



# State of Canadian Psychedelic Law 2022 Report

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**Authors:** Sebastian Pazdan and Marc Z. Goldgrub

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# The Legal Psychedelic Renaissance

In the 1990s, research into the therapeutic potential of psychedelic substances such as psilocybin (“magic mushrooms”), LSD (“acid”), and MDMA (“ecstasy”) recommenced following two decades of inactivity, during which studying psychedelics was effectively verboten on account of their counterculture associations.<sup>1</sup> What researchers found was a realm of potentially revolutionary treatments for conditions such as depression, post-traumatic stress disorder (PTSD), anxiety, and addiction.<sup>2</sup>

These treatments typically employ the practice of **psychedelic-assisted therapy**, wherein patients take part in guided sessions involving the consumption of a psychedelic substance. A healthcare professional works with the patient to integrate thoughts, memories, and visions that arise during the psychedelic experience into a new conception of one’s self and personal story. Many study participants report finding the practice enormously curative.<sup>3</sup>

Boosted by the popularity of Michael Pollan’s 2018 book *How to Change Your Mind*, these recent findings have led to a renewal of cultural, commercial, and scientific interest in psychedelics, in what is commonly referred to as the **Psychedelic Renaissance**.<sup>4</sup> And now the Psychedelic Renaissance is having an impact on the law.

In the US, numerous jurisdictions including the State of Oregon, the District of Columbia, and the cities of Seattle, Detroit, Denver, and Oakland have decriminalized possession of psilocybin and other psychedelics – notwithstanding that such substances remain prohibited under American federal law.<sup>5</sup>

Canada has likewise been rethinking its policies regarding psychedelics. In 2020, Health Canada began permitting non-study participants legal access to psilocybin-assisted therapy.<sup>6</sup> In January 2022, the ministry brought into effect Special Access Program regulation amendments allowing health practitioners to request psychedelics for patient use under certain circumstances.<sup>7</sup> These small steps, however, may only mark the beginning of Canada overhauling its psychedelic laws.

# What Is and Isn't Legal in Canada

The legality of psychedelics in Canada is largely governed by two federal laws: the *Cannabis Act* and the *Controlled Drugs and Substances Act* (CDSA).<sup>8</sup> Though these two laws establish in relatively clear terms which substances are permitted or prohibited, due to highly inconsistent enforcement of Canada's drug laws over time and across jurisdictions, many people are confused as to what is legal in Canada. So, let's review the basics.

- **Cannabis** has been legal for adult recreational use in Canada since 2018.
- **Psilocybin** (“magic mushrooms”), **LSD** (“acid”), **DMT** (the active psychedelic agent in ayahuasca), and **MDMA** (“ecstasy”) are all criminally prohibited under the CDSA.
- **Mescaline** is criminally prohibited under the CDSA, but peyote (which contains mescaline) is legal.
- **Ketamine** is legal and regulated for medical but not recreational use.
- **Ibogaine** is not criminally prohibited, nor is it approved for medical or any other use.

## S. 56 Exemptions for Psilocybin

Health Canada has for years granted academic and medical institutions legal exemptions to conduct clinical trials involving otherwise prohibited psychedelic substances. These exemptions are granted under **s. 56 of the CDSA**, which **gives the Minister of Health broad authority to legally exempt activities involving substances prohibited under the CDSA where the exemption is necessary for a medical or scientific purpose, or otherwise in the public interest.**<sup>9</sup>

Beginning in August 2020, Health Canada began exempting psilocybin-assisted therapy for patients struggling with end-of-life anxiety and depression. This marked the first time persons outside of clinical studies were legally permitted to use psilocybin in Canada since the substance's criminalization in 1974.<sup>10</sup> Victoria-based non-profit organization TheraPsil facilitated the

exemptions - as well as most, if not all, exemptions for psilocybin-assisted therapy granted since then.

In December 2020, Health Canada granted 16 healthcare professionals s. 56 exemptions allowing them to possess and use psilocybin themselves for research and development purposes.<sup>11</sup> And in November 2021, TheraPsil and My Community Journeys, a British Columbia-based non-profit multidisciplinary group of healthcare providers, facilitated s. 56 exemptions to provide the first legal group psilocybin-assisted therapy session in Canada for nine end-of-life patients.<sup>12</sup>

## Special Access Program Regulations

In December 2020, Health Canada announced its intention to restore access to “restricted drugs”, including psychedelics like psilocybin and MDMA, through the Special Access Program. This would allow health practitioners to request such substances for patients dealing with serious or life-threatening conditions where conventional medicines have failed, or are otherwise unsuitable or unavailable in Canada.

Health Canada opened a 60-day comment period for the public to provide feedback on the proposal, which closed on February 10, 2021.<sup>13</sup>

On January 5, 2022, Health Canada published the amended regulations. See here for more information: <https://www.psychedeliclaws.ca/what-is-the-special-access-program>

## Federal Psychedelic Legislation

In the leadup to 2021’s federal election, the Canadian Psychedelic Association asked Canada’s major federal parties their stance on legalizing psychedelic therapy.

The Liberal Party responded saying it would “follow the guidance of health experts on this issue,”<sup>14</sup> and the NDP stated that it explicitly supports “safe and equitable patient access to psychedelic

therapy in Canada.”<sup>15</sup> The Green Party also gave a favourable response.<sup>16</sup> The Conservative Party of Canada and Bloc Quebecois did not respond.

The Liberals won a plurality of seats in the election and now hold power with the NDP’s support. As such, the sitting Parliament of Canada appears to have sufficient votes to pass legislation legalizing psychedelic therapy should it choose to do so.

## Subnational Decriminalization Efforts

Canada’s constitution grants the federal government exclusive authority over criminal law, subject to narrow exceptions.<sup>17</sup> Accordingly, psychedelic law in Canada is, at this time, almost entirely a matter of federal jurisdiction with most psychedelic substances criminally prohibited under the CDSA.

That means unlike in the US where federal and state governments have overlapping criminal law powers, **Canadian provinces, territories, and cities have no legal authority to decriminalize or legalize federally prohibited substances.** Though all Canadian jurisdictions ultimately have some degree of control in determining their own law enforcement priorities, which is why certain jurisdictions *appear* to have de-facto decriminalized psilocybin in recent years.<sup>18</sup>

Nonetheless, several subnational Canadian jurisdictions, including the province of British Columbia, and the cities of Toronto, Montreal, and Vancouver recently initiated efforts to obtain s. 56 exemptions from Health Canada. The requested exemptions would effectively decriminalize personal possession of prohibited substances (including psychedelics) by barring the law’s application in the applicable jurisdictions.<sup>19</sup> These decriminalization efforts, however, are not motivated by psychedelic-related concerns, but rather, are intended to improve local governments’ ability to address the opioid crisis by compassionate means rather than criminal law.<sup>20</sup>

Health Canada has not at this time granted any subnational s. 56 decriminalization request. If it does at some point in the future, possession of otherwise-prohibited psychedelic substances in the

applicable jurisdiction(s) would be decriminalized, but commercial and medical activities involving prohibited psychedelics would likely remain illegal.

## A *Charter* Right to Psychedelics?

Case law suggests the *Canadian Charter of Rights and Freedoms* may support a right to psychedelic-assisted therapy access.

The *R v. Parker* (ONCA, 2000) and *Canada v. PHS Community Services Society* (SCC, 2011) precedents indicate that when individuals' health and safety may substantially benefit from access to a controlled substance, s. 7 of the *Charter* bars the government from prohibiting access without compelling justification.<sup>21</sup> But *Parker* and *PHS Community Service Society* diverged on the issue of what constitutes "sufficient" access.

In *Parker*, the Ontario Court of Appeal held that prohibiting individual access to a medically necessary substance (cannabis) violated the plaintiff's s. 7 *Charter* right to life, liberty, and security of the person. Though the government argued that individuals could obtain legal access by means of a s. 56 exemption, the court found that did not constitute sufficient access; a legal framework allowing access by physician recommendation was necessary. The decision led to Canada legalizing medical cannabis in 2001.

By contrast, in *PHS Community Services Society*, which pertained to a safe injection site's ability to operate legally, the Supreme Court of Canada held that Health Canada's permitting access to a prohibited substance for health and safety reasons solely by means of a s. 56 exemption was acceptable – but refusal to *grant that exemption* where appropriate was an unacceptable violation of patients' *Charter* rights. This suggests that denying a s. 56 exemption request for psychedelic therapy may constitute a *Charter* violation if the denial appears arbitrary.

Because the Supreme Court of Canada's *PHS Community Services Society* ruling supersedes the Ontario Court of Appeal's *Parker* ruling, it is unclear whether a case arguing for a *Charter* right to individual psychedelic therapy access by physician recommendation would prevail. Some

psychedelic therapy legalization advocates, however, believe that *Carter v. Canada* (2015), which established a *Charter* right to medical assistance in dying (MAID), provides a strong Supreme Court of Canada precedent in favour of necessitating individual access.<sup>22</sup>

TheraPsil has indicated its readiness to mount a *Charter* challenge against the prohibition of psilocybin-assisted therapy, if necessary.<sup>23</sup>

*(January 2022 Update: Recent amendments to Special Access Program regulations may weaken the calculus behind a Charter challenge with respect to medical psychedelic access.*

*The new regulations allow health practitioners in Canada to submit individual requests to Health Canada for patients contending with serious or life threatening conditions to access psychedelic therapy. In terms of increasing accessibility, this marks a big step forward from requiring a s. 56 exemption from the Minister of Health. However, the practical effect of the regulatory amendment is not yet apparent. If Health Canada is overly restrictive in granting requests, that could give rise to new legal challenges per the PHS Community Services Society case described above.)*

## Psychedelic Investing

Since Mind Medicine Inc. (MMED) debuted on Toronto's NEO Exchange in March 2020, becoming the first publicly traded psychedelic company,<sup>24</sup> scores of other psychedelic companies have followed suite and made initial public offerings (IPOs).

The proliferation of psychedelic investment options inevitably resulted in the creation of several psychedelic exchange traded funds (ETFs), including the Horizons Psychedelic Stock Index ETF (PSYK) and AdvisorShares Psychedelics ETF (PSIL).

But the profitability of psychedelic companies hinges on one crucial factor: when will psychedelics be legalized for general medical or recreational use? And where? Though many in the psychedelic

space see some form of North American legalization as inevitable, no one knows when it will occur.<sup>25</sup>

## Services for Psychedelic Enterprises

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 incorporation to contracts, IP management, and regulatory compliance. **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.

## The Authors

Sebastian Pazdan is a law student at Osgoode Hall Law School and a contract law clerk with Green Economy Law Professional Corporation. He is interested in renewable energy, climate policy, and land use planning.

Marc Z. Goldgrub is the founding lawyer of Green Economy Law Professional Corporation. He holds a JD from the Benjamin N. Cardozo School of Law in New York City, and a GPLLM from the University of Toronto Faculty of Law.

## Green Economy Law Professional Corporation

192 Spadina Ave, Suite 300  
Toronto, Ontario M5T 2C2

647-725-4308

[info@greeneconomylaw.com](mailto:info@greeneconomylaw.com)

[www.greeneconomylaw.com](http://www.greeneconomylaw.com)

[www.psychedeliclaws.ca](http://www.psychedeliclaws.ca)

**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> Robin Carhart-Harris & Guy Goodwin, *The Therapeutic Potential of Drugs: Past, Present, and Future*, NEUROPSYCHOPHARMACOLOGY (May 17, 2017).
- <sup>2</sup> See *ibid.*; see also Paul Tullis, *How ecstasy and psilocybin are shaking up psychiatry*, NATURE (January 27, 2021).
- <sup>3</sup> *Ibid.*
- <sup>4</sup> Elena Schmidt, *Michael Pollan: A Catalyst to the Psychedelic Renaissance*, THIRD WAVE (April 22, 2021).
- <sup>5</sup> See Natan Ponieman, *Are Psychedelics Legal In The US? Where are they Decriminalized? A Deep Dive Into the Legal Status of Psilocybin, MDMA, LSD, Ketamine And More*, YAHOO! FINANCE (July 30, 2021); see also *Psychedelic Legalization & Decriminalization Tracker*, PSILOCYBIN ALPHA (last accessed November 23, 2021).
- <sup>6</sup> Bethany Lindsay, *4 Canadians with terminal cancer win the right to try magic mushrooms*, CBC (August 5, 2020).
- <sup>7</sup> *Regulations Amending Certain Regulations Relating to Restricted Drugs (Special Access Program): SOR/2021-271*, Canada Gazette, Part II, Volume 156, Number 1 (January 5, 2022).
- <sup>8</sup> Cannabis Act (S.C. 2018, c. 16); Controlled Drugs and Substances Act (S.C. 1996, c.19).
- <sup>9</sup> *Ibid.* at s. 56(1) (“The 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.”).
- <sup>10</sup> *Supra* note 6.
- <sup>11</sup> Kate Dubinski, *Some doctors, therapists get Health Canada permission to use magic mushrooms*, CBC (December 10, 2020).
- <sup>12</sup> *Roots to Thrive celebrates its first legal Psilocybin mushroom*, CANADIAN PSYCHEDELIC ASSOCIATION (November 9, 2021).
- <sup>13</sup> *Supra* note 7.
- <sup>14</sup> *Letter to the Canadian Psychedelic Association*, LIBERAL PARTY OF CANADA (August 29, 2021) (accessible at <https://twitter.com/cdnpsychedelic/status/1432459204921466882>).
- <sup>15</sup> *Letter to the Canadian Psychedelic Association*, NEW DEMOCRATIC PARTY (September 8, 2021) (accessible at <https://twitter.com/cdnpsychedelic/status/1435712221808521219>).
- <sup>16</sup> *Canada Supports Psilocybin-Assisted Therapy*, CANADIAN PSYCHEDELIC ASSOCIATION (last accessed November 23, 2021) (<https://www.psychedelicassociation.net/canada-supports-psilocybin-assisted-therapy>).
- <sup>17</sup> See, e.g., *Bédard v. Dawson*, [1923] S.C.R. 681.
- <sup>18</sup> Megan Devlin, *Why magic mushroom dispensaries are popping up all over Vancouver*, DAILY HIVE (November 5, 2021).
- <sup>19</sup> See Dr. Eileen de Villa, *Opioid Poisoning Crisis in Toronto – Update*, CITY OF TORONTO (November 5, 2020) (accessible at <https://www.toronto.ca/legdocs/mmis/2020/hl/bgrd/backgroundfile-158017.pdf>); see also Alanna Moore, *Montreal Is Now Asking The Canadian Gov’t To Decriminalize Simple Drug Possession*, MTL BLOG (January 27, 2021); see also *Preliminary Submission Request to Health Canada – Exemption Request*, CITY OF VANCOUVER (March 1, 2021) (accessible at <https://static1.squarespace.com/static/601dd5fc10894c548327a294/t/617a233771a7e43d44ebd36a/1635394361323/cdsa-preliminary-exemption-request.pdf>); see also *Decriminalization in BC: S. 56(1) Exemption*, BRITISH COLUMBIA MINISTRY OF MENTAL HEALTH AND ADDICTIONS (October 2021) (accessible at <https://news.gov.bc.ca/files/DecrimSubmission.pdf>).
- <sup>20</sup> See *ibid.*
- <sup>21</sup> *R. v. Parker*, 2000 CanLii 5762 (ON CA); *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44.
- <sup>22</sup> *Carter v. Canada (Attorney General)*, 2015 SCC 5; see also Ritika Dubey, *In Canada, End-of-Life Therapy May Be the Path to Legal Psilocybin*, FILTER (August 9, 2021).
- <sup>23</sup> Curt Petrovich, *The Fight for Medical Use of Magic Mushrooms Is Moving to the Courts*, THE TYEE (July 5, 2021).
- <sup>24</sup> Ryan T., *MindMed Becomes First Psychedelics Pharma Company to Go Public Following Historic IPO*, THE CANNABIS INVESTOR (March 3, 2020).
- <sup>25</sup> The State of Oregon has passed a ballot measure to legalize psilocybin-assisted therapy, with the law set to take effect in 2023, at which point it may be the first North American jurisdiction to legalize psychedelic therapy. See Chris Roberts, *Oregon Legalizes Psilocybin Mushrooms and Decriminalizes All Drugs*, FORBES (November 4, 2020). Without a change in US federal law though, such therapy will still be technically illegal, even in Oregon.