

## Legal update

### Medical marijuana dispensaries in Toronto: a commercial landlord's problem?

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**Real estate**

The proliferation of medical marijuana dispensaries in cities such as Vancouver and Toronto has prompted city councillors to crack down—albeit in different ways—on these illegal businesses. While Vancouver has sought to limit the number of dispensaries through a licensing scheme, Toronto has begun placing responsibility for proliferation on landlords. Commercial landlords in Toronto should be careful about renting to dispensaries and consider adding language to their standard forms of lease to protect themselves in the event of enforcement action by the city.

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#### Background

Access to medical marijuana is regulated under the *Marihuana for Medical Purposes Regulations*<sup>1</sup> (MMPR), with some licences still existing under the now-repealed *Marihuana Medical Access Regulations*<sup>2</sup>. Storefront dispensaries are not licenced under either regime and therefore do not operate legally. In *Allard et al v Canada*, the Federal Court declared the MMPR regime unconstitutional, citing patients' right to access marijuana for medical purposes.<sup>3</sup> Although some argue that this decision justifies dispensaries supplying medical marijuana to patients, these unlicensed dispensaries remain illegal for the time being.

However, in Vancouver and Toronto, local police have taken a largely hands-off approach. As a result, both cities have seen a surge in the number of dispensaries. While Vancouver has sought to address the issue by way of a by-law delineating how and where the businesses can operate,<sup>4</sup> Toronto has taken a different approach. Toronto city council recently announced the debate over a potential licencing regime would be deferred until details of the proposed federal legislation are made available.<sup>5</sup> In the meantime, the city has been targeting the illegal businesses, and, importantly, their landlords.

In May 2016, the City of Toronto and the Toronto police distributed notices of unpermitted use to dozens of landlords whose tenants operate dispensaries.<sup>6</sup> According to the city, marijuana dispensaries are in violation of zoning by-laws. Landlords renting to an illegal operation face fines of up to \$50,000 for a first conviction, and up to \$25,000 per day for subsequent convictions if they continue to not comply.<sup>7</sup>

Notices of unlawful activity distributed concurrently by the Toronto police threatened landlords whose tenants operate dispensaries with the possibility of prosecution under the *Controlled Drugs and Substance Act*<sup>8</sup> or other provincial statutes, including the *Civil Remedies Act*.<sup>9</sup> Last month, the Toronto police raided 43 dispensaries. The first round of raids was followed in late June with more enforcement activity, resulting in 34 dispensaries being shut down.<sup>10</sup> There are reports that marijuana dispensary owners, store clerks and their landlords were charged.<sup>11</sup>

## What can landlords do?

### Due Diligence

Landlords can protect themselves by doing diligence on prospective tenants. Before entering into a lease, landlords should perform robust business and legal diligence searches. These searches can include everything from Google searches to corporate and bankruptcy searches to police background checks. In particular, landlords should be aware of tenants purporting to operate pharmacies and alternative medicine practices. For existing tenants, landlords should regularly inspect the leased premises pursuant to the terms of their leases.

In this context, the tenant's illegal acts could result in liability for the landlord; therefore, there is an increased onus on landlords to conduct their own due diligence. Zoning and licence by-law offences are typically "strict liability" offences, meaning that liability can attach even where the landlord had no knowledge of the wrongdoing. As a result, landlords may need to do additional due diligence to ensure tenants' legal compliance, including making inquiries as to permitted use under zoning by-laws and ensuring tenants have the necessary business licences.

### Adapted Lease Provisions

Landlords should also ensure that their leases provide them with sufficient remedies to deal with tenants' legal non-compliance. Landlords should seek to ensure they have the ability under the lease to step in and cure (or otherwise address) legal non-compliance on the part of the tenant before it results in liability for the landlord. In that vein, landlords should consider tailoring the default provisions of their leases towards potential by-law infractions, for example by including landlord rights to cure the tenant's non-compliance at the tenant's cost.

Landlords should also make sure that the notice and cure periods for such defaults under the lease track the notice and cure periods that might be specified in an enforcement order from the city or other governmental authority. A landlord does not want to be served with an enforcement order that gives it three days to comply while the lease default provisions allow the tenant five days to comply.

### Bottom line

Although the dispensaries remain illegal, it is unlikely landlords in Vancouver will be targeted by by-law enforcement, as the city has taken a regulatory approach to managing the dispensaries. Further, Vancouver police have stated they will not be targeting medical marijuana dispensaries unless there is a public safety concern.<sup>12</sup>

In Toronto, however, the city and Toronto police have put landlords on notice as to the presence of dispensaries on their property, making it incumbent upon them to take steps to remove these illegal businesses.

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### Footnotes

- <sup>1</sup> SOR/2013-119.
- <sup>2</sup> SOR/2001-227, as repealed by *Marihuana for Medical Purposes Regulations*, SOR/2013-119, s 267.
- <sup>3</sup> 2016 FC 236.
- <sup>4</sup> See: <http://vancouver.ca/doing-business/medical-marijuana-related-business-regulations.aspx>.
- <sup>5</sup> See: <http://www.theglobeandmail.com/news/toronto/toronto-city-council-committee-turns-away-marijuana-advocates/article30627296/>.

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- <sup>6</sup> See: <http://www.theglobeandmail.com/news/national/toronto-targets-landlords-in-pot-shop-crackdown/article30089082/>.
- <sup>7</sup> *Planning Act*, RSO 1990, c P13, s 67(2)(a).
- <sup>8</sup> SC 1996, c 19.
- <sup>9</sup> SO 2001, c 28, s 8(1).
- <sup>10</sup> See: <http://www.theglobeandmail.com/news/toronto/toronto-city-council-committee-turns-away-marijuana-advocates/article30627296/>.
- <sup>11</sup> See: <http://www.metronews.ca/news/toronto/2016/06/15/toronto-marijuana-shop-operators-have-first-day-in-court.html>.
- <sup>12</sup> See: <http://vancouver.ca/police/policeboard/agenda/2015/0917/1509C01-2015-112-Marijuana-Dispensaries.pdf>.
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