

**SOME CLARITY; SOME FOG: CANNABIS LICENCE ACT, 2018
ONTARIO REGULATION 468/18**

By Rick Moscone

Introduction:

The *Cannabis Licence Act, 2018* was enacted in October 2018 and provides for a licensing and regulatory regime for privately-owned and operated cannabis retail stores in Ontario. The Act is now proclaimed in force and, as part of doing so, the Government made *Ontario Regulation 468/18* (the General Regulation) under the Act. Regulations are used to provide further details on the Government's public policy with respect to the regulatory structure and its administration by the Alcohol and Gaming Commission of Ontario.

Some Clarity

Ontario Regulation 468/18 re-enforces two decisions made by the Government:

- The number of retail stores is to be determined not by planning but by the number of persons who want to open retail stores and availability of premises to be used as a retail store:
 - there are no restrictions on the number of retail outlets that may be authorized — although there is a limit of 75 per licensee and its affiliates,
 - municipalities are statutorily-prohibited from regulating or restricting the number of retail stores in a municipality, although municipalities do have one-time opportunity (January 22, 2019) to advise the Registrar that a municipality has decided to prohibit any retail stores in the municipality (section 22). However, the normal planning provisions that would otherwise be applicable — short of this prohibition — are not available to municipalities. First Nations have an ongoing authority to prohibit retailers,
 - the "public interest" test for residents of a municipality to object to a retail store authorization is significantly and materially-restricted in s. 10 of the General Regulation to (i) protecting public health and safety, (ii) protecting youth and restricting their access to cannabis, (iii) preventing illicit activities in relation to cannabis.
- Previous unlawful activity related to the illegal sale of cannabis prior to October 17, 2018 that would probably otherwise make someone ineligible to be licensed or registered under other regulatory statutes



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administered by the AGCO, will not necessarily be a bar to obtaining a cannabis licence or retail store authorization. The Regulation attempts to create an envelope for individuals who were active prior to (but not after) October 17, 2018 with illegal possession, production, distribution and sales in section 5 of the Regulation. However, it is important to review this exemption with great care to ensure that all individuals involved fall clearly and exclusively within that exemption. In addition, not all offences under the *Controlled Drugs and Substances Act* (Canada) are included in the exemption — the exemption only applies to cannabis-related offences, and to those for possession (section 4), trafficking and possession for purposes of trafficking (section 5), production (section 7) and section 7.1 with respect to anything intended to be used to produce cannabis. Importing and exporting and possession of those purposes under section 6 are not within the exemption.

Regulations, as noted above, are used to provide detail about administrative matters. *Ontario Regulation 468/18* does provide clarity on a number of critical matters that are important for potential applicants for a licence and for store authorizations. Clarity is provided in several areas:

- **Outstanding Taxes (Section 6)** — a person is not eligible for a retail operator licence if in default of any taxes owed to the Minister of Finance or Canada Revenue Agency.
- **Licensed Producers Ownership of Retailers (Section 7)** — a corporation may not be issued a retail operator licence if more than 9.9 per cent of the corporation is owned or controlled, directly or indirectly, by one or more licensed producers or their affiliates.
- **Criminal Organization (Section 8)** — a person is not eligible for a licence or authorization if the person is or has been a member of a criminal organization under subsection 467.1(1) of the *Criminal Code* (Canada) — which is broader in scope than many may understand or appreciate — or "has been involved in, or contributes or has contributed to, the activities of such an organization." Interestingly, while sections 3, and 5 of the Regulation attempt to create an envelope for individuals, section 8 may prove to be a significant bar, depending upon the source of the cannabis, the location of any "dispensary" or the financing of the operations if there was any involvement of a criminal organization.
- **School Buffer Zone (Section 11)** — the buffer between a retail store and a school is set out in section 11. It reduces the buffer zone from the previous 450 metres to 150 metres, which should make it easier for applicants to locate potential retail premises.
- **Store Limits (Section 12)** — there is no overall or geographic limit to the number of store authorizations that may be issued. There is a limit to the number a licensee may hold. An applicant for a store authorization is limited to a maximum of 75 stores. This limit also applies to the applicant and its "affiliates". The definition of "affiliates" is discussed below. The result would appear to limit further the ability of larger corporations from owning and operating chains of retail outlets or to have "franchise" operations. Given that the number of potential retail stores has been estimated at from 750 to over 1,200, section 12 places a significant barrier to any person becoming a dominant retailer in the overall market.

- **Operations (Sections 9, 14, 18, 19 and 20)** — the retail stores must be self-contained (s. 9) and single purpose — under s. 18, only cannabis, cannabis accessories and shopping bags may be sold at the retail store. The cannabis retail seal (s. 19) must be displayed in a conspicuous place that is visible from the exterior of the public entrance — presumably to ensure nobody enters without full knowledge of what the store is selling. However, the licensee may not permit anyone under 19 years of age from entering the store (s. 20) and, if the individual appears to be under 25 years of age, must check the individual's identification for age. Section 14 prohibits the holder of a store authorization from entering into contracts or agreements with any person or entity for the provision of cannabis distribution services, other than the Ontario Cannabis Retail Corporation or a person acting on its behalf, or the retailer's employees.
- **Hours (Section 17)** — a retail store may be open from 9:00 a.m. to 11:00 p.m., consistent with the revised opening hours for liquor stores.
- **Training (Section 21)** — the board of the AGCO may approve training course or programs and holders of the retail store authorization, managers and individuals employed to work in a cannabis retail store must successfully complete the course. It is expected that the course or programs will be similar to those used for liquor licensed premises.
- **Automatic Revocation (Section 15)** — The Registrar shall revoke a licence or authorization (without issuing a proposal to do so) under s. 11 of the *Cannabis Licence Act*, 2018 in specified circumstances. Section 15 of the Regulation adds to those grounds a conviction under section 9 of the *Cannabis Act* (Canada) which deals with illegal distribution.

Some Fog

There are a number of provisions that remain less clear in the Regulation. For example, the definition of "affiliate" does provide some clarity, but there remains significant fog. Section 2 defines who is an affiliate — both for purposes of licensed producers and retail store authorizations, but also for purposes of the maximum of 75 retail store authorizations for a licensee under s. 12.

The usual approach to dealing with words such as "affiliate" is to list who would be an affiliate so that it would be readily apparent who is or is not on the list. Section 2 of Ontario Regulation does include a list, such as a subsidiary, a partner, a trust, member of a joint venture, unincorporated association, unincorporated syndicate or unincorporated association, and someone who holds shares above a specified threshold. There is a general threshold set in clause 2(1)(c) of 9.9 per cent of the voting rights for a corporation in which the person beneficially owns or controls, directly or indirectly, shares or securities currently convertible into shares. While the actual wording of subsection 2(1) is more complicated and applicants for a licence will need to take great care in how ownership structures are created — in particular if a licensed producer is directly or indirectly involved — overall, the approach is consistent with other regulatory statutes.

Subsection 2(2) is also relatively simple to apply to fact situations. A person is deemed to be an affiliate of another person if that person is a corporation and the other person, or a group of persons or entities acting jointly or in concert with the other person, owns a beneficial interest in shares of the corporation that carry at least 50 per cent of the votes for the election of directors of the corporation and those votes are sufficient, if exercised, to elect a director. The subsection continues with another clause that deals with the fair market value of the shares — if the person holds at least 50 per cent of the fair market value of all of the issued and outstanding shares of the corporation. While there may be difficulty in assessing fair market value at any particular point in time, especially if the shares are not trading on a public exchange, it is determinable who has at least 50 per cent.

The "fog" and difficulties for applicants is in subsections 2(3) and (4). These subsections provide as follows:

- 2(3) — A person is deemed to be an affiliate of another person if the other person, or a group of persons or entities acting jointly or in concert with the other person, has any direct or indirect influence that, if exercised, would result in control in fact of that person.
- 2(4) — Subsections (2) and (3) apply with respect to a group of persons or entities acting jointly or in concert with another person whether or not they are acting pursuant to an agreement or arrangement.

What is sufficient to result in "control in fact"? Complicating the factual analysis is the qualification that such control does not need to be direct, but can be indirect, done jointly or in concert with others, and does not need to be actually exercised. On the face of it, a typical franchise model would likely fall within subsection 2(3). Whether that franchise model results in an eligibility issue for a licence or store authorization will depend, of course, on who is involved — such as a licensed producer. But pursuant to subsection 2(4), there does not need to be an agreement or even an arrangement behind that "affiliation". Would a familial relationship be sufficient to trigger an "affiliation" for purposes of section 2?

This issue, of course, is particularly relevant with respect to licensed producers who are limited to one retail store authorization, which is to be located at the manufacturing premises. But it is also relevant with respect to the cap of 75 retail store authorizations per licensee and its "affiliates" under section 12.

AGCO Application

Any application for a licence to be a retail store operator or a manager will start with the application form. It is understood that the AGCO will begin to accept applications through its online portal as of December 17, 2018. It is also understood that the AGCO will be issuing the Registrar's Standards under the legislation prior to December 17, likely in the first week of December. Compliance with those Standards will also be important and will likely be relevant with respect to premises and how retail stores are operated.