



Backgrounder

Legalization of Cannabis

January 2018

SCC POSITION

The Saskatchewan Chamber of Commerce endorses a private sector distribution and retail sales model for legal cannabis moving forward, with licensing and regulatory oversight provided by the SLGA. The Chamber believes that the Government of Saskatchewan's proper role in the legal cannabis sector is that of a fair and impartial regulator of private sector activity, and not as a participant in the market. Private sector businesses are best suited for fostering innovation and growth. They also have an incentive to be responsive to changing consumer demand.

While the legalization of cannabis will create exciting new business opportunities for the private sector in the province, legalization also brings with it a host of new challenges for employers, particularly those operating in safety-sensitive environments. On these matters, the Chamber recommends that both the provincial and federal government provide greater clarity to employers by establishing a legal definition of impairment, develop reliable, standardized, and legally-sanctioned drug testing protocols to detect cannabis impairment with a standard legal limit, and establish a legal definition for the term "safety-sensitive position." The Chamber strongly recommends that any additional workplace-related guidelines should be put into place before full legalization takes effect.

ISSUE

The Government of Canada is proceeding with the legalization of recreational cannabis. Bill C-45, also known as the *Cannabis Act* had its third reading on November 27, 2017 with the legislation moving to the Senate for further study and debate. The *Cannabis Act* is expected to come into full force and effect no later than July 1, 2018. Existing laws related to medical use, the *Access to Cannabis for Medical Purposes Regulations* (ACMPR), remains unchanged.

While business groups throughout Canada are not opposed to cannabis legalization, it does bring with it a host of new challenges for employers. Challenges include the lack of clarity from the Government of Canada around workplace safety issues, including uncertainty over an employer's ability to test for impairment and the added liability surrounding these responsibilities.

There are also a number of questions about what the market structure for legal cannabis should look like in the province moving forward, both in terms of distribution and retail. While cannabis legalization touches on a number of different areas, the scope of this report will focus primarily on the workplace-related challenges that employers will face, along with a discussion of the pros

and cons for each of the three main retail and distribution approaches.

BACKGROUND

In the 2015 Speech from the Throne, the Government of Canada communicated its intent to amend the *Criminal Code* by legalizing, regulating, and restricting access to cannabis among youth. The *Cannabis Act* seeks to accomplish the following objectives:

- Restrict youth access to cannabis products.
- Protect young people.
- Enhance public awareness of the health risks associated with cannabis use.
- Deter criminal activity by imposing serious penalties to those who break the law.
- Protect public health through strict product safety and quality requirements.
- Provide for legal production of cannabis to reduce and undermine illicit market.
- Allow those 18 years of age and older access to regulated, legal cannabis.
- Reduce the burden on the criminal justice system.¹

In addition to formally legalizing cannabis and addressing the above-mentioned policy goals, the *Cannabis Act* outlines the following guidelines for regulating the legal cannabis market moving forward:

- Producers must be federally licensed by Health Canada
- Minimum age to consume is 18 but provinces can raise minimum age
- Legal possession for adults is limited up to 30 grams while in public
- Controls on packaging, promotion, labelling, and display to the public
- Adults can grow up to 4 plants per residence without a license²

Since Bill C-45's third reading, there have been three amendments made. These include:

- The removal of height restrictions placed on plants grown by adults at home
- Regulations on edible products to be enacted one year after Bill C-45's passage
- A commitment to review the legislation every three years after coming into effect³

The *Cannabis Act* also allows provinces and territories to create additional laws and regulations around distribution and retail sales, workplace safety, impaired driving, consumption in public spaces, and taxation. The Government of Saskatchewan is currently developing policies and legislation through the Ministry of Justice, Ministry of Labour Relations and Workplace Safety, and SGI.

In December 2016, the Government of Canada's Task Force on Cannabis Legalization and Regulation submitted their report, *A Framework for the Legalization and Regulation of Cannabis in Canada*. The Task Force is comprised of nine individuals from a variety of different professional background including a lawyer, two police officers, medical doctors, public health officials, and

¹ Government of Canada. *Legislative Background: An Act Respecting Cannabis and to Amend the Controlled Drugs and Substances Act, the Criminal Code and Other Acts*. Ottawa. May 2017. 4.

² Jason Childs and George Hartner, "Policy Brief: An Effective Retail and Distribution Model for Recreational Cannabis", *Johnson Shoyama Graduate School of Public Policy* (December 2017).

³ Eileen N. McMahon, Teresa A. Reguly, and Manpreet Singh, "Proposed Amendments to Canada's Cannabis Act," *Torys LLP*, October 11, 2017.

experts in addictions and mental health. The report contains over 80 recommendations around five key principles:

- Minimizing harm of use.
- Establishing a safe and responsible supply chain.
- Enforcing public safety and protection.
- Maintaining medicinal cannabis access.
- Implementation.

ISSUES AROUND WORKPLACE SAFETY

Lack of Clarity from Government Around Guidelines for a Safe Workplace

Employers across the province, particularly those in safety-sensitive sectors such as construction, mining, oil and gas, forestry, and transportation have expressed uncertainty about what their rights and responsibilities are if they suspect a worker is impaired on the job. Three of the 83 recommendations found in the Task Force on Cannabis Legalization and Regulation's report address workplace safety, specifically:

- Facilitating and monitoring ongoing research on cannabis impairment, considering implications for occupational health and safety.
- Working with existing federal, provincial, and territorial bodies to better understand potential occupational health and safety issues related to cannabis impairment.
- Working with provinces, territories, employers, and labour representatives to facilitate the development of workplace impairment policies.⁴

Despite the three recommendations from the Task Force, the version of Bill C-45 currently before the legislature does not specifically address workplace-related issues, but pledges to protect public health and safety more generally. Furthermore, the Government of Canada has not provided adequate direction as of late on workplace-related policies, which has in turn affected their provincial counterpart's ability to create related policies.

With legalization approaching, The Human Resources Professionals Association (HRPA) reports that a major increase in recreational use among adults will likely occur (at least initially) post-legalization, similar to what was experienced in U.S. states like Colorado and Washington State soon after it was legalized in 2012⁵. Because of this, employers are concerned that legalization, along with the anticipated increase in consumption, will lead to more workplace accidents and other such issues. Some of the potential issues that have been identified by employers in the HRPA study include:

- Employees operating company vehicles while impaired.
- Uncertainty surrounding disciplinary procedures.
- Decreased productivity.
- Employees operating heavy machinery.
- Admissibility of employees travelling cross-border into the United States.

⁴ Canadian Chamber of Commerce. "Marijuana in the Workplace: Ensuring the Safety of Workers and Businesses." *Policy Resolutions 2017*.

⁵ Human Resources Professionals Association. "Clearing the Haze: The Impacts of Marijuana in the Workplace." June 2017. 4.

Legal Obligations

Canadian employers under the *Criminal Code* are required by law to ensure a safe workplace by imposing a "legal duty to take reasonable steps to prevent bodily harm to that person, or any other person, arising from that work or task."⁶ This concept is also enshrined in existing provincial occupational health and safety legislation. For example, employers under the *Saskatchewan Employment Act* must provide for a safe and healthy workplace. Further, Part III of the *Saskatchewan Employment Act* includes "general duty" health and safety provisions which explicitly prohibit impairment in workplaces.

Employees also have rights and responsibilities under the Act in Section 3-10 which states that: "Every worker while at work shall take reasonable care to predict his or her health and safety and the health and safety of other workers who may be affected by his or her acts or omissions." Going beyond general duties, the *Mines Regulations, 2003* states that "An employer or contractor must take all reasonable steps to ensure that no person whose ability to work safely is impaired by alcohol, any drug, or any other substance is allowed to work at a mine. The *Mines Regulations, 2003* could serve as a blueprint on impairment in the workplace for other safety-sensitive sectors in the province.

British Columbia goes even further by requiring that a worker with a physical or mental impairment that affects their ability to perform assigned work must disclose the impairment to their supervisor or employer and not knowingly perform work where such an impairment may create undue risk to themselves or others. Some provinces have zero tolerance policies prohibiting alcohol and drug impairment of any kind in specific safety-sensitive sectors. A number of industry groups, including Enform, the safety association for the upstream oil and gas sector in Canada have gone on record saying that cannabis use is incompatible with working in a safety-sensitive environment and have advocated for an outright prohibition on cannabis in the workplace.⁷

Duty to Accommodate

Adding another layer of complexity is that medical cannabis use and recreational cannabis use must be treated separately. This is because Canadian human rights legislation recognizes medical cannabis as a prescription drug. As a result, employers have a "duty to accommodate" workers with a valid medical cannabis prescription. Accommodation is required up to the point of "undue hardship" (financial or otherwise), where the costs of reasonable measures are too difficult or expensive.⁸ The onus is on the employer to demonstrate that everything was done to accommodate an employee with a disability short of undue hardship. However, employees are responsible for providing their employer with sufficient information on a disability that requires accommodation.

An employee is not entitled to choose their preferred form of accommodation. The courts have made it clear that employers have a duty to accommodate a worker's needs, not their preferences. In other words, where multiple forms of accommodation are possible, the employer has the right to choose the less expensive or less onerous option.⁹ Recreational cannabis

⁶ Enform. "Enform's Submission to the Task Force on Marijuana legalization, Regulation and Restriction," August 29, 2016.

⁷ Ibid. 6.

⁸ Carolyn Frost and Reis Pagtakhan, "Getting into the Weed on Immigration: How Legalized Marijuana Could Affect Employee Travel to the US," *MLT Aikins LLP*, Published November 30, 2017.

⁹ Human Resources Professionals Association. "Clearing the Haze: The Impacts of Marijuana in the

however, is not a prescription drug and is not subject to human rights legislation at the moment. It is also difficult to apply lessons learned in U.S. states that have legalized cannabis because U.S. employers do not have the same duty to accommodate as do their Canadian counterparts.

Drug Testing Protocols

Cannabis is a chemically complex substance with far more complicated effects on the body compared to alcohol. Cannabis is a fat soluble drug, meaning it is flushed from the body on a much slower cycle than most other intoxicants, which tend to be water soluble.¹⁰ As a consequence, drug testing can show significantly more amounts of cannabis in an individual's system days or weeks after the individual last used it. Further to this, habitual or chronic cannabis users tend to build up significant quantities of the drug in their systems. There is no existing, let alone reliable, non-invasive testing method that can distinguish between those intoxicated at the moment, as opposed to high residual amounts from off-hour use.¹¹

There are limitations to testing for cannabis in the workplace. Per the Supreme Court of Canada, employers are not permitted to carry out randomized testing, as it was found to be an infringement on worker privacy. Canadian law allows for drug testing under the following three conditions: (i) pre-screening process; (ii) post-incident; (iii) under reasonable suspicion. Legal cannabis poses a unique challenge because a worker may not present identifiable symptoms of impairment, despite being a clear danger to themselves and others.

Currently there are two types of methods for measuring impairment: (i) a urine-based sample; (ii) an orally administered saliva sample. Both have their strengths as well as their limitations. Testing equipment and related policies necessary for determining impairment are an added cost borne solely by employers for simply maintaining the same safety standards enforced today.

MARKET STRUCTURE

Three different regulatory approaches are analyzed through the lens of four objectives offered by the Johnson Shoyama Graduate School of Public Policy (JSGS). These are:

- Restricting youth access
- Economic benefits
- Quality and safety
- Non-monetary costs of consumption.¹²

Government Monopoly Model

Both distribution and retail are solely owned and operated by the provincial government through a crown corporation or a similar arm's-length entity. This approach requires large up-front costs. Such an approach is likely to be moderately effective in restricting youth access. Government monopolies offer less variety and convenience and will not fully displace the illicit market. Monopolies rank low on fostering innovation and the likelihood of an inflated price will embolden

Workplace." June 2017, 13.

¹⁰ Government of Canada. Health Canada. *Information for Health Care Professionals: Cannabis (marihuana, marijuana) and the Cannabinoids*. Published February 2013.

¹¹ John Lax. *Advocacy Update Our Ongoing Work: Marijuana Legalization*. We Build: Saskatchewan's Construction Magazine. Winter 2014. 14.

¹² Jason Childs and George Hartner, "Policy Brief: An Effective Retail and Distribution Model for Recreational Cannabis," 1.

the illicit market.¹³

Colorado Model

A free-market, light-touch approach involving a large number of privately owned retailers and distributors operating in a competitive environment. A key facet of this model is the high density of retail stores and multiple distribution channels. Competitive pressures mean that restricting youth access will be difficult. The existence of multiple distribution channels will make ensuring quality control and safety difficult. The high degree of competition has usurped a large chunk of the illicit market, generated substantial tax revenues, and has fostered innovation and growth.¹⁴

Washington State Model

The government places limits on the number of private sector retailers and their locations, while requiring products to be sourced through a single distributor as a chokepoint for product safety and quality. The ability to restrict youth access is similar to that of a monopoly. While economic benefits are not as large as those realized under the Colorado model, it performs better than the government monopoly approach, as private retailers have an incentive to be responsive to consumer demand. JSGS has endorsed a variant of this model with a single private distributor contracted by the government. Manitoba will introduce a hybrid model in which the provincial government will operate wholesale and distribution, while the private sector will operate retail stores.¹⁵ Alberta has also adopted a variant of the hybrid model in which private retailers will operate storefronts and the province will operate wholesale and distribution, as well as manage online sales.

Saskatchewan Model

The Government of Saskatchewan will soon make available 60 licenses to qualifying private sector cannabis retailers who apply for the right to sell. Private retailers must operate stand-alone storefronts and sell only cannabis and cannabis-related accessories. Cannabis sold by retail stores must be supplied by a designated distributor. More details around the selection process for the first 60 retail stores will be provided over the next few months by the province. The selection process for a privately-owned and operated distributor will soon be carried out by SLGA.

SUMMARY

The use of private sector retail and distribution channels is good news for Saskatchewan. Significant work remains in identifying what “impairment” levels are for all workplaces, but especially for safety-sensitive ones. The complex interaction between alcohol, recreational cannabis, medical cannabis, and other drugs like opioids in our communities, as well as in individual users is still to be determined. A decision around minimum legal age for sale and consumption of cannabis is a question that we are still seeking input from our members on.

¹³ Ibid. 2 -3.

¹⁴ Ibid. 3.

¹⁵ Ibid. 3 -4.