

# Liability risk for private pot retailers

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Your retail client could be at risk of a lawsuit if it starts selling cannabis, but the exposure may not be the same as the liability risk of a bar serving alcohol, an insurance defence lawyer suggests.

Whether a retailer selling cannabis or alcohol could be sued is “a question of foreseeability,” Ari Krajden, a partner with law firm Zarek Taylor Grossman Hanrahan LLP, told *Canadian Underwriter* recently. Krajden co-chairs ZTGH’s coverage practice group.

Based on the foreseeability principle, the liability risk of a retailer selling product for customers to take home and consume may not be the same as it is for bars and restaurants that serve alcohol for customers to drink on the premises.



“If you buy alcohol at a bar, you are consuming alcohol at the bar, and therefore there is an opportunity for the employees at the bar to observe whether you are intoxicated or not, and they have an obligation to ensure that you get home safely; that you are not driving home; that you are not posing a danger to yourself or other users of the roadway,” Krajden noted.

On the other hand, “if you are a perfectly sober person walking into either a cannabis or an alcohol retail store, and you are not known to them, and they have no reason to believe that you are going to abuse the drug or operate a motor vehicle or heavy machinery on it, then there is really no foreseeability. For that reason, any lawsuit against them would probably not be successful.”

Effective October 17, a recent change to federal law will make it legal for Canadians to possess and share up to 30 grams of dried cannabis for recreational use.

The Ontario government announced Aug. 13 it is aiming to have a “private retail model” by next April for the sale and distribution of recreational cannabis. As a result of the Ontario election this past June, the Progressive Conservatives replaced the Liberals, who earlier decided that only the province-owned Liquor Control Board of Ontario (LCBO) would be allowed to sell cannabis in stores.

It’s still too early to tell what kind of liability risk a private cannabis retailer may face in Ontario, Krajden said. The Ontario government has released few details on how the private retail model would work.

Attorney General Caroline Mulroney and Finance Minister Vic Fedeli said Aug. 13 they will consult with police, municipalities and indigenous communities, among others, on how the private retail model would work. “No one knows what [Ontario Premier] Doug Ford’s private retail model is going to look like,” Krajden said. “No one has seen the legislation. No one knows what policies and procedures he is going to put in place.”

So it is difficult to compare the liability risk of this private retail model with the liability risk faced by a government-run retail store like the LCBO because the Liberals never released their plan before being ousted from office. But for a government-run retailer, lawmakers can “write certain protections” from lawsuits into the statute, Krajden noted.

“No matter which model you look at, whether it’s a private retailer or a government model, all of the employees are going to have to complete training, and it is probably going to look something like the Smart Serve training course that anyone who sells alcohol is required to take,” said Krajden.