

AGCO'S EXPRESSION OF INTEREST LOTTERY: DO YOU FEEL LUCKY?

By Don Bourgeois and Rick Moscone

Introduction

The AGCO published, on January 2, 2019, the *Rules for the Cannabis Retail Store Licensing Expression of Interest Lottery* to select potential operators for the initial 25 retail store authorizations. The Rules are designed to ensure that the 25 stores open on April 1, 2019. The Expression of Interest and Lottery process was put in place to address the Government of Ontario's decision to phase-in the introduction of retail stores for the sale of cannabis.

The Government had initially (October 2017) put in place an open market approach; given supply issues for the supply of lawful cannabis from federally-licensed producers of cannabis, the Government decided to limit the number of retail outlets to 25, distributed by Region throughout Ontario. The phased approach is discussed in the previous Briefing Note — *Cannabis Reboot: Dealing with Shortages in Ontario*. The AGCO received its policy direction in *Regulation 497/18*, which amended *Ontario Regulation 468/18*. It is expected that *O.Reg. 468/18* will be amended prior to December 13, 2019 to implement the open market approach, subject to there being sufficient supply of lawful cannabis.

Rules for the Expression of Interest Lottery

Be Sure You Want to Enter the Lottery

The Rules are set out on the AGCO's website at <https://www.agco.ca/cannabis/cannabis-retail-lottery>. There are two important points to make based on the Rules:

- If the applicant is not confident that it will be "ready, willing and able" to open its retail store on April 1, 2019, it should consider very seriously not submitting to the Expression of Interest and not participating in the EOI Lottery. The Rules are designed to ensure that only those applicants who will be able to open on April 1, 2019, if successful in the Lottery, apply. There are significant penalties for failing to open on April 1, 2019.
- Any applicants should be very clear on their legal and organizational structures and that there are no issues with respect to "affiliates" when the Expression of Interest is submitted. Applicants should also be very certain that they are fully compliant with the Rules throughout the process and that they will be in compliance with *Ontario Regulation 468/18* and the Registrar's Standards as of April 1, 2019. Failure to comply with the Rules, for example, can result in severe



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penalties including disqualification. And this disqualification can occur any time between January 2, 2019 and December 13, 2019 — *even after the store has been opened.*

Process and Timeline for Expression of Interest and Lottery

The Rules for the Cannabis Retail Store Licensing Expression of Interest Lottery have been reviewed by the AGCO's fairness monitor, accounting firm KPMG, which will also be monitoring compliance and implementation. The lottery being used was developed by the AGCO's Gaming Laboratory, which is internationally-accredited. In addition, Gaming Laboratories International, a recognized testing laboratory, reviewed and certified the AGCO's lottery system.

That system is intended to ensure that "winners" for the 25 retail outlets are selected on a random basis in accordance with the Rules. The AGCO will be publishing the results of the lottery – including those selected and those who are placed on the "waiting list" — and KPMG's report as the fairness monitor. It is evident from the Rules, the processes that have been put in place, and the accountability measures, including the use of a fairness monitor, that the AGCO's intention is to conduct a lottery that is fair and transparent.

The AGCO has included in the Rules its timeline, which is summarized below in the AGCO's infographic. The initial key dates leading to the Selection List and the Waiting List are:

- January 2 — Rules are published and in effect
- January 7 at 12:01 a.m. EST to January 9 at 12:00 p.m. (noon) EST — Applicants may submit an Expression of Interest
- January 11 — Lottery selection will take place
- January 12 — AGCO will publish the Selected List (25 operators for 25 retail sites) and the Waiting List for each Region



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The Rules are detailed and cover the period from January 2, 2019 (when published) to December 13, 2019, when *Ontario Regulation 468/18* is expected to be amended to authorize the AGCO to issue more licences based on market demand. *Ontario Regulation 468/18* maybe amended earlier if the supply of lawful cannabis is resolved.

It is critical to understand that compliance with the Rules applies throughout this period. If the AGCO determines that an applicant that is selected, opened its store on April 1, 2019 and is subsequently identified as not having complied, the AGCO will revoke the retail store authorization and the cannabis retailer licence.

Those who did not comply with the Rules and were not selected in the Lottery for the Selected List or the Waiting List may also incur difficulties once the open market approach is implemented after December 13, 2019. A failure to comply with the Rules, even if not successful as a result, may have a negative effect on the Registrar's assessment of the Applicant when it applies for a Retail Operator Licence and Retail Store Authorizations once the open market approach is implemented.

Regions

As discussed in *Cannabis Reboot — Dealing with Shortages in Ontario*, the Government has divided Ontario into 5 Regions and allocated the 25 stores that are to be opened on April 1, 2019 as follows:

- East Region — 5 stores
- GTA Region — 6 stores
- North Region — 2 stores
- Toronto Region — 5 stores
- West Region — 7 stores

Since an Applicant may only receive one store authorization during this process, once it is selected for, say, East Region, its participation in the Lottery ends. An Applicant may also be placed on Waiting Lists if it has not been selected for a store authorization. A potential Applicant should, therefore, consider carefully which Regions it submits especially if it is not "ready, willing and able" to open on April 1, 2019 in all of the Regions for which it submits. Since the lottery is random, an Applicant could be selected for its least favourite Region and not for its preferred Region.

Application to the Expression of Interest Lottery

The application must be done using the Applicant's iAGCO account — and only one Applicant may submit through that iAGCO account. Only one Expression of Interest is permitted by an Applicant, which may include one or more Regions. The Applicant must pay a \$75 non-refundable fee. The iAGCO website will guide the Applicant but care should still be taken as failures to comply with the Rules will result in disqualification. The Applicant will be asked for only basic information necessary for the Lottery process — keeping in mind, the successful Applicant will still need to complete an application for a Retail Operator Licence and a Retail Store Authorization.

The Applicant may not subsequently make any changes to its submission, but it may prior to January 9 at noon withdraw an application and submit a new application. Rule 2 provides that:

Expression of Interest Applicants in the Lottery Process who are selected to apply for a licence:

1. Must use the same legal name and applicant type identified in the Expression of Interest Application in their Retail Operator Licence Application
2. Are not permitted to change their applicant type, ownership and/or corporate structure in such a way that would result in a change in control of their Expression of Interest Applicant or licensee during the Lottery Process.

What is submitted in terms of name, legal entity, and so forth is what must remain in place throughout the EOI Lottery process, i.e., until December 13, 2019. As a result, an applicant that is selected may not "sell" its lottery win. Care must be taken to ensure that there are no changes that may fall outside compliance obligations. For example, if the intention is to be involved in a franchise operation, be very clear that AGCO agrees that such will not be non-compliant.

The basis information required for a sole proprietor is:

- Legal name
- Personal information — date of birth, place of birth, driver's licence information
- Contact information
- Addresses — mailing, physical and business.

Corporations, limited partnerships, partnerships and trust will need to provide the following information:

- Legal name
- Legal structure
- Contact information
- Addresses — mailing, physical and business.

There is no need to include the address of the proposed retail site or even the municipality within the Region until later.

Application Timing

The Expression of Interest Lottery submissions start at 12:01 a.m. EST on January 7, 2019 and end at 12:00 p.m. EST (noon) on January 9, 2019. It is important to note that there is no advantage to submitting early or later in the process as all submissions are put into the "lottery" and selection is to be done purely on a random basis in accordance with the Rules. What is more important is to ensure that all the ducks are in row — that there is full compliance with the Rules and that any ambiguity has been clarified with the AGCO. Of course, it is also essential to submit prior to 12:00 noon on January 9, 2019 — submissions at 12:01 will not be accepted.

Applicants may not withdraw from the Lottery after 12:00 noon on January 9, 2019. The AGCO will run the lottery in accordance with the Rules. The 25 selected Expressions of Interest Applicants will be advised, and the AGCO will publish both a "Selected List" and a "Waiting List". The Waiting List is necessary should someone on the Selected List subsequently decide not to proceed — or it is disqualified. Rule 13 sets out the dates and circumstances in which an Applicant may withdraw and the circumstances in which the retail store operator licence and the retail store authorization fees may be refunded, and the Letter of Credit will be returned.

Next Steps

If an Applicant is selected, it must within 5 days provide:

- Application for Retail Operator Licence and application fee of \$6,000
- Standby Letter of Credit in the amount of \$50,000 from a Schedule I or Schedule II bank. The AGCO will draw on this Letter of Credit if the retail store is not open on April 1 (\$12,500), on April 15 (additional \$12,500) or by April 30 (additional \$25,000). If an Applicant on the Waiting List is advised that it is now eligible, these timelines will be adjusted. The AGCO has indicated a willingness to review the 5-day period to obtain the standby Letter of Credit if the Applicant can demonstrate that it took best efforts to obtain but needs additional time to obtain from its bank.

The Retail Store Authorization application and its \$4,000 fee may be submitted after the Retail Operator Licence application has been submitted. There are special rules in place for this phase for location of retail stores, i.e., municipalities with more than 50,000 population. Other requirements, including the school buffer zone, public interest placarding and public interest objections, and the opted-out municipalities continue to apply.

It is also important to note that selection through the Lottery DOES NOT GUARANTEE either the Retail Operator Licence or the Retail Store Authorization, both of which are necessary to open a retail store on April 1, 2019. The AGCO will carry out its normal due diligence investigation into the Applicant and if the Applicant is not otherwise eligible to be licensed, it will be refused. And if it failed to comply in any manner with the Expression of Interest process, that is grounds to refuse to issue a licence or to revoke a licence. As noted above, compliance with the Rules is essential and if there are any issues with respect to affiliates, who may be involved, or how the Applicant intends to operate, it is important to clarify and resolve those issues.

The Retail Store Authorization is also subject to the public notice process set out in *Ontario Regulation 468/18*. That process may result in delays to the approval of the store authorization or, if sufficient grounds, to a refusal. Furthermore, the Rules also take into account that municipalities may "opt-out" by January 22, 2019. The Retail Store Authorization applications are to be submitted by January 25 and AGCO anticipates issuing authorizations by March 4, 2019. Ordering from the Ontario Cannabis Store can then occur, although selected Applicants may begin engaging with the OCS as of January 21, 2019.