

**BILL 36 — APPROACH TO CANNABIS RETAILING IN ONTARIO**

By Don Bourgeois and Rick Moscone

**Introduction:**

The Attorney General introduced Bill 36 on September 27, 2018. This Bill, if enacted, would make significant changes to the previous Government's approach to retailing of cannabis and its use in public areas. The Bill would enact the *Cannabis Licence Act, 2018* and amendments to the *Cannabis Control Act, 2017* to implement changes made by the new Government to Ontario's cannabis retailing approach.

The key changes are:

- private sector model for the retail of cannabis in stores;
- no limit to the number of retail stores overall, although the Government has regulation-making authority to limit the number of store authorizations a licensee may have or the number in a municipality;
- the Alcohol and Gaming Commission of Ontario will regulate the private sector retailers through:
  - a licensing process for holders of store authorizations and for managers,
  - store-by-store authorization process,
  - conditions to licences and authorizations,
  - standards and requirements for licensees and for store operations,
  - compliance and enforcement tools;
- municipalities will have a very limited role in the location of retail stores:
  - one-time opportunity (by January 22, 2019) for a municipality to "opt-out",
  - municipalities are prohibited from taking other steps under municipal planning processes or other legislation to interfere in location of retail stores,
  - residents of municipalities may object to the authorization of specific stores on the grounds not in the public interest, but Cabinet may make regulations to limit what factors may be considered for purposes of "public interest";



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- similar provisions are in place for First Nations with respect to retail store authorizations;
- a federally-licensed producer and its affiliates will be permitted only one retail store located at the production sites;
- there are prohibitions against inducements;
- applicants for a licence will be able to obtain a licence and store authorization, notwithstanding charges or convictions under the *Controlled Drugs and Substances Act* related to cannabis — Minister of Finance noted that operators of existing illegal dispensaries may apply if the dispensaries cease operation by October 17, 2018;
- cannabis users will be able to smoke cannabis wherever tobacco smoking is permitted;
- What has not changed is that the Ontario Cannabis Retail Corporation shall have exclusive responsibility for;
- online sale and distribution of cannabis to consumers, which will start on October 17, 2018; and
- wholesale and distribution of cannabis to retailers — licensed retailers may only obtain cannabis for sale to consumers at their retail stores from the OCRC.

### Known Unknowns:

There are a number of important "unknowns" which may affect decision-making by the private sector related to retail licences and store authorizations and store locations:

- what is meant by "affiliates" and how far up the corporate organization chain a relationship will be prohibited between a federally-licensed producer and retail stores?
- what will be the threshold for the Registrar of Alcohol, Gaming and Cannabis to carry out a due diligence investigation on shareholders? Will it be 5% used for gaming control purposes? Or 10% used for liquor licensing purposes? Or will there be no threshold because the Registrar needs to be satisfied that all shareholders are at least 19 years of age?
- what will be permitted to be considered for purposes of "public interest" in making decisions on store authorizations? The statutory approach is similar to that used for new liquor licensed premises. It will require a notice period for new store authorizations and the ability of residents of the municipality to object on the grounds of the new store not meeting the needs and wishes of the residents of the municipality;
- what will be the distance from a school?
- what will be the conditions under s. 6 for a retail licence? a manager's licence? a retail store authorization?
- what will be the Board's "risk-based conditions" under s. 6?
- what will be the Registrar's Standards under s. 26?

- what additional products may a retailer sell in addition to cannabis pursuant to s. 18?
- will there be any branding available? Will licensed producers be able to promote a particular brand?
- what types of relationships will a federally-licensed producer be able to enter into with a licensed retailer — if any — given the uncertainty around "affiliates", the Registrar's standards under s. 26 and the prohibition against inducements under s. 36; and
- what will be the minimum pricing?

## Overview of Cannabis Licensing Act:

### *Introduction*

The CLA sets out a licensing and regulatory regime for the retail sale of cannabis that is similar to liquor licensing under the *Liquor Licence Act*. The overall approach includes a due diligence investigation process that is very broad and deep of the applicant, officers, directors and shareholders of corporate applicants, and of persons interested in the applicant or those officers, directors and shareholders. The Registrar has broad legislative authority to carry out investigations under s. 9 that are necessary for the Registrar to make decisions related to licensing as a retailer or as a manager, and the issuance of store authorizations. The applicant is responsible for the costs of any investigation.

The Act, however, expressly does not apply to the Ontario Cannabis Retail Corporation. This gap in the Registrar's authority means that the OCRC is not "regulated" and that it will not need to comply with any of the legal obligations that retailers will be required to follow. In addition, given that the OCRC will be the exclusive supplier to the licensed retailers and will be the exclusive online retailer, the OCRC will be both a competitor to retailers and will be able to influence the ability of retailers to be successful.

### *Eligibility for Retail Licence, Manager Licence and Store Authorization*

Section 3 sets out the eligibility requirements for a retail licence, s. 4 for retail store authorization, and s. 5 for cannabis retail manager licence. All three are required for a retail store to operate — the holder of a retail licence must also have a retail store authorization for each specific retail store and there must be a cannabis retail manager to manage the retail store and its employees.

The Registrar will make a decision on application for a licence or store authorization. If the Registrar decides to refuse to issue a licence, the applicant may request a hearing before the Licence Appeal Tribunal. The Registrar's decision on a store authorization is final.

### *Retail Licence*

The basic eligibility requirements for retail licence are:

- at least 19 years of age — or if a corporation, its officers, directors and shareholders are at least 19 years of age;
- no reasonable grounds to believe that the applicant will not be financially responsible in the conduct of the applicant's cannabis retail business ;
- no reasonable grounds to believe that the applicant will not carry on business in accordance with the law, or with integrity, honesty or in the public interest, having regard to the past conduct of the applicant, persons interested in the applicant or, if a corporation, the officers, directors, or shareholders of the applicant or persons interested in those directors, officers or shareholders ;
- no convictions or charges under the *CLA*, the *Cannabis Control Act, 2017*, the *Cannabis Act (Canada)* or the regulations ;
- no reasonable grounds to believe the applicant is carrying on activities that are or would be in contravention of those statutes and regulations;
- the Registrar is satisfied that the applicant will exercise sufficient control, either directly or indirectly, over the applicant's cannabis retail business;
- no applicant or employee or agent of the applicant made a false statement or provided false information in the application; and
- any other circumstances that may be prescribed.

#### *Retail Store Authorization*

A retail store authorization may be issued to a licensed retailer after a notice period for a location for municipalities or First Nations that have not opted-out under s. 41 or s. 43. As noted above, a federally-licensed producer may apply for a retail authorization for a store located at the production site and it and its "affiliates" may have only one retail authorization. Subsection 4(6) sets out other eligibility requirements.

The issuance of the retail store authorization must not be "not in the public interest, having regard to the needs and wishes of the residents of the municipality or, in the case of a retail store to be located on a reserve, the council of the band has approved the location on the reserve. In order to accommodate the "public interest" requirement, s. 4 sets out a public notice process. The location must also not be located less than the distance from a school that is specified by or determined in accordance with the regulations.

Section 9 clarifies that a person interested in the store will include the landlord or owner of the premises, a mortgagee or any person with an interest in the assets of the applicant or holder's cannabis retail business or in the store property, fixtures or inventories. This provision clarifies that the Registrar will also be interested in who has an underlining interest in the premises and equipment used in a retail store.

### *Cannabis Retail Manager Licence*

A retail store must be managed by a cannabis retail manager who is licensed for that purpose. The manager is responsible for supervising and managing employees, overseeing or coordinating the sale of cannabis, managing compliance issues in relation to the sale of cannabis, and having signing authority to purchase cannabis, enter into contracts or make offers of employment. The eligibility requirements are similar to those for a retail licence.

### *Regulatory Requirements*

The Registrar, in addition to the imposition of conditions on the licence or risk-based conditions specified by the Board, may also establish standards and requirements for holders of retail licences, store authorizations or manager licences, and for the operation of the retail store. Section 26 is broad and similar to the approach taken under the *Gaming Control Act*. The standards and requirements may address the following matters:

- Store premises, equipment and facilities, including surveillance and security;
- The prevention of unlawful activities, including prohibiting or restricting certain individuals from entering cannabis retail stores;
- Advertising and promotional activities;
- Training relating to cannabis, including the responsible use of cannabis, and to the sale of cannabis;
- The protection of assets, including money and money equivalents;
- The keeping of records, including financial records;
- Reasonable measures to maintain the confidentiality and security of records, including measures to securely dispose of records and to prevent unauthorized access to records;
- Compliance with a cannabis tracking system established under section 81 of the *Cannabis Act* (Canada); and
- Any other matter relating to the conduct of holders of licences or authorizations issued under this Act or to the operation of cannabis retail stores that may be prescribed.

There are few operational aspects that could not be included under the Registrar's standards and requirements, which are not a regulation for purposes of the *Legislation Act, 2006*.

Section 36 of the CLA also prohibits inducements for purposes of increasing the sale of a particular type of cannabis. No person shall directly or indirectly offer or give a material inducement to the holder of a licence or authorization or engage in any prescribed practice respecting the promotion of cannabis.

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*Enforcement and Offences*

The CLA has enforcement provisions that are similar to other regulatory statutes, including providing for inspections and the powers necessary for inspectors to carry out inspections. A failure to comply can result in proposals to suspend or revoke a licence or authorization, or prosecution for certain offences under s. 39. Section 40 provides for fines up to \$250,000 for corporations and \$100,000 and/or term of imprisonment of not more than one year for individuals. Provision is also made for monetary penalties under the *Alcohol, Cannabis and Gaming Regulation and Public Protection Act, 1996*.

*Municipalities and First Nations*

Sections 41 to 42 set out the very limited role of municipalities and the potential role for First Nations. A municipality may, under s. 41, "opt-out" by council resolution not later than January 22, 2019 and decide not to permit retail stores within the municipality. That decision to opt-out may be reversed, but if so, may not be re-imposed. Under s. 42, the municipality is prohibiting from enacting any business licensing by-law respecting the sale of cannabis. A similar prohibition with respect to a planning by-law is in place.

Sections 43 and 44, however, provide a different regime for First Nations. A council may pass a resolution requesting that the Registrar not issue a retail store authorization for a location on reserve and the Registrar shall refuse to issue the store authorization. Section 44 authorizes the Attorney General to negotiate an agreement with a council, subject to the approval of the Lieutenant Governor in Council, with respect to the regulation of cannabis retail stores on reserve, the licensing or authorization of persons to operate cannabis retail stores on a reserve or the enforcement of the Act and its regulations on reserve.