

## Clearing the Haze

### WHAT INSURANCE PROFESSIONALS NEED TO KNOW ABOUT CANNABIS IN CANADA

November 2016 | By Ingrid Sapona

*Abstract: Marijuana has been a popular topic with the media this past year. Undoubtedly, one reason the topic has had so much play is the federal government's plan to introduce legislation to legalize marijuana in Canada. But, beyond the government's announced plans (or perhaps because of it), there has also been much activity related to the drug, including activities like storefront dispensaries popping up in cities across Canada – that have created a haze of confusion about where things stand for this substance.*

*This Trends Paper will update you on the current status of cannabis in Canada and provide information about changes expected for 2017. We'll also take a look at some of the challenges and opportunities these changes may have for the insurance industry.*

#### **The Legal Backdrop**

The Controlled Drugs and Substances Act (CDSA) prohibits the possession, production, and trafficking of marijuana, except as authorized by exemption or regulation. The right of Canadians to an exemption from the CDSA for possession of marijuana for medical purposes arose from a 2000 court decision: *R v. Parker*. In response to the *Parker* decision, in 2001 Health Canada established the Marihuana Medical Access Regulations (MMAR; the Health Canada task force spelled it 'marihuana'). As Health Canada notes in Understanding the New Access to Cannabis for Medical Purposes Regulations, "The MMAR enabled individuals with the authorization of their health care practitioner to access dried marihuana for medical purposes by producing their own marihuana plants, designating someone to produce for them or purchasing Health Canada supply." The MMAR was 'fraught with challenges' and was repealed on March 31, 2014.

Individuals who require cannabis for medical purposes must obtain a medical document from an authorized health care practitioner. The document is similar to a prescription and must include the health care practitioner's licence information, the patient's name and date

of birth, the period of use (which can be up to one year), and an indication (in grams) of the daily quantity of dried marijuana.

In 2013, the Marijuana for Medical Purposes Regulations (MMPR) were implemented, replacing the MMAR program. These regulations “created conditions for a commercial industry responsible for the production and distribution of marijuana for medical purposes. Under the MMPR, individuals with a medical need could access quality-controlled dried marijuana produced under secure and sanitary conditions.” Prior to this, medicinal marijuana could only be purchased directly from Health Canada.

Under the MMPR, commercial growers could apply to be certified by Health Canada as “licensed producers” (“LPs”, as they are known in the sector). As of August 2016, Health Canada reported that there are 34 LPs. A Canadian whose health care practitioner supports their use of marijuana for medical purposes registers with the licensed producer of their choice. Once registered, the LP can ship cannabis to the user. According to Department of Justice information, as of June 30, 2016, more than 60,000 Canadians are registered to access marijuana for medical purposes.

In a June 2015 decision (*R. v. Smith*), the Supreme Court of Canada concluded it was unconstitutional to limit medical marijuana users’ access to dried marijuana only. Interestingly, Smith was not a user of medical marijuana. He worked for a business that produced edible and topical marijuana derivatives for sale by extracting the active compounds from the cannabis plant. The Supreme Court held that individuals with a medical need should be allowed to use and make other cannabis products.

After the Smith decision, the legal landscape changed again. In July 2015 the Minister of Health issued exemptions under the CDSA. The purpose of the exemptions was, “[T]o eliminate uncertainty around a legal source of supply of cannabis ... to allow authorized users to possess different forms of cannabis – not just dried cannabis – and allowing licensed producers to produce and sell cannabis oil, fresh marijuana buds and leaves, as well as dried marijuana.”

In June 2015 the Federal Court of Canada handed down its decision in *Allard v. Canada*. Allard involved a challenge to the requirement that authorized medical marijuana users must get their cannabis from LPs. The Federal Court held that the restriction violated authorized users’ rights because limiting who they could get their supply from meant they didn’t have “reasonable access”. As a result of that decision, Health Canada revoked the MMPR and implemented a new regulation called the *Access to Cannabis for Medical Purposes Regulations* (ACMPR). The purpose of the ACMPR is to provide individuals who require marijuana for medical purposes reasonable access to cannabis as required by the *Allard* case.

The ACMPR, which has been in effect since August 24, 2016, sets out the current rules related to medical marijuana. It incorporates many of the rules from the MMAR and MMPR. Health Canada, in administering the ACMPR, licenses and oversees the commercial industry and registers individuals to produce for their own medical purposes or on behalf of someone else.

The ACMPR has two parts:

- Part 1 sets out the rules related to commercial production by LPs, and
- Part 2 sets out the rules for individuals to produce a limited amount of cannabis for their own medical purposes or to designate someone else to produce cannabis for them.

As a result of the ACMPR, individuals who need marijuana for medical purposes can now:

- purchase it from LPs,
- register with Health Canada to produce a limited amount for themselves, or
- designate someone else to produce cannabis for them.

Regardless of how they obtain their cannabis, there's a possession limit of the lesser of:

- A 30-day supply, or
- 150 grams of dried marijuana, or the equivalent if in another form.

### **Where We Stand**

As of November 2016, the only marijuana use permitted in Canada is for medical purposes as permitted under the ACMPR. Recreational use of the drug is not legal. According to the Department of Justice, "Possessing and selling marijuana for non-medical purposes is still illegal everywhere in Canada." And, as the Department of Justice also points out, "[Simple possession of up to 30 grams is an offence with a possible fine of up to \\$1,000 and up to six months in jail.](#)"

But, Prime Minister Trudeau campaigned on the promise he would legalize marijuana and he has put Parliamentary Secretary MP Bill Blair (former Toronto police chief) in charge of figuring out how the government will regulate and restrict access to marijuana when it becomes legal. At this point, the only concrete things we know about how legalization will unfold is that the government intends to legalize marijuana, while strictly regulating, and restricting access to it.

The government has also made it clear that it does not plan to decriminalize marijuana while the legalization process is unfolding. The government's view on the issue is that "[decriminalizing the possession of marijuana without ensuring that controls are in place for its success would be giving the green light to dealers and criminal organizations to sell unregulated marijuana to anyone, including our children and youth.](#)"

In terms of a timeframe, in April 2016 federal Health Minister Jane Philpott announced at a special session of the United Nations General Assembly that the government

intends to introduce legislation in Spring 2017 to legalize marijuana. One of the likely reasons Minister Philpott announced this at the UN is that [Canada has signed three international treaties that criminalize the possession and production of marijuana](#). So, one of the many details the government will have to work out is how to craft legislation that conforms to its treaty obligations. In this regard, Minister Philpott's speech was intended to formally notify our treaty partners of the government's intention to legalize marijuana, but also to reassure them that the legislation would, "[keep marijuana out of the hands of children and profits out of the hands of criminals](#)."

Clearly, before we see introduction of a bill legalizing recreational use of pot, the government has a lot to do. The three objectives the government reiterates in mantra-like fashion every time it speaks about marijuana is that it intends to legalize, while strictly regulating, and restricting access to marijuana in Canada.

The government set up the [Task Force on Marijuana Legalization and Regulation](#). The Task Force, which included public consultation and engagement with provincial, territorial, municipal and Indigenous governments, as well as various national organizations and groups, is [expected to provide its final report to the Government in November 2016. The report will be made public after the Ministers of Justice, Health, and Public Safety have reviewed it](#).

[One other noteworthy comment the government has made that relates to the timing is that the new legislation will come into force after regulations have developed](#). Given that crafting regulations can be arduous, it could be some time after passage of the bill that the law actually comes into force.

### **Storefront Dispensaries**

[In cities across Canada, "dispensaries" – storefront operations selling marijuana – are popping up in growing numbers. LPs are not allowed to provide cannabis for medical purposes through a storefront, they are only allowed to ship product to their registered clients](#). Storefront dispensaries and so-called "compassion clubs" are not licensed by Health Canada under the current law and they are not legal. Given that storefront operations cannot acquire their marijuana from LPs, they can only get their supply from illegal sources. The Department of Justice warns that storefront dispensaries, "[... are supplied by illegal growers and sell untested, unregulated products that may be unsafe and of particular risk to children](#)," even if the buyer is permitted to possess medical marijuana, selling it through a storefront constitutes trafficking under the CDSA.

Reaffirming the illegal nature of such dispensaries, police departments have been cracking down on them in different cities. The Toronto police, for example, raided 43 dispensaries in May 2016, pressing charges against about 90 people. Then, [in August 2016 they raided a number of other dispensaries over the course of a few days](#). Similar action was taken by [police in Barrie, ON, in June 2016, when the owner of the dispensary was arrested and charged with Trafficking a Controlled Substance and Possession for the Purpose of Trafficking](#).

But, not all cities have taken the same approach to storefront dispensaries. Some Canadian cities have used bylaw enforcement tools to close dispensaries in their community. Vancouver, which according to the Vancouver Police Department had about 100 storefront dispensaries as of September 2015, has taken a different approach. [Instead of trying to shut them down, the city has instituted a “regulatory scheme” to regulate the sale of marijuana from such storefronts.](#) The regulations are meant to provide "[tools to the City to impose restrictions on where and how they operate . . .](#)" [The regulations require such businesses to pay a \\$30,000 licensing fee and they cannot open up in certain areas in the city nor can they be within 300 metres of a school, community center, or another such operation.](#) Other cities, such as Victoria, have been watching how Vancouver’s regulatory scheme is working and have talked about following suit.

Businesses are setting up storefront dispensaries with such enthusiasm these days in hopes that by already being established, they’ll have a leg up when recreational use of marijuana becomes legal. Given that at this point, there are all sorts of speculation about what sales channels the government will implement, [some store owners are hoping the legislation contains some sort of grandfathering provision that would allow them to remain open.](#)

As for what will happen with respect to medical marijuana once recreational use becomes legal, that’s not clear either. But, it’s hard to imagine that there won’t be a role for LPs, especially given the time and money they have invested to become licensed. And, with [mainstream retailers like Shoppers Drug Mart, submitting applications to become licensed producers,](#) it seems that they’re betting that even after legalization, LPs will play an important role in supplying marijuana in Canada. Though Shoppers Drug Mart has stressed that it wants to be able to dispense medical marijuana as a way of enhancing patient care, one wonders whether they might be positioning themselves to also be able to serve a broader group of customers once cannabis is legal.

### **The Emerging Insurance Market Around Cannabis**

Let’s look at some of the issues commercial and personal lines insurance professionals may come across with respect to different types of client activities that relate to marijuana. As the legal landscape changes over the next few years, the insurance industry’s response will no doubt evolve as well.

#### **Insurance Related to Licensed Producers (LPs)**

From an insurance perspective, LPs are not particularly different from other commercial ventures. Brody Stonehouse, General Manager of AC&D Insurance in B.C., has not had problems getting the majority of cover required for LPs. But, there are fewer insurers willing to provide cover at this point and this means higher costs and, in certain cases, more restrictive cover.

Marcus Sargent, Account Executive at Steer Insurance Brokers & Consultants, reports a similar experience. Sargent has worked with clients from before they became licensed through to when they’ve gotten their license from Health Canada and have begun

supplying medical marijuana and related products. He notes that the process for becoming an LP is long and involved, and the business' operational risks can change over the process. The insurance issues depend on where the business is at with the licensing process and, ultimately, what they are licensed to do.

Currently, there are a limited number of LP producers; therefore there is less of a financial case for insurers to enter the market. Stonehouse is convinced that "more insurers will offer coverage as this market segment grows. Sargent thinks that standard insurers are watching to see how the market evolves. He also believes that some insurers may stay out of the market completely out of concerns about reputational risk, much the same as they have historically done with the tobacco industry.

In general terms, LPs that are commercial growers have insurance issues similar to businesses that grow other crops in commercial greenhouses. Similarly, some LPs' activities are akin to those of manufacturers of edibles and consumables; making their insurance issues similar to such businesses. But, within each of those categories, there can be variation in the types of insurable risk.

For example, if an LP is a commercial marijuana grower, Sargent notes that they must pay specific attention to their stock and more specifically the genetics and how they are safeguarded against various insurable perils. It is also important to pay particular attention to the grow environment to mitigate the various risks which could cause a product recall or crop spoilage.

There is a movement in the marketplace towards edibles and derivatives. This development has created new opportunities and subsequent risks. LPs that produce cannabis related products, for example cannabis oils or consumables that contain cannabis, should consider product liability insurance as well.

The following are the types of commercial coverage LPs should consider:

- Commercial General Liability
- Broad form Building and Equipment
- Earthquake and Sewer Backup
- Equipment Breakdown
- Business Interruption and Extra Expense
- Directors & Officer's Liability
- Crime – for coverage of employee theft, for example
- Crop (Stock) – given that LPs are required to grow all their crops indoors, this is not the traditional crop insurance that's usually meant to protect against weather hazards such as drought; this specific type of coverage is similar to the type a cultivation facility might have, which covers the plant materials at all stages – from genetics to final product

- Product Liability and Product Recall – for example, this might include coverage for claims related to unintended side effects or if there's an error in the manufacturing process.
- Cargo/Transit/Contingent Cargo – the LP should consider whether to rely on the shipper's insurance, or to obtain their own coverage for shipping product

In terms of underwriting issues related to providing coverage for LPs, Sargent says that since LPs must meet so many stringent requirements imposed by Health Canada to get licensed, they often have addressed many of the COPE (Construction, Occupancy, Protection & Exposure) issues underwriters generally are concerned with. For example, underwriters will look to confirm building construction, security measures, neighboring risks, access to fire departments, proximity to fire hydrants and various tenant improvements. Grow strategies and contingency plans and other risk mitigation strategies are also often taken into consideration by underwriters.

Given the nature of the business, security is also very important to both Health Canada and insurers. So, underwriters will want information about the security measures and evidence that a robust security system is in place and functioning at all times.

### **Insurance Related to Dispensaries and Cannabis Clubs**

To the extent that there's an argument that dispensaries and cannabis clubs are engaged in illegal activities, the insurance issues related to them are a bit trickier. In Vancouver, for example, where the city has chosen to regulate them, rather than try to shut them down, commercial insurance is available. Stonehouse says that there are limited insurance options and limited coverage available to them, and such coverage is primarily through specialties markets. "When we first started insurance dispensaries insurers had a difficult time with the grey area of the law which they fall under. It seems that with the liberal government making moves towards recreational legalization, insurers have opened up to the idea of providing cover for these businesses. However, with limited insurers in the marketplace, there are some limitations to the cover available," says Stonehouse. But, despite the legal vagaries related to dispensaries and limitations on the coverage most take out, Stonehouse's office writes five policies for dispensaries per week.

As for the types of coverage such businesses are looking for, Stonehouse says that they typically need premise liability to satisfy their landlords and basic equipment cover. He also noted that in his experience, most such customers do not want to pay the additional premium for full commercial general liability coverage or stock cover, which typically costs about \$6,500 for a full product liability policy with coverage of \$2 million. Instead, they take basic liability policies that include a lot of exclusions.

In addition to the normal insurance coverage a storefront business of any sort might consider (such as sewer backup, business interruption, and extra expense), dispensaries might also consider crime coverage. If the dispensary or cannabis club allows customers to sample different products For example, in a vapour lounge,

adequate liability coverage is especially important in case a customer falls or hurts themselves as a result of getting intoxicated.

Since dispensaries are not licensed to grow cannabis, if they produce any products that contain cannabis (baked goods, for example), at this point they cannot get product liability insurance for the products.

Because insurance policies typically include a criminal activity exclusion, if a landlord has a dispensary as a tenant, the landlord's policy could be at risk if the tenancy was undisclosed to the insurer. At a minimum, landlords that accept such a tenant should disclose this information to their insurer or they may risk being denied coverage on the basis of a material change of risk or misrepresentation. Stonehouse has worked with many landlords that have had their insurance cancelled or that have been unable to find insurance due to a cannabis-related occupancy. He has found coverage for such customers, however. But, he admits that, a dispensary opening in a commercial building will limit the landlord's options and the premium may be high. [Having the dispensary tenant pay the extra cost is one option landlords might explore, so that the increased cost the landlord faces does not unfairly burden other tenants](#), Stonehouse says.

"As part of our risk management approach, we work with these landlords to ensure their tenants have the necessary insurance to ensure the landlord is adequately protected and that the landlord is listed as an additional insured," he says. In working with landlords, Stonehouse also cautions them not to allow their tenants to procure building insurance on their behalf, since the tenant does not have the same interest in ensuring the necessary covers is purchased and maintained.

At this point, the number of insurers offering coverage for dispensaries and landlords with dispensary or cannabis club tenants is limited. And, the premiums for such coverage can be sizeable, says Stonehouse. But, over time, as insurers get more comfortable with such businesses, the cost of coverage could come down.

### **Personal Lines Cannabis-Related Issues**

Issues around marijuana can come up in the context of personal lines of insurance too. One of the largest topics related to personal lines is with respect to automobile policies. Individuals authorized to use medical marijuana do not have a duty to inform their insurer that they're using cannabis. In other words, to auto insurers, prescribed use of marijuana is the same as any other prescribed medication.

Driving while high – or drug-impaired, as it's more formally referred to – is also treated the same as driving while drunk, under the law and for insurance purposes. In fact, in anticipation of possibly seeing a significant increase in drug-impaired driving once recreational use of marijuana is legalized, [Ontario recently announced that motorists stopped by police for driving while high on marijuana or other drugs face the same stiff penalties as drunk drivers](#).

However, when it comes to roadside determination of whether someone is drug-impaired is not as straightforward as determining whether they're drunk. The federal

Criminal Code, for example, makes it clear that a blood alcohol level of 0.08 or higher is an offense and breathalyzers can be used to determine drivers' blood alcohol level. But when it comes to being drug-impaired, there is no roadside testing machine – it's a judgement call. The determination of whether a driver is drug-impaired is made by police drug recognition experts. Under the Criminal Code, such experts have the power to evaluate whether a person's ability to operate a motor vehicle while impaired by a drug. If such an expert has reasonable grounds to believe a person's ability to operate a vehicle is impaired, the evaluating officer may demand a blood, urine, or oral fluid sample. But, even if such a sample is taken, does a mere trace of the drug in the sample mean the person's ability to operate a vehicle is impaired?

In a recent case heard by the Supreme Court of Canada, a driver who was charged with driving while impaired by drugs challenged the admissibility of the evidence of a drug recognition expert (DRE). An Ontario man (Bingley) was charged with impaired driving; his blood alcohol level was within the legal limit, but he failed the sobriety test so a DRE then conducted tests to determine if he was drug-impaired. A urine sample revealed the presence of cannabis, cocaine and another drug. Bingley was acquitted twice, but the crown appealed and he could face a third trial. Bingley appealed to the Supreme Court claiming the opinion evidence of the drug recognition expert was inadmissible because the evaluation was simply used to justify making a demand for the bodily fluid sample. The Supreme Court has not issued its ruling as of the time of this writing.

Given the plans to legalize marijuana, the government is looking at ways of improving the ability to detect drug-impaired driving. [According to the Department of Justice](#), "[T]he Drugs and Driving Committee of the Canadian Society of Forensic Science is providing scientific advice to the federal government related to a review of the scientific literature on legal limits for various impairing drugs, including THC (marijuana). The Government, in collaboration with the RCMP, is leading research that will help guide the use of roadside screening devices that test oral fluid to detect drug impaired drivers."

Some U.S. states that have legalized marijuana have set limits on the amount of Tetrahydrocannabinol (THC) in one's blood, above which the person is considered impaired. In [Washington State, for example, a driver found to have over 5 nanograms of THC per milliliter in their blood was automatically charged with DUI-cannabis](#). But, setting such thresholds is not necessarily the answer. [Because THC dissolves in fat, whereas alcohol dissolves in water, THC is absorbed in a very different way, which makes it much harder to relate levels of THC to behaviour](#). Further complicating the matter is that THC rapidly clears out of some peoples' blood, but they can still be high because THC leaches out of the user's brain and other fatty tissue for some time.

Another situation that may be relevant to those working in personal lines relates to homeowners insurance. Given that under the Access to Cannabis for Medical Purposes Regulations (ACMPR), individuals can register with Health Canada to produce a limited amount of cannabis for their own medical purposes. Is this something insurers might care about? And must homeowners disclose that they are growing their own cannabis? Stonehouse says it depends on the wording of the policy. He has dealt with claims

where the client did not notify the insurer and claims unrelated to the cultivation were paid, but the insurer got off risk once the condition was discovered.

Stonehouse also believes that brokers should always ask clients whether they are authorized to grow. For clients who grow their own, the broker will have to source coverage through a specialty market, according to Stonehouse.

Given the government's commitment to strictly regulating and restricting access to marijuana even after recreational use is legalized, it seems unlikely that non-medicinal users will be allowed to grow their own. But, as legalization makes people more comfortable with the idea of having cannabis around, more people may start growing their own even if doing so is not legal. Brokers may want to consider reminding customers that most insurance policies include criminal activity exclusions and so if they grow marijuana, their insurer may exclude, fight, or void coverage on the basis of misrepresentation.

### **Conclusion**

It will be interesting to see the impact legalization will have in Canada. Will LPs become the sole supplier for all legal sales of cannabis and cannabis related products? Which sales channel will the government choose for the sale of recreational marijuana? Will legalization change the mainstream retail landscape, as we may happen with Shoppers Drug Mart's application to provide medical marijuana to their pharmacy customers? What cannabis related businesses might emerge – for example, food producers that incorporate cannabis in their products? How will individuals – and police – determine whether they are drug impaired? All these questions – and more – should be of interest to the public and to the insurance industry.