

Feds Not Just Blowing Smoke: Recreational Marijuana to be Legal by July 1, 2018

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By Robert Eisenberg

Less than twenty-four hours after being called out by a candidate for the leadership of the NDP, CBC News has reported that Prime Minister Justin Trudeau's Liberal government plans on introducing legislation in early April 2017 with the intention of legalizing recreational marijuana by July 1, 2018.

According to the CBC report, the new legislation will "broadly follow" the final recommendations of the Task Force on Cannabis Legalization, providing landlords and retail marijuana business owners with some clues as to what the final regulatory system will look like.

Review of the Current Licensing System

Until recreational marijuana is actually legalized, the *Access to Cannabis for Medical Purposes Regulations* (the "ACMPR") provide the current and only framework for the legal sale of marijuana across Canada. Under the ACMPR, Health Canada issues specialized licenses for the cultivation and/or sale of dried marijuana, fresh marijuana, cannabis oil and plants/seeds to eligible persons. As of March 15, 2017, there are 40 licenced producers in Canada, 24 of which are in Ontario, 9 in British Columbia, and the remainder scattered across the country.

However, Health Canada-licenced distributors are currently the only entities who can legally sell/distribute marijuana in Canada. The distributors are largely located in industrial areas and are required to deliver their products to customers via mail/courier. All storefront retailers so-called "dispensaries" or "compassion clubs" are illegal and are subject to periodic raids by local police forces. Similarly, municipalities are utilizing their own policy tools to curtail the spread of dispensaries. For example, the City of Toronto's Municipal Licensing and Standards division is citing dispensaries for violating a zoning bylaw which only permits licensed marijuana producers to operate in certain industrial areas. Nevertheless, these dispensaries are becoming increasingly prevalent in urban centres across the country, as retailers bank on the fact that local law enforcement will choose to look the other way in the face of impending legalization, while landlords are willing to accept the risk of having their tenants raided in exchange for the well above-average rents that they can extract from dispensaries.

The Task Force's Report

In summer 2016, the Task Force on Cannabis Legalization (the "Task Force") was given a mandate to consult and provide advice to the Government of Canada on the design of a new legislative and regulatory framework for legal access to cannabis, consistent with the Government's commitment to "legalize, regulate, and restrict access". In November 2016, the Task Force presented its Final Report. Among its many recommendations, the Task Force also dealt with the issue of distribution, ultimately recommending that "the wholesale distribution of cannabis be regulated by the individual provinces and territories". This option was favoured as the provinces and territories already possess "sophisticated government alcohol distribution networks that [provide] a secure and reliable means to

distribute product. It was noted that these systems, especially the administrative systems and other controls already in place, could be leveraged to distribute cannabis and be tailored to the specific needs of each jurisdiction."

In terms of the retail sale of marijuana and other cannabis products, the Task Force weighed several options, including limiting the retail sale of marijuana to government-owned stores (similar to how alcohol is treated in much of the country), restricting sales to pharmacies, and a "private enterprise" model typified by dispensaries. Ultimately, the Task Force recommended that retail regulations be based upon the following criteria:

- no co-location of alcohol or tobacco and cannabis sales, wherever possible;
- limits on the density and location of storefronts, including appropriate distance from schools, community centres, public parks, etc.;
- dedicated storefronts with well-trained, knowledgeable staff; and
- access via a direct-to-consumer mail-order system.

What will the Retail Sale of Marijuana Look Like?

Ultimately, it appears that while the federal government will likely maintain its monopoly on licensing producers, it will be up to the provinces to decide how marijuana is distributed and sold and at what prices. Based on the federal government's acknowledgement that its legalization regime will "broadly follow" the Task Force's recommendations, it appears likely that some form of storefront retail system will be operated across Canada, subject to the various idiosyncrasies of each province or territory.

The fact that the federal government appears to have ceded responsibility for retail distribution to the provinces means that Canada could find itself with a fractured system, whereby some provinces may choose to maintain a monopoly on the sale of marijuana through government-owned stores while others prefer to adopt a more open system of privately-owned dispensaries. While no final decision has been made as to the form that distribution will take in Ontario, based on prior statements from Premier Kathleen Wynne and Finance Minister Charles Sousa, it appears that they favour a system controlled by the provincial government. The push in Ontario for marijuana to be sold through Liquor Control Board of Ontario ("LCBO") stores is supported by both the union that supports LCBO workers and Premier Wynne, who has said that "it makes sense" for marijuana to be sold through the LCBO.

It remains to be seen whether the Ontario government will follow the Task Force's recommendation against co-locating the sale of marijuana with the sale of alcohol.

The Current Situation for Landlords and Tenants

While the Canadian recreational marijuana market is full of promise for landlords and tenants, leasing to marijuana tenants remains fraught with risk under current laws. It bears repeating that until the federal government changes the law, all marijuana dispensaries remain illegal and are subject to raids by police. Landlords who choose to lease space to these illegal dispensaries run the risk of having the insurance policies on their buildings cancelled, facing major fines from municipalities for zoning infractions (up to \$50,000 in Toronto) or even having their properties seized.

However, with legalization and some form of retail storefront distribution system on the horizon, prudent landlords and tenants should begin thinking about how they will approach commercial leases for marijuana retail stores, and how such deals will impact existing tenancies. For additional information on this topic, please see our article from November 2016, *Don't Let Your Development Go to Pot! Tips for Leasing to Marijuana Retailers*.

If you have any questions about the state of marijuana laws in Canada or how you can prepare your leasing portfolio for the legalization of recreational marijuana, please feel free to contact Robert Eisenberg at reisenberg@weirfoulds.com or by telephone at

416-619-6287.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular applications of the law to specific situations, the reader should seek professional advice.

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