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PUBLICATION

Indispensable Dispensaries: How Cannabis Became "Essential" in the COVID-19 Crisis

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Attitudes surrounding the cannabis industry have undoubtedly evolved in Canada. After decades of prohibition, this often stigmatized plant has arguably become normalized and integral to our modern-day society. This has been made even more apparent by various federal and provincial responses towards cannabis businesses in the current global pandemic.

On March 23, 2020, the Ontario government announced the first round of mandatory closure of all non-essential workplaces for an initial 14-day period, effective March 24, 2020 at 11:59 p.m. The order was made pursuant to s. 7.02(4) of the *Emergency Management and Civil Protection Act*, under Regulation 82/20 (the "**Order**"). The Order outlined 74 categories of "essential" businesses, which included "cannabis stores and cannabis producers", that were permitted to remain open. However, private sector cannabis stores were removed from an updated list of essential workplaces, effective April 4, 2020 at 11:59 p.m. This updated Order will last at least 14 days, with the possibility of extension. Initially, upon this update to the Order, only the government-owned Ontario Cannabis Store was permitted to sell adult-use cannabis in the province. Cannabis producers in the province – which can be captured under "agriculture and food production" of Ontario's essential workplace list – may also remain open.

While private sector cannabis stores have recently been physically closed to help reduce the risk of workers and customers spreading the Coronavirus it should be noted that they have not necessarily been forced out of business. On April 7, 2020 the Alcohol and Gaming Commission of Ontario (AGCO) announced a temporary measure introduced by the Government of Ontario https://www.ontario.ca/laws/regulation/200128 that allows AGCO-authorized cannabis retail stores to stay in business by offering delivery and curbside pick-up services. These new measures are made possible pursuant to a further update to the Order introduced by the Government of Ontario and will last for 14 days, with the possibility of an extension if the Order is extended. This temporary measure was arguably in response to mental health and addiction experts voicing that it is "absolutely critical" to keep legalized cannabis product available.

Despite initially being deemed “essential”, some cannabis firms have insinuated that traces of stigma towards the industry linger, as cannabis companies facing the dire economic effects of the COVID-19 pandemic have been excluded from various governmental assistance measures.

For instance, Export Development Canada (“**EDC**”) and the Business Development Bank of Canada (“**BDC**”) have announced various initiatives to support small and medium-sized businesses dealing with the economic impacts of COVID-19, including the Small and Medium-Sized Enterprise Loan and Guarantee Program and the Business Credit Availability Program (“**BCAP**”). These programs provide billions of dollars in direct lending and other types of financial support at market rates. However, despite the Department of Finance website claiming that “BCAP will support access to financing for Canadian businesses in *all sectors*,” it appears this assistance does not extend to struggling businesses in Canada’s cannabis industry.

In response, a conglomerate of over 70 Canadian cannabis firms have expressed their concerns in a letter to Finance Minister Bill Morneau and Industry Minister Navdeep Bains on March 19 requesting the Government of Canada implement immediate measures to provide economic stimulus to the cannabis industry. The companies identified two ways the federal government can support the industry:

- “Equal and fair access”, including access to the wage subsidies announced by the federal government on March 18. The announcement was initially applicable only to small businesses, however, it was pointed out that some firms employ a greater number than would qualify under the definition of a small business;[1] and
- “Equal and fair access” to funding through federal agencies, including those offered by the BDC and EDC.

While cannabis businesses continue to fight for equal and fair access to BDC funding, another governmental initiative may provide much needed relief to struggling cannabis producers. Canada’s leading agriculture and food lender, Farm Credit Canada (“**FCC**”), has announced that licensed cannabis producers facing economic challenges from the COVID-19 pandemic are eligible to apply for short-term, government-backed credit and loan payment deferrals to a maximum of $500,000 to assist with cash flow needs. FCC has received an enhancement to its capital base that will allow for an additional $5 billion in lending capacity to producers, agribusinesses and food processors. The new lending is in addition to the agency’s current $38 billion portfolio.

According to the FCC’s COVID-19 Support Program details, businesses applying for FCC lending products are subject to normal lending due diligence, which considers business viability, credit history, and management integrity and experience. However, those businesses must also be financially viable entities prior to the impact of COVID-19 to be eligible. While the office of FCC chief communicator Trevor Sutter has confirmed that licensed cannabis producers will qualify as farmers under the stimulus, producers should be cognizant that the financial viability requirement raises questions about whether many Canadian cannabis producers will qualify for the program.

While the current Canadian initiatives to assist the cannabis industry could arguably be improved, our American counterparts have rendered cannabis companies entirely ineligible for federal COVID-19 disaster relief. Because cannabis remains illegal at the federal level, the cannabis industry is being denied access to aid opportunities, including programs administered by the federal Small Business Administration (the "**SBA**"). The SBA recently confirmed "With the exception of businesses that produce or sell hemp and hemp-derived products (Agriculture Improvement Act of 2018, Public Law 115-334), marijuana-related businesses are not eligible for SBA-funded services (OMB, 2 C.F.R. § 200.300)."

As the first G7 country to fully legalize cannabis nationwide, Canada may be viewed by some as a maverick that has embraced the many benefits the cannabis industry has to offer. However, many industry players are lobbying the federal and provincial governments to show cannabis companies the same support offered to small and medium-sized businesses. These companies point out that most Canadian cannabis firms are new businesses in a "fledgling, complicated sector," and are in need of government support to weather the economic impacts of COVID-19. After being deemed as "essential" businesses in various provinces and contributing over $8 billion to the Canadian GDP last year, some are questioning why the cannabis sector is not included in all economic stimulus measures that are being offered to other Canadian businesses.

Furthermore, the cannabis industry has made efforts to support our country in this trying time. Alberta Health Services has received hundreds of N95 respirators from Aurora Cannabis to support frontline health-care workers. Canopy Growth and HEXO have donated personal protective equipment and safety masks to hospitals. In New Brunswick, Organigram has donated 500 litres of ethanol to be used in the production of hand sanitizer. In addition, in an effort to meet the ever-increasing need for testing, Health Canada has also turned to the cannabis industry to see if cannabis laboratories have capacity to test for COVID-19.

Canadian cannabis companies believe they have a lot to offer our country in this unprecedented time. For instance, there are resources in the cannabis sector that are likely being underutilized, such as recently built, large-scale facilities with pharma-grade standards that may not currently be operational. In addition to laboratories being used for testing, such facilities could potentially be used as makeshift hospitals to accommodate the exponentially increasing number of COVID-19 patients.

The cannabis industry has come a long way in a short period of time and Canada continues to lead the way. The significance of being put on the initial "essential" businesses list, AGCO-authorized cannabis retail stores being allowed to offer delivery and curbside pick-up services, and the fact that some Cannabis producers in the province captured under "agriculture and food production" of Ontario's essential workplace list may continue to remain open should not be understated. The challenges ignited by COVID-19 may be viewed as an opportunity to adequately support and sustain this new sector in our country.

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[1] The federal government has now announced that companies with any number of employees that have experienced a decrease in revenue of at least 30 per cent are eligible for the Temporary Wage Subsidy for Employers program.

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