

Ontario Introduces New Cannabis Legislation: What You Need to Know About the Impact on Commercial Real Estate and Leasing

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Introduction: Bill 174

In order to meet the federal government's July 1, 2018 target for legalizing recreational cannabis country-wide, each province and territory across Canada has been seeking public input and developing their respective plans for the regulation of the sale of recreational cannabis. On November 1, 2017, Ontario's Attorney General, The Hon. Yasir Naqvi, introduced Bill 174, An Act to enact the Cannabis Act, 2017, the Ontario Cannabis Retail Corporation Act, 2017 and the Smoke-Free Ontario Act, 2017, to repeal two Acts and to make amendments to the Highway Traffic Act respecting alcohol, drugs and other matters. The Bill, known as The Cannabis, Smoke-Free Ontario and Road Safety Statute Law Amendment Act, 2017, for short ("Bill 174"), is intended to govern the sale, distribution, purchase, cultivation, possession and consumption of cannabis in Ontario. Bill 174 passed First Reading on November 1, and Second Reading is scheduled for November 2. Bill 174 has a four-fold purpose:

1. it enacts the Cannabis Act, 2017
2. it enacts the Ontario Cannabis Retail Corporation Act, 2017
3. it repeals the Smoke-Free Ontario Act and the Electronic Cigarettes Act, 2015 and replaces them with Smoke-Free Ontario Act, 2017
4. it makes amendments to the Highway Traffic Act regarding driving with alcohol or drugs present in the body and other matters

The Cannabis Act, 2017

The primary purpose of the Cannabis Act, 2017 (the "Act") is to restrict the sale or distribution of cannabis in Ontario to the "Ontario cannabis retailer" (see the next section). The Act also makes it an offence to purchase cannabis from anyone other than the "Ontario cannabis retailer". The sale of cannabis shall be limited to people 19 years of age and older, though, like alcohol, identification will be required if the purchaser appears to be younger than 25 years old. For safety reasons, no person who is or appears to be intoxicated may purchase cannabis. In terms of consumption, cannabis may not be consumed in any public place, a workplace, vehicle or a boat, or any other prescribed place. Again similar to alcohol, cannabis may only be transported in a vehicle or boat if the cannabis is not readily available to any person in the vehicle/boat. The majority of the Act does not apply to cannabis sold for medical purposes. Impact on Landlords and Commercial Real Estate and Leasing Since the sale of cannabis is limited to the "Ontario cannabis retailer" – a government monopoly – the most important impact the Act will have from a commercial real estate perspective is on landlords. As the

Act restricts the sale of cannabis to the “Ontario cannabis retailer”, the corollary obviously becomes that any other person or business selling cannabis in Ontario is doing so illegally. Consequently, it is an offence if a landlord knowingly permits any premises that it owns to be used in relation to any activity related to the sale or distribution of cannabis; the only stipulated defence to such a charge is that the landlord took reasonable measures to prevent the offending activity. If the police charge any person for selling or distributing cannabis in contravention of the Act, and a police officer has “reasonable grounds” to believe that certain premises were used in the alleged contravention, then the police officer may cause the premises to be closed immediately and remove any people from the premises. Moreover, if a conviction results from the charge, then the court may order that the subject premises be closed “to any use” for up to two (2) years, and such closing order may be registered against title to the property. The Act also provides for penalties:

- for an individual who is convicted for either selling/distributing cannabis OR permitting premises of which it is the landlord for being used for the sale/distribution of cannabis is liable: (i) on a first conviction, for a fine of up to \$250,000.00 or imprisonment for up to almost two (2) years; and (ii) on a subsequent conviction, for a fine of up to \$100,000.00 for each day on which the offence occurs or imprisonment for up to almost two (2) years, or both
- for a corporation that is convicted for either selling/ distributing cannabis OR permitting premises of which it is the landlord for being used for the sale/distribution of cannabis is liable: (i) on a first conviction, for a fine of between \$25,000.00 and \$1,000,000.00; and (ii) on a subsequent conviction, for a fine of between \$10,000.00 and \$500,000.00 for each day on which the offence occurs.

Overall then, the provisions of the Act and the harsh penalties provided therein should deter commercial landlords from leasing space to any tenant seeking to sell/distribute cannabis in contravention of the Act. However, it remains an open question as to how the Act will impact landlords who already have valid leases with tenants who are operating as illegal dispensaries, especially where the use clauses are broad and open-ended and there may not be a “compliance with laws” clause. Under such circumstances, and where the tenants elect to continue to operate their businesses in contravention of the Act, a landlord’s only statutory defense is that it “took reasonable measures to prevent the offending activity” – which may be difficult depending on the wording of the lease. If you are a commercial landlord with an existing dispensary tenant, please reach out to us if you have any questions about your obligations. The Ontario Cannabis Retail Corporation Act, 2017 The primary purpose of the Ontario Cannabis Retail Corporation Act, 2017 (the “OCRCA”) is to provide for the creation of the Ontario Cannabis Retail Corporation (the “Corporation”), as a subsidiary of the Liquor Control Board of Ontario (the “LCBO”). The Corporation will have the exclusive right to sell cannabis in Ontario, with a few small exceptions including cannabis for medical purposes and cannabis sold on reserves. The Corporation will be a Crown corporation, tasked with:

1. buying, possessing, and selling cannabis and related products
2. determining the varieties, forms, or types of cannabis and related products that it sells and at what prices
3. promoting social responsibility in connection with cannabis
4. any other activities as may be prescribed for the Corporation

However, the OCRCA does permit the Corporation, with the authorization of the Minister of Finance, to enter into agreements with agents for the sale of cannabis, potentially opening the door for an arrangement similar to the LCBO’s “Agency Stores”. Although the Corporation is being created with the capacity, rights, powers and privileges of a natural person for the purpose of carrying out its objectives, it is statutorily barred from purchasing any real property that meets the “prescribed criteria” without the written approval of the Minister of Finance. From a commercial real estate perspective then, the Corporation will seemingly be entering into lease agreements for its retail stores rather than purchasing locations.

Other Impacts of Bill 174

Bill 174 also proposes restricting youth access to cannabis, promoting public health and safety, and establishing 16 Spring 2018 Insti-News rules to help eliminate the illicit market through sanctions and enforcement. This legislation also creates the Smoke-Free Ontario Act, 2017, and makes amendments to the Highway Traffic Act to introduce tougher penalties for drug-impaired driving. As

these aspects of Bill 174 are less relevant to a commercial real estate context, they are beyond the scope of this article.

Summary

The introduction of the Cannabis Act, 2017 and the Ontario Cannabis Retail Corporation Act, 2017 confirm what had been widely known – that the Government of Ontario will be establishing a monopolistic Crown corporation, under the auspices of the LCBO, to be the sole retailer of recreational cannabis in Ontario. While the proposed legislation answers many outstanding questions about the nature of Ontario's recreational cannabis regime, there remain many unanswered questions, including, most notably, where the new stores will be located. Commensurate with the ongoing crackdown and closure of the existing illegal cannabis dispensaries the Government of Ontario has announced plans to open about 40 stores and to create an e-commerce website by July 2018, with 80 stores scheduled to be opened by July 2019, expanding to 150 stores by 2020.

Footnote

[1]"Cannabis" has a detailed definition in the Act and includes any part of a Cannabis plant, any substance containing any part of a Cannabis plant, and any substance "identical to any phytocannabinoid produced by, or found in, such a plant", even if chemically created. The definition also includes exclusions. See s. 2 (2) and (3).

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

For further reading on the impact on municipalities:

Guide to cannabis legalization predicts home-grown pot will give municipalities headaches OTTAWA – Municipalities will have to grapple with a host of thorny issues once recreational cannabis is legalized in Canada – but it's the matter of homegrown marijuana plants that's expected to cause them the biggest headaches.

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