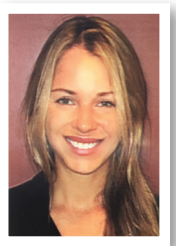


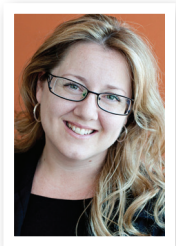
# Weeding Out Unwanted Smoke... And Making Sure The Condo Doesn't Go To Pot!



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As most of our readers will be aware, the federal government recently introduced a host of legislation which, once passed, will ultimately result in the legalization of recreational marijuana across Canada. Promising to establish a “strict legal framework” for the production, sale, distribution, and possession of pot, the government has made it clear that the objective of [Bill C-45, \(the “Cannabis Act”\)](#) is to restrict access to cannabis, protect public health and safety, and to deter criminal activity.<sup>1</sup>

While the concept of “legal” marijuana use is relatively new, smoke is still smoke. The pot smoke of tomorrow can be equated to the cigarette/cigar smoke of yesterday: it should not come as a shock to anyone that while smoking pot may become legal, it will not provide users a licence to light up whenever and wherever they want.

This is especially true in condominium corporations, where the upcoming changes to the existing legislation will likely lead to an increase in both the smoking and growing of marijuana within condominium units. In such cases, we will also likely see an increase in both the nuisance factor for neighbours, and the number of complaints and/or concerns by affected owners. Accordingly, the purpose of this article is to provide our thoughts on issues to consider in light of the upcoming changes to the legislation. [The obligations of Directors and/or the Corporation under current legislation are beyond the scope of this article.]

Harmonious community living necessitates that individual rights are often limited by rights of the collective community. Condominium owners are generally well advised to embrace

a broader community perspective, and appreciate that they are collective owners of the entire condominium – and not just their individual units. However, surrendering even some right to self-interest does not mean that one neighbour’s privilege to smoke pot outweighs the rights of others to use and enjoy their home.

In terms of smoking on a condominium property, it appears to us that marijuana can essentially be equated to tobacco, subject to special rights surrounding “*medical marijuana*”. Both tobacco and marijuana smoke is known to permeate walls and can constitute an annoyance when it ends up in other owners’ personal space.

In addition to this nuisance, and as far as concerns the growing of marijuana, the potential of owners growing large quantities of marijuana within their units can carry with it increased risk of flooding, moisture damage, explosion, electrical fires and other hazards, which can impact both a condominium’s liability and its insurance premiums. Marijuana cultivation can also affect utility usage and place an unfair cost burden on other unit owners.

In these contexts, the broadening of approved use, and forms, of marijuana raises several potential issues, including

- 1 the creation and enforcement of Rules related to the use and growing of marijuana;
- 2 the duty to accommodate users of medical marijuana under human rights legislation; and
- 3 privacy concerns relating to owners who may be authorized to use marijuana for medical purposes.

## The Creation and Enforcement of Rules

### Smoking and Marijuana

Many condominium corporations may already be equipped with tools to address some of the potential challenges which will accompany the legalization of marijuana. While smoking in or on interior common elements is currently prohibited by the [Smoke-Free Ontario Act](#), many condominiums have also passed rules which prohibit smoking on the exterior common elements, and some have also prohibited smoking anywhere on the property, including the units.

In general, condominium occupants will be permitted to smoke marijuana only where people are permitted to “smoke” on the property.

However, given the recent legal developments on this issue, going forward, it will be important for condominium corporations to re-examine their rules surrounding nuisance and smoking and consider an expansion of these rules to include marijuana. Having said that, even if a condominium corporation decides to permit marijuana smoking within units, or on exterior common elements, this does not mean owners are entitled to create a nuisance or commence a commercial grow-op operation to be run out of their living room.

While condominium corporations can take a poll of their owners to get a better idea of preference, to completely avoid this problem, condominiums can consider moving towards a completely smoke-free community [note that grandfathering of “prior smokers” might apply in many cases]. The prohibition of smoking is enforceable in Ontario and can be accomplished by passing a rule/amending the Declaration.

While it will be possible to otherwise ban marijuana specifically (subject to human rights considerations as discussed further below), consideration of rules which capture both tobacco and marijuana smoke likely makes sense.

### Growing Marijuana

For residential condominiums, even though growing marijuana may be legal (from a criminal law perspective), this does not necessarily mean that condominium residents have the right to grow marijuana on the condominium property.

Condominium corporations can certainly consider implementing a prohibition in their rules and/or Declaration to prohibit the growing of marijuana on the [common elements](#).

It might also be possible to prohibit the growing of marijuana in the units by amending the Declaration or passing a new rule. Particularly if growing marijuana could cause harm to the building (for instance, as a result of excessive humidity or heat), or if it could lead to the excessive consumption of water or electricity. On the other hand, since the number of marijuana plants will be limited by federal law, it may be difficult to distinguish between growing marijuana and growing some other type of plant (in terms of potential harm or excessive consumption of utilities) in the units. Accordingly, condos can consider:

- A rule which relates to the number of plants (whether marijuana or another type) which are permitted in the unit; or



- If an absolute prohibition is the desired outcome, in order to minimize arguments about the reasonableness of a restriction in relation to the units, amending the Declaration.

### The Duty to Accommodate

Notwithstanding any Rules, or amendments to the Declaration, which may be implemented, medical marijuana users may have the right to smoke where smoking is otherwise prohibited, depending upon their specific needs (for marijuana) and their specific medical prescription.

The [Access to Cannabis for Medical Purposes Regulations](#), which currently regulates the medical cannabis regime and the existing licenced producers, will continue to govern the production, distribution and sale of cannabis for medical purposes even when the *Cannabis Act* comes into effect. The use of medical marijuana triggers a duty to accommodate, which means condominium corporations will continue to have to make accommodations for unit owners requiring marijuana consumption for medical purposes to the point of undue hardship.

### Privacy Concerns re: Collection of Information on Medical Conditions

When a condominium corporation is required to consider a request for accommodation under human rights legislation, it may be required to gather personal information from the owner of the unit to fully review and consider the request.

Accordingly, condominium corporations should ensure that they have implemented the necessary privacy policies to comfort owners that any personal information which is collected is stored and controlled in accordance with the corporation’s privacy policies.

### SUMMARY

In short, second-hand smoke, whether from tobacco or marijuana, must be controlled.

In most cases, the condominium corporation will need to investigate any problem involving unwanted migration of second-hand smoke (often with the assistance of an expert), in order to track down the cause of the migration, and to determine who is responsible to stop it.

There are many possible solutions, including; sealing between units and/or the common elements; adjustments to air handling and/or exhaust systems; air purification or filtration; air pressure adjustments; etc. In some cases, the corporation may have an obligation to solve the problem, while in others, the onus will fall to the owner

or smoker. Most commonly, both parties will have a joint obligation to reach a reasonable solution.

With the upcoming changes to legislation governing marijuana, condominium corporations will be best served by reviewing their existing governing documents, and considering what, if any, amendments to the Declaration and/or Rules may be required to address these new issues and challenges.

Further amendments and additional clarity are expected to be provided between now and July 2018 as the *Cannabis Act* moves its way through the legislative process and as regulations are released and stakeholders provide their feedback.

Condominium corporations should pay close attention to the provincial governments as they begin to develop their approach to the recreational regime, including any differences in approaches to distribution and sale among the provinces and territories.

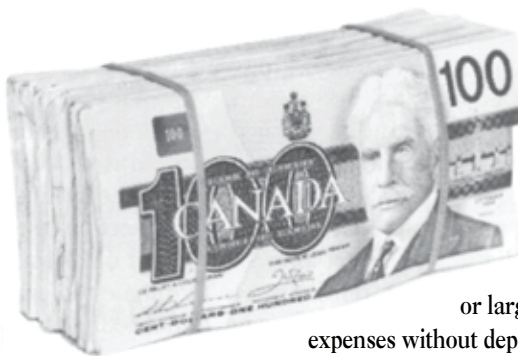
In the interim, condos – don't panic! At the end of the day, legal smoke is still smoke, nuisance is still nuisance, and the proposed *Cannabis Act* does not change that. ■

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