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Registration refused: How adjudication in Ontario's cannabis licencing regime is leaving store operator and manager hopefuls high and dry

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Introduction

The sale and use of cannabis in Ontario has been a hot topic in recent years, all the more so after the *Cannabis Act* legalized the recreational use of cannabis on October 27, 2018, and the *Cannabis Licence Act* correspondingly legalized the retail sale of cannabis. Cannabis use in Ontario is only increasing, especially during the pandemic. Applications for cannabis stores also show no sign of slowing down. As of February 2021, Ontario had 430 licensed cannabis stores open for business and more than 940 applications were still awaiting processing. The demand for retail stores has been so great since the inception of the licencing regime that Ontario has been operating on a lottery basis.

While most cannabis headlines relate to this increase of pot shops in Toronto or the market moves of cannabis giants, the Alcohol and Gaming Commission of Ontario (AGCO) quietly acts as a gatekeeper for managers and operators of retail cannabis shops. The Registrar of the AGCO is responsible for administering the *Cannabis Licence Act*, and reviews and approves or rejects applications for cannabis licences. This article discusses the licencing process for managers and operators and how the AGCO and the Licence Appeal Tribunal (the "Tribunal") has approached issues around individuals seeking a cannabis licence.

The cannabis licencing and hearing process

Cannabis may only be sold at an authorized retail store run by a licenced retail operator. There are three kinds of cannabis licences: Cannabis Retail Manager (CRM) licences, Cannabis Retail Operator (CRO), both of which are individual licences, and retail store authorization for the store a retail operator intends to open.

CRO and retail store authorizations are generally granted together, as a CRO can only operate in a store that it opens. The main difference between a CRO and a CRM is that a CRO opens and operates a retail store whereas a CRM only manages a retail store that has already been opened by a CRO. While a licence is not required to work at a cannabis retailer, only a CRM or CRO can supervise or manage employees of a cannabis retail store, oversee or coordinate the sale of cannabis, manage compliance issues in relation to the sale of cannabis, or have signing authority to purchase cannabis, enter into contracts, or make offers of employment.

There must be at least one CRM for each authorized store location unless a CRO is a sole proprietor or is in a partnership between two or more individuals and will be the licenced operator and performing the duties of a CRM for a particular store. None of the three kinds of licences are transferrable between licence holders, but recent amendments to the Registrar's

Standards for Cannabis Retail Stores now allow CRO's and CRM's to oversee up to five cannabis retail store locations.

The AGCO's work is important: it ensures that only qualified persons are permitted to manage cannabis retailers and sell cannabis to the public. The AGCO's mandate should, in theory, boost public confidence in the newly regulated retail cannabis market. As with other legislation for regulated industries, the primary goal of the AGCO in governing the retail cannabis regime is consumer protection.

If the AGCO decides to refuse an application, the Registrar issues a Notice of Proposal to Refuse. The applicant may then file an appeal with the Tribunal for a hearing on the merits of the Registrar's proposal.

Similarly, the Registrar may issue a Notice of Proposal to Revoke a licence if a person is already licenced under the cannabis licencing regime but the Registrar has concerns about the person's ability to carry on business within the law, or with integrity, honesty or in the public interest.

After holding a hearing, pursuant to section 15(2) of the *Cannabis Licence Act*, the Tribunal may confirm or set aside the proposal of the Registrar and direct the Registrar to take any action specified by the Tribunal that it considers appropriate to give effect to the purposes of the Act, including attaching conditions to the licence. The Tribunal may also substitute its opinion for that of the Registrar when deciding to set aside the Registrar's proposal or decision. This provision appears to give the Tribunal broad power and significant latitude in making a decision.

If the Tribunal affirms the Registrar's proposal to refuse an application, the applicant may reapply after two years have passed since the refusal, and will be eligible for a licence if the applicant can show a material change in circumstances along with being otherwise eligible. If the Tribunal decides that the applicant should be registered, the applicant shall receive their licence.

Both the AGCO and the applicant have a statutory right of appeal to the Divisional Court from an order of the Tribunal.

Registration Pre-Conditions

As with all licencing processes, there are prescribed requirements set out by the governing legislation that an applicant must meet in order to obtain a licence. Sections 3(4) and 5(4) of the *Cannabis Licence Act* pertain to eligibility for CRO and CRM licences, respectively. The language reads as follows:

> *An applicant is not eligible to be issued a cannabis retail manager licence in any of the following circumstances:*
>
> 1. *There are reasonable grounds to believe that the applicant will not, in acting as a cannabis retail manager, act in accordance with the law, or*

with integrity, honesty or in the public interest, having regard to the past or present conduct of the applicant.

2. *The applicant has been convicted of or charged with an offence under this Act, the Cannabis Control Act, 2017, the Cannabis Act (Canada) or the regulations made under any of them that is prescribed for the purposes of this paragraph.*

3. *There are reasonable grounds to believe that the applicant is carrying on activities that are, or would be if the applicant were the holder of a cannabis retail manager licence, in contravention of or not in compliance with a provision of this Act, the Cannabis Control Act, 2017, the Cannabis Act (Canada) or the regulations made under any of them that is prescribed for the purposes of this paragraph.*

4. *The applicant makes a false statement or provides false information in the application.*

5. *Any other circumstance that may be prescribed.*

The *Cannabis Licence Act*'s eligibility provisions are stricter than other statutes considered by the Licence Appeal Tribunal, making it unique in this respect. For instance, the *Motor Vehicle Dealers Act* at paragraph 6(1) and the *Real Estate and Business Brokers Act* at paragraph 10(1) state that "an applicant that meets the prescribed requirements is entitled to registration or renewal of registration by the registrar unless […]". Similarly, the *Liquor Licence Act* at paragraph 6(1) states that "an applicant is entitled to be issued a licence to sell liquor except if […]".

The *Cannabis Licence Act* does not use the language of entitlement *except* in certain circumstances; it uses the language of eligibility, stating that a person is *not eligible* in certain circumstances. This distinction affords the Tribunal significantly less discretion in making an order. According to the *Goldlist* decision, discussed below, the exercise is over when an applicant is found to be ineligible.

As with other hearings in regulated industries, the onus is on the Registrar to prove that the applicant does not meet the requirements of the *Cannabis Licence Act*. The standard of proof is "reasonable grounds for belief", which is less than "a balance of probabilities" but more than "mere suspicion". In other words, this is not a high bar for the Registrar to meet, and is lower than both the criminal and civil burden of proof.

Licence Appeal Tribunal decisions

There is not yet a reported case involving a Notice of Proposal to Revoke a cannabis licence, and there are only two reported decisions in which a Licence Appeal Tribunal Hearing proceeded on the basis of a Notice of Proposal to Refuse a CRM or CRO. These decisions, discussed below, highlight the AGCO's strict scrutiny of applicants applying for CRM and CRO

licences and demonstrate how the Licence Appeal Tribunal interprets the *Cannabis Licence Act* when an applicant requests a hearing of the Registrar's proposal.

***Kyle Drake Hildebrand v. Registrar, Alcohol, Cannabis and Gaming Regulation and Public Protection Act, 1996*, 2020 CanLII 27346 (ON LAT)**

(i) Overview

Mr. Hildebrand applied for a cannabis retail operator licence in February 2019. The Registrar issued a Notice of Proposal to Refuse the application pursuant to section 3(4)1 and 3(4)4 on the basis that there were reasonable grounds to believe that Mr. Hildebrand would not carry on business in accordance with the law, or with integrity, honesty or in the public interest, having regard to his past or present conduct; and on the basis that Mr. Hildebrand made a false statement or provided false information in his application.

(ii) Decision

After a hearing on the issues, the Tribunal confirmed the Proposal to refuse Mr. Hildebrand's licence and directed the Registrar to carry out the Proposal on January 21, 2020. The Tribunal relied on both grounds listed above, noting that each ground was independent of the other and that failure to satisfy either ground is enough to refuse licensure. Chief among the Tribunal's findings were the following:

- Mr. Hildebrand continued to drink and drive after multiple DUI convictions and violated his probation;
- Mr. Hildebrand was vague in his answers [about his prior offences] in interviews with investigators and minimized the seriousness of his prior offences, indicating an unwillingness or inability to comply with the law; and
- Mr. Hildebrand was not at the stage of his life where he had accepted his past and was able to self-regulate his actions in a way that ensured compliance with rules and regulations.

The Tribunal found that conditions would not be appropriate in this case. Mr. Hildebrand had made strides toward sobriety and had not committed an offence in over 2.5 years from the hearing, but he had failed in being candid, open and honest with the AGCO about his past in the application process. This insufficient disclosure, in addition to the conduct itself, was fatal to his application.

***Goldlist v. Registrar, Alcohol, Cannabis and Gaming Regulation and Public Protection Act, 1996*, 2021 CanLII 30519 (ON LAT)**

(i) Background

Mr. Goldlist applied for a cannabis retail manager licence in January 2020. The Registrar issued a Notice of Proposal to Refuse his application pursuant to section 5(4)1 only: that there were reasonable grounds to believe that Mr. Goldlist would not carry on business in accordance with the law, or with integrity, honesty or in the public interest, having regard to his past or present conduct.

(ii) Decision

After a hearing on the issues, the Tribunal confirmed the Proposal to refuse Mr. Goldlist's licence and directed the Registrar to carry out the Proposal on April 7, 2021.

The Tribunal did not take issue with Mr. Goldlist's disclosure in his application, although this was a point of contention during the hearing. The Tribunal based its decision to refuse Mr. Goldlist's application on only two factors: (1) its concern with the fact that Mr. Goldlist "broke in" to the illegal dispensary above his headshop run by his former business partner to evict the dispensary, seize video recordings, and empty the dispensary of its illegal product; and (2) that Mr. Goldlist is involved in outstanding civil litigation that may include allegations based in whole or in part on "fraud, misrepresentation, deceit, or other similar conduct". The Tribunal concluded at paragraph 106:

> *When combined with the other factors that cause concern in this case … my view is that while the appellant's civil dispute against AG remains outstanding, and until such time as the matter either settles or a judge makes findings of fact one way or another, there are reasonable grounds to believe that the appellant will not, in acting as a CRM, act in accordance with the law or with integrity, honesty or in the public interest.*

(iii) Critique

There are two glaring problems with this decision. First, the Tribunal considered and speculated upon matters which were not raised by the Registrar in either its Notice of Proposal, Amended Notice of Proposal, or Notice of Further and Other Particulars. The issue around the eviction or "break in" on the illegal dispensary was not raised in the Registrar's proposal. This presented a procedural fairness issue for Mr. Goldlist, who could not have known that these were issues he would have had to address during the hearing. The Tribunal, in relying upon the "break in" to refuse the application, did not give Mr. Goldlist the opportunity to respond and address those concerns during the hearing.

Second, and as alluded to above, both of the Tribunal's conclusions were based on speculation, not supported by evidence, and were therefore not the proper basis to ground the decision to refuse.

The circumstances of the alleged "break in" were not borne out with sufficient certainty on the record. The AGCO attempted to establish that Mr. Goldlist took the video recordings from the illegal dispensary to cover up his alleged involvement in the dispensary but presented no evidence to prove this allegation. Furthermore, Mr. Goldlist owned the building with his business partner and had been trying for months to get the dispensary evicted from the premises. Finally, Mr. Goldlist provided illegal cannabis to the police that evening and was successful in shutting down the operations of the illegal dispensary for a time. This incident was less a "break in" and more an eviction.

Regarding the civil dispute, it was clear on the record at the hearing that the Registrar did not properly admit evidence of these allegations, and as much was acknowledged by the Tribunal. While the Tribunal is permitted to admit hearsay evidence, a decision should not turn on the existence of allegations of "fraud, misrepresentation, deceit or other conduct" where these allegations have not been borne out in court in the ongoing civil litigation, and where their existence is not a *prima facie* bar to registration under the *Cannabis Licence Act*. The Tribunal stated at paragraph 106 that "presumably the question about outstanding litigation is asked for a reason; that reason being that outstanding litigation involving fraud, deceit, misrepresentation or similar conduct may be relevant to whether a person qualifies for a licence". The Tribunal misunderstood the question on the application about allegations of "fraud, misrepresentation, deceit or other similar conduct" as being a bar to registration, when it is merely relevant.

At the very least, the *Goldlist* decision is perplexing. There was no nexus between the impugned past or present conduct and the ability of Mr. Goldlist to carry out his duties under the *Cannabis Licence Act* because the evidence was simply too speculative to be able to draw a nexus. The Tribunal went beyond the Proposal and the evidence to refuse Mr. Goldlist's licence.

The *Goldlist* decision is currently being appealed to the Divisional Court.

Comparing *Hildebrand* and *Goldlist*

(i) Scrutinizing past conduct

In both *Hildebrand* and *Goldlist*, the past and present conduct of the appellant informed the Tribunal's decision to refuse the licence. In the *Hildebrand* case, the Tribunal's main concern lay with Mr. Hildebrand's active avoidance of disclosing of his previous convictions. The great strides he had made in the couple years leading up to the hearing did not overcome the concerns about disclosure and integrity.

The ACGO brought more of Mr. Goldlist's past conduct into issue than Mr. Hildebrand's, but the Tribunal ultimately based its decision on the two discrete grounds of the dispensary eviction

and the ongoing civil litigation. Both of these decisions demonstrate that an applicant's total history comes under scrutiny during the application process, not just industry-related conduct. Any past offences, litigation, and failures to conduct oneself with integrity generally could be grounds to refuse an application.

Not all past conduct will be subject to such scrutiny. The *Cannabis Licence Act* at section 5(5) specifically states that a cannabis-related drug conviction prior to October 27, 2018 — the date the *Cannabis Act* legalized the recreational sale and use of cannabis — does not disqualify a person from being licenced under the *Cannabis Licence Act*. This provision affords persons who were formerly distributing cannabis in the illegal market to enter the legal market without a stigma attached to their prior conduct.

There is a disconnect between the Tribunal's basis to refuse Mr. Goldlist's and Mr. Hildebrand's applications and the fact that other persons with arguably more concerning past conduct have been granted CRM and CRO licences. Consider the application of Chris Goodwin, who was arrested 14 times and convicted 4 times for cannabis-related offences. Chris and his wife Erin were also the subject of high-profile dispensary raids in 2016. Mr. Goodwin got his retail manager licence in May 2020, and Ms. Goodwin got hers November 2020.

While it is encouraging that the *Cannabis Licence Act* does not bar the registration of persons with cannabis-related convictions pre-October 27, 2018, it is concerning that speculative conduct of an applicant without any recent convictions is not eligible for registration while a publicly defiant illegal dispensary owner is eligible for registration. Which applicant inspires more confidence in the public's eyes?

(ii) The importance of disclosure

Both the *Hildebrand* and *Goldlist* decisions affirm the importance of disclosure in an application for a CRM or CRO licence. The application is the first test of honesty and integrity for applicants seeking registration in regulated industries generally. A false statement on an application is a nonstarter for eligibility. Even if an applicant's history involves some concerning conduct, it is better to disclose this information and explain it than shelter it and hope it goes unnoticed. Mr. Hildebrand was less than forthright in his application and paid the price. Mr. Goldlist was as forthright as possible, and it helped his case in that the Tribunal took no issue with his disclosure.

(iii) Tribunal's discretion to grant a licence

There remains a lack of clarity on the extent of the Tribunal's discretion in considering whether to grant registration when the Tribunal finds that there are reasonable grounds for belief that the applicant will not act in accordance with the law, or with integrity, honesty or in the public interest.

In *Hildebrand*, the Tribunal considered whether granting registrations with terms and conditions was appropriate but found that it was "not confident that the appellant can be monitored

closely enough to ensure he is being truthful, nor do I have the confidence that he will take these [the proposed] requirements seriously. I find that conditions are not appropriate in the circumstances." This analysis suggests that the Tribunal had the ability to grant registration despite finding the applicant ineligible for registration if it had found that conditions existed to allay the concerns of the Registrar.

In *Goldlist*, the Tribunal found that the wording of the eligibility requirements of the *Cannabis Licence Act* means that the Tribunal has "no discretion to still grant a licence with conditions" if it found that there were reasonable grounds to believe that the appellant will not act in accordance with the law, or with integrity, honesty or in the public interest. This raises the question as to why the Tribunals powers are set out in section 15(2) if they are inapplicable once the Registrar has met its onus. The Tribunal's interpretation of its powers in *Goldlist* may be unduly narrow in light of its section 15(2) powers.

One must wonder if the *Goldlist* decision would have been different if the Tribunal had viewed its discretion more like the Tribunal did in *Hildebrand*. This may not have impacted the Tribunal's findings on whether reasonable grounds to refuse registration existed, but it may have allowed the Tribunal to grant the licence with conditions where it otherwise did not believe it could do so.

A lingering stigma

The stigma of cannabis use has substantially abated in recent years, but it has not been eradicated. Some Ontarians still associate the use of cannabis with criminality and do not wish cannabis retailers to set up shop in their neighbourhoods, citing "safety concerns" for local residents. These views are misguided. The cannabis licence regime is highly regulated and is just as safe an industry as the alcohol sales industry, for instance. While the black market remains strong in Ontario, much of this persistence can be attributed to the fact that consumers can purchase a more potent, less expensive product on the black market and that legal cannabis companies have marketing restrictions. Legal cannabis retailers should not be punished for the provincial government's failure to manage the black market or deliver a better product. In any event, illegal cannabis sale in a neighbourhood does not necessarily make that neighbourhood less safe.

When viewed on a statistical basis, alcohol is used far more heavily than cannabis, when used alone alcohol is more likely to hospitalize or kill a person than cannabis use on its own, and the risk of alcohol addiction is higher than that of cannabis. Yet the liquor licencing regime does not have such strict eligibility requirements. Are the current eligibility requirements too strict in light of the actual dangers of cannabis use?

It is possible that this lingering stigma plays into the AGCO's consideration of applications for retail licences. A flourishing legal cannabis market in Ontario is less likely when the AGCO needlessly proposes to refuse applications licences based on speculation about an applicant's past and current conduct.

While appropriate safeguards must be in place to protect the cannabis-consuming public, the standard that an applicant must meet to be licenced should not be substantially higher than that of liquor licencing or used car sales, for example. The *Cannabis Licence Act*'s eligibility requirements should be reconsidered to put cannabis licence applications on the same footing as other regulated industries.

Conclusion

Chris Goodwin, after his application was approved, said in a Facebook comment that "I hope me getting approved gives other people confidence to apply. A lot of people are… saying they didn't even bother cause [*sic*] they thought they'd get denied". The *Goldlist* decision does not give credence to Mr. Goodwin's comment; the past and present conduct of Mr. Goldlist did not rise to the level of ineligibility and he was denied.

As the retail cannabis regime ages and scores of new applications for CRM and CRO licences are submitted, the Registrar will continue to issue proposals to refuse registration. Legal representatives must be ready to assist the Tribunal in navigating the *Cannabis Licence Act* to give their clients a chance to pursue their passion. It is no surprise that the Licence Appeal Tribunal is grappling with this new legislative framework, but the Tribunal's strict application of the legislation to applications must be commensurate with the actual risks of cannabis sale. Most importantly, a clarified interpretation of the eligibility requirements in light of the Tribunal's powers to grant registration in the event of ineligibility is needed.