info@greeneconomylaw.com).**

And for those interested in learning more about the subject matter, the firm also offers a CPD-eligible online course: *Intro to Canadian Psychedelic Law*. For more information regarding the course, please visit <https://www.greeneconomylaw.com/webinar-courses>. Online courses are free for firm clients.

*Read last year's State of Canadian Psychedelic Law: 2022 Report at <https://tinyurl.com/nwada7mc>.*

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**Green Economy Law Professional Corporation does not offer criminal law services and will not perform work for parties engaged in illegal activities.**

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<sup>1</sup> Mattha Busby, *BREAKING: Colorado Legalizes Psilocybin Sessions in Historic Vote*, DOUBLE BLIND (November 8, 2022).

<sup>2</sup> Scott Akins & Clayton Mosher, *Oregon Just Decriminalized All Drugs – Here’s Why Voters Passed This Groundbreaking Reform*, THE CONVERSATION (December 10, 2022); *see also* Alma McCarty, *Oregon Psilocybin Services to finalize rules around administration, production in December 2022*, KGW8 (August 4, 2022).

<sup>3</sup> Miriam E. Delphin-Rittmon, SAMHSA Response to Madeleine Dean (May 13, 2022), (*accessible at* <https://www.documentcloud.org/documents/22121426-exhibit-3-response-to-rep-dean-et-al>).

<sup>4</sup> For bills that have not passed, *see, e.g.*, S.5123 - 117th Congress (2021-2022): Breakthrough Therapies Act. (November 17, 2022). <https://www.congress.gov/117/bills/s5123/BILLS-117s5123is.pdf>, S.4591 - 117th Congress (2021-2022): Cannabis Administration and Opportunity Act. (July 21, 2022). <https://www.govinfo.gov/content/pkg/BILLS-117s4591is/pdf/BILLS-117s4591is.pdf>; *Contra* H.R.8454 117th - Congress (2021-2022): Medical Marijuana and Cannabidiol Research Expansion Act. (July 21, 2022). <https://www.congress.gov/117/bills/hr8454/BILLS-117hr8454enr.pdf>.

<sup>5</sup> *See* Cannabis Act (S.C. 2018, c. 16); *see also* Controlled Drugs and Substances Act (S.C. 1996, c. 19); *see also* Food and Drugs Act (R.S.C., 1985, c. F-27).

<sup>6</sup> In 2022, not only were there numerous above-ground shops in Vancouver selling psilocybin and other federally-prohibited psychedelics, but ‘shroom shops opened in other cities across Canada, including Ottawa and Toronto. Some shops, however, recently faced legal repercussions. *See Raids of Shroomyz and Lizard Labs Highlights Risks of Psychedelic Gray Market*, PSYCHEDELIC SPOTLIGHT (November 15, 2022).

<sup>7</sup> *Personal Possession of Small Amounts of Certain Illegal Drugs in British Columbia (January 31, 2023 to January 31, 2026)*, HEALTH CANADA (May 5, 2021) (*accessible at* <https://www.canada.ca/en/health-canada/services/publications/drugs-health-products/fact-sheet-exemption-personal-possession-small-amounts-certain-illegal-drugs-british-columbia.html>).

<sup>8</sup> Regulations Amending Certain Regulations Relating to Restricted Drugs (Special Access Program): SOR/2021-271 (December 21, 2022) (*accessible at* <https://www.gazette.gc.ca/rp-pr/p2/2022/2022-01-05/html/sor-dors271-eng.html>).

<sup>9</sup> *Id.*

<sup>10</sup> *Subsection 56(1) class exemption for practitioners, agents, pharmacists, persons in charge of a hospital, hospital employees, and licensed dealers to conduct activities with psilocybin and MDMA in relation to a special access program authorization*, HEALTH CANADA (January 5, 2022) (*accessible at* <https://www.canada.ca/en/health-canada/services/health-concerns/controlled-substances-precursor-chemicals/policy-regulations/policy-documents/subsection-56-1-class-exemption-conducting-activities-psilocybin-mdma-special-access-program-authorization.html>).

<sup>11</sup> Caroline Barghout & Kimberly Ivany, *Terminal cancer patient denied magic mushrooms after Health Canada rule change*, CBC (February 28, 2022).

<sup>12</sup> *Special Access Program Requests for Psilocybin APPROVED*, THERAPsIL (April 4, 2022).

<sup>13</sup> Nicole Potter, *Non-profit Organization Marches on Canadian Capital To Fight for Therapeutic Mushrooms*, HIGH TIMES (November 29, 2022).

<sup>14</sup> *Supra* note 7; DECRIMINALIZATION IN BC: S.56(1) EXEMPTION, MINISTRY OF MENTAL HEALTH AND ADDICTIONS, BRITISH COLUMBIA (October 2021) (*accessible at* <https://news.gov.bc.ca/files/DecrimSubmission.pdf>). Also worth clarifying: s. 56 of the CDSA provides that “[t]he Minister may, on any terms and conditions that the Minister considers necessary, exempt from the application of all or any of the provisions of this Act or the regulations any person or class of persons or any controlled substance or precursor or any class of either of them if, in the opinion of the Minister, the exemption is necessary for a medical or scientific purpose or is otherwise in the public interest.” (emphasis added). Though we are not aware of any previous case where an entire province was designated an exempted “class of persons” under s. 56 of the CDSA, the section’s broad language would appear to permit it.

<sup>15</sup> *See, e.g.*, DECRIMINALIZATION, *supra* note 14 at p. 6 (“While no British Columbians have died of illicit drug poisoning at overdose prevention or safe consumption sites, the scientific and medical literature supports what we have been told by [people who use drugs (PWUD)], namely that drug law enforcement pushes PWUD to deliberately avoid these kinds of lifesaving services. Criminalization and stigma lead many to hide their use from family and friends and to avoid seeking treatment, thereby creating situations where the risk of drug poisoning death is elevated. The BC Coroners Service reports that between 2018 and June 2021, most illicit drug toxicity deaths occurred in private residences (55.7 percent) or other residences, such as social housing sites or shelters (26.3 percent), where residents are more likely to use alone.”).

<sup>16</sup> *Supra* note 7.

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<sup>17</sup> *Id.*

<sup>18</sup> *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44.

<sup>19</sup> *Id.*

<sup>20</sup> *Protecting Albertans and Supporting Innovations in Health*, GOVERNMENT OF ALBERTA (October 5, 2022) (accessible at <https://www.alberta.ca/release.cfm?xID=84810A31B1BF6-95C0-8A7F-59EE7A29A22684E8>); see also *Friday's letters: Why Alberta is called Texas of the North*, EDMONTON JOURNAL (October 1, 2021).

<sup>21</sup> S. 91(27), Constitution Act, 1867.

<sup>22</sup> See s. 92(13), Constitution Act, 1867; see also *Law Society of British Columbia v. Mangat*, 2001 SCC 67.

<sup>23</sup> Anna Junker, *Alberta psychedelic regulations could limit patient access, critics say*, EDMONTON JOURNAL (October 15, 2022).

<sup>24</sup> *Thomas Hartle, Janis Hughes, James Doswell, Bruce Tobin, Shannon McKenny, Katherine Marykuca, Jesse Merks, and Jane Harrison v Her Majesty the Queen*, Statement of Claim (July 27, 2022) (accessible at <https://static1.squarespace.com/static/601dd5fc10894c548327a294/t/62ed6421fe9eba2d050a8436/1659724834627/Hartle+et+al+v.+Canada+%28T-1560-22%29+-+Statement+of+Claim.pdf>).

<sup>25</sup> Constitution Act, 1982 R.S.C. 1985, App. II, No. 44, Sched. B, Pt. I, s. 7.

<sup>26</sup> *Supra* note 24 at pp. 83-84.

<sup>27</sup> *R. v. Parker*, 2000 CanLii 5762 (ON CA).

<sup>28</sup> See, e.g., *supra* note 18 (In *PHS Community Services Society*, the SCC appears to have narrowed the Ontario Court of Appeals' approach from *Parker*, rejecting the respondents' proposed resolution of changing the law (a la *Parker*), and determining instead that the proper remedy would be simply ordering the Minister of Health to reverse policy regarding application of existing law. It should be noted, however, that *PHS Community Services Society* did not address a matter of individual access to controlled substances, but rather, institutional use).

<sup>29</sup> *Carter v. Canada (Attorney General)*, 2015 SCC 5.

<sup>30</sup> Sam Riches, *'We're trying to live, yet it's easier to access medically-assisted death in Canada'*, THE GROWTHOP (November 28, 2022).

<sup>31</sup> See *Psychedelic Integration Coach Package*, PSYCHEDELICLAW.CA (accessible at <https://www.psychedeliclawn.ca/psychedelic-integration-coach-legal-package>).