

Cannabis Legal Update Series – Real Estate and Cannabis: Small-scale Home Cultivation

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The pending legalization of home cultivation of up to four cannabis plants has been the subject of recent attention and debate, including some fears that real estate rules and professionals are not ready, and that buyers and sellers of residential real estate may be harmed. Such concerns are exaggerated, and mimic arguments that have previously been rejected by the Supreme Court of Canada. The risks associated with legal small-scale home cultivation are more comparable to those of installing a hot-tub than commercial illegal drug-trafficking activities.

As has become typical in the area of cannabis regulation, Alberta is a leader in implementing sensible without over-regulating or infringing on personal freedoms. The Alberta *Real Estate Act* Rules and Real Estate Council of Alberta guidance provide an effective framework for addressing actual damage and illegal activity and serve as a model for other provinces and their real estate associations.

I. The Law: Legalization of Small-scale Home Cultivation

ACMPR – Current Rules for Home Cultivation for Medical Purposes

Part 2 of the *Access to Cannabis for Medical Purposes Regulations* (“ACMPR”) currently enables an individual to register with Health Canada to be permitted to produce cannabis at home for their own medical purposes, or to designate someone to produce cannabis at home on their behalf for medical purposes.

The ACMPR re-introduced home cultivation for medical purposes in response to the Supreme Court of Canada’s 2016 decision in *R. v. Allard*,^[1] which found the prohibition on home cultivation of the prior *Marihuana for Medical Purposes Regulations* to unjustifiably infringe individuals’ Charter rights to liberty and security of person.

The number of plants permitted to be cultivated and quantity of cannabis permitted to be possessed is calculated by reference to the authorized amount required for medical purposes, and whether cultivation is to be done indoors or outdoors.

Bill C-45 – Proposed Legalization of Home Cultivation for Non-Medical Purposes

Bill C-45 (as passed by the House of Commons and currently awaiting Senate vote at third and final reading, Royal Assent and declaration into force) proposes to legalize the small-scale home production of cannabis by individuals for non-medical purposes, which each province and territory

may further regulate or restrict.

Specifically, Bill C-45 would repeal the scheduling of cannabis and its derivatives from the *Controlled Drugs and Substances Act* in favour of a new *Cannabis Act*.

The *Cannabis Act* would, among other things, **prohibit** any individual over the age of 18 from doing any of the following without authorization:

1. cultivating, propagating or harvesting cannabis from a seed that they know is illicit;[\[2\]](#)
2. cultivating, propagating or harvesting cannabis at a place that is not their dwelling-house (i.e. where the individual is ordinarily resident, including subjacent or contiguous land, yard, garden, or similar land);[\[3\]](#)
3. cultivating, propagating or harvesting cannabis more than four cannabis plants at any one time in their dwelling-house;[\[4\]](#)
4. possessing one or more cannabis plants that are budding or flowering in a public place;[\[5\]](#)
5. possessing more than four plants that are not budding or flowering (including in their dwelling house);[\[6\]](#)
6. altering cannabis by use of an organic solvent (including in their dwelling house);[\[7\]](#) and
7. distributing:
 1. in excess of 30 grams of dried cannabis or its equivalent to an individual over the age of 18;[\[8\]](#)
 2. any amount of dried cannabis to an individual who is under 18 years of age, or to an organization;[\[9\]](#)
 3. any amount of cannabis that they know to be illicit;[\[10\]](#)
 4. one or more cannabis plants that are budding or flowering, or more than four cannabis plants that are not budding or flowering.[\[11\]](#)

Where two or more individuals are ordinarily resident in the same dwelling-house, only up to four plants may be cultivated, propagated or harvested at any on time in the dwelling-house.

The federal government has not released final Regulations to the *Cannabis Act* but has instead released a Proposed Approach to the Regulation of Cannabis, which indicates that the final Regulations will contain rules for personal production and designated production for medical purposes similar to those contained in the ACMPR. An individual could therefore continue to obtain authorization to cultivate more than four plants if required for medical purposes, as is currently permitted.

On May 1, 2018, the Senate Committee on Legal and Constitutional Affairs tabled its report on Bill C-45, which included a non-unanimous recommendation to prohibit home cultivation (presumably, only for non-medical purposes, though further details regarding this proposal have not yet been presented).

Provincial Regulation of Home Cultivation

Provinces and territories are free to further regulate or restrict home cultivation of cannabis, subject to the general protections of the *Charter of Rights and Freedoms*.

Some provinces have chosen to do so, in a variety of ways. For example:

- Québec and Manitoba have proposed legislation to prohibit home cultivation for non-medical purposes.
- British Columbia and New Brunswick have proposed legislation with additional restrictions on home cultivation in a manner visible to the public or in daycares or assisted living homes (in British Columbia), or requiring locked enclosures (in New Brunswick).
- British Columbia, Saskatchewan and Nova Scotia have proposed legislation that would allow landlords to prohibit cultivation in rented properties in existing leases.

The Province of Alberta has not proposed any further restrictions on home cultivation. Rather, it has committed to work to educate landlords, renters and condo boards on their available options, including restrictions in rental agreements or condominium bylaws for multi-unit dwellings.[\[12\]](#)

The *Safety Codes Act*, Alberta Building Code and municipal by-laws in respect of building and development permitting will continue to apply to all construction in Alberta, including construction practices to minimize or remediate damage caused by water, humidity, electrical or similar hazards.

Existing Real Estate Act Rules

The Alberta *Real Estate Act* Rules require all real estate professionals to disclose any “material latent defect” in a property to a potential buyer. This is defined in the Rules as including a defect that renders the real estate dangerous or potentially dangerous to occupants, unfit for habitation, or unfit for the purpose for which the property is being acquired (if known). This could also include circumstances where proper permits have not been obtained, or where remediation of a defect has been ordered by a municipal government or “involve great expense”.

In 2013, the Government of Alberta engaged in [a series of consultations](#) and issued its [Grow Op Free Alberta Final Recommendations Report](#). Shortly thereafter, the Real Estate Council of Alberta (RECA) issued a [Bulletin](#) deeming a “marijuana grow-op” to be a material latent defect requiring disclosure unless and until it has been repaired. RECA further defines a “grow operation” as “[a]ny property that has been leased or bought by persons in the **illegal drug trade** which has been turned into an indoor growing environment for marijuana plants” (emphasis added).

Accordingly, real estate professionals **must** disclose the fact that a property has been used in the illegal drug trade to grow marijuana, regardless of whether actual damage is observed at the property, unless the property has been fully remediated.

The Government of Alberta publishes maps showing the location of known illegal grow-ops. Once a property has been identified as a known illegal grow-op, it often becomes a [stigmatized property](#), which may be difficult to sell or garner a lower price. Obtaining financing for a property identified as an illegal grow-op can be difficult – full remediation will typically be required before a conventional lender is willing to finance a former illegal grow-up.

II. Alberta Analysis

Small-scale Home Cultivation ? Illegal Grow-op

Critics of legal small-scale home cultivation describe such processes as “grow-ops” and raise concerns with respect to risks of mould/contamination, fire, home invasion, diversion and community impacts resulting from small-scale home cultivation akin to those associated with illegal drug trafficking enterprises. Such comparisons are overblown, and were rejected by the Supreme Court of Canada in *R. v. Allard* following review of detailed expert evidence, which held that “[t]he statistical evidence does not support the conclusion that an illegal, covert operation would present the same risk as an open, legal operation.”^[13] Expert evidence in support of the risks of home cultivation being comparable to those of illegal grow-ops was repeatedly rejected as biased and unreliable.

The logic for deeming an illegal grow-op as a material latent defect requiring disclosure remains sound. Raids of illegal grow-ops have discovered growing conditions that are highly susceptible to humidity and mould causing significant damage to structural and electrical systems. These conditions are inherent to the clandestine nature of illegal operations, and their motivation to maximize production to offset the substantial risks associated with illegal activity while avoiding detection. Stigmatizing properties associated with illegal activity is a legitimate deterrence for those who engage in illegal drug trafficking, while forced disclosure protects purchasers from unknowingly buying a significantly damaged and/or stigmatized property. On the topic of home cultivation impacting property values, the SCC found such “such evidence only relates to illicit [cannabis] grow operations and therefore is irrelevant” to legal home cultivation.^[1] The SCC also accepted evidence that legal home cultivation operations are insurable for risks of fire and theft where they are properly and safely installed according to applicable by-laws and codes.

^[1] At para 127.

By contrast, a property that has been used to legally grow up to four plants under the new laws will not be automatically deemed to contain a material latent defect. However, if the growing conditions cause **actual** harm to the property, the possibility remains that legal growing could create a material latent defect requiring disclosure.

Condo boards, HOAs, Landlords

Condo boards, home owners' associations and landlords may consider adopting rules, by-laws or lease terms governing home cultivation by residents/tenants. In doing so, they should remain cognizant of the legal distinction between home cultivation for medical and non-medical purposes and ensuring a rational connection between restrictions and actual or potential harm caused by legal home cultivation.

Where electrical services are shared, residents in multi-unit dwellings may have a legitimate concern that their costs could increase as a result of a neighbour's cultivation methods.

Several businesses have developed fully sealed, lockable and controlled at-home growing environments, which could effectively remove this risk. Although use of such controlled growing environments is not legally mandatory, condo boards, home owners' associations and landlords may consider requiring any indoor growing activity be done only in accordance with appropriate equipment such as controlled growing environments.

Role of Real Estate Professionals

Ultimately, real estate professionals will be expected to engage in some further investigation of properties in which cannabis plants have been grown to determine (1) whether the growing activity was done in accordance with the law, or in association with illegal drug trafficking activity, and (2) whether the growing activity caused any actual damage requiring remediation. Signs of illegal drug activity will remain markedly different from those of a legal small-scale home cultivation due to vast difference in scope and scale of such activities. Investigating actual damage falls squarely within the scope of real estate professionals' expertise, just as they do in respect of confirming appropriate permits and real property reports have been obtained, and in investigating and disclosing other material latent defects. Buyers should always remain vigilant when purchasing real estate and conduct appropriate due diligence and inspections of any property.

In this regard, the real estate risks associated with legal home cultivation are comparable to those associated with installing a hot tub: proper installation and maintenance is required to avoid causing water, fire or electrical damage, and where damage has occurred, disclosure may be required upon sale.

It remains to be seen whether legal home growing of cannabis for personal use becomes popular following legalization. The home-brewing of wine and beer remains a niche market, as most consumers prefer the quality, reliability and accessibility of a professionally manufactured product – home growing of cannabis may well follow a similar trend. In any event, innovative products are being developed to minimize risks associated with home growing to strike an appropriate balance.

This article is provided for general information purposes only, and does not constitute legal advice.

If you have any questions regarding current or proposed cannabis laws, please [contact us](#).

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[1] [2016] 3 FCR 303.

[2] s. 12(4)(a).

[3] s. 12(8).

[4] s. 12(4)(b).

[5] s. 8(1)(d).

[6] s. 8(1)(e).

[7] s. 12(1)(b).

[8] s. 9(1)(a)(i).

[9] s. 9(1)(a)(ii) and (iii).

[10] s. 9(1)(a)(iv).

[11] S. 9(1)(c).

[12] <https://www.alberta.ca/cannabis-framework.aspx#p6241s5>.

[13] At para 120.