

**CANNABIS: THE WHOLE PICTURE**

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### I. INTRODUCTION

Cannabis regulation is a big topic and hot topic for local governments. October 17, 2018 saw Canada's Parliament legalize possession of recreational cannabis, moving the country even further away from cannabis prohibition that lasted from criminalization in 1923 to the Ontario Court of Appeal decision of *R. v. Parker* in 2000, if not later. Legalization of recreational cannabis is likely the biggest change to cannabis law in the past tumultuous two decades and this paper seeks to provide a big picture overview of the new federal and provincial rules as they apply to production, possession and distribution and consumption of cannabis and the scope for local government regulation under this framework.

For brevity, this paper will only provide general descriptions of the new enactments, and readers should consult the acts, regulations and their legal advisers to determine their precise application.

### II. KEY LEGISLATION

#### A. Federal Legislation

Until very recently, the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19 was the principal statute applicable to cannabis. The Act defined cannabis as a prohibited substance under criminal law and imposed strict limits on production, possession and sale. Offenders faced significant criminal penalties. Following the *R. v. Parker* decision, a series of regulations – the Marihuana Medical Access Regulations SOR/2001-227, the Marihuana for Medical Purposes Regulations SOR/2013-119, and the Access to Cannabis for Medical Purposes Regulations SOR/2016-230 – provided exemptions for medical marihuana. These regulations sought at first to allow access to medical marihuana through 'growing at home' and later through licensed producers who were authorized to grow marihuana under strict conditions which included enclosed buildings and security measures such as concrete floors and fences.

With the advent of the *Cannabis Act*, S.C. 2018, c. 16, on October 17, 2018 and the accompanying Cannabis Regulations, SOR/2018-144, the federal government has significantly broadened the exemptions to allow for the possession, use, production and sale of non-medical cannabis. Only synthetic cannabis remains a Schedule II controlled substance under the *Controlled Drugs and Substances Act*. Possession of cannabis and unlawful possession is otherwise governed by the *Cannabis Act*.

Together, the *Cannabis Act* and the Cannabis Regulations:

- Define cannabis;
- Set prescribed amounts of cannabis (30g) that a person may possess and number of cannabis plants (4) may be kept in their household;
- Create a system of licence requirements for the cultivating, processing and sale of larger amounts cannabis;
- Enable a person to possess and sell larger amounts of cannabis if authorized by a provincial licence.
- Set packaging and labelling requirements for cannabis products;
- Regulate product standards, retail conditions and seed-to-sale tracking;
- Regulate the marketing and promotion of cannabis products;
- Set the impaired driving threshold and penalties;
- Create offences for breaches of the above conditions; and
- Provide for the eventual authorization of the sale and distribution of edible cannabis products.

Parliament has also amended the *Excise Act, 2001*, S.C. 2002, c. 22 to provide for the federal taxation of cannabis production.

## **B. Provincial Legislation**

The *Cannabis Act* enables the provinces to regulate a number of matters under the new legalized framework. In British Columbia, this legislation takes the form of a pair of statutes: the *Cannabis Control and Licensing Act*, S.B.C. 2018, c. 29, and the *Cannabis Distribution Act*, S.B.C. 2018, c. 28, as well as a series of regulations under these Acts, including the Cannabis Control Regulation 204/2018, the Cannabis Licensing Regulation 202/2018, the Cannabis Control and Licensing Transitional Regulation 541/2018, and the Cannabis Distribution Regulation 143/2018.

In short, the provincial acts and regulations:

- Regulate private cannabis retail stores;
- Authorize the creation and operation of a provincial government cannabis wholesaler and retailer;

- Regulate public consumption of cannabis;
- Set a minimum age of 19 for buying or receiving cannabis;
- Regulate how household plants may be kept; and
- Create offences for breaches of the above conditions.

The Province has also amended the Agricultural Land Reserve Use, Subdivision and Procedure Regulation, 171/2002 to clarify that outdoor cultivation and certain indoor cultivation is designated as a farm use for the purposes of the *Agricultural Land Commission Act*, S.B.C. 2002, c. 36.

### **C. Municipal Bylaws**

The legalization of non-medical cannabis production, sales and consumption has opened the door to newly lawful industries and activities that invite regulation by local governments in the normal course of exercising their powers. However, these new industries pose specific and significant impacts which require most local governments to turn their minds to express regulations in order to manage these impacts in a way which results in a net benefit for constituents. Regulatory matters which many local governments have specifically addressed in relation to the newly legalized cannabis activities include:

- Land Use Bylaws;
- Business Regulations Bylaws;
- Building Permit Bylaws;
- Nuisance Prevention Bylaws; and
- Highway and Public Spaces Bylaws.

As employers, local governments should also consider how cannabis use may impact the workplace.

## **III. REGULATION OF PRODUCTION**

Who may lawfully produce cannabis, and for what purpose, has changed significantly over the last two decades. Local governments should be mindful of the at-home personal production, the small-scale medical production and the larger scale farm production of cannabis that is presently permitted in Canada.

## A. Regulation of Personal Production at Home

The federal *Cannabis Act* permits up to 4 cannabis plants to be grown in a “dwelling-house” (s. 12(5)). The statutory definition of dwelling-house is broad and includes gardens and buildings in a yard adjacent to the dwelling (s. 12(8)). The 4-plant limit is per dwelling-house and not per resident, and only a resident of the dwelling house may cultivate the plants (s. 12(6)). A person may also produce edible and drinkable cannabis products at home for their own consumption (s. 12(2)).

The 4-plant rule is directed at recreational cannabis users. Individuals who were previously permitted to grow more cannabis plants at home under the Access to Cannabis for Medical Purposes Regulations may continue to do so as “registered persons” until their registration is cancelled or expires (s. 139(5)). Going forward, medical users can apply to be registered persons under the federal Cannabis Regulations and be allowed to grow as many cannabis plants as are allowed under their registration certificate. Such production may be either indoors or outdoors.

Sections 55 to 59 of the provincial *Cannabis Control and Licensing Act* further regulate household production, by requiring the plants to not be visible from public places or grown in residences used for childcare. Landlords and strata councils may also seek to further restrict home cultivation through tenancy agreements or strata bylaws.

Local governments may be interested in further regulating household production, but must do so for a municipal purpose. Unsafe household production indoors could be targeted by building regulations (dangerous wiring, uncontrolled mould) and nuisance control bylaws (odour). A local government may not, however, adopt a bylaw for the purpose of stiffening the criminal law by reducing or prohibiting the number of plants that may be grown within a dwelling.

## B. Regulation of Small-Scale Production for others

As is the case for personal production, the Cannabis Regulations continue permissions under the former Access to Cannabis for Medical Purposes Regulations that enabled medical cannabis users to register a “designated person” to undertake this small-scale production on their behalf. A designated person may grow for up to four authorized patients, in a place that is not necessarily in their residence.

The British Columbia *Cannabis Control and Licensing Act* applies the same rules to “designated persons” growing for other medical users as “registered persons” growing medical cannabis for themselves. Local governments may see the same opportunity to regulate matters related to safety and nuisance abatement. Untested legal questions as to whether and how land use bylaws can regulate medical cannabis production that is not conducted within one’s own dwelling for one’s own use may be also raised.

### C. Regulation of Farm Production

The *Cannabis Act* and its regulations operate to give the federal government the dominant role in regulating large scale cannabis production. A federal licence issued under section 62(1) of the *Cannabis Act* (from Health Canada) and a cannabis licence issued under the *Excise Act, 2001* (from Canada Revenue Agency) are both required for the cultivating, producing and packaging of cannabis for non-personal use.

Prior to making an application for a production licence to Health Canada, a person must notify the local government, the local fire authority and the local police force of their application (Cannabis Regulations, s. 7(1)). The Cannabis Regulations do not set out what a local government is expected to do once notified of an application, however it would appear to be an opportunity to either communicate any concerns to Health Canada or to be aware of a forthcoming change of use on the subject property. A licence-holder is also obliged to notify the same local authorities, within 30 days, of an issuance, amendment, suspension, reinstatement or revocation of the licence.

The federal Cannabis Regulations also impose a number of notable restrictions on large-scale producers that are briefly summarized as:

- No activities may be conducted within a residence or the yard of a residence (s. 40);
- All activities must be conducted indoors except cultivation (s. 41); and
- The site of the activities must be secure from unauthorized access and be in areas monitored by video cameras to detect illicit conduct (ss. 62-72).

The principal purpose of these regulations might be described as ensuring that all cannabis produced by federal licensees is tracked and taxed. Once edible cannabis products become legal, it is expected that federal food safety standards will also be applied.

With regard to provincial oversight of large-scale cannabis production, the most specific and significant regulation is the designation of cannabis production as a farm use for the purpose of the *Agricultural Land Commission Act*. Such production must either be outdoors in a field, or within a facility that meets requirements prescribed by regulation. Local governments may still consider adopting land use bylaws that permit cannabis production in industrial or commercial areas that would not otherwise be considered farmland.

### D. Regulation of Unauthorized Production

Under the earlier cannabis regime, local governments were often concerned that some people authorized to produce cannabis for medical purposes were producing well above the authorized amount. This production, as well as completely unauthorized production, supplied the then-illegal recreational cannabis market. It may become the case that unauthorized

cannabis production diminishes significantly, such that cannabis, like alcohol and tobacco, will now almost always be bought through lawful (and heavily taxed) channels. To the extent that local governments can identify unlawful production, they may still be able to enforce the traditional controlled substance bylaws to address nuisances and other local government concerns.

#### IV. REGULATION OF POSSESSION AND DISTRIBUTION

Compared to the federal government, the Province plays the more significant role in regulating possession and distribution of cannabis. The legalization of the retail sale of cannabis from storefronts will likely attract the most attention from local governments.

##### A. Regulation of Personal Possession

The federal *Cannabis Act* generally prohibits an individual from:

- Possessing, in a public place (including places to which the public is invited), more than 30g of dried cannabis (or deemed equivalent), one or more cannabis plants that are budding or more than four cannabis plants that are not flowering (s. 8(1)(a), (d)-(e));
- Distributing more than 30g of dried cannabis (or deemed equivalent), one or more cannabis plants that are budding or more than four cannabis plants that are not flowering (s. 9(1)(a), (d)-(e));
- Selling cannabis (s. 10(1));
- Importing and exporting cannabis (s. 11(1)); and
- Possessing or distributing any cannabis known to be from an illicit source (ss. 8(1)(b) and 9(1)(iv)).

Federally licensed producers are exempt from some of these prohibitions and may possess and distribute much higher volumes of cannabis. Medical practitioners dispensing and those using medical cannabis are also subject to exemptions. The *Cannabis Act* also permits the possession and sale of larger volumes of lawful cannabis by those persons authorized by a provincial licence (*Cannabis Act*, s. 69). This exemption enables the provinces to provide for and regulate retail sales within their jurisdiction.

British Columbia's *Cannabis Control and Licensing Act* also imposes a general prohibition on the possession of cannabis, unless the possession falls within one of 10 exemptions. For practical purposes, these exemptions replicate what is permitted under the federal *Cannabis Act*. Local governments likely lack any authority to further regulate possession unless that regulation is tied to an activity, place or service over which the local government is exercising specific regulatory authority.

## B. Regulation of Non-Commercial Distribution

Neither the federal *Cannabis Act* nor the British Columbia *Cannabis Control and Licensing Act* (s. 17(f)) prohibit the gratuitous transfer of cannabis from one adult to another so long as the amount is sufficiently small and the original source of the cannabis is legal. The scope for municipal regulation of such a private activity is not readily apparent. A person making a gratuitous transfer would not be a “business” that a municipality could regulate under section 8(6) of the *Community Charter*.

## C. Regulation of Storefront Sales

The federal *Cannabis Act* does provide for licences that permit the sale of cannabis; however these licences are to be limited to online retailers of medical cannabis and online retailers of cannabis to provinces that do not provide for retail sales (unlike British Columbia). Where retail sales are permitted, the *Cannabis Act* imposes rules that significantly restrict the promotion of cannabis products and prohibiting the display of cannabis and cannabis accessories in a manner that may result in it being seen by a young person (*Cannabis Act*, ss. 29, 30).

In British Columbia, the Provincial legislature has sought to provide for the retail sale of cannabis through both government-operated and privately-operated stores. The *Cannabis Control and Licensing Act* sets the minimum age to buy cannabis at 19 years of age, one year older than the minimum age to possess cannabis under the federal *Cannabis Act*.

### 1. Government Cannabis Stores

The *Cannabis Distribution Act* authorizes the establishment and operation of Provincial government warehouses, retail stores and online stores for the distribution of cannabis. The provincial cannabis stores are being operated by the Liquor Distribution Branch. Cannabis and liquor is expected to be sold by that Branch from separate storefronts, except for some stores in rural communities.

The *Cannabis Distribution Act* and its regulations do not impose any restrictions or mandate any processes for selecting the location of these government stores. However, at an administrative level, the Liquor Distribution Branch has expressed an intention to comply with both municipal zoning and hours of business regulations as well as to locate stores a “safe proximity from schools, playgrounds, parks, community centres and other cannabis retailers”. This approach presumes that the government can locate stores in places acceptable to the community.

Readers may recall that two decades ago, a provincial initiative to liberalize casino gaming faced significant opposition from some municipalities who sought to curtail or prohibit casino gaming through zoning (see e.g. *British Columbia Lottery Corp. v. Vancouver (City)*, 1999 BCCA 18; *Great Canadian Casino Co. v. Surrey (City)*, 1999 BCCA 619). In the *Vancouver* case, the Court of Appeal noted that a land use bylaw exception for the Province and its agents under s. 14(2) of

the *Interpretation Act* did not benefit the BC Lottery Corporation if the Lottery Corporation contracted out the operation of its gaming machines to a private user. In the case of government agent operated, which includes government cannabis stores, the exception to land use bylaws provided under the *Interpretation Act* should apply.

## 2. Private (Non-Medical) Retail Stores

Pursuant to powers granted under the *Cannabis Control and Licensing Act*, the Liquor and Cannabis Regulation Branch (formerly the Liquor Control and Licensing Branch) regulates the private retail sale of non-medical cannabis. Private retailers must have a provincial licence and must only sell cannabis purchased through the Liquor Distribution Branch. Section 5 of the Cannabis Licensing Regulation imposes a significant number of rules and requirements on private cannabis retailers that essentially limit them to storefronts at which a person can buy cannabis and cannabis accessories, but cannot consume the cannabis.

In implementing a system of licences for private retail stores, the British Columbia government has given municipalities an effective veto over any particular cannabis retail business by requiring a positive municipal recommendation as a precondition for issuance of either a private or a public retail licence. A local government may choose to make no recommendation (which will end the application process), reject the application, or recommend approval of the application. Giving substantive input requires that the municipality first undertake a public consultation process in the form of its choosing, for which it may impose a fee upon the applicant. Zoning compliance will also be required, although in jurisdictions where site-specific zoning is to take place, the provincial vetting process may begin with ultimate approval contingent upon eventual rezoning.

Whether retail cannabis sales are permitted by existing zoning bylaws may catch some local governments off guard. Readers are likely aware that retail stores selling cannabis have been notoriously present in British Columbia for years. Lacking any changes to existing zoning regulations, as of its legalization on October 17, 2018, cannabis retail sales could have become part of more general use categories such as “retail sales”. Arguably, prior to this date, the criminal character of cannabis prevented retail cannabis sales from being included in these broader categories, given that councils would not have been expected to have included presumptively illegal activity when specifying permitted uses. This point has been argued by certain dispensaries which opened for business prior to legalization and were subsequently the subject of petitions brought by municipalities seeking injunctions to force their closure. Two decisions on this point are currently under reserve and reasons are expected in the near future.

Most local governments have amended their zoning bylaws to create specific categories of uses for cannabis production and retail sales, thereby removing these activities from the more general use categories. Some local governments have included these uses in existing zones, meaning that prospective retail applicants can move immediately to the provincial and municipal licensing stages. Others have settled on a system of site-specific rezoning, with no areas pre-zoned to permit this use, but applications being accepted for the rezoning of specific parcels by a prospective retailer.

For those local governments planning to allow cannabis retail sales, the site-specific rezoning process may be attractive as it offers the opportunity for the public hearing to do double duty – both in the context of the traditional rezoning, and also serving as the public input process which is required under the BC *Cannabis Control and Licensing Act*. Many local governments have struggled with questions regarding how to deal with the volume of applications. Some municipalities have created a scoring matrix under which applications and their proposed locations will be assessed for rezoning, including criteria such as proximity to schools or other sensitive uses, and density and total permitted numbers of cannabis-related businesses.

The Liquor and Cannabis Regulation Branch has also assumed responsibility for background checks into the history of retail applicants and their associates. Local governments which do not wish to inadvertently recommend an applicant with an unsavoury history may indicate to the Liquor and Cannabis Regulation Branch that they are prepared to consider an application, and ask that the Branch carry out their background check process prior to municipal approval or rejection. No background check will be run where a municipality indicates it will recommend rejection, refrain from making a recommendation, or has a current blanket policy of non-approvals within its jurisdiction.

A provincially licensed retail store would also be subject to a municipality's business licence bylaw. Such a bylaw could impose conditions specific to cannabis retail operations such as signage limitations, hours of operation or restrictions on the sale of cannabis accessories.

### 3. Pharmacies

The *Cannabis Control and Licensing Act* retail licensing requirements do not apply to pharmacists who sell drugs containing cannabis in accordance with section 140 of the federal *Cannabis Act*.

#### **D. Regulation of On-line Sales**

Under the former medical marijuana regulations, the federal government briefly flirted with a scheme to only allow the delivery of medical cannabis by mail. This mail-only regime collapsed under both Court challenges and political change. Going forward, health Canada will continue to licence the distribution of medical cannabis by mail, however the BC Cannabis Retailer Terms and Conditions issued by the Liquor and Cannabis Regulation Branch prohibit licensed retailers from operating a non-medical cannabis delivery service or enabling one to be operated in association with their store. At present the Liquor Distribution Branch has expressed an intention to provide for online sales.

A challenge facing the upper level of governments is establishing an effective system by which cannabis may be securely transported by Canada Post or a private courier system and the identity of the recipient is checked before the cannabis is delivered. The scope for municipal regulation in this area appears limited, especially if Canada Post, a federal Crown Corporation, operates the delivery system.

#### **V. REGULATION OF CONSUMPTION**

As a matter of criminal law, the federal cannabis legislation focuses on regulating the possession of cannabis. Rules regarding when and where cannabis may be consumed are essentially left to the authority having a more local jurisdiction. These authorities include the provinces, local governments, strata councils, and Transport Canada as regulator of interprovincial transportation. Such authorities will presumably be mindful of the distinction between drinking and eating products containing cannabis and the vaping or smoking of cannabis, since it is the latter that is more visible, odorous and impacting on public health.

##### **A. Consumption on Public Property**

The provincial regulations in British Columbia generally implicitly allow adults to use non-medical cannabis in public spaces where tobacco smoking and vaping are permitted. However, some prohibitions reflect an intention to minimize child and youth exposure to cannabis.

The *Cannabis Control and Licensing Act* generally prohibits smoking and vaping at, near or in:

- Schools, hospitals, some outdoor spaces (ss. 62-63);
- Parks, regional parks as defined by the *Local Government Act*, and outdoor areas established by local governments for community recreation (s. 63);
- Vehicles and boats (s. 65); and
- Bus stops, ferry docks and similar spaces (s. 66).

In regulating highways and public spaces, local governments would be able to impose additional or overlapping restrictions, as they do for tobacco use.

The *Cannabis Control and Licensing Act* also prohibits the consumption of (non-medical) cannabis by means other than smoking and vaping in a number of places, including school property. Detection of such consumption through edibles or other means may be difficult.

#### **B. Consumption on Private Property to which the Public is Invited**

The smoking and vaping of cannabis is not allowed in “any place to which the public has access of right or by invitation, express or implied, whether or not a fee is charged for entry” (*Cannabis Control and Licensing Act*, s. 64(1)). This prohibition would capture smoking and vaping in restaurants, stores and bars.

The *Cannabis Control and Licensing Act* prohibits the consumption of cannabis by any means in private and government cannabis stores (s. 39).

#### **C. Consumption in Private Places**

The *Cannabis Control and Licensing Act* also prohibits the smoking and vaping of cannabis in workplaces and common areas within apartment buildings, condos, and dorms (s. 64). Landlords and strata councils are presumably also able to restrict or prohibit non-medical cannabis smoking at tenanted and strata properties.

#### **D. Consumption in the Local Government Workplace**

The provincial prohibition on smoking and vaping of cannabis in the workplace of course includes local government offices. Local governments as employers may also be mindful of workers who might consume edible cannabis at the workplace, consume medical cannabis or attend work under the influence of cannabis. This complex employment issue is beyond the scope of this paper. Readers may note that WorkSafeBC has, at the time of writing, emphasized that its current occupational health and safety regulations that apply to alcohol, drugs and other substances that affect a person’s ability to work remain applicable to cannabis.

### **VI. ENFORCEMENT OF CANNABIS REGULATIONS**

The police remain the principal enforcers of the criminal law as it applies to unlawful cannabis possession. With regard to the ensuring compliance with provincial cannabis distribution laws, the Provincial Government has created the Cannabis Community Safety Unit under the auspices of the Ministry of Public Safety and Solicitor General. This unit is intended to enforce against breaches of the British Columbia *Cannabis Control and Licensing Act*, *Cannabis Distribution Act*, and associated regulations. This would include enforcement against unauthorized retail dispensaries which have not obtained provincial or municipal licences and permits.

Specialized enforcement powers include warrantless searches, seizure of product, administrative monetary penalties, and prosecutions, in addition to the possibility of sanctions up to and including the cancellation of licences for provincially licensed retailers who infringe the statutory scheme by selling illicitly produced cannabis or selling to minors, for example. In practice, no enforcement action is expected until a significant number of licensed private stores are in operation. The Provinces has indicated that it first hopes to achieve voluntary compliance through education and outreach.

Local governments will continue to exercise the same bylaw enforcement powers as they apply to the local government regulation of cannabis. This includes enforcement for the purpose of addressing those unlicensed dispensaries which continue to operate within their jurisdictions in the interim time.

## **VII. CONCLUSION**

This paper provides an overview of the new federal and provincial rules regarding the production, sale and consumption of cannabis to assist local governments with determining their own role within the new regime. Local government regulation will no doubt be further influenced by the actual impact of this new federal and provincial regulation, including:

- The pace and effectiveness of law enforcement against unlicensed retail stores;
- The pace and effectiveness of law enforcement against illicit cannabis production;
- The extent to which cannabis consumers embrace household production vs. retail sales;
- The extent to which cannabis produced and sold for medical purposes is displaced by non-medical cannabis;
- The extent to which smoking and vaping is displaced by edibles; and
- The extent to which cannabis consumption has an appreciable impact on public places and local government services.

The “whole picture” for cannabis is likely to keep on changing.

NOTES