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ZTGH CANNABIS CHEAT SHEET

CANNABIS COVERAGE ISSUES

ZAREK TAYLOR GROSSMAN HANRAHAN LLP

What is Legal Pursuant to the *Cannabis Act*, SC 2018

c. 16?

Legal



- Recreational use for adults 18+ (some provinces are 19+)
- Possession of up to 30 grams of dried cannabis
- 4 plants/household (not per person!)
- To possess cannabis other than illicit cannabis (ie that was which was sold, produced, distributed, or imported by a person prohibited from doing so under the *Cannabis Act*)
- Share up to 30 grams of cannabis with adults
- Make cannabis products at home – as long as organic solvents are not used
- Medical marijuana as authorized

Illegal



- Selling cannabis unless authorized pursuant to the *Act*
- Giving cannabis to minors (under 18)
- For a young person to possess more than 5g of dried cannabis (ie child age 12-18)
- To have more than 1 cannabis plants that are budding/flowering in a public place (including a motor vehicle located in a public place)
- To have a cannabis plant that is from a seed or plant material that they know is illicit cannabis
- Driving with THC levels between 2-5 nanograms/mL
- Having blood alcohol level of 50 milligrams/100 mL of blood in addition to THC levels above 2.5 nanograms
- Import/export cannabis without specific legal authorization
- Growing cannabis at a place that is not your home (unless authorized producer with legal license OR medical marijuana user)
- For an organization to possess any cannabis

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Automobile Coverage

s. 7.2.2. of OAP 1 states no payment for loss or damage caused in an incident:

- if you are unable to maintain proper control of the automobile because you are driving or operating the automobile while under the influence of intoxicating substances;
- if you are convicted of an offense under the *Criminal Code of Canada* relating to the operation, care or control of the automobile, or committed by means of an automobile, or any similar offence under any law in Canada or the United States
- if you use or permit the automobile to be used in a race or speed test, or for illegal activity;
- if you drive the automobile while not authorized by law; and
- if another person, with your permission, drives or operates the automobile under any of these conditions.
- The insured only has to provide their permission to drive the automobile to be captured by s. 7.2.2 of the OAP 1. There is no requirement that the insured person permit or have knowledge of the illegal use alleged under s. 7.2.2 (see *Kowaluk v Western Assurance Company*, 2017 ONSC 6077).

Tort Liability

- A prior criminal conviction is admissible as *prima facie* evidence of the wrongdoing at issue (see *RE Del Core and Ontario College of Pharmacists*, (1985) 51 OR (2d) (CA)).
- Where there is no conviction, regular rules of negligence will apply to liability debate.
- Potential future challenges where there is no conviction:
 - THC blood content is not necessarily indicative of an impairment in someone's brain. THC is absorbed into the body slower so it can linger in the body longer than other substances.
 - Potential issues with heavy marijuana users. There are tests that have shown detectable levels of THC in heavy users 30 days after marijuana use.

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SABS Entitlement - Two Sources:

Section 4.4 of the OAP 1

- 4.4 Limitations on Your Coverage: you or other insured persons are not entitled to the Income Replacement Benefit, Non-Earner Benefit or Compensation for Other Expenses if you or they:
- Were driving an automobile while not authorized by law to drive; or
- Were convicted of a criminal offence involving the operation of an automobile.

S.31 of the *Statutory Accident Benefits Schedule*

- S. 31(1) The insurer is not required to pay an income replacement benefit, a non-earner benefit or a benefit under section 21, 22 or 23 of the *SABS*,
 - (d) in respect of a person who, at the time of the accident,
 - (i) was engaged in an act for which the person is convicted of a criminal offence, or
 - (ii) was an occupant of an automobile that was being used in connection with an act for which the person is convicted of a criminal offence;
- The focus under the *SABS* regime is whether the claimant was engaged in an act or connected to an act for which they were convicted of a criminal offence (such as driving while impaired or transporting more than one flowering/budding cannabis plant).
- It is important to note that this section only applies to IRB's, NEB's and "other expenses" under s. 21 to 23 of the *SABS* (i.e. doesn't apply to med/rehab, or attendant care benefits).

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Property Coverage

- Coverage for theft and property damage related to cannabis use, both recreational and commercial, will rely heavily on the wording of the policy.
- Ontario courts are likely to treat legal cannabis in the same manner as prior cases dealing with legal medicinal cannabis:
- Grow-op or cannabis exclusion clauses that are dependent upon the substance being regulated under the *Controlled Drugs and Substances Act* or the *Criminal Code of Canada* will likely not apply anymore in the context of legal cannabis use (see *Stewart v TD General Insurance*, 2013 ONSC 1412).
- Courts have also found that cannabis plants may be covered under the theft of personal property provisions of an insurance policy where the subject cannabis is legal although it depends on the endorsements in the policy (see *Stewart v TD General Insurance*, 2013 ONSC 1412).
- **Other jurisdictions (United States):**
- Courts will also likely look to the knowledge, intention, and expectations of the parties.
- Insurers with knowledge of the nature of their insured's cannabis use a key factor in determining coverage (see *Green Earth Wellness Centre LLC v Attain Specialty Insurance Company*, 2013 Colorado District Court).
- Where cannabis operation not likely contemplated by the insurer and not the type of activity that the insurer would reasonably expect a homeowner to engage in, there will be no coverage (see *Nationwide Mutual Fire Insurance Company v McDermott*, 2015 Michigan Court of Appeals).
- Many American cases should be used carefully given the conflict on legalization between federal and state law.
- Property coverage claims for cannabis plants and related property depend on a case by case, fact specific analysis with emphasis on the wording of the insurance policy and the parties expectations when entering into the insurance contract.
- Doctrines of misrepresentation and material change of fact may also be relied on to deny coverage.

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Social/Commercial Host Liability

- *Childs v Desormeaux*, 2006 SCC 18 is still the leading case on social host liability:
- As a general rule, a social host does not owe a duty of care to members of the public who may be injured by a guests actions, UNLESS the host's conduct implicates them in the creation or exacerbation of the risk.
- *Childs* does not preclude the finding of a duty of care on a social host in the right circumstances such as where the injured party is a guest rather than a third party or where there is one of the enumerated situations below (see *Wardak v Froom*, 2017 ONSC.1166).
- It is only where third parties have a special relationship with the party in danger or have a material role in managing the risk that the law may demand a positive duty of care to act.
- The court enumerated situations which may warrant liability against a social host including:
- Where the defendant intentionally attracts and invites third parties into an inherent and obvious risk that they have created or controlled;
 - Paternalistic relationships of supervision and control; and
 - Where the defendant exercises a public function or engages in a commercial enterprise that includes implied responsibilities to the public at large.
- Additional risks that may be considered by the courts:
 - Alcohol is served by the host rather than BYOB;
 - Size/type of party; and
 - Whether other risky behavior is occurring such as drug use or underage drinking (a mixture of alcohol and cannabis at a social event might attract liability)

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Product Liability

- The courts have long recognized that manufacturers of products that are ingested, consumed or otherwise placed in the body, and therefore have a great capacity to cause injury to consumers, are subject to a correspondingly high standard of care under the law of negligence (see *Hollis v Dow Corning Corp.*, [1995] 4 SCR 634)
- Canadian courts do not impose strict liability for product liability cases, as is done in some US states, but rather impose a standard of reasonable care consistent with the common law of negligence (see *Phillips et al. v Ford Motor Co. of Canada Ltd. et al.*, [1971] 2 OR 637).
- There is a general four step approach taken by the courts when assessing a product liability case (see *Harrington v Dow Corning Corp.*, 2000 BCCA 605 cited with approval in *Batten v Boehringer Ingelheim (Canada Ltd.)*, 2017 ONSC 53):
 - Determining whether the product is defective or whether, although non-defective, the product has a propensity to injure
 - Determining what the manufacturer knew about the dangerousness of its product;
 - Given the state of the art and the extent of the risks inherent in the product's use, determining the reasonableness of the warning whether made directly to the consumer or to a learned intermediary; and
 - This step seeks to determine the adequacy of the of the warning;
- Determining individual causation and damages
- Manufacturers have a common law duty to warn consumers of the dangers of using their product that the manufacturer is aware of or ought to have been aware of to allow a consumer to make an informed decision concerning safe use of the product. The labeling and packaging requirements for cannabis use are highly regulated by the government.
- Complying with mandatory warning labels required by the statutory framework will not absolve a insured from liability where the warnings/labels are insufficient to disclose the risk (see *Buchan v Ortho Pharmaceutical (Canada) Ltd.*, [1986] OJ No. 2331)



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