

# THE LEGALIZATION OF CANNABIS FEDERALLY AND STRATA CORPORATION BYLAWS

By Elaine T. McCormack, J.D.

*Published in the Winter 2018 edition of the CHOA Journal*

In the summer of 2008, my article entitled “What Laws Regulate Smoking in British Columbia Strata Corporations?” was published in the CHOA Journal. The article was controversial at the time, as I wrote that many councils were considering proposing bylaws that prohibited or limited smoking in the complex.

The air has now become hazier, so it is time for another article. There is now federal and provincial legislation allowing for the recreational use of cannabis. What does that mean for strata corporations located in British Columbia?

Councils are actively trying to balance the rights of smokers and non-smokers. This article provides basic legal information on the topic of using and growing cannabis in British Columbian strata complexes and how this issue is addressed in the Schedule of Standard bylaws as well as specific bylaws passed for that purpose.

## **What is Legal in Canada?**

As of October 17, 2018, the *Cannabis Act* of Canada provides a legal framework to control the production, distribution, sale and possession of cannabis across Canada. Adults are able to possess 30 grams of dried cannabis in public, or an equivalent amount in another form. One gram of cannabis is considered in the legislation equal to:

- (a) 5 grams of fresh cannabis;
- (b) 15 grams of edible product;
- (c) 70 grams of liquid product;
- (d) .25 grams of concentrates (solid or liquid)
- (e) 1 cannabis plant seed.

Adults can share up to 30 grams of cannabis with other adults. Adults can also grow, from licensed seed or seedlings up to four cannabis plants per residence for personal use and make products such as food and drinks at home, as long as organic solvents are not used.

## **How Does that Apply in British Columbia?**

British Columbia’s *Cannabis Control and Licensing Act*, also addresses the issue of cannabis. The goals of this legislation are to protect those who are under 19 years of age, promote health and safety, address crime, deal with road safety and create a positive economic impact. In British Columbia 19 years of age is the minimum age to purchase, sell or consume cannabis. As per the federal legislation, adults can possess up to 30 grams of cannabis in a public place.

Of specific note for strata corporations, cannabis smoking and vaping are prohibited everywhere that tobacco smoking and vaping are prohibited. Smoking within a common area of a condominium or apartment building is prohibited and so is smoking or vaping within a prescribed

distance from a doorway, window or air intake. In addition, consuming cannabis is not allowed while operating a vehicle or being in a vehicle operated by another person.

The *Cannabis Control and Licensing Act* also allows adults to grow cannabis in their dwelling house. The general rule is that no more than four cannabis plants can be grown in a dwelling house at any one time. None of the cannabis plants can be visible from a public place. If an individual is authorized under the *Cannabis Act* of Canada to grow medical marijuana and they live with another adult, the number of plants that can be grown will be the total number allowed to be grown under the federal legislation for medical cannabis, as well as the four-plant limit. The word “grow” is defined to include cultivating, propagating or harvesting.

The government of British Columbia also deals with the sale of cannabis through the Liquor and Cannabis Regulation Branch (LCRB).

### **The Common Law of Nuisance**

At common law, a “nuisance” is a condition on a property or some use of a property that interferes with a neighbouring owner’s ability to enjoy their property. Nuisances can also arise from intentional acts undertaken for lawful purposes. For example, an industrial plant that otherwise operates lawfully may cause a nuisance if smoke or noise invades the right of enjoyment of neighbouring landowners to an unreasonable degrees. As stated by the British Columbia Court of Appeal in *Royal Anne Hotel Co. Ltd. v. Ashcroft et al* (1979), 8 C.C.L.T. 179:

The test then is, has the defendant’s use of this land interfered with the use and enjoyment of the plaintiff’s land and is that interference unreasonable? Where...actual physical damage occurs it is not difficult to decide that the interference is in fact unreasonable. Greater difficulty will be found where interference results in little or no physical injury but may give offence by reason of smells, noise, vibration or other intangible causes.

“Nuisance” is a common law cause of action, and has also been incorporated into the schedule of standard bylaws in the *Strata Property Act*, which is in force for all strata corporations in British Columbia, unless repealed.

### **What is the Potential Impact of Cannabis in a Strata Complex?**

Councils are concerned about residents smoking or vaping cannabis in the strata complex because others can breathe in the second hand smoke. Depending on the layout of the complex it may be reasonable to create a bylaw that eliminates smoking and vaping. Some strata corporations have bylaws that prohibit smoking and vaping on common property, involving a variety of substances, including nicotine, cannabis or crack cocaine. Other strata corporations prohibit smoking these substances everywhere in the complex, including on a balcony, patio or inside a strata lot. As an aside, adults using cannabis in their home, should have a plan for how to protect children and pets from accessing the substance.

With respect to growing cannabis in a strata lot, concerns for the strata community include the potential for reduced indoor air quality and mold, the use and disposal of pesticides and radiation hazards from UV-emitting products.

## **Do the Standard Schedule of Bylaws Apply?**

Section 3(1) and 3(2) of the Schedule of Standard Bylaws to the *Strata Property Act* provide as follows:

### **Use of property**

- 3** (1) An owner, tenant, occupant or visitor must not use a strata lot, the common property or common assets in a way that
- (a) causes a nuisance or hazard to another person,
  - (b) causes unreasonable noise,
  - (c) unreasonably interferes with the rights of other persons to use and enjoy the common property, common assets or another strata lot,
  - (d) is illegal, or
  - (e) is contrary to a purpose for which the strata lot or common property is intended as shown expressly or by necessary implication on or by the strata plan.
- (2) An owner, tenant, occupant or visitor must not cause damage, other than reasonable wear and tear, to the common property, common assets or those parts of a strata lot which the strata corporation must repair and maintain under these bylaws or insure under section 149 of the Act.

If smoking cannabis in a strata lot causes a nuisance or hazard to another person, and/or unreasonably interferes with their use and enjoyment of the common property, common assets or another strata lot, then this is a breach of the Schedule of Standard Bylaws. Strata corporations faced with a second hand smoking complaint, whether it be regarding smoking cannabis, nicotine or some other substance, should not shy away from going through the proper enforcement procedure under section 135 of the *Strata Property Act*, and deciding on whether there has been a breach of the bylaws. If there has been a breach of the bylaws, they will need to consider enforcement, including fines and taking other steps, such as filing a Notice of Complaint with the Civil Resolutions Tribunal.

## **Can Strata Corporations have Bylaws that Prohibit Smoking Cannabis?**

Strata corporations can prohibit many legal activities from taking place in strata lots. Consider, for instance, that strata corporations can prohibit owners from installing hard surface flooring or keeping a pet. Smoking cannabis is another legal activity that can be limited to certain areas of the complex, or prohibited entirely in the complex.

Strata Corporations can have bylaws that prohibit smoking cannabis and other substances in all or part of the strata complex. Like all bylaws, they should be reasonable for the community and should be for protecting others from second hand smoke.

Non-smoking bylaws are subject to a challenge under the *Human Rights Code*. For instance, in a strata corporation that has a bylaw that bans the use of cannabis in the complex, a resident may advise council that they have a physical disability that is ameliorated by smoking cannabis for pain control and that the strata corporation must provide accommodation and allow them to smoke in their strata lot. The council will then have to consider all relevant information. Has the resident

provided medical evidence proving a physical disability? Does the medical evidence support that the owner needs to smoke cannabis for pain control, or can they ingest it by other means? Does the resident need to smoke cannabis in the strata lot? Can steps be taken so that the smoke does not create a nuisance to others? I recommend that councils dealing with potential human rights issues seek legal advice to ensure that they take the proper investigative steps and properly consider the strata corporation's obligations and options.

### **Can Strata Corporations Create Bylaws that Prohibit Growing Cannabis?**

A strata corporation can also have a bylaw that prohibits growing cannabis in a strata lot. Just like smoking cannabis, there could be a request made to continue to grow cannabis based on accommodating a mental or physical disability pursuant to the *Human Rights Code*. Keep in mind that some residents may have a license to grow medical marijuana. It is my view that councils responding to such requests should have the benefit of legal advice.

### **Grandfathering**

Sometimes strata corporations want to propose new smoking bylaws that do not apply to smokers already residing in a strata lot. This exception, commonly referred to as "grandfathering" may be proposed for several reasons. First, council may not want residents to have to change their lifestyle, particularly if there has been no complaints about their activities. Second, the bylaw is more likely to pass at a general meeting if it does not negatively affect any of the current residents. I caution the use of any bylaw that restricts only the behaviour of future residents. How these bylaws will be interpreted will be decided in time by the Supreme Court of British Columbia, and on a case by case basis by the Civil Resolutions Tribunal.

I believe that as councils become more knowledgeable, by experience and through an understanding of the medical impact on second hand smokers and second hand growers, bylaws addressing these matters will become increasingly sophisticated and detailed.