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CLEARING THE SMOKE AROUND CANNABIS DISPENSARIES

With hundreds of cannabis (marijuana) retailers already operating across the country and Canada's legal pot industry valued in the billions, a growing number of landlords and tenants want to get in on the action. However, the relatively recent introduction of (and changes to) laws regulating medical production and sale of cannabis, coupled with the federal government's commitment to legalize non-medical cannabis, has created some uncertainty among the public regarding the legality of these so-called "dispensaries." Allow us to clear the smoke.

THE LAW

Possession of cannabis, including its preparations and derivatives, is a criminal offence under Canada's *Controlled Drugs and Substances Act*. The prohibition has been in place for almost 100 years. Anyone engaging in a cannabis trade remains exposed to criminal sanction, unless expressly excepted under the legislation. The *Access to Cannabis for Medical Purposes Regulations* exempt two categories of persons: (1) producers licensed to grow cannabis by Health Canada, and (2) individuals authorized by their health care professional to use cannabis for medical purposes (and such individual's designated grower, if any).

At this time, there are 40 licensed producers operating cannabis grow ops from industrial locations and selling their product exclusively via mail/delivery to Canada's approximately 100,000 prescription-carrying individuals. Currently, this is the only legal way to buy or sell cannabis in Canada.

The "dispensaries" offering cannabis for sale at retail are not licensed producers. These businesses are criminal. Interestingly, many dispensaries have branded themselves with a medicinal-like image, in some cases requiring that the customer have a consultation on-site to verify their medicinal need for cannabis. These features do not change the illegal nature of the trade. As the law stands now, these dispensaries are no more legal than meeting a drug dealer in an alley.

ENFORCEMENT

The current legislative climate has put local law enforcement in a difficult position. Legalized sale of cannabis has been promised by our Prime Minister. It may therefore seem to be a complete waste of public resources to criminally charge and try dispensary operators, if imminent legalization means the charges may never lead to a conviction. On the other hand, police and municipalities can't stand idly by while communities complain about retail "pot shops" selling an array of unregulated cannabis products in a legal vacuum. To date, police have raided dozens of dispensaries across Canada. But many operators seem undeterred, in some cases re-opening the very next day.

In an effort to regulate these budding businesses pending legalization, municipalities have utilized their bylaw powers. Toronto, for example, has laid charges for failure to comply with zoning and business licensing bylaws, threatening fines and closures. Vancouver and Victoria have taken a different approach, introducing bylaws that regulate the location and operation of these illegal businesses.

LANDLORD AND TENANT

So what does this mean for a landlord approached by a tenant intending to operate a cannabis business? The landlord should first determine whether the tenant is a licensed producer. A complete list of licensed producers is available on Health Canada's website. If the tenant is a licensed producer, then provided the producer complies with its license, there is no issue with the legality of the tenant's grow op. The landlord will then want to address several factors typically considered when leasing premises for industrial use, including: insurance, utilities, restoration, etc. When leasing to a licensed producer, a landlord should also consider security, given the particular risk of robbery that grow operators face.

If the tenant is not a licensed producer, then its proposal is to use the premises for criminal activity. The proliferation of dispensaries indicates that some landlords have nevertheless been willing to lease premises for this purpose. They are gambling that local authorities will not strictly enforce cannabis prohibition laws while the federal government is actively pursuing legalization.

There is no guarantee that current laws will not be enforced pending legalization. There has been no indication that dispensaries now operating will be allowed to continue when legalization takes effect. To the contrary, one of the federal government's principal expressed objectives of legalization is to "establish and enforce a strict system of production, distribution, and sales". The dispensaries are illegal today, and may remain illegal after the legalizing legislation comes into force.

If a landlord is prepared to roll the dice, it should consider the following: (1) municipalities may issue zoning and/or licensing infractions, which may result in charges being laid against the landlord, (2) dispensaries have been the victims of robberies, in some instances at gun point, but operators typically don't call the police out of fear that they will attract criminal charges, (3) insurance may be jeopardized as a result of criminal activity being conducted in the premises, and (4) in extreme cases, the provincial government may, pursuant to the *Civil Remedies Act*, seize the building being used for unlawful activity.

Some landlords may be receptive to a tenant intending to use the premises for an "alternative medicine shop" or "compassion pharmacy." Describing the use clause innocently will not change the effect of an actual illegal use. Most commercial leases require that the tenant comply with all laws and bylaws. On the basis of such a provision, a landlord should be entitled to

terminate a tenancy if the tenant is illegally trading in cannabis. Even after legislation, a "compliance-with-laws" provision will prohibit the tenant's sale or distribution of cannabis if it is not in accordance with whatever regulations are enacted. To prohibit cannabis sales altogether, however, may ultimately require an express prohibition in the lease.

RESIDENTIAL TENANCIES

With the passage of the *Access to Cannabis for Medical Purposes Regulations*, prescription-holding individuals are once again permitted to grow cannabis for personal consumption. Before planting the seeds, an individual has to register with Health Canada. Notably, registration does not require the landlord's consent. This makes many residential landlords uncomfortable, as growing cannabis, albeit legally, may lead to several problems for the landlord, including: odours wafting to adjacent units, increased electricity consumption and fire hazards from grow lights, mould issues from warm temperatures and humidity, security concerns, and more.

Some have argued that residential landlords' concerns are overblown, since a typical medicinal user is only permitted to grow a handful of plants indoors at any given time. (Tell that to the Coquitlam, BC landlord who spent \$135,000 remediating mould and repairing damage to the building's electrical system caused by her prescription-holding tenant's grow op.) In Ontario, a landlord cannot terminate a residential lease solely because the tenant is legally growing medicinal cannabis. Refusal to enter into a lease with someone because of their "dependency on a drug" is a prohibited form of discrimination under the *Canadian Human Rights Act*.

The Liberal government is expected to release proposed legislation imminently, providing for cannabis to be legalized by Canada Day 2018 ... stay tuned!



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